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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. ALL FLORIDA TREE & LANDSCAPE, INC. Respondent.	OSHRC DOCKET NO. 13-0373

APPEARANCES:	Charna C. Hollingsworth-Malone, Esquire U.S. Department of Labor Office of the Solicitor 61 Forsyth St., S.W., Room 7T10 Atlanta, Georgia 30303 For the Complainant	Andrea Lee Wolfson, Esquire Wolfson & Konigsburg, P.A. 4491 South State Rd. 7 Suite 314 Davie, Florida 33314 For the Respondent
BEFORE:	Dennis L. Phillips Administrative Law Judge	

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). All Florida Tree & Landscape, Inc., ("All Florida" or "Respondent") is a corporation operating in the Fort Lauderdale, Florida area, where it is engaged in pruning and removing trees and shrubs, and debris removal. On August 21, 2012, two of Respondent's employees were cutting and removing branches while high up in a large kapok tree in the backyard of a residence in Coral Springs, Florida. The employees wrapped the branches in

chains hanging from a crane that thereafter lifted the cut branches away from the tree. Energized overhead lines were in the vicinity of the tree.[1] Mr. Jorge Carrera-Zarate ("Carrera-Zarate" or "deceased"), age 30, one of Respondent's employees assisting in tree branch cutting and removal was electrocuted. This occurred when the lower segment of the chain rigging hanging down from the crane hook either struck or came close to an energized overhead line running below the deceased and Mr. Carrera-Zarate contacted the upper segment of the chain rigging. Mr. Carrera-Zarate died a few days later. (Tr. 38, 53-54; Ex. C-2, at p. 3 (response to Request for Admission ("RFA") No. 4), ex. R-B).

Following a referral from the local police department, Compliance Safety and Health Officer ("CSHO") Maria Colon conducted an inspection of the job site on August 22, 2012. CSHO Anthony Campos reviewed CSHO Colon's inspection and conducted follow-up inspections. After the investigation, the Occupational Safety and Health Administration ("OSHA") issued one citation alleging a serious violation and one citation alleging willful violations. The Secretary proposed a penalty of $2,800 for the serious violation and a combined penalty of $56,000 for the willful violations. (Tr. 164-165, 179, 411, 413).

Respondent filed a timely Notice of Contest. After a contentious period of discovery, which will be discussed *infra*, a hearing was held in Miami, Florida on December 3-5, 2013. The parties have filed both opening post-hearing briefs ("Post-Hr'g Br.") and reply post-hearing briefs ("Reply Br."), and the matter is ready for decision.

Cited Standards

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.180(h)(3)(v), which

[1] Overhead line refers to a line above the ground. The energized overhead line that made contact with the crane's chain was situated below Mr. Carrera-Zarate. In this decision, the energized overhead lines are also referred to as "lines", "power line", "energized power lines", "wire(s)", "wiring", "overhead lines", "energized overhead power lines", and "overhead power lines".

provides:

> 1910.180 **Crawler, locomotive and truck cranes.**
>
> * * *
>
> (h) *Handling the load-*
>
> * * *
>
> (3) *Moving the load.*
>
> * * *
>
> (v) No hoisting, lowering, swinging, or traveling shall be done while anyone is on the load or hook.

Specifically, the Secretary alleges that "On or about 8/21/2012, at 2660 SW 13th Avenue, Fort Lauderdale, FL, two employees were exposed to a fall and/or electrocution when being brought up into a tree while riding the hook of the crane, which came in close proximity to energized power lines." (Citation 1, Item 1)

Citation 2, Item 1(a) alleges a willful violation of 29 C.F.R. § 1910.333(c)(3), which provides:

> 1910.333 **Selection and use of work practices.**
>
> * * *
>
> (c) *Working on or near exposed energized parts-*
>
> * * *
>
> (3) *Overhead lines.* If work is to be performed near overhead lines, the lines shall be deenergized and grounded, or other protective measures shall be provided before work is started. If the lines are to be deenergized, arrangements shall be made with the person or organization that operates or controls the electric circuits involved to deenergize and ground them. If protective measures, such as guarding, isolating, or insulating are provided, these precautions shall prevent employees from contacting such lines directly with any part of their body or indirectly through conductive materials, tools, or equipment.

Specifically, the Secretary alleges that "On or about 8/21/2012, at 2660 SW 13th Avenue, Fort Lauderdale, FL, the employer did not ensure that overhead power lines were de-energized prior to work being started." (Citation 2, Item 1a).

Citation 2, Item 1(b) alleges a willful violation of 29 C.F.R. § 1910.333(c)(3)(i)(A)(*1*), which provides:

(i) *Unqualified persons.* (A) When an unqualified person is working in an elevated position near overhead lines, the location shall be such that the person and the longest conductive object he or she may contact cannot come closer to any unguarded, energized overhead line than the following distances:

(*1*) For voltages to ground 50kv or below-10 ft. (305 cm);

Specifically, the Secretary alleges that "When an unqualified person was working in an elevated position near overhead lines with voltages to ground rated at 50 kV or below, the location was such that the person and the longest conductive object could contact the power line. On or about 8/21/2012, at 2660 SW 13th Avenue, Fort Lauderdale, FL, the employer directed employees to work within 10 feet of an energized 7620 overhead power line." [2] (Citation 2, Item 1b).

Jurisdiction

Respondent admitted in its answer that, at all relevant times, it was engaged in a business affecting commerce and was an employer employing employees. Respondent also admitted that jurisdiction of this action was conferred upon the Commission by § 10(c) of the Act, 29 U.S.C. § 659(c). (Answer, at ¶¶ 1 and 2, Joint Pre-Hr'g Statement ¶ III(a)(b) and (c)). Based on the parties' pleadings, stipulations, and the trial record, the Court finds that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 652(5). The Court also finds that jurisdiction of this proceeding is conferred upon the Commission by § 10(c) of the Act and that it has jurisdiction over the parties and subject matter in this case.

Stipulated Principles of Law and Facts

The parties agreed to the following principles of law in their joint pre-hearing statement:

[2] At the start of the trial, the Court granted the Secretary's Motion to Amend Citation 2, Item 1(b), allowing the word "not" following the words "the location was" to be deleted from the citation item. Respondent was not prejudiced by this amendment. The Court also denied Respondent's Motion to Dismiss Citation 2, Item 1(b). (Tr. 14-16).

1. Respondent, at the time of the inspection, was an employer engaged in business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*

2. OSHA has jurisdiction over Respondent as the employer of the employees at the worksite inspected between August 22, 2012 and February 20, 2013.

3. Respondent timely contested the citation and the proposed penalty, pursuant to the provision of section 10(c) of the Act.

(Joint Pre-Hr'g Statement, at p. 12).

The parties stipulated to the following facts in their joint pre-hearing statement:[3]

1. At the time of the accident at the jobsite on August 21, 2012, Jorge Carrera-Zarate was Respondent's employee.

2. Mr. Alan McPherson is Respondent's owner.

3. Mr. Alan McPherson was on the job site and observed the preparation for removal of the kapok tree by the crane company (Hunter/Merchant's Crane) and MonkeyMan Tree Service, Inc. on August 21, 2012.

4. Mr. Alan McPherson and Mr. Raphael Pacheco discussed the workplace's energized overhead power lines before the accident.

5. Before the accident, Mr. Alan McPherson did not believe the overhead powerlines were turned off.

6. Before the accident on August 21, 2012, Mr. Alan McPherson saw Jorge Carrera-Zarate working in the tree.

[3] Additional stipulated facts were made during the trial as sanctions remedying Respondent's discovery deficiencies. *See* discussion, The Secretary's Motion in Limine to Exclude Evidence in Support of Respondent's Affirmative Defenses, *infra,* at pp. 64-71, herein.

(Joint Pre-Hr'g Statement, at pp. 12-13).

Witness Testimony

Three witnesses testified for the Secretary: Respondent's president, Alan McPherson; CSHO Anthony Campos; and Rafael Pacheco, owner of Monkey Man Tree Service, Inc. ("Monkey Man") and the Respondent's foreman at the job site on August 21, 2012.[4] The Respondent called nine witnesses: Alan McPherson; Respondent's employees Messrs. Jesus Cruz, William Gonzalez, and Jesus Pineda; former Hunter Merchant Crane salesman, Randy Miller; Consultant Mary Ann Wolfson, who does Respondent's payroll; Delancy Rochester, who runs Coral Springs Tree Service and observed the work at the job site; Delio DeBenedetto a crane operator who also observed the work at the job site; and Ronny Hoggins, Hoggins Construction Co., 5540 Lyons Road, Coconut Creek, Florida 33073 ("Hoggins Construction"). Hoggins Construction was the general contractor renovating the home at the job site. (Tr. 113, 132; Ex. R-A).

Testimony of Alan McPherson

Alan McPherson has been the president of All Florida since it was formed in April, 2003. He is a certified arborist, having received his certification from the International Society of Arborculture in about 2003. All Florida engages in tree trimming, pruning, and tree and debris removal in south Florida. He testified that he generally subcontracts work that requires climbing trees when performing tree pruning and removal. Mr. McPherson testified that he never personally climbed trees or used a bucket to access tree limbs being pruned or removed.[5] He stated that All Florida has used buckets to access tree limbs. He further testified that

[4] The employment status of Mr. Pacheco is in dispute and will be discussed, *infra.*
[5] A "bucket truck" generally has an aerial "basket" or "bucket" resting atop a protruding boom. *See Consumers Power Co.,* 5 BNA OSHC 1423, 1424 at n. 6 (No. 11107, 1977).

Respondent's employees occasionally climb trees, but generally perform work that is done from the ground with pull printers and pull clips. Mr. McPherson testified that Respondent's work "never" involved overhead energized lines before August 21, 2012.[6] Hoggins Construction entered into a contract with All Florida to remove a large kapok tree located on the property at 2660 Southwest 13th Avenue, Fort Lauderdale, Florida ("job site"), and to chip, process, and remove the debris.[7] (Tr. 92-95, 113, 131, 135, 705-708, 769-771).

In about June, 2012, Mr. McPherson went to the job site to assess the job before bidding on it. The purpose of his "location and tree assessment" was to recognize and note any hazards involved with the job. He recognized hazards associated with the energized overhead lines; as well as with the size, height and difficulty in removing the tree. He recognized the enormity of the tree required a big crane and experts to remove. He observed and recognized that the energized overhead lines at the job site created natural hazards, including electrocution. The tree was in the backyard of a ¼ acre plot. Mr. McPherson testified that the tree was "enormous" with huge limbs, "almost 100 feet tall" and 100 years old. (Tr. 107-109, 136-137, 721).

Mr. McPherson testified that he immediately thought that he could get Monkey Man to do the tree removal. He testified that Mr. Pacheco was "very experienced," "extremely high-qualified," and "highly skilled" in pruning and tree removal that he had been doing for thirty years. He testified that he discussed the energized overhead lines with Mr. Pacheco before Mr. Pacheco first looked at the job site. He stated that he told Mr. Pacheco then that he had not been able to "get them [the energized overhead lines] shut down" and that he [Mr. Pacheco] had to

[6] Mr. McPherson's testimony at trial in this regard was contradicted by a prior statement that he made to OSHA representatives on August 30, 2012, when he said that Respondent had come in contact and worked around power lines, usually avoiding trees with limbs, when asked when interviewed "Have you ever worked on jobs around powerlines before?" (Tr. 95-105; Ex. 5, at p. 3).

[7] Mr. McPherson testified that the tree removal was funded by the federal government and the City of Fort Lauderdale, Florida. (Tr. 713).

consider any overhead line there "live" when he [Mr. Pacheco] went to visit the job site. Mr. McPherson determined that, to do the job safely, experts were required and a crane needed to lift the cut limbs over the house and into the street. (Tr. 108, 128, 709, 720-722).

Mr. McPherson testified that Mr. Pacheco visited the job site twice before commencing work on August 21, 2012. He testified that, after Mr. Pacheco visited the job site, Mr. Pacheco told him that he [Mr. Pacheco] was "comfortable" and had "no problem" with the job. Mr. McPherson testified that Mr. Pacheco asked him if he [Mr. McPherson] could get the energized overhead lines "shut down."[8] In response, he told Mr. Pacheco "okay."[9] He further testified that together, he and Mr. Pacheco, "took into consideration the wire, the buildings, the fences, the size, the height, [and] the degree of difficulty" and they mitigated these considerations by getting a bigger crane for the job. (Tr. 129-130, 708, 712-713, 718, 720-722).

Mr. McPherson stated that the crane was hired to keep "us a safe distance, the limbs, anything from coming in contact, ... [with the energized overhead lines]." He testified that "[t]he tree limbs were nowhere near the lines." He used the crane to lift tree limbs that had been cut over the tree and the property and "fly the limb to the street." He testified that he did not want the cut limbs to come down beside the tree because he "didn't want to break those lines, I didn't want to hit those lines, I didn't want to destroy anything." Mr. McPherson further testified that "naturally [he] would be concerned about something hitting the wire, yeah. That's why they didn't have anything that they held or controlled that could reach the wiring."[10] He also testified that he was "[a]bsolutely" concerned about hitting the energized overhead lines by

[8] Mr. McPherson also testified that Mr. Pacheco said to him before Respondent submitted its bid for the job: "If you can get it [the energized overhead line] shut off I would like to have it shut off." (Tr. 722).
[9] Mr. McPherson testified that Mr. Pacheco never arranged to have the power shut off on jobs when Mr. Pacheco worked for Respondent. (Tr. 723).
[10] This testimony belies the fact that Messrs. Pacheco and Carrera-Zarate routinely touched the crane's rigging's chains to wrap around tree branches and these chains came in contact with the energized overhead lines located beneath the tree climbers.

lowering the cut branches down beside the tree because the branches were too big. He stated that the energized overhead lines "were much lower than where the employees were going to be working" in the tree and that there was no work to be done below the wires, except to cut the tree at its base that was 25 to 30 feet below the energized overhead lines. (Tr. 134, 143-146, 721).

Mr. McPherson testified that Hoggins Construction agreed to supply and pay for the crane at a cost of $1,500. Mr. McPherson referred Hunter Merchant Crane, a company that he had worked with before, to Hoggins Construction. Mr. McPherson talked to Randy Miller, who worked for Hunter Merchant Crane, and asked him to send a crane to the job site. Mr. McPherson testified that he told Hoggins Construction that he [Mr. McPherson] had not been able to get "FP&L ["Florida Power & Light"] to act." (Tr. 134-135, 141, 713, 722, 773-774; Ex. R-A).

In early August, 2012, about three weeks before the job began, Mr. McPherson returned to the job site a second time to determine if there was proper access for the crane and if anything in the street would prevent debris removal. He saw that the hazards he had previously noted had not changed between his two visits to the job site. (Tr. 108-110, 718).

Mr. McPherson testified that he contacted FP&L about de-energizing or insulating the energized overhead lines. He claimed that he called the power company three to four times a week for a couple of weeks, but FP&L allegedly did not respond. Mr. McPherson testified that he assured Mr. Pacheco that he would try more times to contact FP&L. He did not know the names of any of the people he spoke with at FP&L and asserted that his contacts there would not give their names. He also testified that he would get passed from one person to another, or given a number to call back. He stated that "it's a shell game."[11] He also stated that he asked a

[11] Mr. McPherson testified that FP&L had never before the accident shut down any energized overhead line, "Not

number of other people, including municipal people, if they could help him contact FP&L. Mr. McPherson testified that he called the city forester who told him that it would take an act of God to get FP&L to de-energize the overhead lines. Mr. McPherson also testified that FP&L does not shield lines. He asserted that this was the experience of everyone in the industry. (Tr. 110-111, 132, 142, 719-720, 782; Ex. C-3, at p. 22).

Mr. McPherson stated that "I don't attack jobs where there's a line going through trees." He testified that in such cases he used Asplundh Tree Expert Company ("Asplundh"), an overhead line clearing contractor, but added that Asplundh did not remove trees. He first asserted that he did not call Asplundh on this job because the tree was far enough from the energized overhead lines and there was nothing to cut that would affect the overhead lines. On cross-examination, he recanted his initial testimony and instead testified that he did call Asplundh, but it did not take the job because Asplundh lacked the authority to remove that type of tree. (Tr. 112, 130-131, 143, 151, 719, 780).

Mr. McPherson was next at the job site on the morning of August 21, 2012. He observed that the hazards he had previously noted during his two earlier visits to the job site had not changed. He and Mr. Pacheco again assessed the energized overhead lines hazard. Specifically, he testified:

> Q. So my question was did you do anything to change the hazard regarding the lines before the morning [of August 21, 2012]?
>
> A. Other than the talk in the morning with the guys and the talk with Ralph [Pacheco] prior to the job. When Ralph went and looked at it, we assessed the hazard, Ralph assessed it, I assessed it. We assessed it again that morning. We went over it prior to the start of the job to make everybody aware those lines are live.

(Tr. 110-111).

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anywhere. Ever. Not anywhere. And I've been a lot of places and in a lot of – lot of places." (Tr. 724).

Mr. McPherson testified that before work began at the job site he made sure that the workers knew what they were supposed to do; that the job site was clear, the dumpsters moved, and that there would be access for debris removal and for parking the crane. These included Mr. Robert Dale Scesny, Hunter Merchant Crane ("Scesny" or "the crane operator");[12] Ronny Hoggins, Hoggins Construction; Foreman Pacheco and Respondent's other employees. He spoke separately with Messrs. Hoggins, Pacheco, and Scesny. Mr. Scesny was Hunter Merchant Crane's crane operator. When talking with Mr. Hoggins, Mr. McPherson testified that he "made him aware of the fact that the wire was still live."[13] (Tr. 94, 110, 113, 129, 132, 453, 458, 725-726).

Mr. McPherson testified that he told Mr. Pacheco that the overhead lines were live. He also testified that he told Mr. Pacheco to use the nylon straps as the crane's rigging and to be careful. On rebuttal, Mr. McPherson testified that he told Mr. Pacheco not to get within 10 feet of the lines, and to try to stay at least 15-20 feet away from the energized overhead lines. He also testified that he told Mr. Pacheco that there were no tree limbs near the energized overhead lines. (Tr. 111, 138-139, 724-725).

Respondent's original plans called only for Mr. Pacheco to work in the kapok tree and Mr. Carrera-Zarate was going to work in the street doing debris removal. However, Mr. McPherson testified that on August 21, 2012 Mr. Pacheco stated that it would be helpful to have a second tree climber assist him working in the tree. Mr. McPherson further testified that he agreed with Mr. Pacheco and Mr. Carrera-Zarate was assigned to assist Mr. Pacheco as a second tree climber. Mr. McPherson stated that Mr. Pacheco had provided training to Mr. Carrera-Zarate years ago. Mr. McPherson testified that Mr. Carrera-Zarate knew how to climb, trim, and

[12] Mr. Scesny did not testify at the trial.
[13] Mr. McPherson testified that he had not met Mr. Hoggins before August 21, 2012. (Tr. 141).

work in trees and that he was "incredibly experienced in trees."[14] Mr. McPherson stated that Mr. Pacheco directed the activities of Mr. Carrera-Zarate when he [the deceased] worked in the tree. Mr. Pacheco provided Mr. Carrera-Zarate with a saw, climbing gear, and harness. Mr. Pacheco did not provide any blankets to cover any energized overhead lines at the job site. Mr. Scesny also did not have any blankets to cover the energized overhead lines. Mr. McPherson testified that he is not certified to go anywhere near energized overhead lines and lacked the authority to cover them. No materials that provided protection against electrocution were issued to either Messrs. Pacheco or Carrera-Zarate. (Tr. 135, 142, 228, 727, 755-756, 772, 779, 783; Ex. C-6, at pp. 3-4).

Mr. McPherson testified that "[a]nytime there's a power line, a communication line, there's a hazard." Mr. McPherson testified that he considered all of the overhead power lines, including the top wire, to be energized. He first testified that the energized overhead lines at the job site were not insulated. Later on, he testified that, except for neutral wires, the energized overhead lines were insulated.[15] He testified that the energized overhead lines were also isolated because they "weren't in the tree" and did not pass through the tree's branches. (Tr. 111, 151, 780-781; Ex. C-13).

He testified that, in the past, Respondent had worked in trees where workers stayed a safe distance from overhead lines, a minimum of 15 feet. He said that his "guys" knew not to get within 15 feet of energized overhead lines. He stated that any distance less than 15 feet was "not acceptable." He testified that as long as a tree is a safe distance from the energized overhead lines, it is safe to work in the tree. He stated that he knew OSHA's requirement that employees

[14] Mr. Carrera-Zarate did not have an arborist certification. (Tr. 117).
[15] Mr. McPherson asserted that he looked at the energized overhead lines the morning of the hearing and they were still insulated. (Tr. 781).

had to stay a minimum of 10 feet away when working around energized overhead lines. Mr. McPherson testified that, once he allowed the men into the trees, he did not believe that an employee was going to be within 10 feet of any energized overhead lines.[16] He stated that "[w]e [he and Mr. Pacheco] naturally knew that we had to be 15 feet minimum away" from the energized overhead lines. He initially testified that Respondent's "work was 35, 40, 50 feet away" from the energized overhead line. Shortly thereafter he testified that Respondent's "working zones were 20, 30, 40, 50, 60 feet away" from the energized overhead lines. He also stated that "the majority of those [tree] limbs "weren't even actually over other than the 50, 60 feet away" from the wire. Shortly thereafter Mr. McPherson further testified that the tree "limbs were 20, 30, 40 feet away. There was no limb anywhere close to the wire." He stated that Respondent was "way, way in excess of 15, 20 feet away from it [energized overhead line]." (Tr. 111-112, 127, 130-131, 134, 720, 767).

Mr. McPherson testified that he discussed setting up the crane with Mr. Scesny so that he could see the work being done while he operated the crane. Mr. McPherson testified that he confirmed that Mr. Scesny could see the energized overhead lines in the tree from the crane in the street.[17] The crane at the job site was about 150 feet in height. Mr. McPherson testified that he believed that Mr. Scesny understood that the energized overhead lines were live, and that he [Mr. Scesny] was going to lift the cut limbs over the house and to the street using the crane. Mr. McPherson testified that Mr. Scesny told him that the crane was twice the size necessary and that he [Scesny] would have no trouble doing the job. He also stated that the crane operator had a

[16] Mr. McPherson also testified that he did not expect Mr. Carrera-Zarate to get within 20 feet of the energized overhead line. (Tr. 130).

[17] Specifically, Mr. McPherson testified:

> Q. And that he [Mr. Scesny] could see the power lines in the tree from the street, is that correct?
> A. Yes.

(Tr. 148).

"spotter" to be located in the backyard, by the tree, who would guarantee that Mr. Scesny could see the job and direct Mr. Scesny by radio.[18] Mr. McPherson testified that Mr. Scesny had a good attitude, and was not irritable or grumpy. Mr. McPherson initially testified that he could only tell Mr. Scesny the identities of the properties where he could operate the crane. But he later also testified that he directed Mr. Scesny to use the crane company's rigging for the crane. Mr. McPherson said that Mr. Scesny told him that he had "straps in the box." He also testified that crane's rigging is typically provided with the crane and that was the case here. He stated that Respondent did not have slings that hang off a crane that are 40 feet long and hold 20,000 to 30,000 pounds. Mr. McPherson testified that before the job was started he [Mr. McPherson] personally retrieved the straps from the supply truck and handed the straps to the crane's spotter. Mr. McPherson testified that he was not paying for the crane and did not care how long the job took.[19] (Tr. 94, 110, 127, 135-139, 148-149, 725-726; Ex. C-13).

Before the work began, Mr. McPherson testified that Mr. Scesny told him that he [Mr. Scesny] did not bring his basket to hoist the climbers into the tree. The crane company's policy was to not hoist employees into a tree without a basket. He further stated that Mr. Scesny told him that his office was too far away for him to go back and get a basket. Mr. McPherson further testified that Mr. Scesny called Hunter Merchant Crane's office to get permission to have the employees ride the ball[20] of the crane into the tree. Mr. McPherson stated that he was told that the crane company "needed a basket to hoist the men up." Mr. McPherson told them that the job should not be held up because they did not have what was needed for the crane to properly hoist the men up into the tree. Calls were made to other places to determine if anyone had something

[18] The name of the spotter is not in the record and the spotter did not testify at the trial.
[19] Mr. McPherson also testified, to the contrary, that he planned to complete the job in one day, and had notified every one of that. (Tr. 146).
[20] The object ridden by the employees is referred to as the "ball" or the "hook" of the crane. Respondent's employees were not lifted into the tree using a bucket, basket or other appropriate device.

that could properly hoist the employees up into the tree. After getting nowhere, Mr. McPherson testified that he told those at the job site, "Well, guys, you know the situation here. I'm going to go over to Snyder Park. You guys figure it out." (Tr. 762-763).

Mr. McPherson testified that he would not let anybody proceed with the work at the job site until he "reviewed everything." Before Messrs. Pacheco and Carrera-Zarate began working up in the tree, Mr. McPherson testified that he talked to his employees about the energized overhead lines, but he did nothing else to eliminate the hazard the energized overhead lines posed at the job site. He testified that he let the work begin even though the overhead lines were energized because Messrs. Scesny and Pacheco were "comfortable", knew the lines were energized, and "there was plenty of space in-between the work site and the lines." He then left the job site to visit another job at Snyder Park. Mr. McPherson testified that, before he left, the employees had not yet been hoisted into the tree, and he did not know how they were going to gain access to the top of the tree. He testified that at the time he left the job site the first time that morning, Mr. Scesny was using nylon straps for the crane's rigging. (Tr. 110, 764, 779).

Mr. Pacheco was left "in charge of the work being done in the tree," including removing its limbs. Mr. McPherson testified that Mr. Pacheco had the experience and training to handle anything that arose at the site.[21] He testified that if there were "any problems with the machinery or equipment or personnel or anything, Ralph [Pacheco] could be involved, but he [Mr. Pacheco] was the lead man for the site." Mr. Pacheco "could review everything and make sure everything was fine with the equipment." Mr. McPherson also testified that Mr. Pacheco was a mechanic, tree climber, and driver with a Commercial Driver's License ("CDL"). In Mr. McPherson's absence, Mr. Pacheco had the authority to direct the other All Florida employees at the job site.

[21] Mr. McPherson testified that Mr. Pacheco has experience removing Australian pines that were much taller, harder, wider and heavier than the kapok tree, which was made of softer wood. (Tr. 139-140).

Mr. McPherson testified that Mr. Pacheco was "also responsible for, you know, overseeing that everything was going okay in the street -", which is where the majority of Respondent's employees were processing the debris from the tree. Although Mr. McPherson believed that Mr. Pacheco had various certifications, including an electrical certification, he admitted that he never saw any such certifications and only knew about Mr. Pacheco's experience. (Tr. 113-116, 134-135).

About an hour after he first left the job site on August 21, 2012 and went to another job right down the street, Mr. McPherson returned to the job site. Messrs. Pacheco and Carrera-Zarate were up in the tree. He observed them remove two or three tree limbs. Mr. McPherson knew that the overhead lines remained energized at all times while Messrs. Pacheco and Carrera-Zarate worked in the tree. Mr. Scesny was still using the fabric straps to hoist the limbs over the house that Mr. McPherson had handed to the crane's spotter.[22] As he drove by the job site, he testified that he tooted his horn and Mr. Pacheco gave him a "thumbs up" while working in the tree indicating that everything was fine. (Tr. 117-118, 138-140, 764-765).

Mr. McPherson testified that he later returned to the jobsite a third time in the afternoon. As he drove by, he said that he saw "one man in the tree and chains on the limbs flying out." He stopped by the crane. Rather than nylon straps, the crane's rigging now consisted of "pure chain." He testified that he did not know that Mr. Scesny had changed the crane's rigging until he returned. Mr. McPherson asserted that, although he had some control over the type of rigging used at the beginning of the job, he had no control over the type of rigging used by Mr. Scesny after he left the job site the first time. He testified that about 30 seconds after parking his car,

[22] The fabric rigging was attached to hoisting chains dangling down from the crane. (Exs. R-G at pp. G77, G84, G85).

Mr. Pacheco walked in front of him and again gave him the thumbs up.[23] Mr. McPherson testified that Mr. Pacheco said to him "Hey, we're done." Before he could respond, men started screaming. (Tr. 112-113, 139, 764-767).

When asked if All Florida has any training manuals or training programs instituted with its employees, Mr. McPherson testified that Respondent had an Electrical Hazard Awareness Protection Plan ("E-HAP") manual produced by the tree care industry. He further testified that the manual is also available in Spanish and is given to employees when hired. It has "all general OSHA stuff that we pick out that pertains to our industry." He testified that, once a year, possibly more if there were rainy days, he had Respondent's employees read, review and study the manual. He further testified that Mr. Pacheco had access to Respondent's manual. He admitted that Respondent's exhibits did not show that its employees received any training. (Tr. 759-761, 778-779; Ex. R-D).

Mr. McPherson testified at length regarding his long-term relationship with Mr. Pacheco. He observed Mr. Pacheco removing trees with cranes and in all kinds of situations starting in about 1998. He saw Mr. Pacheco work around overhead lines; but not when trees had energized overhead lines running through them. Mr. McPherson knew that in instances where a charged wire is running through a tree "everything in and around" the charged "wire is potentially something that could come in contact with" the wire. According to Mr. McPherson, Mr. Pacheco came to him asking for work. Mr. McPherson replied that he could not afford to pay him. Mr. Pacheco asked, "what can we do where you can afford me?" Mr. McPherson replied, "I can't afford all of the taxes and all the burdens and all the things that go with it. . . .[Y]ou're doing something that I can't afford to pay everything like Workman's Comp and . . . all that."

[23] *See* Respondent's answer to Interrogatory No. 21, which states in part: "I [Mr. McPherson] returned to the job site approximately three minutes before sparks flew off of the chain." (Ex. C-3, at p. 24).

Mr. McPherson testified that he subcontracts with people with their own equipment because he cannot pay all of the expenses. He testified that this method allows him to not have to carry Mr. Pacheco as an employee every day. (Tr. 125-128, 561, 709-710, 762).

Mr. McPherson testified that he advised Mr. Pacheco to form a corporation. He helped Mr. Pacheco fill out the forms for his occupational license. Mr. McPherson also pointed out that, if you are a sole proprietor and employ only two or three people, you can be exempt from worker's compensation insurance. He also testified that there is a benefit to have a person form his own business and let them pay their own taxes and insurance. Mr. McPherson stated that this method is the "only way you can, not escape, you can't get rid of paying, but it brings him the money that he can afford and command." Mr. McPherson estimated that worker's compensation, and unemployment, Social Security and Medicare taxes add 30% to the hourly cost of an employee. He testified that he did not force Mr. Pacheco to open a corporation. He also stated that he had many other people with whom he worked in a way similar to Mr. Pacheco. (Tr. 710-712).

Mr. McPherson asserted that he had no financial interest in "Monkey Man." He said that he did not restrict Monkey Man's activities. Mr. McPherson testified that he referred jobs to Monkey Man all the time because there was more work than Mr. McPherson could handle. He asserted that he started in business the same way as Monkey Man. He also stated that Mr. Pacheco was not a friend, but he was a man that he respected because of his abilities. He testified that he knew Mr. Pacheco since 1997 when they both worked at Community Tree. (Tr. 714-717, 758).

Mr. McPherson testified that when offered a job that he wanted Mr. Pacheco to do, he would not accept it unless Mr. Pacheco first agreed to do it. Mr. McPherson further testified that

Mr. Pacheco was not required to work any specific, or particular number of, hours, or be available certain hours of the day. If Mr. Pacheco could not finish a job in one day, he could come back to complete the work. Mr. McPherson testified that Respondent paid Mr. Pacheco $250 per day. It also reimbursed Mr. Pacheco for gasoline he paid for that was used in Respondent's equipment. At the end of the year, Mr. McPherson sent Monkey Man an I.R.S. Form 1099. (Tr. 757-758, 761, 774).

Mr. McPherson testified that Hoggins Construction initially paid Respondent $3,500 and a later payment of $500 for the job. He said that he did not receive any money from Hoggins Construction to pay for the crane. He further stated that he did not enter into a contract with the crane company, pay the crane company, or know who, if anyone, paid the crane company. He did, however, admit that the crane company was "there on my word" and that he had asked Mr. Miller "to send a crane for the job." (Tr. 758, 772-773).

Testimony of CSHO Anthony Campos

Anthony Campos is a retired captain from the New York City Fire Department after 28 years with the department. He has been employed by OSHA for 12 years and has conducted approximately 450 inspections. Approximately 40 of these inspections involved fatalities. Eight of the fatalities involved energized overhead lines and approximately five involved tree trimming.[24] CSHO Campos received training on energized overhead lines through courses taken at the OSHA Technical Institute. He also received training provided by two local, independent electrical companies. While investigating another fatality that involved a FP&L employee electrocuted by an energized overhead line, FP&L gave him background training on distribution systems and how they break down to the homeowner. (Tr. 160-164).

[24] He testified that "overhead line" means "an above ground wire." (Tr. 468).

OSHA received a referral from the local police department of an employee injury at the job site at 5:30 p.m. on the day of the accident. Because of the late hour, the OSHA investigation began the next day, on August 22, 2012. At the time, CSHO Campos was the Acting Assistant Area Director, and he assigned another CSHO, Maria Colon, to conduct the initial investigation.[25] CSHO Colon went to the accident site on August 22, 2012. CSHO Campos first visited the job site on September 20, 2012 and he saw the tree when four or five large limbs remained atop the tree.[26] He testified that CSHO Colon inspected the harness used by the tree climbers and spoke with the medical examiner's office and the crane company. They both spoke with the general contractor. Both also took photographs and measurements while visiting the job site. CSHO Campos also reviewed the photographs that were taken by CSHO Colon on August 22, 2012. (Tr. 164-167, 178-182, 189-190, 413-414, 418; Ex. C-14).

CSHO Campos described the residence at the job site as a one-story concrete, single family home. There was a fairly small yard. The kapok tree being worked on was in the backyard, and there were energized overhead lines that ran parallel to the street. A step down transformer at the corner of the backyard supplied power to the house.[27] The kapok tree was large, with a trunk about four feet in diameter. A safety strap hung from one of the cut limbs on September 20, 2012. There was a primary energized overhead line carrying 7,620 volts. There was also a secondary energized overhead line carrying 220 or 240 volts that went from the step down transformer to the property. CSHO Campos testified that the energized overhead lines were, without question, closer than 10 feet from the tree trunk. His measurements revealed that the primary energized overhead line was within three feet of the tree trunk. Because of the

[25] According to the Secretary's Counsel, Ms. Colon intended to testify at the trial. However, [redacted] prevented her from appearing at the hearing. (Tr. 184-185).
[26] CSHO Colon accompanied CSHO Campos on this visit. (Tr. 178, 190).
[27] CSHO Campos testified that the transformer converted the 7,620 volts in the primary energized overhead line to either 110 or 220 volts, depending on the needs of the homeowner. (Tr. 168-169).

proximity of the tree to the energized overhead lines, CSHO Campos could not directly measure the distance between them and the tree. Instead, he used a fiberglass trench rod and took the measurements indirectly, using points of reference. He stated that his measurement "encompassed from the base of the tree up the trunk of the tree, the remaining trunk." (Tr. 165-166, 171-174, 192-193, 198, 416-417, 435-438, 463-464, 518; Exs. C-13, marked "B", C-14, marked "A", "C", "D", C-19, marked "A", "B". "C", C-27).

CSHO Campos participated in the OSHA interviews of Messrs. McPherson and Pacheco, as well as of Respondent's employees Messrs. Cruz, Gonzalez and Pineda. CSHO Campos testified that Mr. McPherson told him that he was the owner of All Florida and that he was hired by Ronnie Hoggins of Hoggins Construction to remove the tree. Mr. McPherson visited the job site twice prior to the day work began on August 21, 2012. Mr. McPherson knew that the overhead lines were energized. (Tr. 205-207, 239).

On September 14, 2012, Mr. Pacheco told CSHO Campos that he went to the site on Thursday, August 16, 2012 to make an initial assessment of the property. He took a video of the trees and wires. Later that day, Mr. Pacheco called Mr. McPherson and told him that there were energized overhead lines under the tree. Mr. Pacheco expressed his concern of the tree being close to the energized overhead line. Mr. Pacheco told CSHO Campos that he told Mr. McPherson that the overhead lines were energized and that they should be de-energized before they did any kind of work at the job site. Mr. McPherson told Mr. Pacheco that they had to do the job on Tuesday, August 21, 2012, so they would see when they got there. Mr. Pacheco told CSHO Campos that Mr. McPherson was responsible for contacting FP&L to de-energize the energized overhead lines. Mr. Pacheco told CSHO Campos that Mr. McPherson told him that FP&L would not de-energize the overhead lines. Mr. Pacheco told him that Mr. McPherson

never has the power shut off at jobs being done around power lines.[28] Mr. Pacheco also told CSHO Campos that Mr. McPherson said on August 21, 2012 that it was too late to have the overhead lines de-energized because the crane was already on site. (Tr. 218-219, 224-226, 232; Ex. C-6).

CSHO Campos testified that Mr. McPherson was in charge of the job. When Mr. McPherson left the job site, he put Mr. Pacheco in charge at the job site. Every All Florida employee OSHA interviewed stated that Mr. Pacheco was the job's foreman. Mr. Pacheco also identified himself as the foreman for all Respondent's employees at the job site. Mr. Pacheco identified Mr. McPherson as his direct supervisor. Mr. Pacheco worked in the tree directing the work being done there, including the work being done by Mr. Carrera-Zarate. Mr. Pacheco also testified that he told Mr. Scesny which tree branch was to be cut. CSHO Campos testified that the Mr. Scesny positioned the crane's chains in the tree and Mr. Carrera-Zarate then used the chains hanging from the crane to wrap around the branches. (Tr. 207-208, 228-229, 236, 240, 250, 454, 548; Exs. C-6, C-10, at p. 1).

Mr. Gonzalez told CSHO Campos on September 14, 2012 that he worked for Respondent. He identified Mr. Pacheco as the foreman for the job and in charge at the job site. He also told him that he was not sure if the overhead lines were energized because "Alan [McPherson] never told us." (Tr. 239-240; 242-249; Ex. C-10 (portions admitted into evidence)).

Mr. Cruz told CSHO Campos on September 14, 2012 that he started with Respondent

[28] CSHO Campos testified:
Mr. Campos: Okay, the question as I know it was has Mr. Pacheco ever worked around power lines with All Florida Trees or Mr. McPherson, am I correct?
Ms. Hollingsworth-Malone: Q. Yes
A. Okay. In his signed statement, he indicates that he worked a few jobs with Alan [McPherson], around ten, around power lines and Alan never shuts the power off.
(Tr. 232; Ex. C-6, p 3).

working on the ground with the "chipper" for 18 months. Thereafter, he worked as a tree "climber," and used a bucket truck. He was working in the backyard by the base of the tree, holding a rope that Mr. Carrera-Zarate was using so that the rope would not touch the energized overhead lines, when the accident occurred. He identified Mr. Pacheco as his supervisor. (Tr. 248-252, 255-256; Ex. C-11 (portions admitted into evidence)).

Turning to the individual citations, CSHO Campos testified that Citation 1, Item 1 was issued because the cited OSHA standard prohibits employees from riding on the hook of a crane. Based on photographs and his interviews, he determined that Respondent's employees rode the hook of the crane to the top of the tree. CSHO Campos testified that Photograph C-38 showed the deceased "riding the hook of the crane." On September 14, 2012, Mr. Pacheco told him that there was a problem climbing the tree because of the thorns. Mr. Pacheco stated that "We [he and the deceased] accessed the tree by having the crane bring us up to the top of the tree and work our way down. This tree had thorns so it would be hard to climb." On August 21, 2012, Messrs. Pacheco and Carrera-Zarate rode the hook of the crane to get up to the top of the tree. According to Mr. Pacheco, riding a crane was a standard way for Mr. Pacheco's crew to get into a tree. (Tr. 226-230, 306-307, 566; Exs. C-6, at p. 2, C-38).

CSHO Campos explained that it is a fall hazard to ride the hook of a crane at any elevation. He further testified that a tree is an energy conductor and any contact between the tree and an energized overhead line would also create an electrocution hazard for any worker who rides a crane's hook up into the tree. Based on his interview with Mr. Pacheco and photographs that show the deceased in the tree, CSHO Campos concluded that Messrs. Carrera-Zarate and Pacheco were exposed to fall and electrocution hazards by riding the crane's hook into the tree. He estimated that the length of exposure was the time it took the employees to mount the crane's

hook and get into the tree, which he estimated was at least 15 minutes. (Tr. 307-308, 561-562).

CSHO Campos concluded that Respondent had knowledge of the violation. He explained that, as a certified arborist, Mr. McPherson knew that OSHA standards required Respondent to use a bucket for workers to gain access to the top of the tree on August 21, 2012. Also, Mr. Pacheco, Respondent's foreman, directed Mr. Carrera-Zarate to ride the hook with him to the top of the tree. (Tr. 308-309; Ex. C-6, at p. 2).

The violation was deemed to be serious because a fall from the crane's elevated hook could result in severe, life altering fractures or death. Additionally, the hazard of electrocution could result in the death of an employee. (Tr. 309).

CSHO Campos asserted that, based solely on the gravity of the violation, the penalty would have been $7,000. A 60% deduction was granted because of Respondent's small size. No reduction was given for good faith because the gravity of the violation was a "high grader" and a fatality occurred. OSHA had never before inspected Respondent and it did not qualify for a reduction based on history. OSHA proposed a penalty of $2,800 for Citation 1, Item 1. (Tr. 321-322).

Turning to Citation 2, Item 1(a), CSHO Campos testified that he learned from interviews, photographs and personal observation that Respondent's employees were working in a tree near energized overhead lines on August 21, 2012 at the job site. He pointed out that the jacket seen on the primary energized overhead line in the photographs is a weather protector and not a line insulator. He testified that the uninsulated primary and secondary energized overhead lines ran through the tree. CSHO Campos explained that Messrs. Pacheco and Carrera-Zarate wrapped nylon or chain slings hanging from the crane's hook around the tree limbs and then cut the limbs. The nylon or chain slings had to be sufficiently lower than the branch being cut. This enabled

the workers to put a choker or shackle on the branch so that the cut limb could be raised over the energized overhead lines and dropped to the ground. The crane's lifting hook was above the energized overhead lines, but its chains dropped down below the lines. Photograph C-34 shows one length of chain dropping down on the side facing the limb where a tree climber was sitting on a branch. The other length of chain is shown draped over a branch on the far side. CSHO Campos testified that non-metallic slings, generally made of nylon webbing, were also used by the crane on the job. He stated that these nylon slings (also referred to as "fabric straps") were not insulated. (Tr. 310, 314, 515-516; Ex. C-34).

CSHO Campos testified that the tree had branches that spread out from its trunk. He stated that a branch could come into contact with the energized overhead line and create a risk of electrocution either because of wind or someone standing on the branch. He stated that branches "move up and down." Additionally, a tool or chainsaw could be dropped onto an energized overhead line and create a risk of electrocution.[29] The only safe way to do the job would be to either de-energize the overhead lines or provide some type of barrier to prevent contact with the energized overhead lines. CSHO Campos also noted that when trimming a tree, the branches and leaves hide the energized overhead lines, making it hard to determine exactly where the lines are. The crane's rigging equipment can hang down and possibly contact an energized overhead line. He pointed out that it is not necessary to make direct contact with an energized overhead line because electricity can arc as it looks for a potential to ground. This arcing can be caused by a tool, employee, or tree, all of which could result in electrocution. He testified that there would be a path to ground if the crane's chain, draped on a tree limb, came in close proximity to the energized overhead line. (Tr. 310, 449-450).

[29] CSHO Campos testified that Messrs. Pacheco and Carrera-Zarate were also using positioning belts in the tree. He identified positioning belts as tools and described them as grommeted, thick canvas belts with eyelets. (Tr. 313).

Based on his measurements, CSHO Campos determined that the primary uninsulated, energized overhead line of 7,620 volts was not more than three feet from the tree trunk. He also testified that photograph C-36 showed a tree branch, with a worker on it, near the energized overhead line.[30] He further said photograph C-36 showed the worker about twelve feet from the energized overhead line. He also stated that the crane's rigging chain was in "close proximity" to the primary energized overhead line. (Tr. 198, 311-314, 416, 516-517, 551-553, 570; Exs. C-27, C-34, at "E" and "F", C-36 at "A", "B", "C").

CSHO Campos testified that both tools and trees are conductive. They can act as a conductor that can result in electrocution. He testified that "the entire tree is a conductive item."[31] According to CSHO Campos, it really did not matter if a tree branch was within 10 feet of the energized overhead line. The tree trunk was within 3 feet of the line and its branches were part of the tree. CSHO Campos testified that "an employee was on a conductive surface [tree branch] within ten feet of an energized power line," and that is what Respondent was cited for. He testified that the deceased was on a conductive surface, the tree branch, when a conductive object [the crane's rigging's chain] touched the energized overhead line. From photographs, he determined that there was a lot of potential for the crane's rigging's chains or tree branches to make contact with the energized overhead line. He also pointed out that fabric straps, used on the crane at the beginning of the job, also conduct electricity. (Tr. 313, 451, 464-465, 516-517, 553-554; Ex. C-34).

CSHO Campos testified that Mr. Carrera-Zarate was "close enough to that chain and to the end of the limb to grab that chain and whatever rigging they had to wrap around the limb."

[30] CSHO Campos testified that photograph C-36 was taken by Ms. Em-Orn Yosagrai on August 21, 2012 while she was watching the work because she felt it was very, very dangerous and she was afraid that one of the tree limbs would hit her house. Ms. Yosagrai lived adjacent to the job site property. (Tr. 574-578; Ex. C-36).
[31] He testified that the tree included "the parts of the tree, trunk, limbs, branches, it's all the same." (Tr. 469-470).

He concluded that the accident occurred when Mr. Carrera-Zarate either came in contact with the chain hanging down from the crane, or was on a tree limb, and either the crane's chain or tree limb made contact with the energized overhead line. He explained that there does not need to be direct contact between the crane's chain and the energized overhead line because electricity can arc into the chain.[32] In his view, the accident occurred when a conductive object, either the crane's chain or a limb of the tree, was in contact with Mr. Carrera-Zarate and the conductive object touched or came too close to the energized overhead line.[33] (Tr. 452-456, 460-461, 510-517, 557).

CSHO Campos testified that when a worker comes in contact with an energized overhead line through a conductive object, the electricity "goes right through them, it cooks them, goes through the tree, goes to ground," resulting in electrocution. CSHO Campos testified that the doctor who performed the autopsy indicated that the manner of Mr. Carrera-Zarate's death was electrocution. [redacted] This is not unusual because the burns are exit wounds, not entrance wounds, caused when electricity violently exits the body. CSHO Campos testified that "there was no way to do this job with this line energized. There's actually two lines that were concerns because the secondary line is energized as well." (Tr. 451-456, 460-461, 510-517, 554, 557; Ex. R-B, at p. 2).

CSHO Campos testified that photographs of the tree clearly show how close the energized overhead line is to the tree. He identified Mr. Carrera-Zarate in the tree before the accident on the photograph at Exhibit C-34 and marked him with a "D." He also identified the

[32] CSHO Campos further testified that Mr. Carrera-Zarate did not "have to grab a chain to be shocked. If the chain comes in contact, the power jumps to that chain and contacts a tree limb where the employee is, that would be enough." CSHO Campos testified that Mr. Carrera-Zarate was "just shocked" when the chain got too close to the energized overhead line. (Tr. 456, 517).

[33] CSHO Campos testified that Mr. Carrera-Zarate may have made contact with the crane's chain. He did not believe that Mr. Carrera-Zarate personally touched an energized overhead line. He testified that the deceased did not have to touch the chain in order to be electrocuted or shocked. (Tr. 517-519, 561).

chain hanging down from the crane's rigging in the photograph at Exhibit C-34 at "E." He testified that the photograph at C-34 shows the chain coming down on the far side of one of the limbs and then on the inside part of another limb. CSHO Campos testified that the two energized overhead lines at letter "C', Exhibit C-34, ran through the tree. He testified that his visual observations and photographs C-27 and C-34 showed that the primary 7,620 energized overhead line, marked at "F" on C-34, was within ten feet of the tree trunk, or one of its limbs, on August 21, 2012. He testified that photograph C-34 also shows that the secondary energized overhead line, marked at "G", running through the tree is ten feet or less away from the tree. He said that this is so because the secondary energized overhead line is shown inside the branches and running through the tree's foliage to outside the branches. He stated that based upon his observation, measurements and photograph C-34, "it's clearly evident that you have this [secondary energized overhead] line that's running very, very close to that tree."[34] CSHO Campos testified that there was "not a clear-cut path for the [energized overhead] line going through the tree being any kind of a safe distance." (Tr. 387-390, 394-395, 443-445, 449-450, 453, 467, 469, 516; Exs. C-27, C-34).

According to CSHO Campos, the work could have been performed safely by de-energizing the overhead line, relocating it, or covering it with blankets, all of which were standard procedures for FP&L. He noted that FP&L takes the hazard of electrocution very seriously because of the potential liability. He testified that when FP&L is called to de-energize an overhead line, it responds. (Tr. 314).

CSHO Campos testified that Messrs. Pacheco, Carrera-Zarate and Cruz were exposed to the hazard of electrocution. He testified that the electrocution hazard was not only the primary

[34] Although not clearly identified in his testimony, the Court finds that CSHO Campos was referring here to the secondary energized overhead line at "G" running very close to the tree. (Ex. C-34).

energized overhead line, but the secondary energized overhead line as well. He testified that the secondary energized overhead line was also three feet or less from the trunk of the tree. He stated that even though the secondary energized overhead line had a jacket on it, the jacket was basically a weather protection jacket, and not an insulator. He stated that Mr. Cruz was exposed even though he was on the ground because had the rope he was holding for Mr. Carrera-Zarate contacted the energized overhead lines Mr. Cruz could also have been shocked. The exposures lasted between four and four and one-half hours. The exposures started at 10:00 a.m., August 21, 2012 when work began in the tree, and continued until 2:00-2:30 p.m. when the accident occurred. (Tr. 314-316).

CSHO Campos testified that he considered All Florida to be the controlling employer at the job site. He explained that, except for Mr. Scesny and his spotter, all the workers at the job site were Respondent's employees. He stated that Mr. McPherson directed Messrs. Pacheco and Carrera-Zarate to work in the vicinity of the energized overhead lines. He testified that the overhead lines were energized when Messrs. Pacheco and Carrera-Zarate were in the tree and Respondent knew that. (Tr. 496-497, 512, 561).

He also considered All Florida to be the exposing employer. CSHO Campos testified that "[t]he hazard was that the tree was, in fact, closer than ten feet and the result of it is we have an employee who perished." He testified that he based his conclusion upon the photographs, his personal observations of the tree, and the measurements that he had made at the job site. He stated that photograph C-34 showed the energized overhead "lines going through trees" and "chains from a crane that are going through tree limbs." He also testified that Mr. Scesny gave him a signed statement where Mr. Scesny stated that the tree trunk was within three feet of the

energized overhead line.[35]

CSHO Campos also testified that Mr. Scesny told him that he [Mr. Scesny] saw someone holding the crane's chain. CSHO Campos identified two photographs that he believed showed Mr. Carrera-Zarate holding the crane's chain in the tree. He testified that photograph C-35 showed Mr. Carrera-Zarate holding the crane's chain in his left hand. He further testified that the photograph at C-36 shows him holding the chain in his left hand getting ready to "sling" a tree limb. He explained that Mr. Carrera-Zarate first wrapped the crane's chain around the tree limb, cut the limb, and then moved closer to the tree trunk. The cut limb was then suspended by the crane and lifted up and away from the tree by the crane. (Tr. 497-504, 541-542, 545, 547, 552, 562-566, 571-573; Exs. C-35, at "A", C-36 at "B", "C", "D").

CSHO Campos further testified that Respondent had knowledge of the violation. Mr. McPherson twice visited the job site to assess hazards before August 21, 2012. Mr. Pacheco was also at the job site the Thursday before the accident. On the morning of the job, Messrs. McPherson and Pacheco discussed the energized overhead lines. Yet, even though they both knew that the energized overhead lines were energized, Mr. McPherson instructed Messrs. Pacheco and Carrera-Zarate to get into the tree and cut it down. (Tr. 314-315; Ex. C-2, at p. 21 (response to RFA No. 21)).

CSHO Campos testified that he considered the violation to be willful. Mr. McPherson had long experience in the field and he was a certified arborist, which requires familiarity with OSHA regulations. He was aware that FP&L needed to be called to de-energize the overhead lines. He failed to follow through and get the overhead lines de-energized. Although Mr.

[35] CSHO Campos testified that he believed that Hunter Merchant Crane was also cited for a serious violation and fined by OSHA for hanging the crane's chains within ten feet of the energized overhead lines. (Tr. 453, 457-458, 545-547).

McPherson believed that a safe distance from the energized overhead line was fifteen feet, Respondent's employees worked in a tree that was well within that distance. Despite all this, he made the decision to disregard the hazard and proceed with the job on August 21, 2012. (Tr. 316-317).

Willful Citation 2, Item 1(b) alleged that an unqualified person was working in an elevated position near an energized 7620 volt overhead line at a location where the person and the longest conductive object could contact the energized overhead line. CSHO Campos testified that a person working around energized overhead lines needs to have a basic knowledge of electricity and hazard assessment in order to be qualified to do so. He testified that tree limbs were the longest conductive objects at the job site. He stated that the crane's chain, block and cabling, and the workers' chain saws were also all conductive objects that could have conducted electricity to the deceased even absent direct contact. CSHO Campos testified that Mr. Carrera-Zarate had not received any specific training that would make him aware of how to recognize the electrocution hazards at the job site and how to avoid them. Yet, Messrs. McPherson and Pacheco directed Mr. Carrera-Zarate to go into a tree that was in close proximity to an energized overhead line. While working in the tree, Respondent knew the deceased would be exposed to an electrocution hazard. CSHO Campos testified that the branch where Mr. Carrera-Zarate was sitting at the time of the accident was close enough to the primary energized overhead line to allow Mr. Carrera-Zarate to be electrocuted by a conductive object's contact with the primary energized overhead line. (Tr. 318-320, 427, 466, 509-510, 546, 561, 566; Ex. C-34).

CSHO Campos testified that after reviewing CSHO Colon's investigative file before the citations were issued, he agreed with her findings, including the finding that Mr. Carrera-Zarate

was unqualified when he worked too close to an energized overhead line.[36] CSHO Campos testified that the training required to work around energized overhead lines depended on the type of electricity and work at the job site. He pointed out that there are qualifications for working around energized overhead lines, and other qualifications for working on underground or above ground vaults. CSHO Campos testified that, in order to be qualified, workers had to know why they needed to stay away from energized overhead lines. They needed to know the accurate distances to any energized overhead lines, what to do to prevent an injury when recognizing a hazard, and have a basic knowledge of electricity. CSHO Campos testified that after he had reviewed CSHO Colon's materials and the notes and statements given, a determination was made before the citations were issued that Messrs. Pacheco and Carrera-Zarate were not qualified under the cited standard. He also testified that OSHA never received any of the requested documentation from Respondent that might have shown that they, or anyone else at All Florida, were qualified under the cited standard. (Tr. 422-435).

CSHO Campos concluded that Citation 2, Item 1(b) was willful because of Mr. McPherson's experience, training, and failure to get the energized overhead lines de-energized. He testified that Mr. McPherson had a heightened level of awareness, knew the conditions at the job site, and had the ability to correct the condition, but did not. He could have stopped the men from getting into the tree, but did not. He failed to ensure that Messrs. Pacheco and Carrera-Zarate were qualified to work around energized overhead lines and there was no specific instruction given to them on how to recognize the hazards created when a high voltage energized overhead line is close to a tree being cut down by workers elevated in the tree. (Tr. 317-320).

A combined penalty of $56,000 was proposed for willful Citation 2, Items 1(a) and (b).

[36] Respondent did not have OSHA's investigative file because it had not engaged in any affirmative discovery before the trial and had not requested it. (Tr. 430-432).

CSHO Campos classified the gravity of the violation as 10 out of 10. The gravity based penalty was $70,000. A 20% reduction was given due to Respondent's small size. CSHO Campos explained that when a violation is willful and results in a fatality, the full 60% size reduction is not given. Rather, the Area Director has the discretion to reduce the credit for a small employer to 20%. No credit was given to history or good faith because the violations were willful. (Tr. 322-323).

Testimony of Jesus Cruz

Mr. Jesus Cruz testified that he now lives at West Palm Beach, Florida. He stated that he was working for Respondent at the job site on August 21, 2012, the day Mr. Carrera-Zarate was injured. He has been an employee of All Florida for approximately five years. His primary task is to work on the ground and drive the truck. He picks up tree limbs. He identified Mr. Pacheco as the foreman on the job on August 21, 2012. He stated that whenever Mr. Pacheco is on the job, he is looked on as the supervisor. Mr. Cruz testified that he saw the accident. He stated that the crane operator had "no control" and that he warned Mr. Carrera-Zarate just before the accident to "be careful." He testified with words to the effect that the crane's cable and a chain first made contact with the overhead power line and then a chain made physical contact with Mr. Carrera-Zarate. (Tr. 334-339, 347, 357).

He testified that he had difficulty knowing or remembering whether Mr. McPherson was at the job site when the chain was put on the crane, distances relating to the tree and overhead lines,[37] reading and signing his interview statement, and Monkey Man. Mr. Cruz acknowledged that he gave a statement to OSHA personnel and identified it at Exhibit C-11. Mr. Cruz testified

[37] Without any reference point, Mr. Cruz testified that the tree "and the cable maybe ten feet" or "more [apart]." (Tr. 339).

that he previously lived at Lake Worth, Florida.[38] He testified that Mr. Jesus Pineda was in the house, but it was unclear whether he was referring to his former or current residence. Mr. Cruz denied having received a subpoena at his West Palm Beach house. (Tr. 338-339, 344-349; 351, 357; Ex. C-11, at p.1 (portions admitted into evidence)).

Testimony of William Gonzalez

Mr. William Gonzalez testified that he lives at West Palm Beach, Florida.[39] He has worked as a laborer for Respondent for two years. He testified that he was at the job site all day on August 21, 2012. His work included cleaning up debris in the front yard along the street. He identified Mr. Pacheco as the foreman and boss at the job site. He also stated that he saw personnel working in the tree while it was being cut. (Tr. 359, 370-374).

Mr. Gonzalez testified that he saw Messrs. Pacheco and Carrera-Zarate, at an unspecified time on August 21, 2012, when they were more than ten or twenty feet from the overhead line. He did not measure the distance. During his testimony, he identified Messrs. Pacheco and Carrera-Zarate up in the tree in photograph C-33. He testified that photograph C-33 was taken on August 21, 2012, but did not know at what time. He did not recall the overhead lines shown in photograph C-33. He could not remember if the overhead lines at the job site were energized. (Tr. 370-374, 378-379; Ex. C-33).

Mr. Gonzalez testified that he saw Mr. Carrera-Zarate working on a branch atop the tree. He stated that Mr. Carrera-Zarate asked him for water and told Mr. Gonzalez that he was warm and needed help. Mr. Gonzalez relayed Mr. Carrera-Zarate's request for help to Mr. Pacheco.

[38] On November 20, 2013, the Court issued a subpoena *ad testificandum* that the Secretary used to subpoena Mr. Cruz, at his Lake Worth, Florida address to appear at the trial at 1:00 p.m., December 3, 2013. (Ex. C-43). The September 14, 2012 record of Mr. Cruz's interview by CSHO Campos shows the same Lake Worth, Florida address. (Ex. C-11, at p. 1 (portion admitted into evidence)).

[39] The September 14, 2012 record of Mr. Gonzalez's interview by CSHO Campos shows the same West Palm Beach address. (Ex. C-10, at p. 1 (portion admitted into evidence)).

(Tr. 360).

He testified that he recalled talking with OSHA personnel about what he saw at the job site. He also testified that he signed a statement at the OSHA office. He identified his signature on two of the pages of his statement. (Tr. 247, 360-361, 368-369; Ex. C-10, at pp. 2-3).

Mr. Gonzalez testified that he received his subpoena *ad testificandum* the day before he was scheduled to testify at the trial. It was postmarked November 20, 2013. (Tr. 361-362, 364).

Testimony of Jesus Pineda

Jesus Pineda has worked for Respondent as a driver and laborer for almost two years. He knows how to work the chipper. He was at the job site working for Respondent at the time of the accident. Mr. Pacheco told him what to do when they started the job. He did not know if Mr. Pacheco rode the hook of the crane up into the tree. When the accident occurred, Mr. Pineda was working with the chipper in the front of the house and in the street. He testified that he was about 40-50 feet from the overhead line. Mr. Carrera-Zarate was working in the back of the house. He estimated that Mr. Carrera-Zarate was sitting in the tree about 15 feet from the overhead lines. He testified that he did not measure the distance and that he was not sure of the distance because he was working in the front of the house. After the accident, Mr. Pacheco [redacted]. An ambulance was called and arrived right away. Mr. Pineda testified that he later spoke with OSHA personnel about how the accident happened and what kind of tools were used by Mr. Carrera-Zarate in the tree. He told the OSHA personnel that Mr. Carrera-Zarate had all the tools he needed, including a belt, rope, hat, and saw. (Tr. 398-408).

Testimony of Randy Miller

Randy Miller is currently the general manager for Allegiance Crane. At the time of the accident, he was a salesman for Hunter Merchant Crane. He submitted a bid for the removal of

the kapok tree for Mr. McPherson. He has also been a crane operator for ten years. He described Hunter Merchant Crane as a crane rental company. The company leases cranes with operators. (Tr. 476-479).

Mr. Miller testified that after talking with Mr. McPherson, he visited the job site to make an assessment of the size of the crane that was needed for the job. He could not recall the date that he made his assessment. He went into the home's backyard and looked at the tree. He testified that the kapok tree was 110 feet tall and its removal required that the crane lift pieces over the house. The crane needed to reach about a hundred feet from its position on the street, over the house, to the tree. Mr. Miller noticed an overhead line behind the tree. He initially testified that he had visually observed and estimated during his job site assessment that the overhead lines were probably 20 feet off the ground and below the branches. He also initially testified that he visually estimated that the closest point between the overhead line and the lowest tree limb where the employees would work to be a distance that was 20 feet vertically. He did not measure the distance between the overhead lines and the tree and had no idea how far away from the overhead line the tree was horizontally. (Tr. 477-484, 491).

Mr. Miller later contradicted his initial testimony regarding distances. He testified that he could not tell from photograph C-33 whether the overhead line shown at "A" was 20 feet beyond the tree, or how close it was to the tree. He testified that he could not tell whether the overhead line was amongst the tree branches. When shown the overhead line at photograph C-36, Letter "A", Mr. Miller also testified that he could not tell how close the overhead line was to the branch. He did admit that "[f]rom this picture [photograph C-36] it looks close" and agreed that the overhead line was near the branch. He also admitted after being shown photograph C-36 that he did not know how many feet the overhead line was from the tree's lowest branch. (Tr. 486-

492; Ex. C-36).

During the morning of August 21, 2012, Mr. Miller called Mr. Scesny and told him that they were going to take the tree down in pieces and to be aware that there was a power line behind the tree.[40] He stated that the plan was to take the tree limbs out level. He did not visit the job site on August 21, 2012. He testified that he was not concerned about the overhead line because of its distance from the branches. (Tr. 480, 484-485, 489).

Mr. Miller testified that Mr. McPherson originally asked Hunter Merchant Crane for a 110 ton crane. After Mr. Miller assessed the job, the decision was made to send a 200 ton crane. Mr. Miller further testified that Hunter Merchant Crane's responsibility at the job site was to lift the tree parts to the front yard. He stated that Mr. McPherson did not have the ability to tell Mr. Scesny what to do. He also testified that none of All Florida employees were allowed to climb on the crane, or direct Mr. Scesny. Mr. Miller also testified Hunter Merchant Crane provided the crane's rigging and that it was customary for the crane operator to do so. He stated that Mr. Scesny had straps and chains available to use as crane rigging at the job site. He testified that Mr. Scesny could give his input to the workers in the tree on rigging the branches being cut. He said that Mr. Scesny did not have the responsibility to direct the arborists. (Tr. 477-478, 480-481, 484).

Testimony of Mary Anne Wolfson[41]

Mary Anne Wolfson identified herself as a certified arborist. She works at her own

[40] Mr. Miller did not testify whether or not he knew that the overhead lines at the job site were energized on August 21, 2012.

[41] During the trial, the Secretary objected to Ms. Mary Anne Wolfson's testimony on the basis that she was not identified on Respondent's pre-hearing witness list. Respondent asserted that pre-hearing notice was provided. The Court instructed the parties to review their notice materials and discuss the issue in their post-hearing briefs, if necessary. Her testimony was received at the trial as an offer of proof. (Tr. 523-526). *See* 29 C.F.R. § 2200.72(b). The parties did not raise it further in their post-hearing briefs. The Court will consider her testimony in reaching its decision.

company called Arborist Services. Since 2007, she has worked full time as a consultant for Respondent. She keeps records and payroll for, and basically runs, All Florida. She regularly paid the deceased. She also has records of independent contractors. She maintains records of Monkey Man's incorporation, worker's compensation exemption, and insurance coverage. She also handles the invoices Monkey Man submits to Respondent, its receipts for expenses, and Respondent's correspondence to and from Monkey Man. She testified that Monkey Man started working as a subcontractor for Respondent in 2010 and receives an I.R.S. Form 1099 from Respondent. Ms. Wolfson testified that Mr. Pacheco has never been a Respondent's employee. (Tr. 526-536; Exs. R-E, R-F).

Ms. Wolfson testified that, when employees start working for Respondent, they watch a video and review safety manuals. The safety manuals cover tree matters. She testified that the employees keep the manuals and sign for them. She could not recall if Mr. Carrera- Zarate signed for a manual. Employees are required to have hard hats, safety vests, steel toed boots, long pants, long sleeves, protective eye wear, certain color safety jackets and gloves and, when needed, hearing protection. Through the tree industry care association, Respondent receives a safety program manual that comes with a videotape. Most of the manuals are also in Spanish. The manuals have sections dedicated to working around electricity. Ms. Wolfson testified that from 2007 until before August 21, 2012, Respondent's employees had no major injuries. One employee cut his finger and was out for a while. (Tr. 530-536).

Ms. Wolfson prepared the June 29, 2012 "Estimate" that All Florida provided to Hoggins Construction for the job. The estimate called for the "removal of very large kapok tree" at 2660 SW 13th Avenue, Fort Lauderdale, Florida at a cost of $4,000. The estimate stated that [Respondent] was "Not responsible for fences or any underground cables, wires, electrical, …

etc. North side of property must be cleared for access as agreed upon. Tree permit must be previously applied for and approved prior to commencement of any work." The estimate further provided that "[a] crane will be needed for this project and will cost $1,500 to be paid by Hoggins Construction." According to Ms. Wolfson, the estimate served as the contract between Respondent and Hoggins Construction to remove the kapok tree. (Tr. 531-532; Ex. R-A).

Testimony of Ralph Pacheco

Ralph Pacheco has been cutting trees since he was 12 years old, for 28 years. He has been a foreman or lead man for 20 years. He learned from other tree trimmers and has experience cutting trees around overhead lines. Sometimes the power has been cut, at other times the overhead lines were energized. Mr. Pacheco testified that he knew Mr. McPherson before he left his earlier job at Community Tree. (Tr. 616-618, 621-622; Ex. C-6, at p.1).

When he asked to work for All Florida, he knew that Mr. McPherson had a few employees and a number of subcontractors. Mr. Pacheco also testified that he started his own business in 2010 because the only way he could get a job working for All Florida was as an independent contractor. He asserted that he did not set up his company, Monkey Man. He told Mr. McPherson that he did not have the money to start a business. Mr. Pacheco testified that Mr. McPherson did all the paperwork, "set it all up for me," and paid for it. Mr. Pacheco testified that he never wanted to get into his own business because of the headaches involved. He further testified that he did not want to work that way, but was forced into it because he could not otherwise find work.[42] He stated that Mr. McPherson's only interest in Monkey Man was to have Mr. Pacheco work for him. Since forming Monkey Man, Mr. Pacheco has only worked for

[42] Mr. Pacheco testified:

> Q, But you agreed to do it [work as an independent contractor] that way, right?
> A. I didn't agree. He [Mr. McPherson] did the paperwork and paid for it. I didn't want to do it that way, but I had to work. I was forced into doing this.

(Tr. 620).

All Florida. (Tr. 608-609, 618-620, 654).

Mr. Pacheco testified that he did not bring any business to All Florida. Mr. McPherson told him when to show up for jobs, but did not exactly set a time when work would end. Nonetheless, he worked each day from 8:00 a.m. until 5:00 p.m., "just like a regular employee." According to Mr. Pacheco, "[t]he only difference was that he didn't have Workman's Comp on me and didn't pay my taxes." He received no benefits from All Florida. He did not operate like a business, where he would tell the client what he wanted to get paid. He got paid what Mr. McPherson wanted to pay him. He stated that Mr. McPherson gave him an I.R.S. Form 1099 annually from 2010 through 2012. Sometimes he would get on the ground to pick up debris. He was paid the same rate, no matter what he did. He testified that it was Mr. McPherson's arrangement and not his [Mr. Pacheco's] that he work as a subcontractor. Mr. Pacheco testified that he worked "underneath" Mr. McPherson and Mr. McPherson had the authority to direct him how to remove a tree. In the instant case, Mr. Pacheco testified that he [Mr. Pacheco] determined how the tree was coming down. (Tr. 609, 623-624, 627, 655-657).

Mr. Pacheco testified that he removed trees near overhead lines for All Florida about ten times before. Mr. Pacheco never saw any training manuals or videos at the yard where he would meet up with All Florida employees when going to work for Respondent. Before the accident, Mr. Pacheco had no certifications in electricity and no electrician qualifications. After the accident he took a course with his current employer, P.J.'s Land Clearing near Green Acres, Florida. He worked with Mr. Carrera-Zarate off and on for about ten years since the deceased arrived in Florida. He testified that he had provided training to Mr. Carrera-Zarate and directed him on this job. Mr. Carrera-Zarate was not certified as an electrician. (Tr. 595, 607-608, 622, 660-661; Ex. C-6, at p.3).

Before starting the job on August 21, 2012, Mr. Pacheco testified that he went to the job site and made an assessment of the job.[43] As a result, he made a video where, speaking in Spanish for the crew, he stated that the job was "going to be hell because we're going to need to cut the power." He testified that the energized overhead lines were 12 inches away from the tree trunk and about thirty-five feet in the air. He did not feel comfortable doing the job unless the power was off. He recognized that somebody could get killed. At the trial, he testified:

> Q. Okay. Now, you've mentioned that you were concerned about the overhead lines. Why were you concerned about them?
>
> A. The electricity. He was going to get killed.

Mr. Pacheco also testified that he concluded that a bucket truck, like a "cherry picker," could not be used on the job because a bucket truck could not get back into the property's backyard.[44] Consequently, he told Mr. McPherson "to get a crane only because that wire was so close, I was scared of working on it." He agreed that he discussed cutting the power with Mr. McPherson before arriving at the job site on August 21, 2012. He testified that he told Mr. McPherson that he could do the job, "but we need to cut the power."[45] He testified that although Mr. McPherson did not personally cut trees, "he has the power to cut the power."[46] (Tr. 597-598, 606-607, 620-623, 626, 629-630, 668).

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[43] Although he initially testified that he visited the job site the day before, he later testified that he was not sure of the precise date that he visited the site to perform his assessment. (Tr. 626, 645).

[44] Mr. Pacheco testified that he normally drives and uses one of Respondent's bucket trucks when doing work for All Florida. (Tr. 607).

[45] Mr. Pacheco testified:

> Q. What discussion was there from Mr. McPherson regarding the wires when you told him after your site visit before the job?
>
> A. I told him [Mr. McPherson] that we needed to cut the power on that and he said okay. That's what he told me. He did not say that he was going to get it done or anything like that. After we got to the job and I says is the power cut off, he says no. And I said, well, we need to cut the power. And he goes, well, there's no time now, the crane's here.

(Tr. 646).

[46] Mr. Pacheco testified that Mr. McPherson "won't get up in a tree" and he never saw him in a tree. (Tr. 657, 666).

Mr. Pacheco testified that he was at the job site on August 21, 2012 when Mr. Carrera-Zarate was injured. At first, he testified that he was the foreman in charge of the job.[47] He then altered his testimony and indicated that he was "not really considered like a foreman." He also testified that there were no other foremen or supervisors on the job for Respondent. (Tr. 596).

Mr. Pacheco testified that on August 21, 2012, at the beginning of the job, he "asked Alan [McPherson] to cut the power, that we needed to get that power cut because it was dangerous. I didn't feel comfortable with it unless it was off." Mr. McPherson replied that it was too late to have the power cut because the crane was already at the job site. Mr. McPherson did not tell him that FP&L refused to de-energize the overhead lines or respond to any request to cut the power. Mr. Pacheco testified that he does not know who to call to cut power to energized overhead lines. He stated that Mr. McPherson is the one who arranges to have the power cut to energized overhead lines at job sites. There was no protection for the energized overhead lines at the job site. Mr. Pacheco testified that sometimes the power is cut to the energized overhead lines upon his [Mr. Pacheco's] request and other times it is not. He stated that he will sometimes refuse jobs when the power will not be cut in energized overhead lines. He testified that he could not tell Mr. McPherson on August 21, 2012 that he was not getting in the tree since the power was not cut off to the overhead lines because Mr. McPherson "wanted to get that job done because he had the crane there." He testified that "I told Alan [McPherson] cut the power. He didn't want to cut the power because the crane was there so I felt like I had no choice so I went up there to cut the tree." Mr. Pacheco also testified he told Mr. McPherson, at the beginning of the job, that he did not like Mr. Scesny's attitude. Mr. Pacheco "felt that vibe that he wasn't a pretty good [crane] operator." (Tr. 597-598, 600, 622-629, 646, 671-672).

[47] This testimony is consistent with what Mr. Pacheco told OSHA investigators on September 14, 2012 when he stated "I am the foreman for All Florida Tree & Landscape employees." (Ex. C-6, at p 4).

Mr. Pacheco testified that on the morning of August 21, 2012 he conducted a safety meeting with the crew at the job site. He told the crew members what Mr. McPherson wanted to get done and how they were going to do it. He explained that they were at the job site to knock down a large kapok tree. He also told the crew to wear safety gear, hard hats, vests, safety glasses and gloves because the tree had a lot of spikes. Mr. Pacheco owned the belt harnesses, climbing gear, power pruner, and the chain saw and provided these for the job.[48] He also provided the deceased with ropes and a harness. He instructed Mr. Cruz, who was on the ground and controlling the ropes in the tree, to make sure that the ropes did not get tangled. He testified that if the ropes got hung up on the thorns, the ropes would be hard to pull. The plan was to bring the tree down in pieces, like a puzzle, from top to bottom. The crane was used to grab pieces and swing them away from the energized overhead lines. He testified that the plan was to provide the workers with more control of the tree, which was needed because the tree was next to energized overhead lines. The use of the crane was also intended to help keep cut pieces of the tree away from the energized overhead lines, as well as a fence and shed on the property. (Tr. 596-598, 600-601, 628, 656, 668-669, 680-681; Ex. C-6, at p. 3).

Mr. Pacheco testified that Mr. McPherson asked him if he wanted Mr. Carrera-Zarate to work in the tree with him. Mr. Pacheco testified that he said no at first. However, Mr. Pacheco testified that Mr. Carrera-Zarate wanted to work in the tree. Mr. Pacheco testified that he thought Mr. Carrera-Zarate would be fine to work in the tree because he had provided training to him, so he agreed. (Tr. 662).

Mr. Pacheco testified that Mr. Scesny and his spotter removed fabric straps from a truck

[48] Mr. Pacheco did not know if the saw was insulated. (Tr. 628).

and used them as crane rigging when the job started.[49] Mr. Pacheco testified that the job began at about 10:30 a.m. when he and Mr. Carrera-Zarate started getting up in the tree.[50] According to Mr. Pacheco, he and others, "usually get up on top of the tree" by riding crane hooks. They tie on with a rope and safety harness. At first, Mr. Scesny refused to let him and Mr. Carrera-Zarate ride the crane's hook up into the tree. Mr. Pacheco testified that Mr. McPherson did not try to get a bucket out to the job site as a way to properly gain access to the top of the tree. Instead, he testified that Mr. McPherson "tried to get us to ride the ball [hook] because it would take time to get the bucket over." Mr. Pacheco testified that he heard Mr. McPherson ask Mr. Scesny to call his boss and see if his boss would let him and Mr. Carrera-Zarate ride the hook to the top of the tree one time. After speaking to his office at Mr. McPherson's request, Mr. Scesny gave in and allowed them to ride the crane's hook, but only this one time. Mr. Pacheco testified that Mr. Scesny "brought me straight up and then over on top of the tree and I came down on top of the tree." Mr. Pacheco testified that Mr. McPherson was at the job site when he and the deceased rode the crane's hook into the tree and was still at the job site when they started cutting the tree. Mr. Pacheco stated that he had never before worked with either Hunter Merchant Crane or Mr. Scesny. (Tr. 601-602, 630, 642, 650, 663, 669, 674-677, 680).

Once the two workers were high-up in the tree, the crane set up over a branch. Mr. Pacheco testified that either he or Mr. Carrera-Zarate then walked out to the branch and tied the fabric or chain straps (also referred to sometimes as a "harness") hanging down from the crane to the branch by hand. This tying process takes about 10 minutes. The climber then "hooks" or "smacks" the tied up branch on to the "ball" of the crane. The crane operator tightens the cable

[49] Mr. Pacheco testified that the fabric straps were yellow. (Tr. 604).
[50] Mr. Pacheco testified that Messrs. McPherson, Ivan [Yangez], Jesus Cruz, Willie [Gonzalez], "Poppo" William or Williams, Jesus Pineda and Rubin [Ruda] were at the job site from All Florida when the work started. Mr. Pacheco also testified that Mr. Scesny had a "spotter" who was sometimes in his truck because it was too hot, instead of being on the ground near the tree watching the whole job. (Tr. 601, 624; Ex. C-3, at p. 11).

so, when the climber cuts the branch, the branch will be stable and the crane can pick the branch up and move it to the grinder on the street where the branch is chipped up. Mr. Pacheco testified that Mr. Scesny communicated with one of Hunter Merchant Crane's other employees on the ground underneath the All Florida tree climbers via cell phones and walkie-talkies in order to move the crane's cable, fabric or chain straps, and hook as needed. Mr. Pacheco also yelled down from the tree to "tell them what we wanted done." (Tr. 602-605; C-6, at p. 3).

To cut the branches, Mr. Pacheco used a MS-200 chainsaw. He did not know the chainsaw's insulation rating. He also used a safety harness and leather gloves from Home Depot while in the tree. The gloves had no rubber and he did not know the insulation rating of the gloves that he used. (Tr. 605-606).

Mr. Pacheco testified that Mr. McPherson remained at the job site for a little while after he and Mr. Carrera-Zarate starting cutting the tree. Mr. McPherson then left the job site and returned after about 30-45 minutes; whereupon he drove by the job site and left again. Mr. McPherson "said wave" while he and the deceased were in the tree and a picture was taken of the two of them in the tree showing Mr. Carrera-Zarate, wearing a blue hard hat, waving. Mr. Pacheco also testified that Mr. McPherson was later again at the job site talking with him in front when the accident occurred. (Tr. 664-665, 673; Ex. R-G, at p. G83).

Mr. Pacheco stated that both he and Mr. Carrera-Zarate were working in the tree above the energized overhead lines. He testified that they had both worked on the tree branch shown in photograph C-13, at "C", that was "basically eight to nine feet" or "eight to ten feet" above the primary energized overhead line shown in photograph C-13, at "A".[51] Mr. Pacheco testified that he tried to keep himself and the deceased more than 10 feet from the primary energized overhead

[51] The Court finds that the branch at Ex. C-13, at "A", is the same branch where Mr. Carrera-Zarate was working at the time of the accident.

line. He further stated that he had the hazard in mind all day. Mr. Pacheco was concerned about the energized overhead line because it was close to the tree trunk. The main tree trunk was within a foot or two of the energized overhead lines. Mr. Pacheco testified that photograph C-39 depicted Mr. Carrera-Zarate tying the crane's chain strap into the tree to cut the branch. He marked the top primary energized overhead line as "A." He also testified that photograph C-39 showed Mr. Carrera-Zarate about 10-12 feet away from the primary energized overhead line at "A". (Tr. 230-232, 235, 606, 612-613, 633, 639-641; Exs. C-6, p. 3, C-13, at "A", "C", C-39, at "A").

Mr. Pacheco testified that photograph C-33 showed him and Mr. Carrera-Zarate about 30 to 45 minutes after being in the tree. Photograph C-33 also showed the energized overhead lines at the upper left that Mr. Pacheco was concerned with. About at the same time, Mr. Pacheco began having a difficult time with the crane operator, Mr. Scesny. When he was asked to move the crane in one direction, Mr. Scesny would either go the opposite way or would jerk the crane. Mr. Pacheco was concerned that Mr. Scesny would hit the energized overhead lines because he was operating the crane erratically. He was further concerned, after Mr. Scesny removed the fabric straps from the crane's rigging sometime between noon and 12:30 p.m., that Mr. Scesny was "going to touch the wire" with the metal chains and that was going to cause a shock.[52] This left the crane using hoisting chains alone as rigging. Mr. Pacheco testified that he could have insisted that Mr. Scesny not remove the fabric slings, but he chose not to do so. Despite these concerns, Mr. Pacheco stated that he could not stop the job because it would take time. (Tr. 605, 610, 632, 670-674, 677-678; Ex. C-33, at "A"). .

Mr. Pacheco testified that Mr. Cruz also told him [Mr. Pacheco] that Mr. Scesny was

[52] Mr. Pacheco testified that Mr. Scesny and his spotter removed the crane's fabric straps on the ground and that it was not hard to do. (Tr. 679).

being erratic. Mr. Cruz told Mr. Pacheco that Mr. Scesny moved the crane's chain toward the energized overhead line at the time of the accident. He testified that Mr. Cruz told him that "he [Mr. Cruz] saw the crane operator bringing the chain over towards the wire and it [the chain] touched the wire and then it [the chain] hit Georgie [deceased]. And Georgie was smacking it [the chain] away from him [the deceased]." [53] Mr. Pacheco testified that Mr. Scesny miscalculated where the energized overhead line was. He stated that Mr. Scesny "drug" the crane's chain to a point where the chain first touched the energized overhead line, then the chain moved closer to Mr. Carrera-Zarate, and the deceased thereafter smacked the chain away because he [deceased] had seen it on the energized overhead line. Mr. Pacheco testified that this is when and how the fatal injury occurred. (Tr. 633-636, 673).

Mr. Pacheco testified that when the work began in the tree, the crane's straps used to tie the cut tree branches to the crane's rigging were fabric. They were about four inches wide and 10-12 feet long. Mr. Pacheco did not know if they had any insulation rating. He testified that after the first three or four branches were cut, Mr. Scesny switched the crane's rigging from fabric straps to chains because he was worried that the fabric straps were getting ripped up and breaking.[54] Also, Mr. Scesny asserted that the chains would give him more control. He testified that Mr. Scesny decided which straps to use on the crane. Respondent did not provide any of the crane's rigging. Mr. Scesny did not ask Mr. Pacheco's permission to change the crane's rigging from chains and fabric straps to only chains. Mr. Pacheco recognized that the metal chain was conductive and that there was always a risk that the chain would hit the energized overhead lines if Mr. Scesny was not careful. Mr. Pacheco testified that he exercised control over the crane's

[53] Mr. Pacheco testified that there were two separate chains hanging down from the crane's ball in a loop. The Court finds that these two chains could be spread apart as shown in photograph C-35. (Tr. 635, 659; Ex. C-35).
[54] The Court finds that the photograph R-G, at p. G85, shows fabric straps dangling below two chains after at least five tree branches were cut. (Ex. R-G, at p. G85).

operation to the extent that he could and did tell Mr. Scesny what he wanted when he was up in the tree. Mr. Pacheco did not know if Mr. Scesny would have listened to him if he asked him not to use only chain rigging. Mr. Pacheco testified that he did not stop the job because he believed that Mr. Scesny knew what he was doing. (Tr. 604-605, 636-637, 642, 648, 670-671, 674, 677-678).

Mr. Pacheco testified that he left Mr. Carrera-Zarate alone in the tree because he had to go to the bathroom. At that time, Mr. Carrera-Zarate was sitting in the tree, drinking a bottle of water. Mr. Pacheco testified that photograph C-40 depicts the scene right after the accident, between 1:30 and 2:30 p.m. [redacted] He was about 10 feet from the primary energized overhead line, marked "A." [redacted] Mr. Pacheco knew this because he went up the tree to get Mr. Carrera-Zarate down. To access the tree, Mr. Pacheco again rode the hook of the crane. [redacted] After the accident, he also saw electrical burn marks on both of the crane's chains that were similar to welding burns. (Tr. 613-615, 631-634, 639-641, 659-650; Ex. C-40).

Mr. Pacheco testified that Monkey Man was cited by OSHA and assessed a $3,600 penalty. The citation was for riding on the crane's hook and for working around energized overhead lines. He testified that he recalled telling OSHA that he and Mr. Carrera-Zarate stayed 15 feet away from the wires.[55] During the trial, he answered affirmatively that at an unspecified place and time he was more than ten feet away from an unidentified wire. He testified that he knew that "we" had to stay ten feet away from the wires. He also acknowledged that he and Mr. Carrera-Zarate worked within ten feet of the tree.[56] He testified that the energized overhead lines shown on photograph C-33 were the ones that he was "real concerned" about because they were

[55] His September 14, 2012 written statement to OSHA that is in evidence does not indicate that any such statements were made. The statement does reflect that Mr. Pacheco told OSHA that he thought that there was a requirement to stay 15 feet from energized overhead lines. (Tr. 648; Ex. C-6).

[56] The Court finds that the photograph at C-33 shows Messrs. Pacheco and Carrera-Zarate up in the tree working directly alongside the main tree trunk. (C-33, at "C", "D").

coming sideways and were "right next to the tree." (Tr. 625, 633, 638, 651-652; Ex. C-33, at "A", "E", "F").

Testimony of DeLancy Rochester

Mr. DeLancy Rochester runs Coral Springs Tree Service, which specializes in residential tree work. His company prunes, removes and plants trees. He testified that he knew Mr. McPherson and was familiar with Respondent. He was invited to watch the removal of the kapok tree. He arrived at the job site before work began. When the job began, he overheard a conversation between Mr. McPherson and the crane operator. He described the crane operator as "a hot dog, very bullheaded, very set on doing things his way. A hard man to argue with." (Tr. 685-686, 692).

He testified that the branches did not run through the overhead lines. Rather, the tree trunk was set back from the overhead lines and the tree spread up and over the overhead lines at a considerable height. He estimated, without doing any measurement, the vertical distance between the tree and the overhead line at 15-20 feet. Fabric swings were used to attach to the branches, which he estimated at 3,000 pounds, and set them to the side. He noted that his weight estimate was arrived at because there was a scale on the crane and the spotter told him the weight. (Tr. 686, 692-693).

Describing the operation, Mr. Rochester testified that the crane operator would lower the crane and hook whatever rigging they were using to the branch. Because of the structure of the tree, the climbers were not able to get right to the end of the branch. As a result, the cut pieces of branches were huge. When cut, the branches would swing down, and the green end would swing over sideways toward the overhead lines. He never saw electricity jump. (Tr. 689).

At the beginning, the crane operator was using a fabric sling which he thought to be

nylon. He had no idea of the insulation rating of the slings. He doubted that these were certified nonconductive. Mr. Rochester testified that he was concerned when the crane operator switched from chain and fabric slings to only chains. In his view, it is "very stupid" to use chains near an energized overhead because chains are conductive and definitely create a hazard. Mr. Rochester testified that the crane's chains were not properly positioned. The crane operator could have moved the crane further back in the front yard to give more reach. Instead, the crane was at the end of its reach. He saw newly cut branches swing over and hit the energized overhead lines three times because the crane operator did not have enough reach to pull the branches back in the other direction properly. The lead climber did not stop the job when the branches actually contacted the energized overhead lines. (Tr. 687-688, 693-697).

The crane operator had a spotter with a radio, so that he could know what was going on in the tree. The crane operator was out in the crane's cab in the front yard and could not see what was happening in the tree very well. The crane operator was trying to see over the house and down the length of the pool, straight away and not sideways making it "[v]ery, very difficult to tell what you're doing." When the accident occurred, the spotter was in the truck in the front yard taking a break. Mr. Rochester testified that, by operating without the spotter, the crane operator was using "very bad judgment, and something went real wrong." Mr. Rochester stated that he was and is still appalled when he found out what happened. (Tr. 690-691).

Although he was at the site, Mr. Rochester did not see the injury occur because he was looking in another direction. He testified that all of the tree's branches had been removed and only "logs" remained as part of the tree at the time of the accident. After the accident, he saw the crane's chains, but saw no damage or marks on them. However, he did not pick them up and look at them because the focus was on the injured employee. (Tr. 688, 695-696).

Testimony of Delio DeBenedetto

Delio DeBenedetto is a crane operator who lived caddy-corner to the job site. He has been a crane operator in south Florida for 43 years. He witnessed Mr. Scesny operating the crane's chains around the energized overhead lines. He testified that the use of the crane's chains created a hazard. Nobody stopped the work. He testified that either the contractor or the crane company calls FP&L when there are energized overhead lines in the way. If FP&L does not respond to them, he stated "you do it yourself." Besides de-energizing the overhead lines, FP&L can place electrical shields. Mr. DeBenedetto testified that if FP&L fails to respond, there are protective actions that the contractor can take. He did not specify those measures. He did not see where any of this was done before the job began. (Tr. 701-703).

Testimony of Ronny Hoggins

Ronny Hoggins owns Hoggins Construction, a general contractor that performs construction contracts for the government. Hoggins Construction was awarded a contract by the city of Fort Lauderdale to rehabilitate and remodel the house at the job site in Fort Lauderdale as part of the city's redevelopment plan.[57] He hired subcontractors to assist with the work that included interior home renovation and roofing. (Tr. 730-732).

A city official recommended All Florida to him because it had worked for Fort Lauderdale in the past. He met with Mr. McPherson at the job site to discuss what needed to be done to remove the kapok tree. Mr. Hoggins had no experience removing trees or with crane operations. Mr. McPherson told him that the work required a crane. He testified that the two of them discussed the cost of the crane, which cost $1,500 over and above the $4,000 Hoggins

[57] Mr. Hoggins testified that the City Redevelopment Plan fixes up distressed homes at government expense when property owners cannot afford to do so. (Tr. 731). The contract between Hoggins Construction and the city is not in the record.

Construction agreed to pay All Florida.[58] Mr. Hoggins testified that he did not pay Hunter Merchant Crane because he had not contracted directly with the crane company. He did not meet or have discussions with the crane company before August 21, 2012. He did not hire the crane company, direct it, or meet with the crane operator until he was at the job site on August 21, 2012. Mr. Hoggins' only concern was to get the kapok tree cut down. (Tr. 730-734, 736-738, 743-745, 751).

Mr. Hoggins testified that "[w]e all had concern about the tree being close to the power line." He stated that we knew the tree was directly over the energized overhead lines. Mr. Hoggins testified that he personally called FP&L to cut off the power, but FP&L refused to do so. He testified that FP&L told him that "they don't do that." He testified that Mr. McPherson also contacted FP&L. Mr. McPherson was responsible for contacting FP&L. Mr. Hoggins speculated that cutting the power would affect too many homes in the neighborhood. On other jobs, he contacted FP&L to cut power to a specific house. He had no experience getting them to shut off a main power line and that is why he hires somebody who knows what to do. (Tr. 738-739, 743-749).

He was at the job site on the morning of August 21, 2012 for about 30 – 45 minutes. He testified that he did not call FP&L on the day of the job because he had called several times before and FP&L had refused to cut the power. It was his understanding that people were to stay about 10 or 15 feet away from the energized overhead lines. He testified that he had no concern that anyone would come within 10 feet of the energized overhead lines because the tree was about 20 feet over them. It was his belief that the purpose of the crane was to avoid the energized overhead lines. (Tr. 739-741).

[58] Later, Mr. Hoggins testified that everything, including the cost of the crane, may have been included in the $4,000 contract price between Respondent and Hoggins Construction. (Tr. 751-752).

Procedural Issues

The Respondent raises several procedural objections to matters that occurred during the proceedings, which must be addressed before moving to the substantive issues in this case.

1. Admissibility of Mr. Pacheco's Written Statement and limited portions of Written Statements by Messrs. Gonzalez and Cruz

Respondent contends in a footnote in its Post-Hearing Brief that parts of written statements given to the CSHOs on September 14, 2012 were improperly admitted into evidence. According to Respondent, parts of written statements of Messrs. Pacheco,[59] Gonzalez[60] and Cruz,[61] at Exhibits C-6, C-10 and C-11 respectively, were improperly admitted because they are hearsay and because Messrs. Pacheco, Gonzalez and Cruz were not "unavailable" at the trial under Federal Rule of Evidence ("Fed. R. Evid.") 804. (*See* Resp't's Post-Hr'g Br. ("R. Post-Hr'g Br."), at p. 12, fn 2).

a. Respondent has waived its hearsay objection to the admissibility of Mr. Pacheco's written statement.

On December 5, 2013, during the trial, Respondent's counsel asked Mr. Pacheco questions using parts of his written statement beyond those admitted by the Court on December 3, 2013. At the end of Mr. Pacheco's testimony on December 5, 2013, the Court granted

[59] On December 3, 2013, the Court admitted Mr. Pacheco's responses to a limited number of interview questions concerning: 1) the interviewee's name, address, phone, job title, and signature, 2) an admission that the crane brought Messrs. Pacheco and Carrera-Zarate up to the top of the tree, 3) an admission that Mr. McPherson never had the power shut off for the job, and 4) an admission that Mr. Pacheco was the foreman for Respondent's employees. (Tr. 237; Ex. C-6).

[60] On December 3, 2013, the Court admitted Mr. Gonzalez's responses to a limited number of interview questions concerning: 1) the interviewee's name, address, phone, job title, supervisor, interview date, and signature, 2) two admissions that Mr. Pacheco was the foreman who directed the work and was left in charge at the job site, and 3) a statement and admission that Mr. McPherson never informed Mr. Gonzalez that there was electricity in the overhead lines. (Tr. 247; Ex. C-10).

[61] On December 3, 2013, the Court admitted Mr. Cruz's responses to a limited number of interview questions concerning: 1) the interviewee's name, address, phone, job title, interview date, supervisor, and signature, 2) a statement and admission that Mr. Cruz was assigned to hold the rope that the deceased was using so that it would not touch the overhead power lines, and 3) an admission that Mr. Pacheco was left in charge at the job site. (Tr. 256; Ex. C-11).

Respondent's motion to move Mr. Pacheco's entire September 14, 2012 written statement into evidence.[62] By its actions at trial regarding the use and admissibility of Mr. Pacheco's statement, Respondent has waived its hearsay objections concerning its admissibility into evidence.

b. Messrs. Pacheco's, Gonzalez's and Cruz's Written Statements are not hearsay.

Under Commission Rule of Procedure 71, 29 C.F.R. § 2200.71, the Federal Rules of Evidence are applicable to hearings. Under Fed. R. Evid. 801(d)(2)(D), a statement is not hearsay if the statement is offered against the opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed.[63] To qualify as an admission, no specific "against interest" component is required. *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 761 (7th Cir. 2003); *United States v. McGee*, 189 F.3d 626, 631 (7th Cir. 1999) (holding that there is no "requirement that admissions by a party-opponent be inculpatory" and that "the statement need only be made by the party against whom it is offered"). Under Commission precedent, a statement made by an employee concerning a work activity is an admission, not hearsay, "[b]ased on the plain language of Rule 801(d)(2)(D)."[64] *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991).

One of the threshold issues in this case is whether Mr. Pacheco was actually one of Respondent's employees who served as Respondent's foreman during the job. Respondent has

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[62] The Secretary had no objection to the Court's receipt of Mr. Pacheco's entire written statement into evidence. (Tr. 682).

[63] Rule 801(d)(2)(D). Definitions That Apply to This Article; Exclusions from Hearsay, states:

> (d) Statements That are Not Hearsay. A statement that meets the following conditions is not hearsay: …
> (2) An Opposing Party's Statement. The statement is offered against an opposing party and: …
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; ….

[64] In *Regina*, the Commission ruled that the testimony of an OSHA compliance officer regarding two statements he gathered from two employees of Respondent's construction company were admissible because the statements were made during their employment and concerned work activities. *Regina Constr. Co.*, 15 BNA OSHC at 1046. The Commission also found that the testimony was not double hearsay, because each statement made was an exception to hearsay under 801(d)(2)(D). *Id.*

asserted that the Court could not find any of Mr. Pacheco's September 14, 2012 statements as opposing party's statements under Fed. R. Evid. 801(d)(2)(D) because his agency status and scope of employment had not been established and was in dispute at trial. During bench trials, "judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). Here, the Court discussed the admission of Mr. Pacheco's September 14, 2012 statement as an agent or within the scope of his employment through CSHO Campos at the trial:

> Respondent's Counsel: There's been no foundation, no predicate at all to show agency here.
>
> The Court: Oh, no, there has been a foundation [of Mr. Pacheco's agency and scope of employment] through Mr. Campos. He's testified that other employees told him [CSHO Campos] he [Mr. Pacheco] was the foreman; he [Mr. Pacheco] told him [CSHO Campos] he was the foreman. I'm not saying he is the foreman. I'm saying that for the purpose of the question, I'm going to say there's been enough foundation laid that this is a statement against interest.

As discussed later, the Court finds that Mr. Pacheco was actually one of Respondent's employees who served as Respondent's foreman at the job site on August 21, 2012. The Court further finds that Messrs. Pacheco,[65] Cruz, and Gonzalez provided their written statements to the CSHOs on September 14, 2012 when they were still employed by Respondent and the written statements that were admitted into evidence, in whole or in part, concerned matters within their employment for Respondent at the job site on August 21, 2012. (Tr. 214, 246-47, 256-57; Exs. C-6, C-10 and C-11).

c. Notwithstanding the above, Fed. R. Evid. 804 does not justify the exclusion of Mr.

[65] Respondent also maintains that CSHO Campos's testimony, regarding Mr. Pacheco's out of court statement that Mr. McPherson was his boss, was double hearsay. (Tr. 208) This argument fails, as "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed. R. Evid. 805. As discussed, *infra,* the Court finds that Mr. Pacheco was employed by the Respondent and Mr. Pacheco's statement that CSHO Campos testified to was related to Mr. Pacheco's scope of employment.

Pacheco's Written Statement and limited portions of Written Statements by Messrs. Gonzalez and Cruz.

Under Fed. R. Evid. 804, a declarant is "unavailable" as a witness if they are "absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance. . . ." Fed. R. Evid. 804(a)(5)(A).[66] The burden is on the offering party to supply justification as to why a declarant is unavailable. *Moore v. Miss. Valley State Univ.*, 871 F.2d 545, 552 (5th Cir. 1989). The plain assertion that a witness is unavailable does not satisfy Fed. R. Evid. 804(a)(5). *See Id.*

In *United States. v. Morsley*, the Fourth Circuit held that the trial court "properly concluded that the government had met the burden of demonstrating its declarant's unavailability" where the government obtained an arrest warrant and attempted to serve the declarant with that warrant. *United States. v. Morsley,* 64 F.3d 907, 919 n. 11 (4th Cir. 1995); s*ee also Ohio v. Roberts,* 448 U.S. 56, 74 (1980) (finding a reasonable good faith effort to obtain the presence of a witness at trial is required before unavailability is established). In *United States v. Smith*, 577 F. Supp. 1232, 1234-1235 (S.D. Ohio 1983), the court held that a witness can be considered unavailable under Fed. R. Evid. 804(a)(5) and it could consider prior testimony where the defense counsel attempted to serve a subpoena on the witness to testify at a preliminary criminal hearing, and apparently succeeded, but she did not appear.[67]

Here, the record shows that the Secretary served Messrs. Pacheco, Gonzalez and Cruz subpoenas via certified mail. The record also shows that Messrs. Pacheco, Gonzalez and Cruz

[66] *See also* Fed. R. Civ. P. 32(a)(4)(D): *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds that the party offering the deposition could not procure the witness's attendance by subpoena.

[67] Counsel was also unable to contact her by telephone. Apparently, the witness refused to testify at the hearing due to an alleged fear of harassment by police and adverse publicity in the case. *United States v. Smith*, 577 F. Supp. at 1234-1235.

did not appear in court at the date, time and place designated on the subpoenas; *i.e.* December 3, 2014, at 1:00 p.m., at Courtroom 1524, Claude Pepper Federal Building, 51 SW 1st Avenue, Miami, Florida. On December 3, 2013, Mr. McPherson acknowledged that Messrs. Cruz and Gonzalez were employed by Respondent as of the hearing date.[68] When Mr. McPherson was asked if he had telephone numbers where Messrs. Gonzalez and Cruz could be reached, he initially claimed he did not. After a short recess, the parties were able to obtain a telephone number for Mr. Cruz, but he was unreachable. A telephone number for Mr. Gonzalez was not ascertained. (Tr. 152-159, 211; Ex. C-43).

Because Messrs. Pacheco, Gonzalez and Cruz did not present themselves at the date, time and place; *i.e.* the courtroom specified on their subpoenas, and the Secretary was unable to reach them using other reasonable means, the Court found that they were all unavailable as witnesses under Fed. R. Evid. 804(a)(5) on December 3, 2013.[69]

[68] The Court was initially told at the hearing on December 3, 2013 that neither Mr. McPherson nor Respondent's counsel knew the names of the these two witnesses subpoenaed by the Secretary, or whether they were still employed by Respondent. Respondent's counsel later acknowledged, when reminded by the Secretary's counsel, that she was provided with the names of these two employees by the Secretary's counsel the preceding Wednesday, November 27, 2013. The Secretary also served copies of these two subpoenas upon Respondent's counsel, who declined to accept service of the two subpoenas. Thereafter, Respondent's counsel asked Mr. McPherson to see what he could do to help them appear at the hearing. (Tr. 153). He apparently did little, if anything, to help facilitate the presence of Messrs. Gonzalez and Cruz at the hearing on December 3, 2013 to testify during the Secretary's case-in-chief. *See* Fed. R. Evid. 804(b)(6), exceptions not excluding prior statements if the declarant is unavailable as a witness where the "statement is offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result." Here, the Court finds that Respondent acquiesced in wrongfully causing Messrs. Gonzalez's and Cruz's unavailability to testify as witnesses for the Secretary on December 3, 2013, and did so intending that result. Both were employees of All Florida as of that date. Respondent knew the Secretary wanted them to testify at the hearing during his case-in-chief on December 3, 2013. Only after the Court admitted portions of their September 14, 2012 statements on December 3, 2013 as part of the Secretary's case-in-chief, did both appear to testify the next day for Respondent.

[69] On December 4, 2013, Respondent called Mr. Gonzalez to testify in its case-in-chief. During direct examination, Respondent asked Mr. Gonzalez questions about his September 14, 2012 written statement to the CSHOs. On cross examination, he acknowledged that it was his written statement. Later, he testified that Mr. Pacheco was "the foreman there. He's the boss." (Tr. 360-361, 368-370; Ex. C-10). On December 4, 2013, Respondent also called Mr. Cruz to testify in its case-in-chief. During direct examination, Respondent showed and asked Mr. Cruz questions about his September 14, 2012 written statement to the CSHOs. Mr. Cruz acknowledged that it was his written statement and identified Mr. Pacheco as the job's foreman. (Tr. 339-345; Ex. C-11).

If a declarant is found unavailable as a witness, the following is not excluded by the rule against hearsay:

> Fed. R. Evid. 804. Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness. …
>
> (b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: …
>
> (3) Statement Against Interest. A statement that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; …

Fed. R. Evid. 804(b)(3)(A).

In the employment setting, "[a] statement is against pecuniary and proprietary interest when it threatens the loss of employment, or reduces the chances for future employment, or entails possible civil liability." *Gichner v. Antonio Troiano Tile & Marble Co.*, 410 F.2d 238, 242 (D.C. Cir. 1969). If a statement includes both self-inculpatory and non-self inculpatory parts, only those parts of the statement which are self-inculpatory may be admitted under Fed. R. Evid. 804(b)(3). *Williamson v. United States*, 512 U.S. 594, 600-605 (1994).

The Court finds that CSHO Campos' testimony regarding Mr. Pacheco's out of court statement of September 14, 2012 that: 1) the crane brought Messrs. Pacheco and Carrera-Zarate up to the top of the tree, 2) Mr. McPherson never had the power shut off for the job, and 3) he [Mr. Pacheco] was the foreman for Respondent's employees at the job site on August 21, 2012, to also have been properly admitted as statements against interest under Fed. R. Evid. 804. It was against Mr. Pacheco's own pecuniary and proprietary interest to admit that he and the deceased rode the crane's hook to the top of the tree, and that he was the foreman on a job site where the power had not been shut off and a worker was electrocuted. This admission could

have threatened Mr. Pacheco's employment, reduced the chance of his future employment, and exposed him to possible civil liability. It was also against Messrs. Gonzalez's and Cruz's pecuniary and proprietary interest to admit that Mr. Pacheco was the job's foreman directing work at the job site on August 21, 2012 since his activities could then expose their employer, All Florida, to liability and threaten both employees with loss of employment. *United States v. Hsia*, 87 F.Supp.2d 10, 14 (D.D.C. 2000) (*citing Gichner,* at 242).

While it was proper for the Court to admit into evidence limited portions of the September 14, 2012 interview statements of Messrs. Pacheco, Gonzalez, and Cruz on December 3, 2013 under Fed. R. Evid. 804, all three gentlemen eventually appeared and provided testimony at the hearing. Mr. Pacheco testified on December 5, 2013 during both parties' cases-in-chief. He covered all of the areas contained within the limited portion of his September 12, 2012 written statement admitted by the Court on December 3, 2013. During his testimony, Mr. Pacheco acknowledged giving a written statement to OSHA and admitted that the crane brought him and the deceased up to the top of the tree, Mr. McPherson did not have the power shut off, and he [Mr. Pacheco] was in charge of the job.[70] Messrs. Gonzalez and Cruz also testified during Respondent's case-in-chief on December 4, 2013. The few matters involved in the limited portions of their interview statements that were admitted by the Court into evidence on December 3, 2013 were all also later covered in their testimony at the trial.[71] (Tr. 332-396, 596, 598, 601-602, 625, 646-648, 680-682; Ex. C-6).

For the above reasons, the Court finds that Mr. Pacheco's entire September 14, 2012 written statement and the limited portions of the September 14, 2012 written statements of

[70] The parties have also stipulated as fact that Mr. Pacheco acted as Respondent's foreman and directed the tree removal activities. (Tr. 280-281).

[71] Therefore, any error regarding the admissibility of these limited portions of their September 14, 2012 statements under Fed. R. Evid. 804 is harmless for this reason alone.

Messrs. Gonzalez and Cruz were properly admitted into evidence.

2. Motion to Dismiss Citation 2, Item 1b.

Respondent next takes exception to this Court's denial of its Motion to Dismiss Citation 2, Item 1b. As originally drafted, the citation item alleged a violation of 29 C.F.R. § 1910.333(c)(i)(A)(1) on the grounds that "[w]hen an unqualified person was working in an elevated position near overhead lines with voltages to ground rated at 50 kV or below, the location was *not* such that the person and the longest conductive object could contact the power line." (emphasis added). The citation went on to specify that "On or about 8/21/2012, at 2660 SW 13th Avenue, Fort Lauderdale, Florida, the employer directed employees to work within 10 feet of an energized 7620 overhead power line." (Original Complaint, at p. 6).

At the hearing, Respondent's counsel moved to dismiss Citation 2, Item 1b, *ore tenus,* on the grounds that the allegation was correct in that the location where the employee was working "was *not* such that the person and the longest conductive object could contact the power line." (Tr. 11-12).

The Secretary's counsel replied that the standard was plainly cited and that it was clear what the citation intended to allege. The Secretary moved to amend the citation by removing the word "not." The Secretary asserted that his motion was due to a "scribner's error." Respondent objected to the amendment asserting that "the descriptive language is not—does not allege that there was any conductive object that my client had—that the employee had within ten feet of the power line, so it is very confusing. I would submit it should be dismissed as alleged." (Tr. 13-14).

When asked if Respondent was prejudiced by the amendment the following discussion ensued:

> Court: [portion omitted] If you'd like to tell me where the prejudice has been because of this word not, to exclude it, where was the prejudice to you?
>
> Respondent's counsel: Your Honor, no, I just wanted to make sure that – I just wanted to straighten the record out and make my motion on the record is all I wanted to do, to make sure it stands as that.
>
> Court: Well, have you been misled by the government along the way here?
>
> Respondent's counsel: No, I'm not arguing---
>
> Court: This case was filed back earlier in the year.
>
> Respondent's counsel: I'm not suggesting that, I'm not arguing prejudice, Your Honor.

(Tr. 15).

The Court denied Respondent's motion to dismiss Citation 2, Item 1b at the trial. Despite denying any prejudice from the amendment at the trial, in its Post-Hearing Brief, Respondent takes exception to the Court's denial of its Motion to Dismiss Citation 2, Item 1b because the item as originally worded failed "to state either factually or legally" that Respondent violated the cited standard. Respondent argues that it agrees with the allegations contained in the original citation. It also asserts that, "the standard as cited does not apply to this case and the Secretary did not place AFT&L [All Florida] on notice of the conduct that AFT&L engaged in that was in violation of the OSHA standard." (Tr. 14-16; R. Post-Hr'g Br., at p. 11).[72]

Respondent's exception is rejected. Whether the Secretary established a violation of the cited standard is an issue independent of whether the amendment was appropriate and will be dealt with at the appropriate time in this decision. The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") apply to Commission proceedings. *See* 29 U.S.C. § 661(g) ("Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal

[72] The applicability of 29 C.F.R. § 1910.333(c)(i)(A)(1) to Respondent's work will be discussed, *infra.*

Rules of Civil Procedures)." Fed. R. Civ. P. 15(a) states that, before trial, leave to amend "shall be freely given when justice so requires." The Secretary's *ore tenus* motion to amend his pleading was made at the start of the trial as a consequence of Respondent's *ore tenus* motion to dismiss. The Court's Notice of Hearing and Scheduling Order issued on May 10, 2013 ("Scheduling Order") called for all motions to be submitted to the Court by November 8, 2013, 25 days before the start of the trial. Respondent's Motion to Dismiss Citation 2, Item 1b should have been submitted by Respondent to the Court in writing, after conferring with the Secretary, before the start of the trial. *See* 29 C.F.R. § 2200.40; Scheduling Order. The Scheduling Order also required the parties to include "a list of all motions or other matters which require action by the U.S. Administrative Law Judge…" in the Joint Pre-Hearing Statement. The matter was neither raised by Respondent in the Joint Pre-Hearing Statement filed on November 8, 2013 or during the final pre-hearing conference conducted on November 15, 2013.[73] Respondent's Motion to Dismiss was untimely and not submitted in compliance with the Court orders and Commission rules. Justice requires the Secretary's Motion to Amend to be granted at the start of the trial.

The decision to amend a pleading is at the sound discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) (*citing Avatar Exploration, Inc. v. Chevron, U.S.A.*, 933 F.2d 314, 320 (5th Cir. 1991); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993); *Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978). The Commission has held that motions to amend pleadings will not be granted if the objecting party would be prejudiced by the amendment, or if there was intent to deceive the opposing party. *See Kokosing Constr.*

[73] The Scheduling Order also directed the parties to be prepared to discuss their compliance with the Scheduling Order, including the status of motions, at the final pre-hearing conference.

Co., Inc., 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006), *aff'd*, 232 F.App'x 510 (6th Cir. 2007); *see also Conagra Flour Milling Co.,* 15 BNA OSHC 1817, 1821-23 (No. 88-2572, 1992). "[I]t is the opposing party's burden to prove that such prejudice will occur." *Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 428 (3d Cir. 1987) (citing *Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987)). Judges must also ensure that the objecting party has sufficient time to prepare its case, and should grant a continuance where appropriate. *Kokosing Constr. Co.,* 21 BNA OSHC at 1631 (*citing Reed Eng'g Grp., Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005) ("fair notice" must be given to a non-moving party; this may be accomplished through granting a continuance).

Respondent's counsel explicitly stated that the amendment caused it no prejudice. It was clear that the insertion of the word "not" into the citation was a typographical error and there is no doubt that Respondent understood that it was being alleged that an unqualified employee and a conductive object could contact the energized overhead line. Neither at the time of the motion nor at present does Respondent assert that it needed a continuance to prepare to defend the amended citation. Respondent explicitly agreed that it was not misled.

The Secretary's Motion to Amend was properly granted. *See Bomac Drilling Co. and True Drilling Co.*, 9 BNA OSHC 1202, 1203 (No. 79-828, 1980) (consolidated) (finding Complainant permitted to amend the complaint at trial to insert a missing word where there was no proof of prejudice).

3. <u>The Secretary's Motion in Limine to Exclude Evidence in Support of Respondent's Affirmative Defenses.</u>

The Secretary served his First Set of Interrogatories, First Request for Admissions and Request for Production of Documents on Respondent on May 9, 2013. (*See* R. Post-Hr'g Br., at p. 9). Respondent answered the Secretary on June 11, 2013, providing its Responses to Requests

for Admissions, but stating that it would provide its answers to interrogatories and the documents on June 14, 2013. On October 24, 2013, the Secretary filed a Motion to Compel Responses to Complainant's Request for Interrogatories, Production of Documents, and Requests for Admission with the Court ("Motion to Compel"). The Secretary's Motion to Compel asserted that Respondent had not provided complete answers to his interrogatories or requests for admission, and that it failed to produce all unprivileged documents requested. The Secretary sufficiently met and conferred with Respondent prior to the filing of the Motion to Compel.[74]

On November 8, 2013, the Secretary filed his Motion *in Limine* to Exclude Evidence in Support of Respondent's Affirmative Defenses ("Motion in Limine"). The Secretary claimed that he still had not received Respondent's Answers to Interrogatories, or any of the documents asked for in his requests for discovery. Complainant sought to bar Respondent "from presenting any evidence at the hearing regarding its affirmative defense" because Respondent had allegedly failed to comply with Commission procedures and the Scheduling Order by not: 1) providing complete responses to written discovery requests, 2) participating properly in prehearing exchange activities by not providing proper notice of its witnesses and trial exhibits, and 3)

[74] Complainant's Motion to Compel included the following:

> Complainant has made good faith efforts to resolve this discovery dispute before filing this motion pursuant to Commission Rules and the Fed. R. Civ. P. Commission Rule 2200.40(a) requires a party filing any motion with the Court to first "confer or make reasonable efforts to confer" with the other party. Complainant, on seven (7) occasions, either by email or phone call or letter sent by facsimile, has attempted to communicate with Respondent's counsel to resolve this discovery dispute. Further, Complaint has identified the discovery deficiencies by email and letter so that Respondent would have a clear outline of Complainant's position and could respond reasonably. *Nev. Power Co. v. Monsanto Co.*, 151 F.R.D. 118 (D. Nev. 1993). In this case, the undersigned has attempted in good faith to request initial discovery responses to interrogatories and requests for production. Also, in good faith, the undersigned as [sic] asked Respondent to cure its requests for admissions and to attest to them.
>
> Complaint's counsel certifies that she has attempted to confer with Respondent's counsel, Andrea L. Wolfson to resolve the matter outlined above. Also, on October 22, 2013, Complainant's counsel attempted to contact Ms. Wolfson regarding this Motion by email (citation omitted] and left a message at her office. The undersigned spoke with Respondent's counsel for nearly an hour at approximately 2:00 p.m. on October 23, 2013. At the time of this filing, Respondent's counsel has not provided the promised discovery. (Motion to Compel, pp. 7-8).

producing any documentation to support its affirmative defense. Complainant further alleged that Respondent had: 1) engaged in contumacious conduct, 2) not properly supported its affirmative defense, 3) abandoned its affirmative defense, and 4) prejudiced Complainant by its actions.

On November 13, 2013, the Court issued an Order granting the Secretary's Motion to Compel, and ordered Respondent to provide: 1) complete responses to Interrogatories 1-25; 2) complete answers to Requests for Admission Nos. 8 and 9; 3) an attestation for Requests for Admission 1-25; and 4) all unprivileged documents that are responsive to the Secretary's Request for Production of Documents. The Court also deemed Request for Admission No. 12 admitted.[75] All of Respondent's responses to the Order were due on or before November 20, 2013. Respondent provided its corrected responses on November 21, 2013. (Ex. C-3).

Respondent filed its Response to the Secretary's Motion in Limine on November 14, 2013 ("R. Response to Motion in Limine"). Respondent asserted that, during OSHA's investigation, it voluntarily provided OSHA with documents and information for employees who were working at the time of the accident. It also asserted that during OSHA's investigation, Mr. McPherson answered OSHA's questions concerning the fatality. Respondent asserted that "it never intentionally withheld evidence and in fact has complied with each and every request for documents interviews and inspection of tangible items made by OSHA and the Secretary of Labor." Respondent claimed the discovery was sent to the Secretary at an earlier date, but was not received due to computer errors.[76] It further asserted that the Secretary failed to "show prejudice or surprise in fact and bad faith or willfulness" by Respondent during the discovery

[75] Request for Admission No. 12 stated: "Alan McPherson oversaw tree removal activities before the [sic] leaving the workplace the morning of August 21, 2012."

[76] According to Respondent, the discovery was sent via email at first, but the file size was too large to send. Later the discovery was sent via Adobe Send Now, but the Adobe server had inadvertently deleted the documents and they were not sent. (*See* R. Response to Motion in Limine, Exs. C-5, C-6)

process. (R. Response to Motion in Limine, at pp. 10-11).

The Secretary filed a reply to the Respondent's Response to the Motion in Limine on November 19, 2013. The Secretary acknowledged that after a telephone conversation between the parties on November 8, 2013, Respondent sent discovery to the Secretary, but it was incomplete and non-responsive as a whole. In its Surreply, Respondent claimed that it was unaware of the discovery not being sent, and that it was as compliant as possible in remedying the situation. Respondent claimed further that the Secretary had not been prejudiced by the late service of discovery.

On November 25, 2013, the Court denied the Secretary's Motion in Limine without prejudice, finding it premature and overly broad in the scope of the remedy sought.[77]

During the trial, the Secretary renewed his Motion in Limine to bar Respondent from presenting any evidence at the hearing concerning Respondent's affirmative defense of unpreventable employee/subcontractor misconduct due primarily to its failure to provide any responses to Interrogatory Nos. 6, 7, 9 and 13, and for inadequate responses to Interrogatory Nos. 15 and 23 during the pre-trial discovery phase of the proceeding. The parties agreed, as a remedy for Respondent not responding to Interrogatory Nos. 6, 7 and 15, to stipulate as fact that: 1) From August 22, 2010 through August 21, 2012, there were no disciplinary actions taken by Respondent with regard to any unauthorized action that was similar to the August 21, 2012 incident involving Mr. Jorge Carrera-Zarate against any employee or subcontractor; 2) There was no disciplinary action taken by Respondent against anyone based upon the August 21, 2012 incident involving Mr. Jorge Carrera-Zarate; and 3) In his testimony at trial, Alan McPherson

[77] The Court further ordered that the Secretary may, during the course of the trial, object to the admissibility of any trial exhibit or the testimony of any witness, and assert any grounds of prejudice that he may have sustained as a result of any failure by Respondent to make timely and complete responses to the Secretary's discovery requests, or to provide timely and proper notice of its witnesses and trial exhibits.

will not describe in detail the manner in which Respondent enforces the work rules that apply to the work activities in which Respondent's employees, supervisors and foremen were engaged on August 21, 2012. (Tr. 66-67, 77-80, 85-86, 277-305; Ex. C-3).

The parties agreed, as a remedy for Respondent not responding to Interrogatory No. 9, to stipulate as fact that: 1) "Mr. Jorge Carrera Zarate worked in the tree.", 2) "Mr. Rafael Pacheco worked in the tree.", and 3) "Mr. Rafael [Pacheco] acted as Respondent's foreman and directed the tree removal activities." (Tr. 280-281, 298-302).

The parties further agreed to stipulate as a fact that "Respondent does not have written work rules regarding traveling on a crane load or hook[.]" as a sanction for not answering Interrogatory No. 13. The parties also agreed that Respondent would not present any evidence that it provided work policies and rules to its employees that addressed hazards. (Tr. 72, 76, 281-282).

The Court also imposed a sanction against Respondent for its inadequate response to Interrogatory No. 23(b), by finding a stipulation of fact that:

1) Mr. Rafael Pacheco worked for All Florida Tree, Respondent, each week as follows: September 2010 through March of 2011, three weeks in April 2011, each week from May 2011 through November 2012 and one week in December 2012.

2) Respondent paid Monkey Man intermittently on a daily or weekly basis for each period of work for September 2010 through March of 2011, three weeks in April 2011, each week from May 2011 through November 2012 and one week in December 2012.

3) Rafael Pacheco was the only employee of Monkey Man.

4) Rafael Pacheco was reimbursed for Respondent's expenses while working for Respondent between October 2010 through December 2012 and that these payments

or reimbursements were addressed to Monkey Man.

(Tr. 289-302).

The Court further sanctioned Respondent for its inadequate responses to Interrogatory Nos. 6, 7, 9, 13 and 23(b) during discovery by excluding from evidence, as a remedy, Exhibit C, All Florida Tree & Landscape, Inc., General Construction, Additional Safety and Health Work Practices and Procedures Including Hazard Communication, pp. C-10 through C-17, and the Tree Care Industry Association's Electrical Hazard Recognition and Compliance Training Manual, pp. C-18 – C-55 [both English and Spanish versions] "for failure to properly -- adequately respond to Interrogatory [nos.] 6, 7, 9, 13, and 23B and for violating the Court's order which directly directed the Respondent to answer all the Interrogatories and that order was not complied with." (Tr. 77, 85, 302-304).[78]

Under Commission Rule 52, a judge may impose sanctions for failure to comply with a discovery order with "[a]n order refusing to permit the disobedient party to support or to oppose designated claims or defenses or prohibiting it from introducing designated matters in evidence." 29 C.F.R. § 2200.52(f)(2). The order may be issued by the judge's own initiative or upon a motion by a party. *Id.* The court must allow the opposing party the opportunity to show cause why the sanction should not issue. *Id.* This was done here.

In its Post-Hearing Brief, Respondent asserts that sanctions were inappropriate since the Secretary failed to comply with Fed. R. Civ. P. 37 because he failed to certify that he had in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action before filing his Motion to Compel.[79]

[78] These pages are from Respondent's safety/training manual. In general, the referenced interrogatories were relevant to Respondent's asserted affirmative defense of "unpreventable employee/subcontractor misconduct." Respondent also withdrew Exhibit C, pages C-18 through C-55, at the beginning of the trial. (Tr. 52, 60).

[79] *See* Fed. R. Civ. P. 37(a)(1) that states:

Respondent is mistaken. Complainant fully complied with Fed. R. Civ. P. 37 before he filed his Motion to Compel. Complainant's Motion to Compel included a certification that Complainant had attempted to confer with Respondent's counsel in an effort to resolve the discovery dispute before seeking judicial intervention. The motion was signed and attested to by the Secretary's counsel. The Secretary's Motion to Compel sets forth his, more-than-adequate, good faith attempts by the Secretary to seek proper discovery responses from Respondent. Respondent's objection is also untimely. The time for Respondent to have raised any such lack of certification objection was when its response to the Secretary's Motion to Compel was due, in this case by November 6, 2013, and not raise it for the first time in a post-hearing brief.[80] (R. Post-Hr'g Br., at p. 12; Motion to Compel, at pp. 7-8).

In *Modern Cont'l/Obayashi v. Occupational Safety & Health Review Comm'n,*, 196 F.3d 274 (1st Cir. 1999), the court held that the administrative law judge did not abuse his discretion by denying the employer's motion to compel discovery and quashing of two of its subpoenas when the employer failed to adequately respond by the court's discovery deadline. The First Circuit held that "[a]ppellate courts seldom intervene in discovery questions," and "will intervene in such matters only upon a clear showing of manifest injustice, that is, where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party." *Id.,* at p. 281. The court in *Modern Continental* reasoned that the employer's own lack of diligence in seeking and responding to discovery provided "more than adequate grounds" for the trial judge to reach the decision that he did. The court also found no reason to

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In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

[80] Respondent filed no response to the Secretary's Motion to Compel.

question the trial judge's decision to sanction the employer by quashing two subpoenas. *Id.*

Here, the Court explicitly ordered Respondent to provide: 1) complete responses to Interrogatories 1-25; 2) complete answers to Requests for Admission 8 and 9; 3) an attestation for Requests for Admission 1-25; and 4) all unprivileged documents that are responsive to the Secretary's Request for Production of Documents by November 20, 2013. Respondent did not comply. The Court sanctioned Respondent by excluding from evidence Exhibit C, part of which Respondent had withdrawn from the case; as well as imposing stipulation of facts after consultation with counsel as discussed above.[81] Respondent claims that the inadequate responses were simply mistakes on her part.[82] The Court does not view them as such. Respondent was given ample opportunity to provide responses to Interrogatory Nos. 6, 7, 9, and 13, and adequate responses to Interrogatory Nos. 15 and 23. The Secretary was prejudiced by Respondent's failure to timely and adequately respond to many of Complainant's requests for interrogatories before trial. The Secretary's Motion in Limine at trial was properly granted to the extent indicated herein.

4. *Employment Status of Ralph Pacheco d/b/a Monkey Man*

Respondent asserts that Mr. Pacheco was an independent subcontractor who, in Mr. McPherson's absence, was left in charge of the job site and that All Florida is not responsible for the citations incurred due to Mr. Pacheco's actions. (*See* R. Reply Br., at p. 3).

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[81] Complainant sought as a sanction an order barring Respondent from presenting any evidence at the hearing that concerned Respondent's affirmative defense of unpreventable employee/subcontractor misconduct. The Court found the requested remedy to be overly broad in scope and fashioned a lesser sanction as described above. (*See* Court Order Denying, without prejudice, the Secretary's Motion in *Limine* to Exclude Evidence in Support of Respondent's Affirmative Defenses, dated November 25, 2013).

[82] At the trial, Respondent's counsel stated:

> I did not see, and it's my error, I did not see that you wanted me to more fully answer any of them. (Tr. 62).

At the hearing, Mr. McPherson readily admitted that he wanted to hire Mr. Pacheco but that the costs imposed by taxes and worker's compensation insurance made it infeasible to hire him as an employee. Mr. McPherson encouraged Mr. Pacheco to form his own corporation, Monkey Man, which ostensibly enabled All Florida to take on Mr. Pacheco as an independent contractor. Mr. Pacheco did not want the headaches of forming and running his own company. Mr. McPherson did the necessary paperwork to form Monkey Man and paid the associated costs and fees. Since forming Monkey Man in 2010, Mr. Pacheco worked directly only for All Florida. (Tr. 608-609, 620, 654, 709-711).

Monkey Man was formed as a convenience to All Florida. It was a method that attempted to reduce Respondent's tax and insurance liabilities. By Mr. McPherson's own estimate, hiring Mr. Pacheco as a subcontractor saved All Florida approximately 30% of the cost to employ him in a more traditional manner. Mr. McPherson asserts that he commonly uses this type of arrangement. This was how he started his own business. The Court expresses no opinion as to whether the tax and insurance avoidance scheme was sufficient to qualify Mr. Pacheco as a subcontractor rather than as an employee for IRS, Social Security, or worker's compensation purposes. Whether All Florida was Mr. Pacheco's employer under section 3(5) of the Act, 29 U.S.C. § 652(5), is a separate issue that is addressed herein. (Tr. 708, 711, 716).

"In determining whether the Secretary has established that a cited entity is the employer of the particular workers at issue, the Commission relies upon the test set forth in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)." *See also Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1289 (No. 00-1402, 2010); *Allstate Painting & Contracting Co., Inc.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated) (noting that Commission relies on the Darden test to determine whether the Secretary has met his burden to establish an employment

relationship). In *Darden*, the main factor in deciding if an employer-employee relationship exists is the extent "of the hiring party's right to control the manner and means by which the product [was] accomplished. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) ("principal guidepost" is the control exercised over a worker); *Sharon & Walter Constr., Inc.*, 21 BNA OSHC at 1288 (*citing Darden,* 503 U.S. at 323). Factors relevant to the inquiry include:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; [12] and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24 (citation omitted).

Under *Darden*'s "common law" approach, the factors determining the employment relationship are non-exhaustive and there is "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)). To determine if Mr. Pacheco was Respondent's employee, or an independent subcontractor, the Darden factors must be applied to the case at hand:

1) Skill Required

Mr. Pacheco has been in the tree trimming business for over 20 years. He is an experienced tree trimmer. Respondent had other employees who also climb and trim trees. At least two other All Florida employees at the job site, Messrs. Carrera-Zarate and Cruz, had experience trimming trees. Like other All Florida employees, Mr. Pacheco also worked on ground level picking up debris. The Court finds that there was nothing in Mr. Pacheco's skill set

that set him apart from Respondent's employees who performed the same tasks. The Court concludes that this factor supports the finding of an employment relationship. (Tr. 616, 621, 644, 655, 661, 665-666).

2) The Source of the Instrumentalities and Tools

Mr. Pacheco provided the "chainsaw, climbing gear, power trimmer, and weed eater" for the job. Respondent provided and manned the chipper and hired the crane. The former is more consistent with independent contractor status and the latter is not. On balance, this factor is inconclusive as to whether Mr. Pacheco was employed by Respondent. (Tr. 676, 680, 737-38, 743, 773).

3) The Location of the Work Performed

Respondent was hired to cut a specific tree at the job site. Mr. Pacheco had no ability to change the location of the job. The evidence further indicates that, at other times, All Florida hired Mr. Pacheco to trim trees at other locations identified by Respondent. Based on the record, the location of the work performed supports a finding that Mr. Pacheco was Respondent's employee. (Tr. 609).

4) The Duration of the Relationship Between the Parties

Mr. McPherson knew Mr. Pacheco for at least 20 years. From about September, 2010 to early December, 2012, Mr. Pacheco worked for All Florida every week except one, approximately 106 out of 107 weeks. Although Mr. McPherson testified that Mr. Pacheco was supposedly free to contract with other companies, Mr. Pacheco worked only for All Florida.[83] Mr. McPherson testified that jobs Mr. Pacheco worked were generally only one day long. The

[83] Mr. McPherson testified that Mr. Pacheco obtained "jobs on the side all the time." This assertion was contradicted by Mr. Pacheco who testified that he worked only for All Florida for about 106 out of 107 weeks. (Tr. 294-96, 654, 714; Ex. C-42). The Court does not credit Mr. McPherson's testimony in this regard. The Court finds Mr. Pacheco credible and Mr. McPherson not based upon their demeanor at the trial. *See infra*, at p. 79, fn 86.

duration and regularity of the relationship between All Florida and Mr. Pacheco supports a finding that Mr. Pacheco was Respondent's employee. (Tr. 128, 294-96, 654, 714, 761; Ex. C-42)

5) Whether the Hiring Party has the Right to Assign Additional Projects to the Hired Party

Although supposedly hired as a tree trimmer, Mr. Pacheco routinely performed additional tasks assigned by Mr. McPherson. Mr. Pacheco worked as a mechanic, bucket truck driver, CDL driver, and ground level debris remover for All Florida. He was able to and did anything that needed to be done on the job. Mr. Pacheco testified that, if he declined the job at issue, Mr. McPherson would have had him work on one of the several other jobs Respondent had going at the same time. This all suggests that Mr. Pacheco often performed tasks as if he were a regular employee of All Florida and that he relied on Respondent to assign him to jobs in a manner very similar to an employee. This factor supports a finding that Mr. Pacheco was Respondent's employee. (Tr. 114, 626-627, 655, 709).

6) The Extent of the Hired Party's Discretion Over When and How Long to Work

Mr. Pacheco worked under Mr. McPherson's supervision.[84] Mr. McPherson told him when jobs began. Mr. Pacheco did not work for any other company. He was in charge of all of the other All Florida employees at the job site when Mr. McPherson was absent. He was All Florida's foreman at the job site. Here, Mr. Pacheco continued to perform work at the job site, despite being concerned about the energized overhead lines, at Mr. McPherson's direction because the crane was there.

Mr. McPherson testified that Mr. Pacheco was not tied to any particular work hours, but was expected to stay on the job until it was finished. Also, Mr. McPherson asserted that he did

[84] He identified Mr. McPherson as his "direct supervisor" during his OSHA interview on September 14, 2012. (C-6, at p. 1).

not require Mr. Pacheco to be available certain hours of the day. In contrast, Mr. Pacheco stated: "I worked [at All Florida] basically [from] 8:00 to 5:00 every day just like a regular employee." Mr. McPherson testified that Mr. Pacheco "doesn't have to work every day. But when there's work, he works." He worked virtually every week for more than two years at All Florida.

The Court finds that Mr. Pacheco could not leave a job whenever he wanted, and that Respondent had control over when and how long he worked as the hiring party. This factor supports a finding of an employment relationship. (Tr. 114, 224-226, 589, 609, 654-655, 665, 709, 757).

7) The Method of Payment

Monkey Man did not submit bids to All Florida for particular jobs, and was not paid by the job. Mr. Pacheco "got paid what [McPherson] wanted to pay me. I didn't get paid as a business of me asking what I needed. If I told him I needed a rate on what I wanted to get paid as a business, he wouldn't want to pay it." Respondent regularly paid Mr. Pacheco from about September, 2010 to December, 2012. All Florida reportedly paid Mr. Pacheco $250 per hour. Mr. McPherson also paid expenses Mr. Pacheco incurred on the job, such as gasoline used in Respondent's equipment. Respondent prepared an I.R.S. Form 1099-MISC, Miscellaneous Income, that reported $61,993.09 as Nonemployee compensation for Mr. Pacheco, Monkey Man in 2011. Respondent prepared an I.R.S. Form 1099-MISC, Miscellaneous Income, that reported $3,962.74 as Nonemployee compensation and $71,689.53 as Other Income for Mr. Pacheco, Monkey Man in 2012. There is no evidence that Mr. Pacheco's compensation was based on the danger and complexity of a particular job. The Court finds the reported hourly basis for payment supports the finding of an employment relationship. (Tr. 296, 619-620, 627, 654, 774-775; Ex. R-F).

8) The hired party's role in hiring and paying assistants

Nowhere in the record is there any indication that Mr. Pacheco had any authority to hire and pay assistants that worked with him on Respondent's jobs. All of the other employees involved in the tree trimming operation at the job site were employed band paid by Respondent, except Mr. Scesny and his spotter who worked for Hunter Merchant Crane. As foreman, Mr. Pacheco supervised Respondent's employees at the job site. In that role, he would have provided input to Mr. McPherson as to whether Respondent's employees adequately performed their jobs and should be paid by Respondent. Mr. McPherson also consulted with Mr. Pacheco on whether to use Mr. Carrera-Zarate as a tree climber. The Court's analysis of this factor is inconclusive as to any employment relationship between Respondent and Mr. Pacheco.

9) Whether the Work is Part of the Regular Business of the Hiring Party

Mr. McPherson is a certified arborist. Respondent's business is "[t]ree pruning, mainly, and some tree removal. But most[ly] debris removal from the pruning activities." Respondent holds itself out as an "expert" in tree pruning and its website claims it does "hazardous tree removal." All Florida had other employees, such as Messrs. Carrera-Zarate and Cruz, who also climbed trees and cut them down. Mr. Pacheco was hired to perform the very work that is the core of Respondent's business. Mr. Pacheco was not a certified arborist and worked under Respondent's license. That the work Mr. Pacheco performed at the job site was the same as Respondent's regular business supports the finding of an employment relationship. (Tr. 661, 665, 706, 727, 770; Ex. C-6, at p. 1).

10) Whether the Hiring Party is in Business

Respondent is in business as All Florida Tree and Landscape, Inc. All Florida incorporated in 2003. It keeps a website, business address, and telephone number. It has

employees and is actively engaged in the tree trimming business. The Court concludes that Respondent is in business. This factor supports the finding of an employment relationship. (Tr. 705, 768).

11) The Provision of Employee Benefits

Mr. Pacheco asserted that the only difference between himself and the other employees at All Florida "was that [Mr. McPherson] didn't have workman's comp on me and he didn't pay my taxes." Mr. Pacheco said that the contractor-subcontractor relationship that was allegedly in place between All Florida and Monkey Man was "[McPherson's] idea, not mine." Mr. Pacheco received no benefits from All Florida. That this is so is of little weight. Small businesses often provide no benefits to employees. *See* e.g. *NRG Sound & Commc'ns., LLC,* 23 BNA OSHC 2017, 2022 (No. 10-2576, 2011). Mr. Pacheco agreed to be paid at a particular daily rate that eschewed benefits so that he could work for All Florida. (Tr. 655-656).

12) Tax Treatment of the Hired Party

Mr. Pacheco received an I.R.S. Form 1099 from Respondent from 2010 to 2012. Respondent did not withhold any taxes for Mr. Pacheco. While the provision of employee benefits and the withholding of taxes from a paycheck is usually indicative of an employee relationship, the converse is not as telling. *See Id.* at 2022 n.6; *Sharon & Walter Constr., Inc.*, 23 BNA OSHC at 1289. Here, Monkey Man was born of a scheme hatched by Mr. McPherson to enable him to hire Mr. Pacheco at a low cost while paying Mr. Pacheco a specific daily rate. The "failure to withhold federal income and Social Security taxes was …not a bona fide reflection of an authentic independent contractor relationship." *Id.* The Court finds that the lack of benefits and tax treatment are not dispositive in determining whether Mr. Pacheco was an employee under the Act. (Tr. 289-302, 655, 658; Ex. R-F).

Additional Considerations

Given Respondent's degree of control of his work and applying the *Darden* factors strongly suggest that Mr. Pacheco was an employee of Respondent on August 21, 2012.[85] In addition to these factors, other evidence strongly suggests an employment relationship. Mr. McPherson testified that Mr. Pacheco was in charge of cutting the tree. Mr. Pacheco directed the activity at the job site, especially when Mr. McPherson was absent. Mr. Pacheco operated as Respondent's foreman in charge of the job. Respondent's other employees at the job site believed that Mr. Pacheco was their foreman. The parties have stipulated as a fact that Mr. Pacheco was the foreman at the job site. In that capacity, he was expected to make sure that everything went smoothly at the job site. Although Mr. Pacheco determined how best to take the kapok tree down in consultation with Mr. McPherson, Mr. McPherson had the ultimate authority to direct him how to remove the tree. (Tr. 113, 134, 207, 299-300, 370, 596, 623).

Mr. McPherson testified that Mr. Pacheco requested that Mr. Carrera-Zarate be assigned to assist him in the tree. According to Mr. McPherson, Respondent had no gear for Mr. Carrera-Zarate and agreed to the assignment only when Mr. Pacheco told him that he had gear he could lend to Mr. Carrera-Zarate. Mr. Pacheco's account differed markedly. Mr. Pacheco testified that he did not want assistance up in the tree. Rather, Mr. McPherson told him that he [Mr. McPherson] wanted Mr. Carrera-Zarate to assist him. Mr. Pacheco initially refused, stating that he did not want Mr. Carrera-Zarate working up in the tree with him. When Mr. Carrera-Zarate said that he wanted to work in the tree, Mr. Pacheco relented. (Tr. 662, 756, 772).

The Court credits the testimony of Mr. Pacheco. He had no reason not to tell the truth.

[85] *See The Barbosa Grp., Inc., d/b/a Exec. Sec.,* 21 BNA OSHC 1865, 1867 (No. 02-0865, 2007) (finding an employment relationship based in part on the degree of control exercised by the employer) aff'd 296 F. Appx. 2 (2d Cir. 2008) (unpublished)..

Monkey Man had already been cited for a violation and paid the penalty. In addition to the matter of Mr. Carrera-Zarate's assignment, the Court also finds that throughout the hearing, Mr. McPherson's testimony was often: 1) contradicted by other evidence, 2) self-serving, 3) self-contradictory and 4) not credible.[86]

Based on the foregoing analysis, the Court finds that Mr. Pacheco was an employee of Respondent. Mr. Pacheco worked solely for Respondent. There was no subcontract between All Florida and Monkey Man pertaining to any work Monkey Man was to perform at the job site on August 21, 2012. All Florida employees at the job site considered Mr. Pacheco the job's foreman. Although he was incorporated as Monkey Man, the paperwork and costs of incorporation were paid for by Respondent. Mr. Pacheco admitted that he did not want to incorporate.

"Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act." *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 729, (1947). While under

[86] For example: (1) Mr. McPherson testified that, before the accident, Respondent never worked around overhead energized lines. He had previously told OSHA investigators on August 30, 2012 that Respondent had worked around power lines; (2) He testified that Messrs. Pacheco and Carrera-Zarate did not hold or control anything that could reach the energized overhead lines when both men used nylon and chain rigging to wrap around branches; (3) Mr. McPherson first testified that he did not contact Asplundh, a company with expertise in cutting trees that cross overhead lines, because the kapok tree was a distance from the energized overhead lines. Later, he claimed that he did contact Asplundh, but that it refused the job because it lacked the authority to remove kapok trees; (4) Mr. McPherson testified that he told Mr. Pacheco that he did not care how long the job took when he also testified that he told everyone that the job was to be done in one day; (5) Mr. McPherson testified that he told his employees that the overhead lines were still energized. Employee Gonzalez testified that he was never told that the overhead lines were energized; (6) Mr. McPherson testified that he left the job site before the employees rode the crane's hook up into the tree. Mr. Pacheco testified that Mr. McPherson was still at the job site when he and Mr. Carrera-Zarate rode the crane's hook up into the tree and began to cut branches; and (7) Mr. McPherson testified that Mr. Scesny had a good attitude, and was not irritable or grumpy. In contrast, Mr. Rochester, an observer with no personal interest in this case, described the crane operator as "a hot dog, very bullheaded, very set on doing things his way. A hard man to argue with." Mr. Rochester's characterization of Mr. Scesny was supported by Mr. Pacheco, who testified that when he asked Mr. Scesny to move the crane in one direction, he would move it in another. He also did not know whether Mr. Scesny would have complied with a request to continue to use the fabric straps as the crane's rigging, rather than switch to chains. (Tr. 105, 111, 117, 131, 134, 138, 143-146, 151, 242, 598, 630, 677, 692, 721, 725, 763-764, 768, 780; Ex. C-5, at p. 3 (portion admitted)).

the *Darden* criteria, "no one factor is decisive" in determining whether the employer-employee relationship exists, the overwhelming evidence establishes that the formation of Monkey Man was a tax/benefits avoidance scheme and that in virtually every respect, Mr. Pacheco operated as an employee of All Florida on August 21, 2012.[87]

The Violations

Secretary's Burden of Proof

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2170 (No. 97-257, 2000), *Atlantic Battery Co.* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994), *Astra Pharm. Prods., Inc.,* 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); a*ff'd,* 681 F.2d 69 (1st Cir., 1982).

A violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there is a substantial probability that an accident will occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984) (*citing California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 n.1 (9th Cir. 1975)).

[87] Respondent argues that because OSHA issued Monkey Man a citation for riding the crane as well, Mr. Pacheco cannot be considered an employee of Respondent. This argument is invalid. While, at the time of the inspection, the Secretary may have believed that Monkey Man was a subcontractor, further investigation revealed that Monkey Man was essentially a shill corporation set up as a tax avoidance scheme and that Mr. Pacheco was an employee of Respondent under the Act. The fact that a citation was issued to another alleged employer does not automatically negate the employer-employee relationship. *See Cent. of Ga. R. Co. v. Occupational Safety & Health Review Comm'n*, 576 F.2d 620, 625 (5th Cir. 1978) (noting employer of exposed employees properly cited even where other company might have been cited).

1. ***Applicability of the Cited General Industry Standards to All Florida's job site.***

As a threshold issue, Respondent raises whether the General Industry Standards of Part 1910 under which Respondent was cited applied to its job site, or whether it should have been cited under the Safety and Health Regulations for Construction under 29 C.F.R. Part 1926.

Respondent argues that 29 C.F.R. § 1910.12(b) provides that construction work means work for construction, alteration, and/or repair. A subcontractor is defined at 29 C.F.R. § 1926.13(c) as a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair. Respondent argues that Hoggins Construction was engaged by the City of Ft. Lauderdale Redevelopment Authority to make alterations and repairs to the real property situated at the job site. Hoggins Construction entered into an agreement with Respondent to remove a large kapok tree on the property being renovated by Hoggins Construction. Respondent contends that removal of the tree was construction work because it was integral to the renovation of the property. (Tr. 730-731).

For work to constitute "construction" there must be a nexus between the work and the construction site or structure. *Brock v. Cardinal Indus., Inc.,* 828 F.2d 373, 378 (6th Cir. 1987). Activities that aid non-construction activities, are not actual construction and are not specifically related to the performance of construction work are not construction work. *Royal Logging Co.,* 7 BNA OSHC 1749 (No. 15169, 1979), a*ff'd,* 645 F.2d 822 (9th Cir. 1981).

Respondent was hired to remove a tree from the job site. It had no construction responsibilities and was not engaged in the general rehabilitation, repair or alteration of the structure at the job site. It did not perform any construction, alteration, or repair to any structure on the project. Rather, its sole purpose at the project was to remove a tree which constituted general maintenance work at the job site. There is nothing inherent in tree trimming that would

constitute "construction work." In *Consumers Power Co.,* the Commission rejected the Secretary's argument that trimming trees around power lines constituted "construction work." *Consumers Power Co.,* 5 BNA OSHC 1423, 1424 (No. 11107, 1977). Rather, the Commission found the activity to constitute "maintenance," which is excluded from the definition of "construction" work. In so finding, the Commission noted that tree trimmers performed no work on the transmission lines and that, when their work was completed, the lines were in the same condition as they were before the work.

> The employees involved in the instant citation were engaged solely in trimming trees. They did not work directly upon electric transmission lines or equipment. Rather they pruned branches from within the aerial basket of an insulated 'bucket truck." [fn deleted] Employees classified as tree trimmers were neither trained nor permitted to work directly on the utility lines. In fact, they did not even carry the tools needed to work on electrical lines and equipment.
>
> It is abundantly clear that respondent's tree trimmers were not engaged in the erection of new lines or equipment.

Id. at 1424.

The employees involved at the job site were engaged solely in trimming trees. Respondent performed no work in, or on, the home structure which, after the kapok tree was removed, was in the same condition as it was before the tree's removal. Although the kapok tree was tall and large, Respondent's activities were no different from any other tree removal taking place around energized overhead lines.

Finally, in its Reply brief, Respondent argues that the standards at Part 1926 – Safety and Health Regulations for Construction, should apply because they are more specific than the general Occupational Safety and Health Standards at Part 1910.[88] Under Respondent's theory, the general industry standards prohibit work "near" energized overhead lines, but fail to define

[88] *See* 29 C.F.R. § 1926 *et seq*. and 29 C.F.R. § 1910 *et seq.*, respectively.

the term "near." In contrast, the construction industry standards clearly define "near" as 10 feet. 29 C.F.R. § 1926.550(a)(15). The argument is without merit. First, a construction industry standard cannot apply to non-construction work merely because it may be more specific than the applicable general industry standard. There may be valid reasons why the general industry standard is written more broadly than its construction industry counterpart. Simply put, if an activity does not qualify as "construction work," the construction industry standards do not apply. Second, the Court finds that there is insufficient evidence to show that Respondent did not understand the requirements of the cited standards or that the standards were otherwise unconstitutionally vague. Finally, as will be discussed, *infra*, the term "near" is sufficiently defined at 29 C.F.R. § 1910.333(c)(3)(i)(A)(1) (Citation 2, Item 1b), as 10 feet for "unqualified employees" working around energized overhead lines.

The Court finds that Respondent was engaged in non-construction, maintenance work on August 21, 2012 at the job site. Accordingly, the Court finds that the cited standards applied to Respondent's job site.

Citation 1, Item 1

Respondent was cited under 29 C.F.R. § 1910.180(h)(3)(v) for permitting the hoisting and traveling of its employees on a crane's load or hook.

The section provides:

> No hoisting, lowering, swinging, or traveling shall be done while anyone is on the load or hook.

Respondent does not dispute that both Messrs. Pacheco and Carrera-Zarate accessed the kapok tree by riding the hook of the crane on the morning of August 21, 2012.[89] Exhibit C-38

[89] Respondent's Proposed Fact No. 18 alleges that "Mr. Pacheco and Mr. Carrera-Zarate eventually rode the ball of the crane up to the tree branches and started to remove the branches of the Kapok Tree. (sic)" (R. Post-Hr'g Br., at

shows Mr. Carrera-Zarate riding the crane's hook. Respondent claims that it had no knowledge that Messrs. Pacheco and Carrera-Zarate rode the crane hook to the top of the tree branches because Mr. McPherson had left the job site beforehand. Respondent also asserts that Messrs. Pacheco and Carrera-Zarate rode the hook of the crane "because the trunk of the kapok tree was covered with thorns. It was not possible for Mr. Pacheco and Carrera-Zarate to safely climb up the tree trunk in order to work on the elevated tree branches." Lastly, Respondent argues that Respondent's use of the crane's hook to access the tree should be viewed as a *de minimis* violation. (Tr. 566; Ex. C-38; R. Post-Hr'g Br., at pp. 6, 15).

Respondent had actual knowledge that Messrs. Pacheco and the deceased rode the hook up to the tree top through Mr. McPherson and Foreman Pacheco.[90] When the crane arrived at the job site, Respondent was aware that it was not equipped with a bucket, basket or platform. Instead of requiring his employees to wait for any of these devices to be delivered, Mr. McPherson orchestrated the effort to have the crane company and operator have Messrs. Pacheco and Carrera-Zarate ride the hook up into the tree. Mr. McPherson testified that he was not actively engaged in the decision making process that led to Messrs. Pacheco and Carrera-Zarate to ride the crane's hook up into the tree.[91] This is contrary to Mr. Pacheco's testimony. Mr.

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6).

[90] Mr. McPherson's knowledge is imputed to Respondent because he owns All Florida and Mr. Pacheco's knowledge is imputed to Respondent because he was its foreman at the job site. *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1308 (11th Cir. 2013) (Noting employer knowledge must be established by either employer's actual knowledge, or by its constructive knowledge where employer could foresee the unsafe conduct of supervisor); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1538-39 (No. 86-360, 1992) (consolidated) (finding the actual or constructive knowledge of a foreman can be imputed to the employer). Here, Mr. McPherson saw his workers ride the crane's hook to the top of the tree. It was also readily foreseeable to him that is how they gained access to the tree based upon Mr. Pacheco's prior unsafe routine of getting atop trees and the absence of any other way to do so at the job site.

[91] Mr. McPherson claims he told his employees, "[w]ell, guys, you know the situation here. I'm going to go over to Snyder Park. You guys figure it out." (Tr. 763). Such instructions, given to his employees just before he allegedly left the site, constitute tacit consent for having his employees ride the hook into the tree. Therefore, even if he left the site before the employees were lifted into the tree, Respondent had at least constructive knowledge of the violation.

Pacheco testified that Mr. McPherson did not try to get a bucket over to the job site on the morning of August 21, 2012. Instead, Mr. Pacheco testified that Mr. McPherson "tried to get us to ride the ball because it would take time to get the bucket over." Mr. Pacheco testified that he heard Mr. McPherson ask Mr. Scesny at the job site to call his boss and see if his boss would let them ride the ball to the top of the tree once. After speaking to his office at Mr. McPherson's request, Mr. Scesny gave in and allowed Messrs. Pacheco and Carrera-Zarate to be hoisted to the top of the tree using the crane's hook. Mr. McPherson further claims he was not at the job site when Messrs. Pacheco and Carrera-Zarate rode the crane's hook up into the tree the morning of August 21, 2012. Mr. Pacheco testified that Mr. McPherson was there at that time. The Court observed Mr. Pacheco's demeanor as he was testifying and found him to be honest, truthful, knowledgeable, direct, and persuasive with regard to Mr. McPherson's presence and activities at the job site on August 21, 2012. Conversely, the Court also observed Mr. McPherson's demeanor as he was testifying and found him to be less than credible with regard to his presence and activities at the job site on August 21, 2012. The Court finds that Mr. McPherson was at the job site when the two men used the crane's hook to travel up into the kapok tree and that he had advocated that the crane's hook be used to do so. The Court finds that Respondent used the crane's hook to hoist, lower, and transport Messrs. Pacheco and Carrera-Zarate into the tree at the job site on August 21, 2012 in violation of the cited standard. (Tr. 642, 650, 663).

Also, Respondent has admitted that "Alan McPherson oversaw tree removal activities before the [sic] leaving the workplace the morning of August 21, 2012."[92] The Court has found that Mr. McPherson was present at the job site when Messrs. Pacheco and Carrera-Zarate rode the crane's hook up to the tree branches and Respondent has admitted that Mr. McPherson

[92] As discussed *supra*, the Court has deemed Complainant's Request for Admission No. 12 admitted.

oversaw such an activity before he left the job site for the first time on August 1, 2012.

Next, Complainant asserts that Respondent has raised what appear to be defenses of impossibility or greater hazard for the first time in its Post-Hearing Brief.[93] The Secretary is correct. Respondent did not raise these affirmative defenses in its Answer as required by Commission Rules 34(b)(3) and (4), 29 C.F.R. § 2200.34(b)(3)(4).[94] Respondent also failed to raise the affirmative defenses during prehearing conferences, the Joint Pre-Hearing Statement and the hearing.[95] The Court finds that Respondent failed to raise the affirmative defenses as soon as practicable, as required. 29 C.F.R. § 2200.34(b)(4). Because the affirmative defenses were not timely raised, they should not be considered by the Court. *Nat'l Eng'g & Contracting Co.,* 16 BNA OSHC 1778, 1779 (No. 92-73, 1994) (finding infeasibility of alternative measures affirmative defense not considered where not raised in Answer). Further, the issues raised by the defenses were not tried by the parties' express or implied consent. *See* Fed. R. Civ. P. 15(b)(2).

In the defense of impossibility of compliance, an employer must prove that it would be impossible to perform its work and that an alternative means of protection is unavailable. *Brock v. Dun-Par Engineered Form Co.,* 843 F.2d 1135 (8th Cir. 1988); *Siebel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1225-1228 (No. 88-821, 1991). Mere inconvenience, difficulty or expense are not sufficient to avoid compliance. *C.J. Coakley Co., Inc.*, No. 80-4128, 1981 WL 19430, at *3 (O.S.H.R.C.A.L.J. May 27, 1981). Regarding the greater hazard defense, an

[93] The first and only affirmative defense raised in Respondent's answer concerned alleged "unpreventable employee/subcontractor misconduct." (Answer, at p. 2; Joint Pre-Hr'g Statement, at pp. 14-15).

[94] 29 C.F.R. § 2200.34(b)(3)(4) states:

> (3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."
> (4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

[95] The Scheduling Order stated that the "Respondent shall set forth the factual basis of each affirmative defense as it relates to each specific item" in the Joint Pre-Hearing Statement that was due and filed by the parties on November 8, 2013.

employer must prove that compliance with the standard is more hazardous than noncompliance, that alternative means of protection are unavailable, and that a variance has been sought and denied, or that a variance application to OSHA would be inappropriate. *John H. Quinlan d/b/a Quinlan Enters*., 17 BNA OSHC 1194, 1995 (No. 92-756, 1995). (*See also* Complainant's Reply Br. ("C. Reply Br."), at pp. 7-8).

Even if Respondent's late-raised affirmative defenses are properly before the Court, and they are not, Respondent failed to present sufficient evidence to support them and they are without merit. Regarding the defense of impossibility, Respondent claims that use of a conventional means of access was impossible. Respondent has not shown why it could not have used another means, such as a bucket, basket or suspended platform, to gain access to the upper branches of the tree at the job site. In this case, Mr. McPherson surveyed the job site several times before work began. He had plenty of opportunity to see the kapok tree and ascertain whether thorns made it difficult to climb. He knew, or should have known through constructive knowledge, that he or the tree climbers may have preferred to be mechanically hoisted into the tree due to the presence of any thorns. When arranging for the use of the crane, he should have ensured that the crane would arrive at the job site with a bucket, basket or platform available to lift the tree climbers up into the tree. Although to do so may have been more inconvenient, untimely, and costly, the evidence is insufficient to show that it was impossible or more hazardous to do so. Respondent's failure to use a bucket, basket or platform with the crane to get the tree climbers up into the tree on the morning of August 21, 2012 was not because it was impossible or created a greater hazard to use any of these devices to gain access to the tree, it was because Respondent did not want to delay the start of the job any longer and riding the crane's ball was the typical mode of how tree climbers working for All Florida were transported

up into the tree top. According to Mr. Pacheco, he and others "usually get up on top of the tree" by riding the ball of the crane. Respondent did not have any written work rules regarding traveling on a crane load or hook and Respondent did not present any evidence that it provided work policies and rules to its employees that addressed any fall or electrocution hazards relating to doing so. (Tr. 72, 76, 142, 281-282, 314, 507, 601-602, 607, 642, 650, 663, 779).

Similarly, Respondent did not explain why having its employees hoisted to the top of the tree using a bucket, basket or platform suspended from the crane would have been more hazardous than having its employees ride a crane's hook where they were exposed to fall or electrocution hazards. Moreover, Respondent did not claim it ever sought a variance from OSHA, or explain why it did or could not seek one.

Respondent also asserts that the use of the crane's hook to access the tree should be viewed as a *de minimis* violation. Respondent relies on OSHA Standard Interpretation, Standard Number 1910.180(h)(3)(v), from February 17, 1993, *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21040. The Standard Interpretation states:

> OSHA has determined, however, that when the use of a conventional means of access to an elevated worksite would be impossible or more hazardous, a violation of 1910.180(h)(3)(v) will be treated as de minimis if the employer has complied with the provisions set forth in 1926.550(g)(3)[Crane Operational criteria], 1926.550(g)(4) [Personnel platforms], 1926.550(g)(5)[Trial lift, inspection, and proof testing], 1926.550(g)(6)[Work practices], 1926.550(g)(7)[Traveling] and 1926.550(g)(8) [Pre-lift meeting].

(*Id*., at p. 1).

Respondent neither offered the standard interpretation as evidence at the hearing nor even mentioned it at any time before citing to it in its Post-Hearing Brief. Pursuant to the referenced Standard Interpretation, Respondent needed to show that access to the elevated job site would be

impossible or more hazardous, as well as showing that it had complied with the enumerated provisions set forth above; *e.g.* trial lift, inspection and proof testing. Respondent has failed to show this and to demonstrate that its actions fit within the referenced standard interpretation. The Court does not view Citation 1, Item 1 as a *de minimis* violation and finds the referenced standard interpretation to be inapplicable here. (*See* R. Post-Hr'g Br., at p. 15).

The Court further finds Respondent's defenses to be without merit for the reasons stated above and also finds that Respondent had actual knowledge of the hazard. Exposure to the violative condition has been established. Citation 1, Item 1 is affirmed.

'Serious' Classification

Citation 1, Item 1 was deemed a "serious" violation. A violation is serious under § 17(k) of the Act, 29 U.S.C. § 666(k), "'if there is a substantial probability that death or serious physical harm could result.'" *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1557 (No. 93-2535, 1996) (quoting *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317 (No. 89-2253, 1991). This does not mean "that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw* at 1557; *Super Excavators, Inc.*, 15 BNA OSHC at 1317; *Natkin & Co.*, *Mech. Contractors*, 1 BNA OSHC 1204, 1205 (No. 401, 1973).

CSHO Campos testified that there were two hazards associated with Citation 1, Item 1. First, a fall hazard was present for any worker riding on the crane's hook. Second, an electrocution hazard was present due to the proximity of the crane's hook and the tree climbers riding the hook to the energized overhead lines. The CSHO testified that the result of these hazards could be death, broken bones and serious physical injury. Item 1 was properly classified as serious. (Tr. 307-309).

The Secretary proposed a penalty of $2,800. Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. *Specialists of the S., Inc.*, 14 BNA OSHC 1910, 1910 (No. 89-2241, 1990). These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992); *Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247, 1982)).

CSHO Campos testified that the gravity of the violation was high and mandated a penalty of $7,000. A deduction of 60% was granted due to the small size of Respondent's business. Due to the high gravity of the violation and the fatality that occurred due to other alleged violations, no reduction was given for good faith. Finally, no reduction was allowed for Respondent's safety history. CSHO Campos testified that, under OSHA procedures, a company that has not been inspected within the last five years is deemed not to have an established safety history. Here, this was the first time Respondent was inspected. (Tr. 320-322).

The Court finds that the Secretary properly considered the § 17(j) factors when proposing the $2,800 penalty. Accordingly, the proposed penalty of $2,800 is assessed by the Court.

Citation 2, Items 1a and 1b

In Citation 2, Item 1a, Respondent was cited for a willful violation of 29 C.F.R. § 1910.333(c)(3) for performing work near overhead lines, when the lines were not de-energized and grounded, or other protective measures provided before work was started.

Citation 2, Item 1b alleges that Respondent violated 29 C.F.R. § 1910.333(c)(3)(i)(A) on the grounds that Respondent directed unqualified employees to work within 10 feet of an

energized 7620 volt power line.

Were Employees Working "Near" Energized Overhead Lines?

The Court now turns to whether the employees were working near energized overhead lines, as alleged in Citation 2, Items 1a and 1b, and whether employees may have been in contact with a "conductive object" that came within 10 feet of an unguarded, energized overhead line, as alleged in Citation 2, Item 1b. As Respondent noted, *supra*, 29 C.F.R. § 1910.333(c)(3) does not define the term "near." That question, however, is resolved in the subsequent subsections of the standard. Section 1910.333(c)(3)(i)(A) defines minimum clearances when work is being performed by "unqualified persons" at 10 feet for voltages below 50 kV.

The evidence demonstrates that Respondent's employees were exposed to the hazard of electrocution because: 1) both Messrs. Pacheco and Carrera-Zarate worked on a tree branch within ten feet of the primary energized overhead line, and 2) Mr. Carrera-Zarate and a conductive object, *i.e*. metal chains dangling from the crane's hook, came within 10 feet of energized overhead lines. Mr. Pacheco testified that both he and Mr. Carrera-Zarate worked on the tree branch shown in photograph C-13, at "C", that was "basically eight to nine feet" or "eight to ten feet" above the primary energized overhead line shown in photograph C-13, at "A". This is the same branch where Mr. Carrera-Zarate was working at the time of the accident. Mr. Pacheco testified that photograph C-40 depicts the scene right after the accident, between 1:30 and 2:30 p.m. It shows Mr. Carrera-Zarate hanging onto the branch with his right arm and with his left arm dangling away from the branch. He was about 10 feet from the primary energized overhead line, marked "A." Mr. Pacheco also testified that photograph C-39 depicted Mr. Carrera-Zarate tying the crane's chains into the tree to cut the branch. He also testified that photograph C-39 showed Mr. Carrera-Zarate about 10-12 feet away from the primary energized

overhead line at "A". Of all those alive today that were at the job site, Mr. Pacheco knew best how close he and Mr. Carrera-Zarate were to the primary energized overhead line when working in the kapok tree.[96] The Court finds that Messrs. Pacheco and Carrera-Zarate worked in the tree near, *i.e*. within ten feet, of the primary energized overhead line. (Tr. 230-232, 235, 606, 612-613, 633, 639-641; Exs. C-13, at "A", "C", C-39, at "A").

The evidence shows that Mr. Carrera-Zarate and a conductive object in his hands, *e.g.* metal chains dangling from the crane's hook, came within 10 feet of energized overhead lines. Other tools used by the deceased while up in the tree, including a chainsaw and positioning belts, were also conductive objects. Photograph C-34 shows one length of chain dropping down on the side facing the limb where the deceased was sitting on a branch. The other length of chain is shown draped over a branch on the far side. Photograph C-35 shows two chains hanging from the crane's hook. Photograph C-36 shows the crane's rigging chain in close proximity to the primary energized overhead line. Photograph C-39 shows Mr. Carrera-Zarate working on a branch near both the crane's chain and the energized overhead line**.** The Court finds that the crane's rigging chain was, at times, in close proximity to, or made contact with, the primary energized overhead line. The Court also finds that the deceased regularly made contact with the crane's chain in order to wrap the branches so that cut branches could be relocated to the street. The Court further finds that Mr. Carrera-Zarate and a conductive object, *i.e*. metal chains dangling from the crane's hook, came within 10 feet of energized overhead lines.[97] (Tr. 313,

[96] The Court gave much less weight to conflicting testimony by others as to how close the deceased came to the primary energized overhead line when working up in the tree. Such testimony comes from those on the ground, working in the street, or who were at the job site intermittently or only for a short time; e.g. Messrs. Hoggins, Gonzalez and McPherson. For example, Mr. McPherson gave conflicting testimony that his employees worked no closer than somewhere between 15 to 60 feet away from the energized overhead lines. (Tr. 127, 130-131).

[97] Due to these findings, the Court need not find whether Messrs. Pacheco and Carrera-Zarate were exposed to an electrocution hazard solely because the kapok tree within which they were working was itself closer than ten feet from the energized overhead lines. Whether a tree, by itself, is a "conductive object" for purposes of establishing a

546, 561, 613; Exs. C-34, C-35, C-36, C-39).

The evidence establishes that the accident occurred when a lower portion of the crane's chains used as rigging came close to or made contact with the primary energized overhead line, while an upper portion simultaneously came in contact with Mr. Carrera-Zarate.[98] Although Mr. McPherson, Respondent's crew, Mr. Scesny and his spotter, and two observers were at the job site at the time of the accident, the only eyewitness of record was Mr. Cruz. Mr. Pacheco testified that Mr. Cruz told him that he saw the crane operator bring the crane's chain over towards the overhead line. The lower end of the chain touched the primary energized overhead line while an upper portion of the chain came in contact with the deceased. At the trial, Mr. Cruz essentially confirmed Mr. Pacheco's recollection of what Mr. Cruz had said he observed at the time of the accident. Mr. Pacheco testified that the chain was conductive and that there was a risk that it would hit the primary energized overhead line. He was concerned when Mr. Scesny changed the crane's rigging from chains and straps to only chains, but he did not stop the job because, despite being erratic, Mr. Pacheco "figured he [Mr. Scesny] knew what he was doing." His pre-August 21, 2012 prophesy that someone was going to be killed if the overhead lines were not de-energized unfortunately came true. (Tr. 337-338, 633-635, 642, 648, 674).

Both Messrs. Pacheco and Carrera-Zarate were Unqualified Persons under the Cited Standard.

Here, the Secretary alleges that both Messrs. Pacheco and Carrera-Zarate were

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minimum distance violation under 29 C.F.R. § 1910.333(c)(3) is a matter of first impression for the Commission. It is undisputed that the trunk of the tree was within 10 feet of the primary energized overhead line, and the Court so finds. 29 C.F.R. § 1910.333 does not list a tree as being conductive. But the standard also states that any object not rated for insulating is considered a conductor. 29 C.F.R. § 1910.333(c)(3)(i)(B) at "Note." The standard's regulatory history does not address whether a tree is a conductor.

[98] This conclusion is somewhat consistent with Respondent's response to the Secretary's Interrogatory No. 22 that states, in part, "The Chain hit the powe (*sic*) rline (*sic*) or conducted the electricity from the power line and hit Carrera Zarte's (*sic*) leg in more than one place and acted as the conductor of electricity to Mr. Carrera-Zarte (*sic)*. (Ex. C-3, at p. 25).

"unqualified" under the cited standard.

A "qualified person" is defined at 29 C.F.R. § 1910.399 as:

> *Qualified person.* One who has received training in and has demonstrated skills and knowledge in the construction and operation of electric equipment and installations and the hazards involved.
>
> NOTE 1 TO THE DEFINITION OF "QUALIFIED PERSON:" Whether an employee is considered to be a "qualified person" will depend upon various circumstances in the workplace. For example, it is possible and, in fact, likely for an individual to be considered "qualified" with regard to certain equipment in the workplace, but "unqualified" as to other equipment. (See §1910.332(b)(3) for training requirements that specifically apply to qualified persons.)
> NOTE 2 TO THE DEFINITION OF "QUALIFIED PERSON:" An employee who is undergoing on-the-job training and who, in the course of such training, has demonstrated an ability to perform duties safely at his or her level of training and who is under the direct supervision of a qualified person is considered to be a qualified person for the performance of those duties.

As referenced in Note 1, the training requirements for a "qualified person" is set forth at 29 C.F.R. § 1910.332(b)(3):

> (3) *Additional requirements for qualified persons.* Qualified persons (i.e., those permitted to work on or near exposed energized parts) shall, at a minimum, be trained in and familiar with the following:
>
> (i) The skills and techniques necessary to distinguish exposed live parts from other parts of electrical equipment,
>
> (ii) The skills and techniques necessary to determine the nominal voltage of exposed live parts, and
>
> (iii) The clearance distances specified in §1910.333(c) and the corresponding voltages to which the qualified person will be exposed.
>
> NOTE 1. For the purposes of §§1910.331 through 1910.335, a person must have the training required by paragraph (b)(3) of this section in order to be considered a qualified person.
>
> NOTE 2. Qualified persons whose work on energized equipment involves either direct contact or contact by means of tools or materials must also have the training needed to meet §1910.333(c)(2).

Finally, the nature of the required training is set forth at 29 C.F.R. § 1910.332(c):

> (c) *Type of training.* The training required by this section shall be of the classroom type or on-the-job type. The degree of training provided shall be

determined by the risk to the employee.

The Court finds that the evidence establishes that both Messrs. Pacheco and Carrera-Zarate were not "qualified" persons within the meaning of the cited standard.[99] CSHO Campos testified that neither employee had the specific training or qualifications that made them qualified under the cited standard. There is no evidence that either employee received training that made them aware of how to recognize and avoid electrical hazards or the rationale for the distance requirements to energized overhead lines.[100] There is no evidence that either Messrs. Pacheco or Carrera-Zarate had either class room or on the job training on the matters set forth at 29 C.F.R. § 1910.332(b)(3). There was no documentation that demonstrated that the two employees received any training by Respondent or elsewhere. Mr. Pacheco testified that he never saw any training manuals or videos in the yard where crews assembled to go to work on Respondent's jobs. Mr. Pacheco lacked any certification to work on energized circuits and admitted that, before the accident, he had no electrician qualifications. (Tr. 318, 428, 661, 607-608, 779).

Mr. Pacheco testified that Mr. Carrera-Zarate had no electrical certifications. He pointed out that he knew Mr. Carrera-Zarate since he came to the United States, ten years earlier. Both Messrs. McPherson and Pacheco testified that Mr. Pacheco personally provided some form of unidentified training to Mr. Carrera-Zarate at unspecified times. As an "unqualified person" under the cited standard, Mr. Pacheco was not competent to provide Mr. Carrera-Zarate with training, on the job or otherwise, capable of making Mr. Carrera-Zarate a "qualified person"

[99] The standards do not provide a definition for "unqualified person" but provide that 29 C.F.R. § 1910.333, among others, applies to "…both qualified persons (those who have training in avoiding the electrical hazards of working on or near exposed energized parts) and unqualified persons (those with little or no such training) …." 29 C.F.R. § 1910.331(a)(Scope).

[100] *See Brennan v. Butler Lime & Cement Co.,*520 F.2d 1011, 1018 (7th Cir. 1975) ("Rules are more likely to be observed if their rationale is understood and it is made clear that they are not just arbitrary pronouncements but are grounded in practical reasons of safety.").

under the cited standard.[101] (Tr. 608, 622, 662, 772).

Both Mr. McPherson and Ms. Mary Ann Wolfson testified that Respondent maintains various manuals, including an E-HAP manual, and a video. They explained that, once a year, maybe more often "depending on the weather" Respondent's employees study the manual and may watch the video. Employees supposedly take a "self-test." Mr. McPherson testified that Mr. Pacheco also had access to Respondent's manuals, but asserted that Respondent was not responsible for training Mr. Pacheco because he was a subcontractor. All Florida's employees allegedly completed a certificate to inform the Tree Care Industry Association ("TCIA") that they were trained. No TCIA employee certifications, or any indication regarding who received any electrical awareness training, were entered into evidence. (Tr. 530, 534, 537-538, 760-761).

Any claim by Respondent that Messrs. Pacheco and Carrera-Zarate were provided the necessary training to be deemed "qualified persons" under the cited standard is rejected. *See Teichert Constr.*, 578 Fed.Appx. 647, 649 (9th Cir. 2014) (finding trucks were not inspected where no safety sheets in evidence), *U.S. ex rel. Compton v. Midwest Specialties, Inc.,* 142 F.3d 296, 303 (6th Cir. 1998)(noting the absence of a record of an event is probative of the fact that the event did not occur); *Wiley v. United States*, 20 F.3d 222, 227 (6th Cir. 1994)(same). *See also Murray Roofing Co., Inc.,* No. 98-0923, 1999 WL 717820, at *6 (O.S.H.R.C.A.L.J. Sept. 3, 1999) (showing company's failure to respond to a subpoena *duces tecum* calling for all fall protection training records reasonable basis for concluding that Murray did not prepare the required written record).

The record demonstrates that Respondent had no formal training program and made no legitimate effort to ensure that its employees, including Messrs. Pacheco and Carrera-Zarate,

[101] On September 14, 2012, Mr. Pacheco told OSHA investigators that he was responsible for providing most of the on-the-job training to Respondent's employees. (Ex. C-6, at p. 5).

were trained. None of Respondent's current employees who testified at the trial, *i.e.* Messrs. Gonzalez, Cruz and Pineda, presented testimony regarding any training they received from Respondent. Rather at best, Respondent had a "catch-as-catch-can" approach to safety training that was more dependent upon the weather than the hazards to which its employees were exposed. There were no All Florida or Monkey Man safety policies when working near energized overhead lines. Accordingly, the Court finds that neither Messrs. Pacheco nor Carrera-Zarate were "qualified persons" within the meaning of the cited standard. (Tr. 334-357, 359-396, 398-410; Ex. C-6, at p.4).

All Florida has not Met its Burden of Establishing the Multi-employer Worksite Defense.

Respondent asserts that the hazard of electrocution was caused by the unauthorized acts of Mr. Scesny over which it had no control. All Florida argues that the Secretary presented no evidence that Mr. McPherson knew or could have known that Mr. Scesny would not be able to control the crane, or that he would change the crane's chain and fabric rigging to only chains. It contends that it should have been able to rely on Hunter Merchant Crane to provide a crane operator who was experienced, certified and capable of using the crane to avoid contact with energized overhead lines. (R. Post-Hr'g Br., at pp. 16-18). In support of its position, Respondent cites *Elec. Smith, Inc. v. Sec'y of Labor*, 666 F.2d 1267 (9th Cir. 1982), where the Court vacated a citation issued to an electrical subcontractor on a multi-employer worksite. The Court found that, on a multi-employer worksite, a non-controlling, non-creating subcontractor can avoid liability where it shows that it has protected its own employees by "realistic measures taken as an alternative to literal compliance with the applicable standard," *i.e*. "those measures that would be taken by a reasonable employer seeking to protect his employees and faced with

the same conditions."[102] *Id.* at 1268. The Court vacated the citations because it found that the non-controlling employer attempted to have the violations abated. When that was unsuccessful, the employer took "realistic and reasonable" measures to minimize employee exposure.

The Commission has recognized OSHA's authority to cite multiple employers at a job site. *See, e.g. Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010). "Exposing," "creating," "controlling" and/or "correcting" employers can be cited for hazardous conditions that violate OSHA's standards. Here, Respondent was at least an exposing and controlling employer at the job site.[103] Its employees were exposed to fall and electrocution hazards. Messrs. Pacheco and Carrera-Zarate rode the crane's hook at the instigation of Mr. McPherson, and Mr. Carrera-Zarate worked in the kapok tree within 10 feet of energized overhead lines and with conductive objects that could come in contact with the lines. Respondent alone permitted its employees to participate in tree removal activities while exposed to the known electrocution hazard for more than four hours. The Commission has a long-standing precedent holding that an employer whose own employees are exposed to a hazard, *i.e.* an "exposing employer", has a statutory duty to comply with a particular standard.[104] *See S. Pan Servs. Co.,* No. 08-0866, 2014 WL 7338403, at *5 (OSHRC Dec 18, 2014). Respondent had an independent duty to protect its own employees from recognized hazards.[105] It did not fulfill its duty obligations.

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[102] This is known as the *Anning-Johnson/Grossman* rule. *Anning-Johnson Co.,* 4 BNA OSHC 1193 n.16 (No. 3694, 1976) (consolidated); *Grossman Steel & Aluminum Corp.,* 4 BNA OSHC 1185 (No. 12775, 1976).

[103] Respondent also failed to take appropriate abatement measures to protect its employees from the fall and electrocution hazards at the job site. It neither asked Mr. Scesny to abate the hazards, nor attempted to abate the hazardous conditions itself. Respondent could have elected to wait until a bucket, basket or platform were brought to the site and the overhead lines were de-energized or protected before permitting its employees to work in the tree.

[104] This is true even where the exposing employer did not create or control the hazard. *S. Pan Servs. Co.,* 2014 WL 7338403, at *5. .

[105] Under the Act, an employer has a duty to protect its own employees from workplace hazards. *See* 29 U.S.C. § 654(a). That duty may not be contracted away to third parties. *See Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 209 (3d Cir. 2005); *Summit Contractors, Inc.*, 23 BNA OSHC at 1207 (finding employer may not contract out of its duties under the Act); *Barbosa, 21 BNA OSHC at 1867***;** *Baker Tank Co.*, 17 BNA OSHC 1177, 1180 (No. 90-

All Florida's multi-employer worksite defense and argument fails as the Court finds that it had sufficient control at the job site to the extent that the standard applies.[106] Respondent's owner and foreman supervised Respondent's employees at the job site. There is no evidence that Respondent lacked the authority or ability to prevent its employees from riding the crane's hook to the top of the tree or working in the tree within 10 feet of energized overhead lines or with conductive objects that could come in contact with the lines. Respondent could have taken whatever steps it deemed necessary to protect its employees working in the tree. Respondent had the authority and responsibility to insist that everyone at the job site, including Mr. Scesny, comply with the requirements of the cited standards. Mr. McPherson identified, hired, and most likely incurred the obligation to pay Hunter Merchant Crane to operate the crane at the job site. Despite its protestations to the contrary, the Court finds Respondent was in a position to exercise control over Mr. Scesny at the job site.

The Commission recognizes that reasonable measures may fall short of full compliance because "[w]hat is realistic depends upon a balance of the hazard involved with considerations of efficiency, economy, and equity." *Sunshine Guardrail Servs.*, No. 96-631, 1996 WL 650480 at *5 (O.S.H.R.C.A.L.J., Oct. 28, 1996) (citing *Hayden Elec. Servs.*, 4 BNA OSHC 1494, 1495 (No. 4034, 1976). The Commission also recognizes that "[i]t is normally not difficult to assert

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1786-S, 1995) (finding Respondent could not contract away its legal duties to its employees or its ultimate responsibility under the Act by requiring another party to perform them). Hunter Merchant Crane did not accept the responsibility in any contract to insure that Respondent's employees did not come within 10 feet of the energized overhead lines, with or without a conductive object. When an employer denies liability on the ground that it lacked control over hazardous conditions to which its own employees were exposed, it must show, first, that it had no ability or authority to abate the hazard as required under the cited standard; and second, that it took reasonable alternative steps to protect its employees from the hazard. *See Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1808 (No. 93-45, 1996) (consolidated) (noting an employer must prove three elements to establish the multi-employer defense, including it did not control the violative condition so that it could not itself have performed the action necessary to abate the condition, and it took all reasonable alternative measures to protect its employees from the violative condition). The employer bears the burden of establishing this multi-employer worksite defense. *See Grossman Steel & Alum. Corp.*, 4 BNA OSHC at 1190. Respondent has failed to meet its burden in this regard.

[106] *See Atl. Battery Co.*, 16 BNA OSHC at 2166 n.56 (finding multi-employer worksite defense rejected when employer had "control" over the cited conditions).

that the subcontractor could conceivably have done something more to protect their exposed employees." *Elec. Smith, Inc.*, 666 F.2d at 1273-74 (9th Cir. 1982). We must therefore view Respondent's conduct in its totality and in terms of "whether a reasonable employer would have done more." *Capform, Inc.*, 16 BNA OSHC 2040, 2042 (No. 91-1613, 1994) (*citing Elec. Smith, Inc.*, 666 F.2d at 1273-74).

About 30-45 minutes into the job, Mr. Pacheco realized that Mr. Scesny was having difficulty operating the crane. He described the operator's movements as "erratic" and was concerned that Mr. Scesny would hit the energized overhead lines. Mr. Rochester saw cut branches hanging from the crane's chain strike the energized overhead lines three times. Mr. Pacheco also knew that reconfiguring the crane's chain and fabric rigging to only chains substantially increased the risk to those working in the kapok tree, including himself. He did not stop the job because it would take more time. (Tr. 642, 648, 672-673, 687, 695).

Despite the lethal combination of an erratic crane operator and the use of chain rigging on the crane, Mr. Pacheco never ask Mr. Scesny to continue to use fabric slings or reposition the crane. At the start of the job, Mr. Scesny initially refused to allow employees to ride the crane's hook up into the tree. Mr. McPherson protested and had him call his office. Respondent eventually prevailed upon him to allow Messrs. Pacheco and Carrera-Zarate to ride the crane's hook in violation of OSHA regulations. Similar pressure by Respondent could also have prevailed upon Mr. Scesny to revert back to using the fabric slings on the crane, especially where the goal was to reduce, not increase, the hazard to employees. Either Messrs. McPherson or Pacheco could have also again called Mr. Scesny's office and explained his erratic crane movements and the need to revert back to the use of fabric rigging. This was not even attempted. Although there is no evidence that the fabric slings were also not conductive, the use of only

metal chains as rigging dramatically increased the hazard of electrocution enough to raise concerns with Messrs. Pacheco, Rochester, and DeBenedetto.[107] Inexplicably, Mr. Pacheco assumed that Mr. Scesny knew how to safely operate the crane. (Tr. 642, 648, 674, 703).

From early August 21, 2012, Respondent knew that Mr. Scesny was a difficult person to deal with. Mr. Pacheco testified that he warned Mr. McPherson that he did not like Mr. Scesny's attitude at the start of the job. This was supported by Mr. Rochester who was a neutral observer at the job site. Overhearing a conversation between the crane operator and Mr. McPherson, Mr. Rochester described the crane operator as "a hot dog, very bullheaded, very set on doing things his way. A hard man to argue with." Even if Mr. Scesny refused to revert back to using fabric slings, Respondent had the option of stopping the job rather than allowing its employees to be exposed to a foreseeable and fatal hazard by an erratic crane operator who was using equipment that only exacerbated the hazard.[108] Not only did Respondent fail to take "realistic and reasonable" alternative measures, it took no measures at all. The Court finds that Respondent does not qualify for the exception set out in *Capform,* its purported multi-employer defense fails, and the cited standard applies. (Tr. 671-672, 692).

Willfulness

The Secretary alleges that Citation 2, Items 1a and 1b, are willful. A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996); *Williams Enterp.*, 13 BNA OSHC 1249,

[107] The crane's fabric rigging was itself conductive and presented an electrocution hazard. 29 C.F.R. § 1910.333(c)(i)(B) ("objects which do not have an insulating rating for the voltage involved are considered to be conductive").

[108] Respondent also failed to take corrective action to insist that Mr. Scesny stop operating the crane in the tree when his spotter left his station below the tree and sat in the truck in the front yard taking a break. This is when the accident occurred. (Tr. 691).

1256 (No. 85-355, 1987); *Asbestos Textile Co., Inc.,* 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984). The Secretary must differentiate a willful from a serious violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Valdak Corp.,* 17 BNA OSHC at 1136 (*citing Gen'l Motors Corp.*, *Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (No. 82-630, 1991). The Secretary must show that, at the time of the violative act, the employer was actually aware that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corp.,* 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999). Willfulness is negated by evidence that the employer had a good faith opinion that the conditions in its workplace conformed to OSHA requirements. *E.g., Calang Corp*., 14 BNA OSHC 1789, 1791 (No. 85-319, 1990). The test of good faith is an objective one, *i.e*., whether the employer's belief concerning the factual matters in question was reasonable under all of the circumstances. In other words, the employer's belief must have been "nonfrivolous." *Morrison-Knudson*, 16 BNA OSHC 1105, 1127 (No. 88-572, 1993); *McLaughlin v. Union Oil Co. of Cal.*, 869 F.2d 1039, 1047 (7th Cir. 1989).

The evidence demonstrates that All Florida had a heightened awareness of the hazard posed by the energized overhead lines and was indifferent to the safety of its employees. Messrs. McPherson and Pacheco assessed the job site before the job began. Mr. Pacheco told Mr. McPherson that the overhead lines needed to be de-energized. Mr. McPherson asserts that he made several unsuccessful attempts to get FP&L to de-energize the overhead lines. Having failed to get the overhead lines de-energized, Mr. McPherson took no other steps to protect his employees. For example, he could have asked FP&L to place insulated blankets or electrical

guards over the energized overhead lines. (Tr.110, 132, 142, 314, 702, 719, 739, 749).

Mr. McPherson's professed efforts to have the overhead lines de-energized demonstrate that he was fully aware that the energized overhead lines posed a hazard to his employees before the job began. On August 21, 2012, Mr. Pacheco told him of his concerns about the energized overhead lines. In a demonstration of plain indifference to employee safety, Mr. McPherson decided to proceed with the job anyway. He replied that the crane was already on the job site and it was too late to de-energize the overhead lines. (Tr. 598).

Respondent concedes that both it and Mr. McPherson knew that the primary overhead line was energized when Messrs. Pacheco and Carrera-Zarate worked up in the tree. Mr. Pacheco knew that Mr. Carrera-Zarate was working in the tree within 10 feet of the energized overhead lines. Both Messrs. McPherson and Pacheco knew that from the very start of the job the crane's rigging included chains that could come within 10 feet of, or even make contact with, the energized overhead lines. Mr. Pacheco was aware of the hazard posed by the combined hazard of an erratic crane operator and the use of chain rigging on the crane that might, and indeed did, make contact with the energized overhead line. As Respondent's foreman, Mr. Pacheco's knowledge may be imputed to Respondent. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994). The Court further finds that it was readily foreseeable to Mr. McPherson that Mr. Carrera-Zarate could either come within 10 feet of the primary energized overhead line or make contact with the line through the crane's chain rigging, as a result of the unsafe conduct of Foreman Pacheco who proceeded with the job at the owner's urging even though the lines remained energized. *ComTran Grp., Inc. v. United States Dep't of Labor*, 722 F.3d at 1316. (Tr. 198, 312).

The actions and knowledge of Owner McPherson, both actual and constructive, and

Foreman Pacheco establish Respondent's willfulness. Both were aware of the unsafe job site conditions, understood their duty and responsibility to employ appropriate safety precautions, and yet chose to proceed with the job while the overhead lines were energized. Both were fully aware that cutting the tree in the vicinity of the energized overhead lines was extremely dangerous. Mr. Pacheco taped a statement for his crew that the job was "going to be hell" because of the need to cut the power. *MJP Constr. Co., Inc.,* 19 BNA OSHC 1638, 1647 (No. 98-0502, 2001) (finding willfulness where the employer's supervisor had actual knowledge of safety standard and no protection) *aff'd* 56 F.Appx. 1 (D.C. Cir. 2003)(unpublished); *Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992) (finding employer who has notice of the requirements of the standard and is aware of a condition which violates that standard but fails to correct the violation demonstrates knowing disregard for purposes of establishing willfulness). (Tr. 626).

Two observers at the job site, Messrs. Rochester and DeBenedetto, were concerned when the crane operator removed the nylon straps and proceeded to use only chain rigging.[109] Mr. Pacheco, who was in charge of the job site and working up in the tree, was similarly concerned. Mr. Pacheco also testified that 30-45 minutes into the job, he observed Mr. Scesny operating the crane erratically. Placing the perceived need to complete the job that day as the overriding consideration, Mr. Pacheco decided not to stop the job because it would take more time.[110] To make matters worse, he realized that the hazard was heightened when Mr. Scesny reconfigured

[109] Mr. Rochester ran a tree removal business and Mr. DeBenedetto had 43 years of experience operating a crane.
[110] As noted, *supra*, at the start of the job, Respondent prevailed upon the operator to allow its employees to ride the crane's hook up into the tree. It failed to similarly attempt to prevail upon Mr. Scesny regarding the rigging. Mr. Pacheco admitted that he could have insisted that Mr. Scesny not remove the fabric slings, but he chose not to do so. This Court concludes that the reason Mr. Pacheco did not try to persuade Mr. Scesny to revert to using fabric rigging was that, while having the tree climbers ride the crane's hook rather than wait for a bucket, basket or platform to get to the job site sped up the job, requesting that Mr. Scesny again use fabric rigging would have taken time and slowed the job. (Tr. 677-678).

the crane's rigging from chains and fabric to only chains about two hours before the accident. Rather than ask Mr. Scesny to return to using fabric rigging, Mr. Pacheco chose to say and do nothing. Instead, he just figured that Mr. Scesny knew what he was doing, although he had reason to believe otherwise. The Court finds this excuse to be noncredible. Mr. Pacheco already observed that the operator was handling the crane erratically. He knew that the use of only chain rigging heightened the hazard that already existed. He certainly had a heightened awareness that the hazard to himself and Mr. Carrera-Zarate increased dramatically when the chain only rigging was employed, especially with an erratic crane operator. "The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful." *Branham Sign Co.*, *Inc.,* No. 98-0752, 2000 WL 675530, at *2 (OSHRC May 15, 2000). (Tr. 42, 627, 648, 672-673, 687, 703).

Respondent's willingness to allow the work to continue despite his knowledge regarding the proximity of the energized overhead lines, the danger posed by the crane's chain rigging, and the questionable attitude of the crane operator demonstrates that Respondent was willing to gamble with workers' safety and lives to complete the job. This is a wager Respondent lost and Mr. Carrera-Zarate unfortunately paid the price with the loss of his life. This willingness to gamble with the safety of the crew demonstrates a conscious, if not reckless, disregard for employee safety. *L.E. Myers Co.,* 16 BNA OSHC 1037, 1047-1048 (No. 90-945, 1993).

The Court finds that this evidence establishes that both Messrs. McPherson and Pacheco knowingly put completion of the job over safety. It further finds that Respondent willfully violated Citation 2, Items 1a and 1b. Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer unless the supervisory employee's misconduct was unpreventable. It is the employer's burden to show that the

supervisory employee's misconduct was unpreventable. *See, e.g., V.I.P Structures, Inc*., 16 BNA OSHC 1873 (No. 91-1167, 1994); *L.E. Myers Co.,* 16 BNA OSHC at 1046. Respondent made no such showing. Finally, where the actions of a supervisory employee are willful, the willfulness of those actions may be imputed to the employer. *MJP Constr. Co., Inc.,* 19 BNA OSHC at 1648**;** *Tampa Shipyards, Inc.,* 15 BNA OSHC at 1539.

The evidence establishes that as "unqualified" persons, both Messrs. Pacheco and Carrera-Zarate performed work near the primary energized overhead line that was not de-energized, grounded or otherwise protected as alleged in Citation 2, Item 1a. The evidence also establishes that the employees were working where conductive objects were or could be within 10 feet of the line as alleged in Citation 2, Item 1b. The violations were established. Additionally, the Court finds that the violations were causing or likely to cause death or serious physical harm.

Penalty

The Secretary proposed a penalty of $56,000 for Citation 2. CSHO Campos testified that the gravity of the violation was considered 10 out of 10 and warranted a gravity based penalty of $70,000. Because the violation was cited as willful and resulted in a fatality, no credit was given for good faith or history. A 20% deduction was given for the company's small size. (Tr. 322-323). The Court find that the Secretary properly considered the factors set forth in § 17(j) of the Act, 29 U.S.C. § 666(j), and that the proposed penalty is appropriate.[111] A penalty of $56,000 is assessed. (Tr. 322).

Findings of Fact and Conclusions of Law

[111] A high penalty is necessary to induce compliance. *See e.g. Revoli Constr.,* 19 BNA OSHC 1682, 1687 (No. 00-0135, 2001).

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that

1. Citation 1, Item 1 for a serious violation of 29 C.F.R. § 1910.180(h)(3)(v) is **AFFIRMED** and a penalty of $2,800 is **ASSESSED**; and

2. Citation 2, Items 1a and 1b, for willful violations of 29 C.F.R. § 1910.333(c)(3) and 29 C.F.R. § 1910.333(c)(3)(i)(A)(1), are **AFFIRMED** and a penalty of $56,000 is **ASSESSED.**

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: January 22, 2015
Washington, D.C.