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

| In the Matter of the Appeal of: | Inspection No. **1233597** |
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| **HAMPTON TEDDER ELECTRIC**<br>**4571 State Street**<br>**Montclair, CA 90810**<br><br>**Employer** | **DECISION AFTER RECONSIDERATION** |

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

## JURISDICTION

Hampton Tedder Electric (Employer) provides high-voltage electrical utility services. High-voltage means energized in excess of 600 volts. (CCR, tit. 8, 2700.) Beginning May 18, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Matthew Zylowski, conducted an inspection arising from an injury at 12932 Glynn Ave, Downey, California (the site).

On November 17, 2017, the Division issued four citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, asserts a Serious violation of section 2940, subdivision (d), alleging Employer failed to have an observer present where work was performed on equipment connected to a high-voltage system. Citation 2, Item 1, asserts a Serious violation of section 2940.6, subdivision (a), alleging Employer failed to ensure employees used insulating equipment for high-voltage work. Citation 3, Item 1, asserts a Serious violation of section 2941, subdivision (h)(4), alleging Employer failed to ensure that ungrounded conductors or equipment were tested prior to work. Citation 4, Item 1, asserts a Serious, Accident-Related violation of section 2940.2, subdivision (a), alleging that Employer failed to ensure employees remained a specific threshold distance from exposed energized parts unless protected.

Employer filed timely appeals of the citations, contesting the existence of the violations, the classifications, and the reasonableness of the proposed penalties. Employer asserted numerous affirmative defenses including the Independent Employee Action Defense (IEAD) as to all citations.[2]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the Appeals Board on April 18, 19, and 20, 2023. ALJ Avelar conducted the hearing with the parties

[1] Unless otherwise specified all references are to title 8 of the California Code of Regulations.
[2] To the extent Employer did not present evidence in support of its affirmative defenses, said defenses are deemed waived. (*RNR Construction*, *Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

and witnesses appearing remotely via the Zoom video platform. Manuel M. Melgoza of Donnell, Melgoza & Scates, LLP, represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted on September 21, 2023.

On October 3, 2023, the ALJ issued a Decision affirming Citations 1 through 3, and vacating Citation 4. Subsequently, both the Division and Employer filed Petitions for Reconsideration challenging the ALJ's Decision.[3] Employer alleges that the Decision improperly affirmed Citations 1 through 3, and improperly denied its affirmative defenses. The Division contends the Decision improperly vacated Citation 4. Both parties allege that the ALJ made findings of fact unsupported by the record.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

## ISSUES

1. Did Employer fail to have an observer present where work was performed on exposed high-voltage wires?

2. Did Employer fail to ensure employees used insulating equipment for high-voltage work?

3. Did Employer fail to ensure that the conductors were tested to ensure de-energization?

4. Did Employer fail to ensure employees remained a specific threshold distance from exposed energized parts unless protected?

5. Did Employer establish the IEAD as to any of the citations?

6. Did Employer establish the *Newbery* defense as to any of the citations?

7. Did the Division establish a rebuttable presumption that the citations were properly classified as Serious?

8. Did the Employer rebut the presumption that all of the citations were properly classified as Serious?

9. Was Citation 4 properly classified as Accident-Related?

10. Were the penalties appropriately calculated?

[3] Employer's petition seeks to incorporate by reference its post-hearing brief. (See, e.g., Petition, p. 24.) However, the Board declines to allow such an incorporation by reference. The Board's rules specifically state that no single document shall exceed 25 pages in length without the prior permission of the Appeals Board. (§ 355.5.) Here, Employer's petition is already 27 pages in length. The requested incorporation by reference would add even more pages to an overlong petition. The Board will not permit such an incorporation, particularly where leave has not been sought for a longer filing. Further, it is well settled that all objections are waived unless set forth in the petition itself. (Lab. Code, § 6618.)

11. Should some of the penalties be dismissed as duplicative?

## FINDINGS OF FACT[4]

1. Raymond Salvador (Salvador) worked for Employer as a journeymen lineman.

2. On May 18, 2017, Salvador worked on a crew assigned the task of installing new electrical lines or wire (reconductoring) on electrical poles in a residential neighborhood as part of a four kilovolts (KV) to 12 KV conversion.

3. The power lines were located approximately 37 to 40 feet above the ground.

4. The primary voltage on the circuits was four KV and the secondary feed was 120/240 volts.

5. At approximately 9 a.m., after picking up the necessary materials to perform the assignment, Salvador's crew arrived at the worksite, located at 12932 Glynn Avenue, Downey, California.

6. There were two crews working in the area consisting of five members each; Salvador was working with one crew and the other worked nearby.

7. Salvador's crew consisted of Foreman Bill Roer (Roer), Groundman Alonzo Trevino (Trevino), Apprentice Edwin Pineda (Pineda), and Journeymen Lineman Warren Houze (Houze).

8. Roer was a supervisor.

9. At the site there were two relevant electrical poles, one on each side of a personal residence. There was one pole at the front of the residence near the street, and another in the backyard near the fence line.

10. Exhibit 22, Mod-1, depicts the location of the poles. The pole at the front of the property is circled in red and the pole to the rear of the property is circled in green.[5]

11. The green pole, also referred to as the source pole, was feeding electricity to the red pole via lines or wire.

[4] The petitions for reconsideration challenge several findings of fact within the ALJ's Decision. The Board did remove some findings to the extent that they are not supported by the record and/or are unnecessary. However, the Board concludes that the remaining findings of fact, and any new ones listed herein, are supported by the record.

[5] Going forward, for ease of reference, the two circled poles will be identified by the color utilized in Exhibit 22, Mod-1 to identify them: the pole near the street will be referred to as the red pole, and the pole near the back of the property will be referred to as the green pole.

12. Upon arriving at the site, the crew conducted a tailboard meeting to discuss site conditions, relevant hazards, and assigned tasks.

13. At the tailboard meeting they discussed, among other things, de-energizing the transformer on the red pole and removing or lifting the feeder tap on the green pole, which would de-energize the feed going to the red pole.

14. After the tailgate meeting, the crew pulled the new line out and de-energized the transformer on the red pole.

15. De-energization of the transformer did not de-energize the conductors or lines that ran from the green pole (the source pole) to the red pole. The wires from pole to pole were still hot.

16. At some point, all five members of Salvador's crew walked over to the green pole, which was the source of electricity to the red pole.

17. At the green pole, the crew agreed to split into two teams after determining that the whole crew did not need to be present for the de-energization of the feed from the green pole.

18. The crew agreed that Houze and Pineda would climb the green pole and lift the tap, with Roer as their safety observer on the ground, effectively de-energizing the feed to the red pole, and Salvador and Trevino would begin work near the red pole to prepare equipment, go up in the bucket, and begin replacing the line.

19. Salvador specifically told the other crew members that he would go up in the aerial bucket, and the crew agreed.

20. The crew also agreed upon a method to replace the wires. Once Houze and Pineda de-energized the feed at the green pole, they would remain aloft at the top of the green pole. After reaching the red pole, Salvador would go up and attach the new wire or conductor to the existing wire on the red pole and then the other crew members would pull the old wire to draw the new wires into position over the trees, effectively using the existing wire as a pull rope. [6]

[6] Salvador stated, "[W]e discussed in the backyard to separate our crew members, and what we discussed back there was they were going to stay on the pole while I prepared that stuff and hooked it up to the conductor up in the -- up on the structure that I was working on so that they would not be waiting -- have to wait for me -- standing up on the pole waiting for me to perform my tasks it took -- before I hooked up the conductor." (TR [4.18.23], pp. 87-89.) Employer's Safety Director, Clifford Ryan (Ryan), said, "So, when they deenergize this line, the plan was to pull this wire, this aluminum wire back away from the pole where we -- where we're looking at now and attach it to the source pole." (TR [4.19.23], pp. 101-103.) He said, "Their plan was to use the existing wire as a pull rope. But it's -- I mean, pulling wire with wire." (TR [4.19.23], pp. 117-118.) Ryan said the plan called for the wire to be de-energized first. (*Ibid*.) Salvador credibly said, "[W]e did not discuss about dropping the wire down to the ground because it's too hard to get the wire back up there. There was trees back there at the time, and that's why we were going to attach that wire that I had in my hand to a wire that was already up there so that we could take it over the top of the trees." (TR [4.18.23], pp. 141-142; see also TR [4.18.23], pp. 74, 194-195.) Notably, the agreement reached by the crew did not necessarily match all the information on the tailboard form. Salvador said the tailboard was modified after he signed it.

21. The crew agreed that Salvador would not conduct tests for de-energization, a step that had also been skipped on other occasions.

22. When Salvador departed from the green pole, Houze and Pineda were preparing to climb the green pole, but had not yet finished de-energizing the feed.

23. It only takes about a minute and a half to put the gear on, another two minutes to climb the pole, and another two minutes to decouple or disconnect the tap.

24. After Salvador and Trevino left the green pole, they walked to the red pole.

25. When they reached the red pole, they began setting up a bucket truck to use to ascend to the top of the red pole. They also prepared or straightened out some conductor line or wire; one was to be the neutral conductor and the other the phase conductor.

26. Salvador next entered the bucket and Trevino handed him one of the lines or wires.

27. Salvador estimates that the process of separating the wires and using the aerial bucket to bring the wire to the top of the red pole took about 15 minutes.

28. Entering the bucket is the last thing Salvador recalls before waking in the hospital.

29. The evidence demonstrates that Salvador got to the top of the red pole, entered the primary area, and connected a new neutral line (or conductor) to the existing neutral line at the top of the pole. The line that Salvador connected can be seen in Exhibit Y going in a diagonal direction toward the ground.

30. It is unclear if Salvador ascended in the bucket a second time. Salvador states he ascended a second time in the aerial bucket to connect the line; however, he admits he had no memory of the event.

31. Irrespective of whether Salvador ascended in the bucket one or two times, it is undisputed that at some point Salvador came in contact with an energized conductor while working aloft.

32. Salvador was not wearing rubber gloves or sleeves, nor any other insulating PPE. Salvador was wearing a hardhat, fire-retardant shirt and pants, safety glasses, and leather gloves.

33. Salvador also did not use insulated tools.

34. Salvador did not use any insulating equipment or PPE because he believed he was entering a de-energized environment, and that Houze and Pineda would have de-energized the feed from the green pole, which is what the crew discussed.

35. Salvador suffered serious physical harm as a result of the electrical contact. Salvador's injuries from working with the high-voltage wires included amputation and severe burns requiring several weeks of hospitalization.

36. Matt King (King), an employee on a different crew, saw Salvador in distress, ran down the street, and used the bucket truck controls to lower the bucket.

37. Trevino was not a qualified electrical worker.

38. Trevino was not present during all time periods while Salvador was working aloft. Although it is unclear precisely when he left, Trevino left the area of the red pole where Salvador was working at some point to put additional gas in a generator powering life support equipment in a nearby customer's home.

39. Working on or near energized high-voltage wires without insulated gear and without testing may realistically result in electrocution, permanent disfigurement, or death.

## DECISION AFTER RECONSIDERATION

**1. Did Employer fail to have an observer present where work was performed on exposed high-voltage wires?**

Citation 1 alleges a Serious violation of section 2940, subdivision (d), which requires:

> (d) Observers. During the time work is being done on any exposed conductors or exposed parts of equipment connected to high-voltage systems, a qualified electrical worker, or an employee in training, shall be in close proximity at each work location to:
> (1) act primarily as an observer for the purpose of preventing an accident, and
> (2) render immediate assistance in the event of an accident. […]

Section 2700 defines relevant terms as follows:

> Conductor. A wire, cable, or other conducting material suitable for carrying current. […]
>
> Exposed (as applied to energized parts). Energized parts that can be inadvertently touched or approached nearer than a safe distance by a person. It is applied to parts not suitably guarded, isolated, or insulated. [. . .]
>
> High-Voltage System. Associated electrical conductors and equipment operating at or intended to operate at a sustained voltage of more than 600 volts between conductors.

> Qualified Electrical Worker. A qualified person who by reason of a minimum of two years of training and experience with high-voltage circuits and equipment and who has demonstrated by performance familiarity with the work to be performed and the hazards involved.

In Citation 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on May 18, 2017, the employer failed to ensure that during the time work was being done on any exposed conductors or exposed parts of equipment connected to high-voltage systems a qualified electrical worker was in close proximity at each work location to act as an observer for the purpose of preventing an accident and render immediate assistance in the event of an accident.

To establish a violation of the safety order, the Division must establish that work was performed on an exposed conductor or exposed parts of equipment connected to a high-voltage system and that Employer did not have a qualified electrical worker to act as an observer for the purpose of preventing an accident, or to render immediate assistance in the event of an accident. Here, the evidence demonstrates a violation of the safety order.

Salvador worked on an exposed conductor that was connected to a high-voltage system. There was no qualified electrical worker to observe Salvador during all relevant time periods. Although Trevino worked with Salvador, he was not present at all times when Salvador worked aloft in the aerial bucket. Trevino also did not render immediate assistance following the accident; rather, King, a member of another crew, was the first to assist Salvador. As the ALJ correctly noted, "Based on the evidence presented, it is found (1) that Trevino was not acting primarily as an observer to prevent an accident, and (2) that he was not in close enough proximity to render immediate assistance." (Decision, p. 6.) Therefore, a violation of the safety order is established.

Employer's petition for reconsideration argues that this citation, and all other citations, should be vacated because Salvador was never assigned any tasks by Employer that involved working on an exposed conductor connected to a high-voltage system. Consistent with the testimony of Ryan and the findings within Employer's incident report, Employer's petition alleges that Salvador departed from his assigned work duties when he worked on the exposed conductors. Employer states that at all relevant times Salvador was merely tasked with prepping the new conductor on the ground, not to ascend in the aerial bucket by himself and make contact with an energized conductor. Employer asserts no work was to occur in the primary area at the red pole until the green pole had been de-energized. Employer also claims Salvador knowingly circumvented the tailboard instructions, failed to test and ground the conductors, failed to wear appropriate insulating PPE, failed to have a qualified observer, and failed to heed Trevino's warning that the line was still hot. Employer argues that Salvador had been a lineman for decades, had vast experience, knew not to touch any equipment that had not been tested, de-energized, and grounded, and knew not to enter into the primary area under an assumption that it had been de-energized. Based on these various factual assertions and arguments, Employer argues that the ALJ made multiple erroneous findings of fact, and erred in affirming the citations.

There are, at least, two problems with Employer's arguments. First, assuming, *arguendo*, that the Board were to accept Employer's various factual assertions and conclude that Salvador worked on the conductors on his own volition, failed to follow direction, and knowingly violated Employer's safety rules, that does not preclude the finding that there was a violation of the cited safety order. The safety order does not ask whether Salvador departed from a plan, failed to follow directions, or failed to follow his assignment. It merely asks whether a qualified observer was present while work was performed on an exposed conductor or exposed parts of equipment connected to a high-voltage system. Even assuming, *arguendo*, that Trevino qualified as an observer (which is subject to dispute in the record), it is undisputed that Trevino was not present at all relevant times while Salvador worked aloft and did not render immediate assistance; therefore, a violation of the safety order exists. Of course, that is not to say that Employer is strictly liable for the violation of the safety order. The Board recognizes multiple affirmative defenses, which may excuse the violation if the requisite elements are established. Those defenses are further discussed below.

The second problem with Employer's argument is that it is premised on disputed facts. Although Employer argues that Salvador deviated from the tailboard instructions and knowingly violated multiple safety rules, Salvador says he was doing what the crew had agreed upon. Salvador said the crew agreed to split into two teams, with some members de-energizing the feed from the green pole and the others working at the red pole. Salvador said the crew agreed that he would prepare the new line on the ground and also go up to connect it. Salvador also said the crew agreed not to ground the line or conduct any tests. He claims his injury occurred because they neglected to de-energize the pole as discussed. Finally, Salvador said he had no memory of Trevino warning him that the line was hot. Ultimately, the ALJ accepted Salvador's account of events, repeatedly relying on his testimony and finding him to be credible. And after an independent review of the record, we concur with the ALJ's assessment. Salvador was the only percipient witness to testify regarding the agreements reached by the crew, and Employer did not meaningfully call Salvador's veracity into question.[7]

Critically, Employer did little to support and prove its alternate factual theories, nor demonstrate why its theories should be credited over Salvador's testimony.[8] Employer's entire contradictory factual narrative (as discussed above) largely comes from a witness who only arrived at the site after the accident. Notwithstanding that there were potentially four other percipient

[7] Any alleged inconsistencies in Salvador's testimony were often taken out of context and/or were *de minimis* in nature, and easily explainable when considered in conjunction with the nature of his severe injuries. Further, his testimony did not waiver in the most important details. For example, Employer argues Salvador's testimony waivered on whose idea it was to split the crew. (Petition, p. 13.) Even if that were so, the important fact is that there was an agreement to split the crew, not who originally had the idea.

[8] Employer also suggests that the ALJ and the Board erred in crediting Salvador's testimony because he testified remotely. Employer argues the Board should have instead credited Ryan's clear and consistent testimony (and his purported candid demeanor) over that of Salvador. (Petition, p. 25.) However, Ryan was not a percipient witness to the events that occurred prior to the accident. Further, Employer's speculation that the outcome might have been different if the hearing occurred in person—offered without any meaningful discussion, analysis, or authority—merits little weight. The ALJ had a meaningful opportunity to hear and view all of the participants by video and found Salvador credible. We see no reason to overturn that finding merely because the hearing occurred by video. We additionally note no party was disadvantaged by the video hearing because all witnesses testified remotely.

witnesses to the agreements reached by the crew (and any statements between them), Employer did not call any other member of the crew to refute Salvador's account of events or support its own. Employer merely offered the testimony of Ryan, who was not present when the incident occurred or when the crew discussed work assignments. Employer also offered its incident report, which had little foundation or authentication. Ryan identified the report but did not meaningfully explain where or how all the information in the report was acquired. Indeed, Ryan specifically said, "I did not fill this out[.]" (TR [4.19.23], p. 81.) Employer had the opportunity and incentive to present stronger evidence and did not. Therefore, like the ALJ, we view Employer's evidence, or failure thereof, with distrust. (Evid. Code, §§ 412, 413.[9])

We therefore affirm the ALJ's Decision, and uphold Citation 1, Item 1.

**2. Did Employer fail to ensure employees used insulating equipment for high-voltage work**?

Citation 2 alleges a Serious violation of section 2940.6, subdivision (a), which at the time required:

> (a) Insulating Equipment.
> (1) Insulating equipment designed for the voltage levels to be encountered shall be provided and the employer shall ensure that they are used by employees as required by this section. This equipment shall meet the electrical and physical requirements contained in the standards shown in Appendix C.
> […][10]

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on May 18, 2017, the employer failed to ensure that protective equipment was used by employees as required by this section. This equipment shall meet the electrical and physical requirements contained in the standards shown in Appendix C.

To establish a violation of the safety order, the Division must establish that an employer either failed to provide, or failed to ensure the use of, appropriate insulating equipment designed for the voltage to be encountered.

[9] See Evidence Code section 412, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." See also Evidence Code section 413, "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."

[10] The citation lists the full text of section 2940.6, subdivisions (a)(1)-(10).

There are no assertions that Employer failed to provide Salvador appropriate PPE and insulating equipment for the voltage he encountered. The remaining issue is whether the Employer failed to ensure the use of appropriate PPE and equipment.

Employer's petition for reconsideration argues that it is not responsible for Salvador's failure to use PPE (or for a failure to ensure use) because Salvador was never assigned any tasks that involved working on an exposed conductor connected to a high-voltage system. However, as previously mentioned, Employer's arguments are based on disputed facts. Salvador said the crew agreed that he would prepare the line on the ground and also go up in the aerial bucket to connect it. Salvador said he did not utilize any insulating equipment or PPE because he believed, pursuant to the crew's agreement, he was entering a de-energized environment and saw no need to further protect himself. He believed he was wearing appropriate gear for a de-energized environment. In resolving the conflicting assertions, the ALJ accepted Salvador's testimony regarding the crew's agreement and we agree with that assessment.

Further, as the ALJ noted, "The wires were not, in fact, de-energized, and so Employer was required to ensure Salvador was using protective equipment designed for 4,000 volts of electricity." (Decision, p. 8.)

We therefore affirm the ALJ's Decision, and uphold Citation 2, Item 1.

**3. Did Employer fail to ensure that the conductors were tested to ensure de-energization?**

Citation 3 alleges a Serious violation of section 2941, subdivision (h)(4), which at the time required:

> (h) Grounding De-Energized Conductors or Equipment. Any exposed ungrounded conductors or equipment not worked upon in accordance with the provisions of subsections (f) above, shall not be worked upon until the following provisions are complied with.
> […]
> (4) A test has been conducted to insure [sic] that conductors or equipment have been de-energized.

For reference, subdivision (f), referenced in subdivision (h), applies to working on energized wires or equipment that carry 600 or more volts.

In Citation 3, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on May 18, 2017, the employer failed to ensure that during the time work was being done a test has been conducted to insure [sic] that conductors or equipment has been de-energized.

To establish a violation of the cited safety order, the Division must demonstrate at least four elements: 1) that there were exposed ungrounded conductors or equipment; 2) that work was

performed on the conductors or equipment; 3) that the work was not performed according to subdivision (f), and 4) no testing occurred to ensure that the conductors were de-energized.

As to the first and second elements, the record demonstrates that work was performed on exposed ungrounded conductors. It is undisputed that the conductors were not grounded. Further, although Salvador had no memory of events after entering the bucket, it is clear that Salvador connected a new conductor to the existing neutral conductor on the pole. The line that Salvador connected can be seen in Exhibit Y going in a diagonal direction toward the ground. It is also undisputed that Salvador made contact with the phase conductor on the pole, as further discussed in the next section.

As to the third element, the evidence demonstrates that the work was not performed according to subdivision (f). Subdivision (f), referenced in subdivision (h), applies to working on wires energized at 600 or more volts. It prohibits employees from touching or working on exposed energized wires unless multiple safeguards occur, including wearing suitably insulated gloves or other suitable devices. Here, it is clear that the work was not done in accordance with subdivision (f). Salvador was not wearing any appropriate PPE, as he did not expect to encounter an energized environment.

As to the final element, the record demonstrates no testing occurred. Salvador credibly testified that the entire crew agreed not to test and ground the wires. Further, the occurrence of the accident itself leads to a strong inference that no testing occurred.

Employer's petition for reconsideration argues that the safety order was not violated because Salvador knew he was required to test the conductor before making contact and not to assume de-energization. Employer also repeats the arguments that Salvador was not assigned the task of working on the conductor, violated safety rules, and failed to follow instructions. However, those arguments fail as to Citation 3 for at least two reasons.

First, even assuming, *arguendo*, that the Board were to accept Employer's various factual assertions and conclude that Salvador failed to follow directions and knowingly violated multiple safety rules, it does not mean there was no violation of the cited safety order. The safety order merely asks, essentially, whether work was performed on exposed ungrounded wires or conductors without testing to ensure that they were de-energized. It is undisputed that Salvador performed work on exposed ungrounded wires without testing for de-energization and consequently a violation of the safety order exists. Of course, that is not to say Employer's arguments, if they were believed, are entirely irrelevant; they may be relevant to an affirmative defense to excuse the violation if Employer can establish all the elements, or to the classification issue, as discussed further below.

Next, Employer's argument is based on disputed facts and we, like the ALJ, do not agree with Employer's account of events. Although Salvador admits to violating safety rules, he states that the entire crew, including the foreman, agreed not to test the wires. Salvador explained that the crew did not intend to test and ground wires because it was only one single span between two poles and there was no need to test or ground. Salvador said they often did not test and ground in

such circumstances. The ALJ accepted Salvador's testimony and, for reasons already stated, we agree with that credibility assessment.

We therefore affirm the ALJ's Decision, and uphold Citation 3, Item 1.

**4. Did Employer fail to ensure employees remained a specific threshold distance from exposed energized parts unless protected?**

The Division cited Employer for a Serious, Accident-Related, violation under section 2940.2, subdivision (a), which at the time required:

> (a) No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table 2940.2-1 through Table 2940.2-3 unless:
> (1) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or
> (2) The energized part is insulated or guarded from the employee and any other conductive object at a different potential.

Citation 4 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on May 18, 2017, the employer failed to ensure that no employee was permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table 2930.2-1 through Table 2940.2-3. As a result, an employee suffered serious burns when he was exposed to and came in contact with exposed energized parts.

To establish a violation of section 2940.2, subdivision (a), and its associated tables, the Division must demonstrate that an employee failed to maintain the required threshold clearances from exposed energized parts. Further, the Division must demonstrate that the employee was not insulated or guarded, and that the energized parts were also not insulated or guarded.

Here, Salvador was exposed to energized parts carrying four KV. It is also undisputed that Salvador was not wearing insulating PPE, nor was he guarded. Likewise, the energized parts were not insulated or guarded. However, the ALJ's Decision held, "While it may be reasonably assumed he was within some proximity to the wires, there is no evidence to show he crossed any prohibited threshold distance." (Decision, pp. 10-11.)

The Division's petition argues that the ALJ erred in vacating this citation. The Petition states, "[t]he tables effective at the time of citation had several permissible clearances given the voltage." (Division's Petition, pp. 4-5.) However, the Division argues that none of the tables would

permit actual contact with energized parts. In other words, none of the tables permitted "zero feet clearance." (Division's Petition, pp. 4-5.) The Division argues that there is evidence that Salvador actually made contact with the energized parts. The Division is correct.

The evidence demonstrates that Salvador made actual contact with energized parts. Although Salvador had no memory after entering the bucket and receiving the neutral wire, the testimony and exhibits demonstrate that Salvador attached a conductor to the existing neutral conductor on the pole. The line that Salvador connected can be seen in Exhibit Y going in a diagonal direction toward the ground. Further, the evidence demonstrates that Salvador made contact with the phase conductor. Ryan determined that Salvador's injury occurred because "he contacted the energized phase[.]" (TR [4.19.23], pp. 69-70.) He testified, "Mr. Salvador contacted an energized phase with one hand while he was holding a wire that was to be installed and still on the ground in the other hand." (TR [4.19.23], pp. 74.) Supplementing and explaining Ryan's testimony, Employer's investigation report also states that Salvador made contact with energized four KV conductors. (Exhibit 19, p. 4.) The report says, "Lineman made contact with the 4KV phase and the new 1/0 acsr on the ground receiving electrical burns due to a difference of electrical potential." (Exhibit 19, p. 10.)[11] Salvador was not using insulated tools when this work occurred. In short, it is largely undisputed that Salvador made actual contact with the energized parts, meaning he came within the proscribed threshold distance. We also observe that Salvador's injuries are consistent with making contact with an energized conductor.

We therefore reverse the ALJ's Decision, and uphold Citation 4, Item 1.

**5. Did Employer establish the IEAD as to any of the citations?**

Employer asserts that it established the IEAD, which operates as a complete defense to a citation when its elements are met. The elements of IEAD defense are: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions against employees who violate the safety program; and 5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish all five elements of the IEAD. (*Ibid*.)

The ALJ determined that Employer did not establish the third and fifth elements of the IEAD. We agree.

Third Element:

[11] Employer asserted no hearsay objection. Even assuming that Employer had asserted a hearsay objection, Employer's various statements are admissible to supplement and explain other testimony. (§ 376.2.) Further, many of these statements are admissible under various hearsay exceptions, including as authorized or adoptive admissions. (Evid. Code, §§ 1220-1222.)

The IEAD's third element requires an employer to show that it effectively enforces its safety program. (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932.) An essential ingredient of effective enforcement is the provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) The adequacy of supervision is a fact-intensive inquiry that requires a case-by-case determination. (*Fed Ex Ground*, *Inc*., Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020).)

The Appeals Board has also long held that the IEAD does not apply where a supervisor or foreperson commits the violation. (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932, citing *Brunton Enterprises*, *Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) "[A] supervisor means someone who has the authority or responsibility for the safety of other employees." (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932, *citing PDM Steel Service Centers*, *Inc*., Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) "The Appeals Board has explained that the issue of whether a supervisor commits the violation is not a true exception to the IEAD, but rather a situation where the third element required under the IEAD is not met." (*Ibid*.)

Salvador credibly testified that the crew agreed to split-up and that Salvador and Trevino would begin work near the red pole to prepare equipment and begin work to replace the line. Salvador specifically told the other crew members that he would go up in the aerial bucket and the crew agreed. Notwithstanding the agreement among the crew that Salvador would be ascending in the aerial bucket, Salvador credibly testified that the entire crew, including Roer, agreed to skip testing and grounding the lines. This agreement created the root hazard common to all of the other citations. The simplest way to detect and correct the hazardous condition would have been to test the lines. Such testing would have identified, and helped the crew negate, Salvador's exposure to energized equipment. Roer should have ensured that the crew tested and grounded the lines by making that a mandatory step in the process, rather than agreeing to skip the step. If Roer had mandated testing and grounding the lines rather than agreeing to skip this step, Salvador's injuries might have been avoided. As already noted, the IEAD does not apply where a supervisor or foreperson is complicit in the violation.

Next, although there is evidence that the employees sometimes relied on both visual and oral confirmation of de-energization, neither occurred here and both are a poor substitute for actual testing. Further, as the ALJ noted, neither Roer nor any other employee took the necessary steps to ensure that effective signaling occurred so that Salvador would have known when the lines were de-energized. (Decision, p. 12.)

The absence of appropriate supervision is also demonstrated by other facts. Salvador credibly testified that the entire crew, including Roer, agreed to split into two teams, with some members working on the green pole and others on the red pole. They also agreed that Salvador would perform work in the aerial bucket at the top of the red pole. Under this agreement, the proper sequence of events was critical to Salvador's safety at the red pole. The de-energization of the feed from the green pole needed to occur before any work was performed on the conductors at the red

pole. Roer's duty of supervision was heightened when he allowed the crew to split under these circumstances. He should not have agreed to split the crew if he could not ensure that events occurred in proper sequence. Alternatively, Roer should have ensured the rapid de-energization of the feed from the green pole since he knew, per the agreement, that Salvador would shortly be ascending to the top of the red pole and expecting to encounter a de-energized environment. He should have also ensured appropriate communication occurred between the two teams. Ultimately, while there is certainly no duty to supervise every action by employees, the duty of supervision is heightened during time periods when the proper sequence of events is critical to employee safety.

Due to the aforementioned failures of supervision, Employer cannot establish the third element of the IEAD.

Fifth Element:

In *Synergy Tree Trimming*, *Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), the Appeals Board explained: "The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." The Appeals Board has held that inadvertence or an error in judgment is insufficient to demonstrate a knowing violation of an employer's safety program. (*Synergy Tree Trimming*, *Inc*., supra, Cal/OSHA App. 317253953.) The Board has described the purpose of the IEAD as follows: "The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met." (*Synergy Tree Trimming*, *Inc*., *supra*, Cal/OSHA App. 317253953, citing *Macco Constructors, Inc*. Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987).)

Employer cannot demonstrate the fifth element for two reasons. First, even assuming, *arguendo*, that Salvador intentionally violated each of the safety orders, we hold that the IEAD, and particularly the fifth element, cannot be established where the violations largely occurred pursuant to a plan agreed to by a supervisor.[12] It is not simply the third element that is implicated when the supervisor is complicit in the violation, but also the fifth element. The fundamental premise behind the IEAD is that an Employer should not be held responsible where a *non-supervisory* employee independently and willfully violates a safety rule. The very namesake of the defense indicates that the employee's actions must be "independent." However, here, Employer cannot demonstrate willful and independent violations of safety rules because Salvador's credible testimony demonstrates that his actions were pursuant to a plan devised and agreed upon with his supervisor and the rest of the crew. Salvador said that the crew agreed he would go up in the bucket and attach the new line. (TR [4.18.23], pp. 87-89, 191-196.) It was also agreed that they would not conduct any test for de-energization. (TR [4.18.23], pp. 98-99.) Salvador said the cause of his injury was that the other crew members failed to do what was agreed upon and de-energize the green pole prior to his work on the red pole. (TR [4.18.23], pp. 92-93.) As the ALJ noted, Salvador unequivocally maintained that his actions were consistent with and dependent on the crew's unanimous decisions. (Decision, pp. 14-15.) The actions and knowledge of the supervisor are imputed to the Employer. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Therefore, when a

[12] We agree with the ALJ's analysis which found that Roer was a supervisor. (Decision, p. 16.)

supervisor is substantially complicit in, or directs, the violation, the employer loses the ability to attribute that violation to an "independent" and "willful" employee act.

Second, although Salvador did violate the safety orders set forth in Citations 1, 2, and 4, he did not do so intentionally. The cited safety orders generally apply to protect employees from the hazards of energized environments. However, Salvador credibly testified that he did not intend or expect to work on energized equipment, nor did he recall receiving any warning that the line was hot. He believed the tap had been lifted at the green pole, disconnecting the feed to the red pole. Salvador's actions, including his decision not to follow certain safety orders applicable to energized environments, all arose from the agreement reached by the crew and from his sincere belief that the source pole would be de-energized as part of that agreement. As the ALJ noted, "Salvador's admissions and credited testimony establish his intent to take precautions commensurate with the risks he expected based on the trust he placed in his foreman and crewmates to perform their tasks." (Decision, pp. 14-15.) Because Salvador believed he was entering into a de-energized environment, he did not intentionally violate safety orders that apply to working with energized equipment. For example, Salvador states he was utilizing appropriate equipment for what was supposed to be a de-energized environment. (TR [4.18.23], pp. 97-98.) Like the ALJ, we find "that Salvador did not deliberately undertake working on exposed energized lines without an observer, insulated gear, and testing, or knowingly assume the associated risks of such omissions, including grievous bodily harm, debilitating burns, and death." (Decision, p. 14.)

Employer failed to establish the fifth element of the IEAD. Because Employer did not establish each element of the IEAD, the defense fails.

**6. Did Employer establish the *Newbery* defense as to any of the citations?**

Employer argued that even if the Board finds a violation, the citation should still be dismissed under the unforeseeable employee act defense set forth in *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641. To establish this defense, the employer must show: (1) the employer did not and could not have known of the potential danger to employees; (2) the employer exercised adequate supervision to ensure safety; (3) the employer ensured employee compliance with its safety rules; and, (4) the violation was unforeseeable. (*Gaehwiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1045; *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board, supra,* 123 Cal.App.3d at 650.)

For the reasons discussed at length with regard to the IEAD, Employer cannot demonstrate that foreman Roer provided adequate supervision to ensure safety, nor did he ensure compliance with all safety rules. For example, Roer was complicit in the crew's agreement not to test the lines, meaning Roer did not exercise adequate supervision to ensure safety. The *Newbery* defense, like IEAD, is unavailable where the supervisor assists in causing the violation. (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932.)

Employer also should have known of the potential danger to Salvador when the crew agreed to split into two teams, working at separate poles. Under the agreement to split the crew, it

was critical to Salvador's safety that de-energization of the feed at the green pole occur before Salvador worked on equipment at the red pole. However, in splitting the crew, it became foreseeable that something could go wrong, or that a deviation from the plan could occur, without both parts of the crew having contemporaneous knowledge of the deviation, which could lead to Salvador unknowingly entering into an energized environment without taking appropriate precautions. The foreseeable danger was exacerbated by multiple other factors, including: the crew's agreement not to test the lines; the failure to devise and implement an effective plan to ensure that Salvador was signaled when de-energization occurred; and the use of a nearby generator, which could (and did) lead to further diminishment of the two teams when the generator required refueling. Employer failed to exercise adequate supervision to negate or ameliorate these foreseeable hazards.

For the reasons stated herein and within the ALJ's Decision, we conclude that Employer failed to establish the *Newbery* defense as to each of the citations.

**7. Did the Division establish a rebuttable presumption that all of the citations were properly classified as Serious?**

Employer's petition asserts a challenge—albeit a vague one— to the Serious classification of all of the citations. (Petition, p. 26.) When determining whether a citation is properly classified as Serious, the relevant statute requires application of a burden shifting analysis. The Division holds the initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).) The term "realistic possibility" means that the Division's demonstration must be within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) If the Division meets its initial burden, a rebuttable presumption is created that the citations were properly classified as Serious. (Lab. Code, § 6432, subd. (a).)

Salvador was an experienced journeyman lineman. Due to Salvador's training and experience as a journeyman lineman, he was able to competently testify regarding the hazards associated with working on or near high-voltage lines without taking appropriate precautions, such as having an observer, insulated gear, and testing. He testified that the hazards of working with high voltage include death and dismemberment by electrocution. Salvador said that if a person works on such electrical equipment without proper insulating protective equipment, electrical contact can occur, which can result in serious injury or death. Salvador also suffered serious physical harm after contacting the energized line, requiring in-patient hospitalization for several weeks.

Next, Hien Le (Le), the Division's Senior Safety Engineer, also testified regarding the Serious classification. Le testified that he is current on all Division mandated training. Because his training is up to date, he is deemed competent by operation of law to offer testimony to establish each element of a Serious violation. (Lab. Code, § 6432, subd. (g).) Le said that each safety order violation could lead to exposure to high-voltage electricity, causing serious physical harm or death. (TR [4.20.23], pp. 22-28.)

Based on the aforementioned testimony, the Division established a realistic possibility of serious physical harm for all the citations.

**8. Did Employer rebut the presumption that the citations were properly classified as**

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

> (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.

For reasons already discussed at length when addressing Employer's affirmative defenses, Employer cannot demonstrate it took all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent these particular violations. Roer, as Salvador's supervisor, did not engage in adequate supervision to ensure Salvador's safety, and was complicit in certain safety violations. Therefore, Employer cannot rebut the presumption of a Serious violation.

**9. Was Citation 4 properly classified as Accident-Related?**

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).) The Division must show the violation "more likely than not was *a* cause of the injury," but need not establish the violation as the *sole* cause of the injury. (*MCM Construction,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Citation 4 asserted a violation of section 2940.2, subdivision (a), which requires that employees maintain required threshold clearances from exposed energized conductors. In this case, as already discussed, Salvador did not maintain the required clearance and came in contact with the exposed energized conductor(s), which caused him to sustain multiple serious injuries. Therefore, a causal nexus exists between the violation and the serious injury.

**10. Were the penalties appropriately calculated?**

Penalties calculated in accordance with the regulations set forth in sections 333 through 336 will be deemed presumptively reasonable. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).) However, the Board has repeatedly noted that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board...." (*Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346, quoting *DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) The Division must still demonstrate that it, in fact, calculated penalties in accordance with the penalty-setting regulations. (*Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) The Board does not simply rubber stamp the Division's penalty calculations. Rather we must engage in a critical review of all the relevant evidence to ensure that the Division's actions are supported by the law. We have also held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to demonstrate its proposed penalty is properly calculated by a preponderance of the evidence. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.)

Here, Le was the sole witness to offer testimony explaining how the Division arrived at its penalty calculations.[13] Le discussed multiple penalty-setting criteria, i.e., Extent, Likelihood, Size, etc.[14] The ALJ's Decision accepted Le's testimony and penalty calculations without engaging in any meaningful analysis. However, Le's testimony does not actually demonstrate that the Division calculated all penalties in compliance with the penalty-setting regulations. (TR [4.20.23], pp. 46-47.) Le disagreed with at least one of the Division's calculations, a point overlooked by the ALJ. (TR [4.20.23], pp. 46-47.) Therefore, because Le's own testimony called into question some of the

[13] Zylowski, the Division's primary investigator in this matter, did not testify. Le, who offered Zylowski support during the inspection, did testify.

[14] To meet its initial burden on penalty calculations, the Division need not necessarily, as an initial matter, offer testimony on each of the penalty-setting criteria. The Board has held that when the Division introduces its proposed penalty worksheet and generally testifies to the calculations being completed in accordance with the appropriate policies and procedures, a presumption is created that the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) If unrebutted, this presumption is sufficient to meet the Division's burden. However, here, the Division did not properly avail itself of this particular presumption. Rather than offering such generalized testimony, Le offered specific testimony pertaining to most of the penalty setting criteria. Since that specific testimony was entered into the record, it became necessary to examine Le's testimony to ensure that the proposed penalties were, in fact, appropriately supported and calculated. (*Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.)

Division's penalty calculations, we engage in an independent review of the record on this point to ensure that the Division's proposed penalties are, in fact, supported by the evidence and law. [15]

**Citations 1 through 4**

Base Penalty:

Le identified the Division's penalty calculation worksheet, referred to as the C-10. (TR [4.20.23], pp. 32-33.) Although the form was prepared by another inspector, Le stated that she played a role in reviewing the penalty calculations. (TR [4.20.23], pp. 32-33.)

Le noted that the Division began with a base penalty of $18,000 for all Serious citations. (TR [4.20.23], pp. 37-39.) The Division calculated the base penalty correctly. Section 335, subdivision (a)(1)(B), provides that the severity of a Serious violation is high. Section 336, subdivision (c)(1), provides that the initial base penalty of a Serious violation is $18,000.

Therefore, the initial base penalty for Citations 1 through 4 was correctly calculated at $18,000.

Gravity-based penalty:

Le also correctly noted that the base penalty is subject to further adjustment for "Extent" and "Likelihood"—resulting in the "Gravity-based penalty." (§ 336, subd. (c)(1).)

Extent:

Extent, in this context, is defined as follows:

> When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:
>
> LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

[15] Although no party meaningfully addressed the penalty calculations for Citations 1 through 3 in their petitions, waiving the point (Lab. Code, § 6618), the Board does, upon granting reconsideration, have discretion to address issues outside the four corners of the petition(s). (E.g., Lab. Code, §§ 6602, 6620-6622.) However, to ensure due process, the Board requested, received, and reviewed additional briefing from the parties regarding the appropriate calculation of penalties. Notably, although the Board requested further briefing from the parties regarding each of the penalty setting criteria with specific citations to the record and authority, the Division's brief did not address all such criteria, nor cite to testimony in the record pertaining to each of these criteria.

> MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
>
> HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.
>
> (§ 335, subd. (a)(2).)

Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MEDIUM," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Le offered common testimony on Extent for all citations. Le testified that Extent was rated as high, resulting in a 25 percent addition to the base penalty. (TR [4.20.23], pp. 37-41.) When asked to explain the Division's high Extent rating, Le stated: "I said this is not a fixed location. It just like a construction site. The worksite, it move[s] from location to location. And the exposure -- no, the violation here is the ratio of one-to-one at the high, so that's why he believe that it high and he rate at the high." (TR [4.20.23], pp. 40-41.) However, Le later testified that she believed Extent should have been rated at moderate. (TR [4.20.23], pp. 46-47.)

Here, although the Division did offer some testimony to justify its high Extent calculation, the testimony was conclusory and vague, leaving uncertainties as to how this penalty criterion was actually calculated. Further, Le later testified that Extent should have been calculated at medium, but again failed to justify this alternate calculation. Due to Le's vague and contradictory testimony, the Board declines to permit any enhancement to the base penalty based on Extent. Rather, maximum credits and the minimum penalty allowed under the regulations must be assessed when the Division fails to adequately justify its proposed penalty. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.) Therefore, for Citations 1 through 3, the Board will apply a 25 percent reduction to the base penalty by applying a low rating for Extent. However, because Citation 4 has been found to be Accident-Related, the base penalty cannot be further reduced, except for Size, discussed below. (§ 336, subd. (c)(2).)

Likelihood:

Section 336, subdivision (c), provides that Likelihood for a Serious violation is rated under section 335, subdivision (a)(3), which states,

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:
>
> LOW, MODERATE OR HIGH

Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MODERATE," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Le testified that Likelihood was rated as high, resulting in another 25 percent addition to the base penalty. (TR [4.20.23], pp. 37-40.) When asked to explain the Division's high Likelihood rating, Le stated: "It's high because it [sic] the likelihood the Employee expose to will cause the serious injury or illness or serious injury, so that's why the rate is high." (TR [4.20.23], pp. 42-43.)

Again, although the Division offered some testimony to justify its high Likelihood calculation, the testimony was conclusory and vague. It was also not sufficiently tied to the regulatory definition of Likelihood. The Board declines to permit any enhancement to the base penalty based on Likelihood. Rather, as noted, maximum credits and the minimum penalty allowed under the regulations must be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Therefore, for Citations 1 through 3, the Board will reduce the base penalty by 25 percent by applying a low rating for Likelihood. However, again, because Citation 4 has been found to be Accident-Related, the base penalty cannot be further reduced, except for Size, discussed below. (§ 336, subd. (c)(2).)

The Gravity-based penalty for Citations 1 through 3 is therefore correctly calculated at $9,000 for each citation. ($18,000, less 50% = $9,000.) The Gravity-based penalty for Citation 4 is correctly calculated at $18,000.

Adjusted Penalty:

The Gravity-based penalty in most cases is subject to further adjustment for Good Faith, Size, and History, resulting in the "Adjusted Penalty." (§ 335, subd. (b), (c), and (d); § 336, subd. (d).)

Size:

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide for the following reductions to the Gravity-based penalty based on Size:

> 10 or fewer employees -- 40% of the Gravity-based Penalty shall be subtracted.
> 11-25 employees -- 30% of the Gravity-based Penalty shall be subtracted.
> 26-60 employees -- 20% of the Gravity-based Penalty shall be subtracted.
> 61-100 employees -- 10% of the Gravity-based Penalty shall be subtracted.
> More than 100 employees -- No adjustment shall be made.

Le said that Employer had more than 100 employees and the testimony was unrebutted. (TR [4.20.23], pp. 42-43.) Therefore, no further adjustment was warranted for Size on any of the citations.

For Citations 1 through 4, Employer is entitled to no further reductions based on Size.

For Citation 4, no further analysis is necessary. Because Citation 4 has been deemed to be Accident-Related, the only permissible reduction is for Size, which does not apply. (§ 336, subd. (c)(2), (d)(7).) Employer is also not entitled to an abatement credit when a citation is Accident-Related. (§ 336, subd. (e)(3)(D).) Therefore, the correct penalty for Citation 4 is $18,000.

History:

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide for penalty modifications based upon the employer's history of compliance, "determined by examining and evaluating the employer's records in the Division's files." Depending on such records, the History of Previous Violations is rated as:

> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
>
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.
>
> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

Section 336, subdivision (d)(3), provides that for a rating of "GOOD," 10 percent of the Gravity-based penalty shall be subtracted; for a rating of "FAIR," 5 percent of the Gravity-based penalty shall be subtracted; and for a rating of "POOR," no adjustment shall be made.

Le identified a document known as an establishment search (Exhibit 26), which purported to show previous inspections of Employer by the Division. (TR [4.20.23], pp. 28-36.) Le also testified that Employer received a poor rating for History. However, little foundation was laid for the facts within Exhibit 26, much less for Le having personal knowledge of those facts. When Le was specifically asked about her familiarity with any inspections or citations issued to Employer in the five-year period prior to this particular inspection, Le stated:

> I heard about that but I did not review the case file or the citation so I cannot say. I heard about that we had Hampton Tedder inspection because the name had been mentioned. But I didn't review the citation or the case file.
>
> (TR [4.20.23], p. 35.)

Le's testimony demonstrated unfamiliarity, the absence of personal knowledge, and the lack of foundation regarding Employer's history. Next, Ryan, upon questioning, also provided no relevant information regarding Employer's citation history that would justify the Division's rating. Again, when the Division fails to justify its proposed penalty, the Board applies maximum adjustments. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Therefore, Employer is entitled to a 10 percent downward adjustment of the Gravity-based penalty for Citations 1 through 3.

Good Faith:

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:
> GOOD—Effective safety program;
> FAIR—Average safety program;
> POOR—No effective safety program.

Section 336, subdivision (d)(2), allows a downward adjustment of 30 percent for a "GOOD" rating and 15 percent for a "FAIR" rating.

Le testified that Employer was entitled to a fair Good Faith adjustment, but otherwise provided no meaningful testimony on Good Faith. (TR [4.20.23], p. 37, 47.) Because the Division failed to justify its Good Faith calculation, the Board applies maximum adjustments, resulting in a further 30 percent reduction to the penalty.

When the penalty adjustments for Good Faith and History are applied, the Adjusted Penalty for Citations 1 through 3 is reduced to $5,400 each. ($9,000, less 40% = $5,400.)

Abatement:

Section 336, subdivision (e), states that the Division shall not reduce the adjusted penalty another 50 percent for Abatement for Serious citations unless the employer has either abated the violation "at the time of the initial or a subsequent visit during an inspection and prior to the issuance of a citation," or "[s]ubmitted a statement signed under penalty of perjury, together with supporting evidence when necessary to prove abatement, that the employer has abated the Serious violation within the period fixed for abatement in the citation." (§ 336, subd (e)(2).) An abatement credit is also not permitted when the Serious citations are Accident-Related, Repeat, or Willful, or when Extent and/or Likelihood are rated as High. (§ 336, subd (e)(3).)

Here, notwithstanding the fact that Division held the burden to justify its proposed penalties, the Division offered no testimony on abatement. Further, as noted herein, Extent and Likelihood have not been rated as High. Therefore, we apply maximum credits and Employer is entitled to the full 50 percent reduction for Citations 1 through 3, resulting in a penalty of $2,700 for each of these citations. ($5,400, less 50% = $2,700.)

**11. Should any of the penalties be vacated as duplicative?**

Generally, only one penalty may be assessed against an employer for multiple violations concerning a single hazard. (*Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1976).) The Board has long recognized it is proper to assess one penalty for multiple violations involving the same hazard where a single means of abatement is needed. (See *A & C Landscaping*, *Inc*., Cal/OSHA App. 03-4795, Decision After Reconsideration (Jun. 24, 2010).) The Board has held penalties which tend to be duplicative or cumulative are inconsistent with the spirit and intent of the Act. (*Ibid*.) However, the Board will decline to apply a duplicative penalty reduction where the substance of each citation is sufficiently distinct from the others. (*Gateway Pacific Contractors*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

Here, while Employer's petition argues that at least two of the penalties should be dismissed as duplicative, the petition does not clearly explain why they should be vacated as duplicative. (Petition, p. 26.) A contention is waived where a party fails to cite legal authority and to the record. (*Shimmick Construction Company*, *Inc*., Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (Mar. 30, 2017).)

Further, addressing the merits, we conclude that the substance of each citation is sufficiently distinct such that a duplicative penalty reduction is not warranted. We also conclude that a single means of abatement would not address each citation. While testing could have helped abate or ameliorate the hazard (and likely would have been among the most important steps), it is not the sole or single means of abatement for each of the citations in this case.

## DECISION

With regard to Citations 1 through 3, the Board affirms the ALJ in part, and reverses the ALJ in part. The Board affirms the ALJ's Decision to the extent that it affirmed the citations and the Serious classifications. However, the Board reverses the penalty calculations. The penalties for Citations 1 through 3 are set at $2,700 each, not $22,950 each.

With regard to Citation 4, the Board reverses the ALJ. The Board affirms Citation 4 and its Serious, Accident-Related classification. The penalty for Citation 4 is correctly set at $18,000.

The total of the four penalties is $26,100.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 10/30/2024