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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ASPLUNDH TREE EXPERT, LLC, and its successors, Respondent.	OSHRC Docket No. 21-0497

Appearances:

Kristi Henes, Esq., and Javier G. Diaz, Esq., Department of Labor, Office of Solicitor, Denver, Colorado
For Complainant

David L. Zwisler, Esq., Ogletree Deakins Nash Smoak & Stewart, P.C., Denver, Colorado
For Respondent

Before: Judge Christopher D. Helms– U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On November 2, 2020, Asplundh Tree Expert, LLC ("Respondent") performed tree-trimming services at a jobsite located at 1777 CR 241, New Castle, Colorado ("worksite" or "site"). On that date, three of Respondent's employees, [Redacted] ('[Redacted]"), [Redacted] ("[Redacted]"), and James Haynes ("Haynes"), the crew foreman, entered the worksite in order to perform tree-trimming services. (Ex. C-10).

As part of these tree-trimming services, the crew was tasked with removing the top portions of several large cottonwood trees. (Ex. C-10). In order to remove a top portion of one of the trees, crewman [Redacted] ascended the tree. (Ex. C-10). After [Redacted] proceeded to cut the top portion of the tree, it broke off and fell in an unattended direction striking the branch [Redacted] was standing on. (Ex. C-10). This caused [Redacted] to fall to the ground, suffering severe injuries. (Tr. 332; Ex. C-10). Respondent notified the Occupational Safety and Health Administration ("OSHA"). (Tr. 220-22). OSHA's Denver, Colorado, Area Office initiated an investigation after the notification. (Tr. 216-17, 220-22).

At the close of OSHA's investigation, on April 26, 2021, the Secretary of Labor ("Secretary") issued a Citation and Notification of Penalty ("Citation") to Respondent. The Citation alleges a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 U.S.C. §§ 651-678 (the "Act"), the statutory provision commonly referred to as the general duty clause. Specifically, the Alleged Violation Description ("AVD") of the Citation alleges Respondent "did not provide safe means or methods to remove a dead cottonwood tree in cold weather" exposing Respondent's employees to struck-by and fall hazards while performing tree trimming operations. The Citation indicates that feasible and effective means existed to eliminate or materially reduce the hazards, and specifically notes that "[a]mong other methods, one feasible acceptable method to correct the hazards is to ensure that all dead limbs are trimmed from a safe distance by using a bucket truck or similar equipment." The Citation proposes a total penalty of $13,653.

On May 19, 2021, Respondent timely filed a notice of contest, thereby bringing the matter before the Occupational Safety and Health Review Commission ("Commission") pursuant to section 10(c) of the Act. 29 U.S.C. § 659(c). A two-day trial was held on June 7, 2022 and June

8, 2022. The Secretary presented four witnesses: 1) an expert witness, Donald Blair[1]; 2) the Assistant Area Director for the Denver Area Office, Lisa Bennett; 3) an employee for Respondent, Donald O'Campo; and 4) a foreperson for Respondent, Christopher Martinez. Respondent did not call any witnesses, but portions of a deposition of Compliance Safety and Health Officer ("CSHO") Katherine Rain were entered into evidence as she was medically unavailable. (Tr. 383-84; Ex. R-40).

Both parties submitted timely post-trial briefs.[2] Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law.

For the reasons discussed, Citation 1, Item 1 is VACATED.

II. Stipulations and Jurisdiction

The parties stipulated to various facts, including several jurisdictional details.[3] (Ex. J-1). Based on the Joint Stipulations, the Court finds the Commission has jurisdiction over this action pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the Court obtained jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act ("Act") upon Respondent's timely filing of a notice of contest. 29 U.S.C. § 659(c). The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5).

[1] At the trial, Mr. Blair testified as an expert arborist. (Tr. 21-23). He has been an arborist for over 50 years. (Tr. 22). He founded and led various businesses relating to arborist work, consulting, and education, including the M.F. Blair Institute of Arboriculture, Sierra Moreno Mercantile Company, and Blair's Arborist Equipment. (Tr. 24-27). Mr. Blair also assisted in authoring various industry standards, publications, and books relating to the arborist industry. (Tr. 23-24, 34-39; Ex. C-17 at 3). He specifically helped draft the ANSI Z-133 standards. (Tr. 35-37; Ex. C-17 at 3).

[2] Affirmative defenses not raised at the trial are deemed waived and abandoned by Respondent. Any affirmative defenses not raised at the trial are deemed waived by Respondent. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 428–29 (5th Cir. 1991); *Ga.-Pac. Corp.,* 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[3] The Joint Stipulations were received and admitted as a Joint Exhibit into the record.

The parties stipulated that the Secretary employed Katherine Rain as a CSHO for OSHA. (Ex. J-1). The CSHO was assigned to OSHA's Denver, Colorado Area Office, and she inspected Respondent's worksite in November 2020. *Id*.

III. Factual Background[4]

Respondent is a nationwide tree-trimming company that contracted with Xcel Energy ("Xcel") in Colorado to prune and manage vegetation affecting Xcel's power infrastructure. (Tr. 220; Exs. J-1, C-10). It is headquartered in Pennsylvania with approximately 34,000 employees nationwide and roughly 290 employees located in Colorado at the time of the incident. (Tr. 74, 220-21; Ex. J-1).

In November 2020, Respondent was engaged in tree pruning and vegetation management at a worksite located at 1777 CR 241, New Castle, Colorado ("site" or "worksite"). (Citation; Tr. 220; Ex. J-1). Xcel had hired Respondent to trim and prune trees that could threaten Xcel's power infrastructure. (Tr. 220; Exs. C-10, C-19). Specifically, Respondent was tasked with trimming several dead cottonwood trees that were interfering with Xcel's powerlines. (Exs. C-10, C-11).

Respondent's worksite management consisted of crew foreman James Haynes. (Ex. C-10). The crew further consisted of [Redacted] and [Redacted]. (Ex. C-10). Respondent's general foreman, who supervised all of Respondent's crews at the time of the accident, was Ramon Varela. (Tr. 318; Exs. C-6, C-8, C-25).

On November 2, 2020, Respondent's crew arrived at the worksite to trim trees. (Tr. 220; Exs. J-1, C-10). Respondent's employees had been instructed to remove the tops of certain trees on the site. (Tr. 45). When Respondent's crew arrived, they performed a Job Safety Briefing before beginning their work. (Tr. 67-68, 102; Exs. C-10 pp. 13-14, R-40 at 144-45). This job

[4] The factual background is based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

briefing included a description of the tasks to be performed, the tools needed for the job, potential hazards, and steps to ensure proper safety. (Ex. C-10 at 12-22). "Dead trees" were identified as a safety hazard. (Ex. C-10 at 13). The Job Safety Briefing was signed by [Redacted], [Redacted], and James Haynes. (Ex. C-10 at 13).

Haynes determined they would need a 60/70 bucket truck in order to top the 70-foot height of one of the trees.[5] (Tr. 47, 330; Ex. C-8). However, Respondent did not provide the 60/70 bucket truck. (Tr. 47, 330). Respondent did not have permission to use the 60/70 bucket truck on site.[6] (Tr. 271). Respondent instead provided a second crew and a smaller squirt boom to assist in topping the hazard trees.[7] (Tr. 49-50, 195-96, 249-50, 337; Ex. C-15). The squirt boom crew consisted of foreman Chris Martinez and crewmember Alfred Rankin. (Tr. 324). Upon arrival at the worksite, the squirt boom crew reviewed the Job Safety Briefing and discussed the plan the first crew had developed. (Tr. 50-51, 320, 325; Ex. C-10 at 12-13).

Prior to the squirt boom crew's arrival, [Redacted], unaware of the squirt boom crew's impending arrival, proceeded to climb a dead cottonwood tree in need of topping. (Tr. 352-53; Ex. C-8). [Redacted], a trained climber with 17 months of experience, made it approximately 35 feet up the tree but was unable to climb any further due to structural weakness in the tree.[8] (Tr. 152-54, 352-53; Ex. C-8). The remaining 35-foot portion of the tree, above [Redacted], needed to

[5] A 60/70 bucket truck refers to the 60-to-70-foot height the bucket on the truck, carrying a tree trimmer, can reach. (Tr. 47).

[6] The Secretary's expert witness admitted the 60/70 truck would have been preferred if Respondent had permission. However, Mr. O'Campo testified that Respondent did not have permission to use the 60/70 truck on the worksite. (Tr. 271). The Secretary's expert witness conceded that a qualified climber could do the work with the equipment provided, that a bucket truck or other aerial lift are not required to do the work, that dead cottonwood trees can be climbed, that the specific cottonwood tree in this case was actually safe to climb, that nothing in the ANSI standards required a 60/70 truck, and that there was nothing in the instance here that required a bucket truck. (Tr. 155-59, 165, 198).

[7] A squirt boom truck can lift a tree trimmer in the air up to a 42-foot working height. (Tr. 77-78, 320-21, 330; Ex. C-15).

[8] The Secretary's expert admitted he had erroneously labeled [Redacted] as an inexperienced climber. (Tr. 152-153).

be topped. (Tr. 352-53). Before beginning his cut, [Redacted] tied into a fall protection system. (Tr. 232). [Redacted] secured his lanyard around the main stem of the tree and his climbing line around the branch on which he was standing.[9] (Tr. 65, 121-22, 141-42, 157-59, 248, 328-29, 339-42, 348; Ex. C-10 at 19-20, R-40 at 69-70). Respondent's employees, who were not in the tree, held on to a tag line intended to guide the portion of the tree that was being topped in a safe direction. (Tr. 69, 167-68, 331).

[Redacted] proceeded with his first cut, the notch cut, into the tree at a 32-degree angle. (Tr. 62-63, 167, 191).[10] The notch cut is the first cut made and is intended to direct the falling path of the portion of tree being cut. (Tr. 57). The notch cut consists of a top cut and a bottom cut which together create an angle to aim the falling portion of tree in the intended direction. (Tr. 57-58). [Redacted] then proceeded to make a back cut but did so incorrectly and created a bypass cut instead. (Tr. 332-34). A back cut is used to remove wood from the back of the tree and create a hinge in conjunction with the initial notch cut. (Tr. 60-61). The hinge is a strip of wood left between the face notch cut and back cut that helps guide the topped portion of the tree to fall in the intended direction. (Tr. 60-61). When a back cut goes too far into the tree through the hinge and into the notch cut, a bypass cut occurs. (Tr. 61). The bypass cut was not observed by Respondent's employees on the ground because they were working on the opposite side of the tree.[11] (Tr. 64, 168, 344; Ex. C-11 at 2).

[9] The Secretary's expert conceded that tie-in locations on trees are tree specific, that tying to the main stem is not referenced in the ANSI standards, that he did not actually know where the lanyard was tied off to, and that his original theory that they lanyard was tied around the branch [Redacted] was standing on did not make sense. (Tr. 158-59, 179-80, 184).

[10] The Secretary's expert admitted that the notch cut was adequate. (Tr. 62-63, 167, 190-91).

[11] The Secretary's expert admitted that Respondent's employees on the ground would not be able to gauge the exact angle of the cut made by [Redacted]. (Tr. 78, 193).

The improper back cut caused the topped portion of the tree to fall in an unintended direction. (Tr. 332; Ex. R-40 at 72, 75-77). The top portion of the tree, estimated to weigh 875 pounds, struck the end of the branch on which [Redacted] was standing and to which his second tie off was secured. (Tr. 328-29, 332; Ex. C-17 at 7). As a result of the top portion of the tree striking the branch, [Redacted]'s lanyard around the main stem was lifted over the area in which he was tied off and caused [Redacted] to fall about 35 feet to the ground. (Tr. 204-09, 332). [Redacted] sustained a broken leg and permanently disabling spinal injuries from the fall. (Tr. 332).

Respondent notified OSHA of the incident as part of the Rapid Response program. (Tr. 220-22). OSHA assigned CSHO Rain to investigate the matter, and she conducted an onsite inspection. (Tr. 220-23; Ex. J-1). Through the course of her investigation, she conducted an opening conference, inspected the worksite, gathered pertinent facts, and conducted a closing conference with Respondent's employees. (Tr. 222-23).

As a result of OSHA's inspection, the Secretary issued Respondent the Citation for a violation of the general duty clause. The Citation alleged Respondent's employees were exposed to struck-by hazards and fall hazards while performing tree trimming operations on a dead cottonwood tree. On April 26, 2021, OSHA issued the Citation that is at issue in this case.

IV. Discussion

A. Law Applicable to Alleged Violation

The general duty clause requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees…" 29 U.S.C. § 654(a)(1). To prove a violation of the general duty clause, the Secretary must show that: (1) a condition or

activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) that a feasible means existed to eliminate or materially reduce the hazard. *Arcadian Corp*., 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) citing *Pelron Corp*., 12 BNA OSHC 1833, 1835 (No. 82-388, 1986); *K.E.R. Enters.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013).

The Secretary must also prove that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Cranesville Block Co., Inc.*, 23 BNA OSHC 1977, 1985 (No. 08-0316, 2012) (consolidated); *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

The Secretary has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Preponderance of the evidence, Black's Law Dictionary (10th ed. 2014) (emphasis added).

1. Citation 1, Item 1

The Secretary alleges that Respondent violated the general duty clause in Citation 1, Item 1 as follows:

> OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to struck-by and fall hazards while performing tree trimming operations:
>
> > On or before November 2, 2020, the employer did not provide safe means or methods to remove a dead cottonwood tree in cold weather. An employee was instructed to climb a tree to cut limbs for the removal. The employee

> tied off to a leader branch that was struck-by another branch when it was cut. As a result, the leader branch that the employee had been tied to broke off and fell approximately 35 feet to the ground. The employee sustained a broken leg and permanently disabling spinal injuries when he landed on the ground. This condition exposed employee to struck-by hazards and a fall hazard of approximately 35 feet.
>
> Among other methods, one feasible acceptable abatement method to correct the hazards is to ensure that all dead limbs are trimmed from a safe distance by using a bucket truck or similar equipment.

See Citation.

For the reasons set out, the Court finds that the Secretary failed to meet its burden to establish Respondent violated the general duty clause.

a. Existence of a Hazard

To establish a violation of the general duty clause, the Secretary must first define the hazard at issue. *K.E.R. Enters.*, 23 BNA OSHC at 2242. "A safety hazard at the worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indus., Inc. v. OSHRC*, 660 F.2d 439, 444 (10th Cir. 1981). When the Secretary proceeds under the general duty clause, it must define the hazard "in a way that apprises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Arcadian*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004); *see also Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993) ("[W]hen the Secretary proceeds under the general duty clause, he must meet the same minimal criterion regarding the nature of the alleged hazard as he does when promulgating a section 5(a)(2) standard."). There is no requirement that there be a significant risk of the hazard coming to fruition. *Waldon*, 16 BNA OSHC at 1060. Instead, the test is whether, if the hazardous event occurs, would it create a significant risk of harm to employees. *Id.* While employers cannot be cited for unpreventable conditions, "the existence of a hazard is established if the hazardous

incident can occur under other than a freakish or utterly implausible concurrence of circumstances." *Waldon*, 16 BNA OSHC at 1060, citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973); *Pelron*, 12 BNA OSHC at 1835.

The Secretary argues that Respondent's employees were exposed to fall and struck-by hazards when they were directed to perform tree-topping of dead cottonwood trees. (Sec'y Br. at 8-10). While alleging that the hazard was improperly defined as a general duty clause violation, Respondent does not dispute that trees fall at its worksites.[12] (Resp't Br. at 4-8). It was aware that certain dead cottonwood trees posed a risk to Xcel's powerlines and needed to be trimmed. (Tr. 44-47). Trimming and reducing tree-related hazards to Xcel's power infrastructure was a routine practice. (Tr. 220-23).

The Secretary's expert explained that a dead tree is a suspect tree due to the rot and structural weakness that results. (Tr. 86, 119-20, 352). If trees are too far degraded, they could collapse if you jumped on them. (Tr. 75). The expert further explained that a dead tree can decay to the "point it has the consistency of angel food cake." (Tr. 86). These dead portions of trees can fall in unintended ways and injure employees. (Tr. 121-22).

The Secretary alleges that dead cottonwood trees present a hazard during trimming because employees can fall or employees can be struck by portions of the tree to be trimmed. The Secretary's expert stated falling and trees striking employees are the most recognized hazards in the tree-trimming industry. (Tr. 137). Trimming dead trees, such as the dead cottonwoods, could lead to falling and crushing employees. (Sec'y Br. at 7-9; Ex. C-10). Respondent acknowledges as much in its TapRoot Report, job briefings, and Job Hazard Assessment ("JHA"). (Ex. C-10).

[12] Respondent attempts to argue that an existing standard, under 29 C.F.R. § 1910.28, precludes citing section 5(a)(1). (Resp't Br. at 6-9). This Court finds that section 5(a)(1) is not precluded and further discusses its reasoning, *infra*, at section V. Affirmative Defenses.

Respondent's JHA specifically acknowledges "fall from height" and "being hit/struck by falling/moving object[s]" as possible safety or environmental hazards at the worksite. (Ex. C-10 at 15-22). Further, there is no credible dispute that Respondent's employees were exposed to struck-by and fall hazards while performing tree trimming operations on dead cottonwood trees. The Secretary established the presence of a hazard (employees falling and dead cottonwood trees falling and striking employees) at the worksite to which employees were exposed.

b. Hazard Recognition

The Secretary can establish hazard recognition either "by proof that a hazard is recognized as such by the employer or by general understanding in the employer's industry." *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *7 (OSHRC, Mar. 4, 2019). The Secretary argues that Respondent was aware of the hazards presented by dead cottonwood trees at its worksites and that its employees were exposed to these hazards. (Sec'y Br. at 9-11). Besides Respondent's own recognition, the Secretary argues that the industry also recognized the hazard of these dead trees striking employees and employees potentially falling. *Id.*

i. Respondent's recognition of the hazard

In support of its contention that Respondent recognized the hazards, the Secretary points to Respondent's Line Clearance Qualification Standard Employer Training Manual ("LCQS Manual"). (Sec'y Br. at 9). Respondent disputes the Secretary's framing of the hazards. It argues that it is unclear from the record what hazard the Secretary is alleging. (Resp't Br. at 9-11). Respondent further argues the series of events which caused [Redacted] to fall from the tree was an uncommon occurrence which is not expected, known, or recognized in the tree-trimming industry. (Resp't Br. at 11-12). It argues that it could not have recognized the hazard because it was freakish in nature and could not have been foreseen. (Resp't Br. at 11-12).

Despite these contentions, both parties agreed (Respondent through its trainings, hazard assessments, safety briefings, and directions to employees) that trimming dead cottonwood trees are dangerous. (Tr. 220-21; Ex. C-10). They agreed, and the facts of the case showed, they may cause severe injury because of their unstable and unpredictable nature. (Tr. 75, 86, 119-22, 352; Exs. C-10, C-16). Respondent's employees had acknowledged dead trees as a hazard in their Job Safety Briefing before beginning their work. (Ex. C-10 at 12-13). They had also acknowledged "being hit/struck by falling/moving object[s]" in their Job Hazard Assessment. (Ex. C-10 at 16-22). Supervisory personnel had also recognized this hazard and had signed the Job Safety Briefing. (Ex. C-10 at 12-13). Respondent routinely directed employees to assess, trim, and mitigate dangerous dead trees. (Tr. 220-21; Ex. C-10). It assigned Haynes' crew to trim and mitigate dangerous dead trees at the worksite precisely because they posed a hazard. (Tr. 220-21; Ex. C-10).

Respondent recognized the hazards which is evidenced through the trainings it provided its employees. (Tr. 154, 246-48; Exs. C-16, R-40 at 85-89). *See Integra*, 2019 WL 1142920, at *8. Respondent provided training on the hazards and discussed the dangers of dead tree hazards, such as falling and portions of trees striking employees in their Job Safety Briefings and Job Hazard Assessments. (Tr. 154, 246; Exs. C-10, C-16, R-40 at 143-45). Its written safety policies define the hazard dead trees pose to employees and include information designed to address the hazards these dead trees present.[13] (Tr. 66, 121-22; Exs. C-10, C-16, R-40 at 85-89). Specifically, Lesson 13 of the LCQS Manual discusses tree felling. (Tr. 53-54; Ex. C-16 at 5). Lesson 13 states that "[f]elling trees, if not done under control, can cause property damage and injury, including loss of life." (Ex. C-16 at 6). The Lesson continues by stating the first step in proper tree felling

[13] The training materials and manual included specific lessons on felling trees safely. (Ex. C-16).

is to check the site and tree for hazards. (Ex. C-16 at 7). Hazards include falling trees and the "felling path" of the tree. *Id.* Step 3 acknowledges struck-by and fall hazards when it instructs employees to use proper escape routes when the tree begins to fall. *Id*. Step 5 additionally warns of struck by and fall hazards when it instructs employees to "[c]heck felling site for hangers/hazards after tree falls to ground prior to proceeding back into the felling site." *Id*. Struck by and falling hazards are further warned against in the reiteration of the "Danger Zone" around the tree to be felled. *Id*. Employees are instructed to avoid this "Danger Zone" when a tree is being felled for their protection. (Ex. C-16 at 7). Further, Lesson 11 of the LCQS Manual discusses specific Pruning Cuts to be used when trimming trees. (Ex. C-16 at 3-4). The Lesson describes how to make appropriate cuts on different limbs and how to safely drop and guide them to the ground. *Id*. Lesson 11 specifically states "[d]o not allow bypass cuts when notching" as control of the tree part being trimmed will not be able to be maintained. *Id*. Respondent's training materials also reference topics covered in ANSI Z-133. (Exs. C-16, R-40). *Seward Motor Freight, Inc.*, 13 BNA OSHC 2230, 2232 n.5 (No. 86-1691, 1989) ("An ANSI standard is relevant evidence that a hazard is 'recognized' within the meaning of section 5(a)(1)."). Respondent trained its employees on the safety tree trimming measures set out in its written materials. (Exs. C-16, R-40 at 85-89).

Respondent was well aware of arborist industry guidelines, particularly ANSI Z-133. There is substantial evidence in the record that Respondent recognized the hazards posed by trimming dead trees and the applicability of ANSI Z-133 to its business. (Tr. 66, 121-22; Exs. C-10, C-16, R-40 at 171-73, 179-81). Respondent's training specifically included material similar to ANSI Z-133 tree felling safety requirements and using chainsaws to fell trees. (Exs. C-16, R-40 at 16-17, 85-89, 171-73, 179-81). Respondent's own work rule in the LCQS Manual

specifically addresses fall protection systems and tie-in procedures to avoid fall and struck-by hazards associated with climbing trees. (Ex. C-16).

Respondent's training on how to address the hazards from trimming dead trees is significant evidence it recognized the hazard. *See Integra*, 2019 WL 1142920, at *8; *Waldon*, 16 BNA OSHC at 1062 (employer's safety manual that defined and set forth "precautionary steps" to prevent the hazard was evidence of employer's recognition of the hazard); *Gen. Dynamics Land Sys. Div. Inc.*, 15 BNA OSHC 1275, 1285 (No. 83-1293, 1991) (safety bulletins issued by employer to employees was evidence of employer's recognition of the hazard), *aff'd*, 985 F.2d 560 (6th Cir. 1993) (unpublished). Respondent provided specific training on hazards related to trimming dead trees, and supervisors directed employees to remove such trees because of the risks they posed.

The Secretary sufficiently established hazard recognition. *See Integra*, 2019 WL 1142920, at *8; *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1186 (No. 91-3144, 2000) (consolidated) (finding employer had actual recognition where "managers at the highest level of the corporation recognized the hazard posed"); *Waldon*, 16 BNA OSHC at 1061-62 (precautions taken by an employer can be used to establish recognition in conjunction with other evidence).

ii. Industry recognition

The Secretary also argues the relevant industry recognized the cited hazards. (Sec'y Br. at 11). Industry recognition may be shown through the general understanding in the employer's industry. *See Integra*, 2019 WL 1142920, at *8. ANSI standards are developed in an attempt to provide safety standards for a variety of workers engaged in various industries. Combined with expert testimony, they can provide evidence of industry hazard recognition. *See Beverly*, 19 BNA OSHC at 1181; *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979); *ACME Energy*

Servs., 23 BNA OSHC 2121, 2124 (No. 08-0088, 2012) (industry recognition may be shown through the knowledge or understanding of industry safety experts) *aff'd*, 542 F. App'x 356 (5th Cir. 2013) (unpublished).

The Secretary's expert testified that ANSI Z-133 applies to dead trees and trimming of those trees, like those at Respondent's worksite. (Tr. 137; Ex. C-17). *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1813 (No. 87-692, 1992) (ANSI standard provides evidence of industry recognition of a hazard). The arborist industry recognizes the danger of being struck by a falling dead tree when they are being trimmed. If an employer is engaged in tree felling, the danger and hazard posed remain the same "regardless of why the tree is being felled." *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207, 1210 (6th Cir. 1995). Respondent adopted safety materials similar to ANSI Z-133 and trained its employees on it. (Tr. 66, 121-22; Exs. C-10, C-16, R-40 at 16-17, 85-89, 171-73, 179-81). Similarly, to the current case, in *Nelson Tree Services* the company was hired not only to fell trees obstructing utility lines, but to trim and cut trees obstructing utility lines as well. *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207, 1210 (6th Cir. 1995). There, *Nelson Tree Services* had argued felling an entire tree was not a recognized hazard in their industry, because they typically topped a tree prior to felling it which reduced and changed the hazard. *Id*. The court rejected this argument and stated, "that although felling preparations may differ according to the reason for felling, the danger posed by a falling tree remains the same; a falling tree creates the same hazard, regardless of why that tree is being felled." *Id*. Simply put, the hazards, namely struck by and fall hazards, from trimming dead trees is the same as if felling them.

Beyond ANSI Z-133, the testimony of the Secretary's expert bolsters the evidence of industry recognition. (Tr. 137; Ex. C-17). According to the Secretary's expert, the number one hazard related to trimming a tree is falling. (Tr. 137). OSHA's Assistant Area Director

additionally testified regarding the tree-trimming industry's recognition of fall hazards and the fall protection methods and equipment needed to ensure that workers are safe while trimming trees. (Tr. 228-29). This testimony, combined with the other record evidence, presents strong evidence of industry recognition of the cited hazards. *See Beverly*, 19 BNA OSHC at 1181 (recognizing that "voluntary industry codes and guidelines are evidence of industry recognition" but also relying on expert testimony to establish industry recognition); *ACME Energy*, 23 BNA OSHC at 2124 (holding industry recognition may be shown through the knowledge or understanding of safety experts familiar with the hazard in question).

The Secretary can establish hazard recognition by showing either the employer's recognition or industry recognition. *Integra*, 2019 WL 1142920, at *8. Here, the Secretary has shown both employer and industry recognition of the hazards. Therefore, the Secretary carried this element of its burden of proof.

c. Death or Serious Physical Harm

To determine whether a hazard is "causing or likely to cause death or serious physical harm," the Commission does not look to the likelihood of an accident or injury occurring, but, instead, looks to whether, if an accident occurs, the results are likely to cause death or serious harm. *See Babcock*, 622 F.2d at 1164; *Beverly*, 19 BNA OSHC at 1188; *Waldon*, 16 BNA OSHC at 1060; *R.L. Sanders Roofing Co.*, 7 BNA OSHC 1566, 1569 (No. 76–2690, 1979), *rev'd on other grounds*, 620 F.2d 97 (5th Cir. 1980).

Respondent's employee, [Redacted], fell from an approximately 35-foot distance when the portion of tree he was trimming fell on the branch he was standing on. (Tr. 204-09, 332, 352). The possibility of death or serious physical harm resulting from an employee falling 35 feet is "supplied by common sense [and] understanding of physical law." *Ill. Power Co. v. OSHRC*, 632

F.2d 25, 28 (7th Cir. 1980). The record supports this commonsense conclusion.

Further, [Redacted] sustained severe injuries. While not dispositive, the existence of an actual injury to employees from the cited hazard is evidence that the hazard presented a risk of death or serious physical harm. *See, e.g., Beverly*, 19 BNA OSHC at 1188-90 (citing actual back injuries suffered by the employer's workers as evidence that the hazard posed a risk of serious harm). As a result of falling approximately 35 feet to the ground, [Redacted] was hospitalized. (Tr. 204-09, 280-81, 332, 352; Ex. C-8). He sustained a broken leg and permanently disabling spinal injuries from the fall. (Tr. 332). Broken bones constitute serious physical harm even if a worker recovers with no permanent side effects. *Waldon*, 16 BNA OSHC at 1060 n.6.

The Secretary established that the hazards presented by trimming dead trees was likely to cause death or serious physical harm.

d. Feasible Means of Abatement

When an employer has taken some action to address a hazard, the Secretary must show that it was inadequate. *See U.S. Postal Serv., Nat'l Ass'n of Letter Carriers,* 21 BNA OSHC 1767, 1773 (No. 04-0316, 2006). Respondent's training materials and work rules refer to similar safety standards articulated in ANSI Z-133. (Tr. 66, 121-22, 141, 154-55; Exs. C-10, C-16, R-40 at 16-17, 85-89, 171-73, 179-81). The Secretary argues that despite the references, there were deficiencies in supervision and rule enforcement. (Sec'y Br. at 12-15).[14] Following [Redacted]'s injury, Respondent's supervisors now conduct hands on job training with employees. (Tr. 310). *See SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1206, 1215 (D.C. Cir. 2014) (finding existing safety procedures inadequate); *BHC Nw. Psychiatric Hosp., LLC v. Sec'y of Labor*, 951 F.3d 558,

[14] Although the Secretary now argues there were deficiencies in supervision and rule enforcement, the Secretary did not cite Respondent for any failure in training or supervision or specify enforcement or supervision of work rules as a feasible means of abatement. (Tr. 154, 246; Ex. C-1). The Secretary also admitted that the citation was not issued as a result of a failure in training, supervision, equipment, or fall protection. (Tr. 246-47; Ex. R-40 at 16-17).

565 (D.C. Cir. 2020) (finding incomplete and inconsistently implemented safety protocols were inadequate to address the cited hazard).

To demonstrate a "feasible" means of abatement, the Secretary "must specify the proposed abatement measures and demonstrate that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly*, 19 BNA OSHC at 1191. The Secretary must also show that the proposed abatement measures are economically feasible. *Waldon*, 16 BNA OSHC at 1063.

The Secretary argues that the violation could feasibly be abated by improving employee supervision and ensuring that dead limbs are trimmed from a safe distance by using a bucket truck or similar equipment. (Sec'y Br. at 12-15). However, the Secretary's own witness conceded that a qualified climber could do the work, in this case, with the equipment provided. (Tr. 155-56, 158-59, 165, 198). The expert specifically testified that a bucket truck or other aerial lift are not required to do the work performed by Respondent. (Tr. 155-56, 158-59, 165, 198). He stated that dead cottonwood trees can be climbed and that, specifically, the dead cottonwood in this case was actually safe to climb. (Tr. 155-56, 158-59, 165, 198). Nothing in the ANSI standards require the use of a 60/70 bucket truck and there was nothing in this instance that required one. (Tr. 155-56, 158-59, 165, 198). *See Arcadian*, 20 BNA OSHC at 2011 ("Feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard."); *Nelson Tree Servs., Inc.*, 60 F.3d at 1211 ("[S]ubstantial evidence supports the administrative law judge's finding that there existed feasible means, which [the employer] could and should have taken, to eliminate or substantially reduce the hazard of being struck by a prematurely felled tree.").

The Secretary's own expert admitted that the Secretary's own proposed abatement measures were not needed in this instance. (Tr. 155-56, 158-59, 165, 198). Further, the Secretary admitted that the citation was not issued as a result of a failure in training, supervision, equipment, or fall protection. (Tr. 246-47; Ex. R-40 at 16-17, 85-89, 91). The Secretary and its expert admitted [Redacted] was a trained climber and not inexperienced as previously thought. (Tr. 152-54; Ex. R-40 at 16-17, 85-89, 91, 147). Consistent with his report, the Secretary's expert testified that a qualified climber could do the work with the equipment provided by Respondent. (Tr. 156; Ex. C-10 at 10).

The Secretary's expert specifically testified that the proposed abatement of trimming all dead limbs from a bucket truck was not feasible. (Tr. 162). On cross-examination, he testified:

> Q. Are you aware of any company in the industry that requires all dead limbs to be trimmed from a bucket or similar aerial lift?
>
> A. Well, no.
>
> Q. Okay. So the fact that the feasible method of abatement that has been proposed by OSHA as requiring Asplundh to have all dead limbs be cut from a bucket truck or similar aerial lift just isn't feasible?
>
> A. That isn't the way I take this case.
>
> Q. I'm not asking you to take the case. Is it feasible to -- is it an industry standard that all dead limbs would be cut from a bucket truck?
>
> A. Absolutely not.
>
> (Tr. 162).

While the Secretary provided the use of a bucket truck or similar aerial lift as one feasible means of abatement in the Citation, it proposed alternative feasible means of abatement as well at trial, although the Secretary did not specify such alternative means in the Citation itself. At trial, the Secretary argued proper employee supervision and training enforcement as alternative feasible

means of abatement. (Tr. 360-61; Sec'y Br. at 12-15). Respondent contends this position is wholly inconsistent with the Secretary's original position in that Respondent was not cited for a failure in training or supervision. (Resp't Br. at 16-17). Respondent points to the Secretary's expert's testimony, that Respondent's training and associated materials met or exceeded industry standards, in support of its inconsistency argument. (Tr. 141-42, 154-55; Resp't Br. at 16-17).

Despite Respondent's assertions, the record reveals that the nature of the alternative means of abatement, of proper employee supervision and training enforcement, were recognized and tried by the parties. During the trial, the Secretary's expert testified extensively about these alternative means of abatement. (Tr. 78-79, 196-97). The expert's report, which Respondent had before the trial, alleged lack of proper supervision as "[p]erhaps the greatest contributing factor to this incident." (Ex. C-17 at 8). The Secretary's expert had also testified, at the trial, concerning adequate supervision as an abatement method. (Tr. 78-79, 97-99, 196-97). Further, Respondent was able to cross examine and depose the Secretary's expert about adequate supervision as an abatement. (Tr. 139). Respondent's ability to prepare and present its case was not impaired by the Secretary's alternative abatement methods.

The record showed that the use of a bucket truck or similar aerial lift would not eliminate or materially reduce the fall and struck-by hazards in this case. (Tr. 160-62, 250-51). The use of a bucket truck in this instance would actually create an additional electrical hazard as the dead cottonwoods were in proximity to power lines. (Ex. R-40 at 93, 166-68). The Secretary presented no evidence that employee supervision or training enforcement would materially reduce the hazard. The Secretary's expert admitted that Respondent's training and associated materials met or exceeded industry standards. (Tr. 141, 154-55). The Secretary also did not cite Respondent for any failure in training or supervision. (Tr. 154, 246). The Secretary's expert testified:

Q. So the documentation by all accounts shows that he was trained in both climbing and cutting.

A. Yes. The implementation of such is another source.

Q. You're aware that there's no citation here for failure to train Mr. [Redacted], correct?

A. Yeah, we're just talking about the 501.5(a)(1).

Q. No citation for failure even in the supervision of Mr. [Redacted], correct?

A. No, there's just the general duty citation.

Q. And in the general duty clause citation they don't say you failed to properly trained, [sic] correct?

A. That's correct.

Q. And in fact in the materials that you've seen, it appears that Asplundh has training requirements that are equal to or better than the industry requirements.

A. Yes, I have no quarrels with the LCQS.

(Tr. 154-55).

The Secretary points to no evidence showing [Redacted] was acting contrary to Respondent's own guidelines. OSHA was aware that [Redacted] was tied off, in conformance with Respondent's policies, but did not know exactly where those tie-in locations were. (Tr. 247-48; Ex. R-40 at 69-71). The Secretary's expert originally testified that [Redacted] was not tied off properly around the main stem. (Tr. 65-67). However, he later accepted the possibility that [Redacted] was actually tied off around the main stem. (Tr. 209). Further, Mr. Martinez testified that [Redacted] was tied off around the main stem in compliance with Respondent's guidelines. (Tr. 346-48). The Secretary has failed to identify one of Respondent's policies that was not followed or to address how a change in training or supervision would have materially reduced the alleged hazard.

The Secretary has not sufficiently established a feasible means of abatement that would materially reduce the hazards. Therefore, the Secretary has not met its burden of showing the hazard could be materially reduced through a feasible means of abatement.

e. Knowledge

The Secretary can establish Respondent's knowledge of a general duty clause violation by establishing either its actual knowledge of the hazard or its constructive knowledge such that it could have learned of the hazard with the exercise of reasonable diligence. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537 (No. 86–360, 1992) (consolidated). As discussed, the Secretary showed that Respondent recognized the hazards associated with trimming dead trees. The Secretary's expert concluded that dead trees are dangerous and can cause severe injury because of their unstable and unpredictable nature. (Tr. 86, 119-22, 137, 352; Exs. C-10, C-16). Respondent, aware that trimming dead trees posed a hazard to its employees, provided training on and developed a work rule discussing these hazards. (Tr. 86, 119-22, 137, 352; Exs. C-10, C-16). However, although there is a recognized hazard, the question of whether Respondent had knowledge of the hazardous condition remains.

The Secretary asserts that Respondent had constructive knowledge of the violations. (Sec'y Br. at 15-17). The Secretary can establish constructive knowledge of a violative condition by demonstrating that the employer failed to exercise reasonable diligence to uncover the condition. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939 (No. 97-1676, 1999). "Reasonable diligence involves the consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Danis Shook Joint Venture*

XXV, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003); *Burford's Tree*, 22 BNA OSHC at 1950 (involved general duty clause violation).

Although the Secretary asserted that Respondent had constructive knowledge of the violations, it is unclear from its argument and the record what the alleged hazardous condition actually was. (Sec'y Br. at 15-17). At the trial, OSHA's Assistant Area Director, Lisa Bennett, originally testified that OSHA had identified a fall hazard and a struck-by hazard as the hazardous conditions. (Tr. 231-32). However, after some questioning, she testified that the hazardous conditions were an employee "removing objects from above where he was working" and the employee was improperly tied off to the tree, with "two points of tie-off, and they were both connected to the same anchor," which was a tree branch the employee was standing on. *Id*. The Secretary's own expert conceded this theory of tie off location did not make sense. (Tr. 158-59, 179-80, 184). While the Secretary's expert made a cursory remark about being "struck by tree parts" and identifying an improper face cut in his report as a hazardous condition, he subsequently changed his opinion to focus on an improper back cut as the main hazardous condition. (Tr. 62-63, 167, 190-91, 227; Ex. C-17 at 6-8). Later in the trial, when asked what condition represented the hazardous condition, the Secretary claimed it was concerned that Respondent's safety "policies and practices are not being enforced." (Tr. 360-61). The Secretary, in its post-trial brief, again alluded to improper training, supervision, and training enforcement as a hazardous condition. (Sec'y Br. at 12-14). However, the record is clear, there was no evidence of or citation for improper training, supervision, or lack of training enforcement. (Tr. 141-42, 154-55, 246-47; Ex. R-40 at 16-17).

Respondent's training materials and work rules acknowledged the hazards associated with trimming dead trees. (Tr. 86, 119-22, 137, 352; Exs. C-10, C-16). However, here, the actual

violative condition arose when [Redacted] was completing his back cut. (Tr. 332-34). The back cut, which became a bypass cut when it went too far, was not observed by Respondent's employees. (Tr. 64, 168, 344; Ex. C-11 at 2). The back cut had occurred approximately 35 feet in the air and on the opposite side of the tree where Respondent's employees on the ground had been working. (Tr. 64, 168, 344; Ex. C-11 at 2). The back cut happened quickly and the employees were unable to impact the direction of the falling portion of tree once it began to move. (Tr. 168-69). The Secretary's expert conceded as much when he testified, "[b]ut have I been in a situation of standing back 40 feet looking at somebody putting in a face cut 35 feet above the ground and was I able to judge, no." (Tr. 193).

Respondent's supervisors could not have known or corrected the incorrect back cut within the rapid manner it occurred. The Commission has previously dismissed a 5(a)(1) citation, finding no employer knowledge when an accident occurs in such a rapid manner that a supervisor could not have corrected it. *See J.H. Traffic Control Co.*, LLC, 26 BNA OSHC 1839, at 1845 (No. 15-1987, 2017)[15] (Judge Duncan notes that "Given that the condition in Citation 1, Item 1 of crossing a live lane of traffic to retrieve three barrels, could only have taken a few minutes, [the supervisor] had no way of knowing that it happened. Therefore there will be no finding of constructive knowledge of the violative condition."). [Redacted] was more than 35 feet in the air, on the opposite side of the tree from Respondent's employees on the ground, when he made his back cut. (Tr. 152-54, 204-09, 332, 352; Ex. C-8). The back cut performed by [Redacted] occurred quickly and his error in making that back cut consisted of cutting too deeply by mere inches. (Tr. 63, 209-12, 346; *see* Ex. 11 at 2).[16]

[15] *J.H. Traffic Control Co.*, LLC, 26 BNA OSHC 1839 (No. 15-1987, 2017) became a final order of the Commission on 7/12/2017.

[16] The Secretary's expert originally identified an improper face cut as a causal factor of the accident in his report. (Tr.

The Secretary has not sufficiently met its burden of establishing that Respondent knew or with the exercise of reasonable diligence could have known of the errant bypass cut that was performed. The Secretary failed to establish Respondent's actual or constructive knowledge of the violative condition.

V. Affirmative Defenses

Respondent pled numerous defenses in its Answer. Those defenses were not raised further at trial, nor in Respondent's Post-Trial Brief. As previously noted in footnote 1, supra, affirmative defenses not raised at the trial are generally deemed waived and abandoned. **Corbesco**, *Inc. v. Dole,* 926 F.2d 422, 429 (5th Cir. 1991) (affirmative defenses not argued waived); *Ga.-Pac. Corp.,* 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991) ("Commission declines to reach issues on which the aggrieved party indicates no interest."). The Court finds all of Respondent's pled affirmative defenses are rejected because they either lack merit, have been abandoned, or both.

Although not specifically argued in Respondent's Post-Trial Brief, Respondent did make a few cursory statements concerning [Redacted]'s failure to properly complete his back cut. (Resp't Br. at 12-13). Therefore, the Court will briefly address the defensive concept of unpreventable employee misconduct.

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). Essentially, Respondent must "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated

62-63, 167, 190-91; Ex. C-17 at 6-8). However, he changed his opinion later on to reflect an improper back cut as a main causal factor. (Tr. 62-63).

and enforced work rule [sic]." *Archer-W. Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

All of the elements required for a showing of unpreventable employee misconduct were not established in this case. There was no work rule advising [Redacted] at which angle to make his notch cut, which factored into the direction the top portion of the tree fell. (Tr. 62-63, 114-15, 264-66). Mr. O'Campo testified that he did not know of any work rules pertaining to notch cut angle's in Respondent's LCQS. (Tr. 264-66).

Respondent has not identified any specific rule designed to prevent the alleged violation at the worksite. The record reveals that prior to the accident Respondent did not enforce or take steps to discover violations of specific work rules designed to prevent the alleged violation. (Tr. 244-45, 295-97, 318-19). The record does show that after the accident and during the investigation, Mr. Varela, Mr. Haynes, and Mr. Martinez were suspended. (Tr. 297-98). Additionally, Respondent's supervisors are now required to directly observe their employees' cuts to ensure they have been made correctly. (Tr. 315-16).

As Respondent has not met its burden in establishing all of the elements of the above-mentioned affirmative defense, the Court finds Respondent's employee misconduct defense fails. Accordingly, even if Respondent's comments in its Post-Trial Brief could be construed as pursuing an unpreventable employee misconduct defense for Citation 1, Item 1, it is rejected.

Additionally, Respondent asserts that the Secretary cannot cite a violation of the general duty clause when specific standards address the hazards associated with an alleged fall protection and struck by hazards. (Resp't Br. at 6). Respondent argues that Subpart D of the Act's standards specifically address the hazards at issue here. *Id*. Alternatively, Respondent argues subsections of 29 C.F.R. § 1910.269 are applicable. (Resp't Br. at 7-8). This case arose out of Colorado, so

along with Commission precedent, precedent would also apply from the 10th Circuit Court of Appeals and from the D.C. Circuit Court of Appeals. The 10th Circuit notes that the applicability of specific standards is an affirmative defense. *See Safeway v. OSHRC*, 328 F.3d 1189, 1194 (10th Cir. 2004). "If an employer demonstrates that a specific standard permits the cited condition and compliance resolves any obvious hazard to employees, there is no general duty clause violation." *Id*. The D.C. Circuit views recognition of the hazard remaining as key, thus where an employer recognizes a hazard remains after compliance with all applicable standards, the employer has a duty under section 5(a)(1) to safeguard his employees. *See Brock v. Gen. Dynamics Land Sys. Div.,* 815 F.2d 1570, 1575-76 (D.C. Cir. 1987). 29 C.F.R. § 1910.5(f) states:

> An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of section 5(a)(1) of the Act, but only to the extent of the condition, practice, means, method, operation, or process covered by the standard.

Commission precedent dictates that proving the application of the cited standard pertains to the cited work conditions, not the particular cited employer. *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *Active Oil Serv., Inc.*, 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005)(finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.*, 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004)("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

Respondent is a tree trimming company that contracted with Xcel Energy to prune and manage vegetation affecting Xcel Energy's power infrastructure. (Tr. 220; Exs. J-1, C-10). Respondent's management of vegetation affecting Xcel's power infrastructure falls under the purview of Part 1910, Subpart R, § 1910.269 - Electric power generation, transmission, and

distribution. The scope of the aforementioned "*section covers operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment*." 29 C.F.R. § 1910.269(a)(1)(i). The standard continues by stating that it applies to the, "*[p]ower generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering that are accessible only to qualified employees*."[17] 29 C.F.R. § 1910.269(a)(1)(i)(A). 29 C.F.R. § 1910.269(a)(1)(E) states the provisions apply to:

> Line-clearance tree trimming performed for the purpose of clearing space around electric power generation, transmission, or distribution lines or equipment and on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment, as follows:
>
> (1) Entire § 1910.269, except paragraph (r)(1) of this section, applies to line-clearance tree trimming covered by the introductory text to paragraph (a)(1)(i)(E) of the section when performed by qualified employees (those who are knowledgeable in the construction and operation of the electric power generation, transmission, or distribution equipment involved, along with the associated hazards).
>
> (2) Paragraphs (a)(2), (a)(3), (b), (c), (g), (k), (p), and (r) of this section apply to line-clearance tree trimming covered by the introductory text to paragraph (a)(1)(i)(E) of this section when performed by line-clearance tree trimmers who are not qualified employees.

Because Respondent's work falls under the purview of Part 1910, Subpart R, § 1910.269, section 1910.28 would not apply as it states: "This section does not apply [t]o electric power generation, transmission, and distribution work covered by § 1910.269(g)(2)(i)." 29 C.F.R. § 1910.28(a)(2)(vii).

Respondent was hired by Xcel to trim and prune several dead cottonwood trees that were interfering with Xcel's powerlines and could threaten Xcel's power infrastructure. (Tr. 220; Exs.

[17] The standard further states:

> "Note to paragraph (a)(1)(i)(A): The types of installations covered by this paragraph include the generation, transmission, and distribution installations of electric utilities, as well as equivalent installations of industrial establishments. Subpart S of this part covers supplementary electric generating equipment that is used to supply a workplace for emergency, standby, or similar purposes only. (See paragraph (a)(1)(i)(B) of this section.)" 29 C.F.R. § 1910.269(a)(1)(i)(A).

C-10, C-11, C-19). However, it is unclear from the record whether Respondent's employees would be considered "qualified" or "unqualified" for purposes of 29 C.F.R. § 1910.269 applicability. Assuming, *arguendo*, 29 C.F.R. § 1910.269 applies in this specific case, Respondent's argument would fail in both the 10th Circuit Court of Appeals and D.C. Circuit Court of Appeals. Respondent has not met its affirmative defense in establishing the applicability of 29 C.F.R. § 1910.269 to its employees. Even assuming the applicable of 29 C.F.R. § 1910.269, as discussed in further detail in Section IV(A)(1)(b)(i) above, Respondent recognized hazards remained as evidenced through the trainings it provided its employees. (Tr. 154, 246-48; Exs. C-16, R-40 at 85-89). Respondent provided training on these hazards and also discussed the dangers of dead tree hazards, such as falling and portions of trees striking employees in their Job Safety Briefings and Job Hazard Assessments.[18] (Tr. 154, 246; Exs. C-10, C-16, R-40 at 143-45). Thus, as Respondent recognized hazards remain, even if allegedly complying with 29 C.F.R. § 1910.269, Respondent still has a duty under section 5(a)(1) to safeguard its employees. *See Brock v. Gen. Dynamics Land Sys. Div.,* 815 F.2d 1570, 1575-76 (D.C. Cir. 1987).

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED and no penalty is ASSESSED.

[18] As discussed herein, while the evidence demonstrates hazard recognition generally by Respondent and the industry, the evidence does not support a finding that Respondent had actual or constructive knowledge of the hazardous conditions at the worksite.

SO ORDERED

/s/
Christopher D. Helms
Judge, OSHRC

Date:
Denver, Colorado