

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

In the Matter of the Appeal of:

**WEST COAST ARBORISTS, INC.
2200 E. VIA BURTON STREET
ANAHEIM, CA 92806**

Employer

Inspection No.
1330292

DECISION

Statement of the Case

West Coast Arborists, Inc. (Employer), provides tree maintenance and removal services. On July 16, 2018, the Division of Occupational Safety and Health (the Division), through Assistant Safety Engineer Paul Espino (Espino), commenced an accident investigation at 16405 Southern Pine Place, in San Diego, California (the job site) in response to an injury report.

On December 6, 2018, the Division issued one citation to Employer, alleging a failure to identify hazards near a tree that was to be removed. Employer timely appealed the citation, contesting the existence of the violation, its classification, and the reasonableness of the proposed penalty. Employer asserted various affirmative defenses.¹

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on May 26, 2021, with the parties appearing remotely via the Zoom video platform. Eugene McMenamin, Attorney at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted on July 26, 2021.

Issue

1. Did Employer fail to identify the hazard of a nearby tree in the area surrounding a tree to be removed?

¹ Except as otherwise noted, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Findings of Fact

1. Santos Lemus (Lemus) was the foreman at the job site. Audomaro Corrales (Corrales) was a tree cutter at the job site.
2. Lemus assigned trees for Corrales to fell. One of the assigned trees was located near another tree with a limb that presented a hazard.
3. Lemus directed Corrales to remove the hazardous limb before felling the assigned tree.
4. Corrales felled the assigned tree without first removing the limb of the nearby tree.
5. The felled tree caught and pulled down the limb of the nearby tree. The limb struck Corrales, resulting in his hospitalization.

Analysis

- 1. Did Employer fail to identify the hazard of a nearby tree in the area surrounding a tree to be removed?**

California Code of Regulations, title 8, section 3247, subdivision (c)(5),² provides:

Prior to the start of any tree felling or removal operations, the hazards and relevant factors pertaining to the tree and the site are to be considered by undertaking actions that include, but are not limited to, the following:

- (A) Identifying potential hazards in the area surrounding the tree to be removed, including nearby trees.
- (B) Determining the species and shape of the tree.
- (C) Evaluating the lean of the tree.
- (D) Inspecting for loose limbs and wood chunks, or other overhead material.
- (E) Evaluating the wind force and direction.
- (F) Identifying decayed or weak spots in the tree.
- (G) Providing a means to protect other persons, property, and electrical conductors.
- (H) Evaluating the terrain characteristics and/or limitations of the work area; and
- (I) Identifying evidence of bees or other wildlife habitation in the tree that may present hazards.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Citation 1, Item 1, alleges:

Prior to and during the course of the inspection, including, but not limited to July 16, 2018, the employer failed to identify the overhead hazards presented by the limbs of a “green” tree nearby the “dead” tree that was going to be removed. On 06/20/18, an employee suffered a “Serious” injury when the limb of the “green” tree was broken by the trunk of the “dead” tree while it was falling during the removal process. The limb from the “green” tree fell to the ground, ricocheted and struck the employee.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) “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).)

The parties do not dispute that Employer engaged in the removal of several trees at the job site over two consecutive days. Lemus was the foreman, and his crew included Corrales, who was a tree cutter, and four other employees performing ground work. On the second day of the job, Corrales and another employee were assigned to remove two trees. They felled one tree. Corrales then proceeded to fell the second tree without the employee assigned to work with him. As the second tree fell, it broke the limb off a nearby tree. The limb struck Corrales, causing his hospitalization.

The parties dispute whether Employer identified the hazard presented by the limb of the nearby tree. Corrales did not testify at hearing. Espino interviewed Corrales as part of the Division’s investigation of the incident. Espino testified that Corrales told him that Lemus did not discuss the nearby limb or identify the limb as a hazard.

Additionally, Espino testified that he received and reviewed Employer’s job hazard analysis (JHA) for the job site. He testified that the JHA did not identify a hazard from the nearby limb and that this absence factored into his conclusion that Employer failed to identify the limb hazard. The Division did not offer the JHA into evidence. On cross-examination, Espino testified that employers do not always document communications that take place verbally.

Lemus, however, testified that he discussed the limb hazard with Corrales. He testified that he did this during a one-on-one conversation with Corrales, which he typically does with tree cutters in order to give them more detailed instructions than he gives to the rest of the crew.

Lemus further testified that he did not witness the accident. He estimated that he was 30 to 40 feet away, operating a wood-chipping machine.

At the time of the incident, Ernesto Macias (Macias) was Employer's Safety & Claims Manager. Macias testified that he interviewed Corrales as part of Employer's investigation of the incident and that Corrales told him that Lemus had discussed removing the limb from the nearby tree.

It is significant that Lemus testified credibly that he discussed the limb hazard with Corrales. The testimony of Macias supplements Lemus's testimony.³ Although Espino testified that Corrales told him that the limb had not been discussed, it is possible that Corrales made contradictory statements to Espino and Macias. Both Espino and Macias testified credibly. The testimony of Espino does not outweigh the testimony of Lemus and Macias.

Espino's testimony regarding the absence of the limb hazard in the JHA receives little weight for two reasons. First, the JHA was not offered into evidence, precluding review and further consideration. Second, Espino testified that employers do not always document verbal communications, which is relevant because Lemus testified that he spoke individually with Corrales. Therefore, the absence of the limb hazard in the JHA would not be dispositive of whether Lemus discussed the hazard with Corrales.

The Division bears the burden to prove a violation by a preponderance of the evidence. The evidence presented by the Division does not outweigh the credible evidence presented by Employer. Accordingly, Citation 1, Item 1, is vacated.

Conclusion

The Division did not establish that Employer violated section 3427, subdivision (c)(5), for failure to identify potential hazards in the area surrounding the tree to be removed, including nearby trees. The Division did not show by a preponderance of testimonial or documentary evidence that Lemus failed to identify a nearby tree limb as a potential hazard. Accordingly, Employer's appeal of Citation 1, Item 1, is granted.

ORDER

It is hereby ordered that Citation 1, Item 1, is vacated as indicated above and set forth in the attached Summary Table.

³ Although the evidence of Corrales's out of court statements is hearsay, it is relevant evidence and the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Therefore, it may be used to supplement or explain other evidence. (Section 376.2.)

It is further ordered that the \$18,000 proposed penalty is set aside as indicated above and set forth in the attached Summary Table.

Dated: 08/23/2021



Mario L. Grimm
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.**