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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.
EASTERN GAS TRANSMISSION AND
STORAGE, INC.,
Respondent.

OSHRC DOCKET NO. 20-0653

Appearances:

Oscar L. Hampton III, Regional Solicitor
Matthew R. Epstein, Trial Attorney
U.S. Department of Labor, Philadelphia, PA
For the Complainant

John R. Callcott, Esq.
Steptoe & Johnson, PLLC, Morgantown, WV
For the Respondent

Before: Carol A. Baumerich, Administrative Law Judge

DECISION AND ORDER

Eastern Gas Transmission and Storage, formerly known as Dominion Energy Transmission¹ (Respondent), is a company engaged in the business of owning, operating, and transporting natural gas via storage wells and pipelines in western Pennsylvania. (Tr. 274, 339).

On January 2, 2020, at Respondent's worksite, located at Ridge Road, Jeannette, Pennsylvania

¹ On April 9, 2020, when the citation issued Respondent's name was Dominion Energy Transmission, Inc. On March 30, 2021, Respondent moved to amend the complaint, to conform the style of the case to reflect Respondent's current name Eastern Gas Transmission and Storage, Inc. By Order dated March 31, 2021, Respondent's motion was granted.

(the worksite), employees Chris Troup and RF² were assigned to remove dead ash trees along a well service road. (Tr. 36; Stips. 1, 8). During this tree removal work, a section broke and struck RF, severely injuring him. (Stip. 11). Respondent notified the Occupational Safety and Health Administration (OSHA). OSHA's Pittsburgh, Pennsylvania Area Office initiated an investigation after the notification. (Tr. 33-36).

At the close of OSHA's investigation, on April 9, 2020, the Secretary issued a one-item serious citation, with two subparts, and notification of penalty (the Citation) to Respondent. The Citation alleges violations of section 5(a)(1) of the Occupational Safety and Health Act of 1970 U.S.C. §§ 651-678 (the Act), the provision commonly referred to as the general duty clause. Specifically, item 1(a) of the Citation alleges a general duty clause violation "in that employees were exposed to danger trees falling and crushing employees, . . . including but not limited to dead ash trees that . . . [are] intertwined with trees to be felled." The Citation indicates that feasible and effective means existed to eliminate or materially reduce the hazard. Specifically, "[b]efore beginning any tree removal operation, the chain saw operator, equipment operator, and/or crew leader shall carefully consider relevant factors pertaining to the tree and site and shall take appropriate actions to ensure a safe removal operation. . . ."

Citation item 1(b) alleges a general duty clause violation in that Respondent exposed employees "to crush by hazards from falling trees." The Citation violation description states, "employees were exposed to danger trees including but not limited [to] dead ash trees falling and crushing employees operating the Bobcat E35 Excavator." The Citation alleges that Respondent could feasibly and effectively materially reduce this hazard by having the Employer furnish protection to the equipment operator, the employee exposed to the crush by hazard of falling dead

² The injured employee's name is not used to protect the employee's privacy.

ash trees, by ensuring “protection from falling objects entering the front of the excavator” and by installing “Falling Object Protective Structure (FOPS)” on the equipment used in tree removal operations.

The Citation proposes \$13,494.00 as a total penalty for Citation items 1(a) and (b).

On April 23, 2020, 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 hearing was held on April 27 and 28, 2021, using Cisco WebEx videoconferencing technology.³ The Complainant, the Secretary of Labor (Secretary), presented two witnesses: 1) the Compliance Safety and Health Officer (CO) who investigated the accident, Courtney Frost⁴; and 2) an expert witness, Donald Blair.⁵ Respondent

³ The parties agreed to participate in a virtual hearing using WebEx video conference technology. WebEx technology permitted the undersigned judge, counsel, party representatives, and witnesses, to contemporaneously participate in the hearing, from separate locations. Both parties had the opportunity to fully participate in the hearing and effectively present their case. The undersigned judge was able to hear and observe all hearing participants, witness testimony, and evidentiary objections raised by counsel. The undersigned judge was able to effectively assess witness demeanor and review exhibits offered in evidence.

⁴ Ms. Frost has been a CO with OSHA for over 10 years. (Tr. 28). Before working for OSHA, she was a safety officer for Giant Eagle. (Tr. 28-29). Ms. Frost has a Bachelor of Science in safety management from Slippery Rock University and a Master’s degree from Columbia Southern University in safety and environment health. (Tr. 29). She has conducted over 600 OSHA investigations. (Tr. 31). She conducted two dozen investigations specifically within the arborist industry. *Id.*

⁵ At the hearing, Mr. Blair was qualified as an expert in safe tree removal practices, the safe use of equipment in tree removal, and the ANSI Z133 standards. (Tr. 171-172; Ex. S-3). He has been an arborist for over 50 years. (Tr. 155-156; Ex. S-3). He founded and led various businesses relating to arborist work, consulting, and education, including the M.F. Blair Institute of Arboriculture, Sierra Moreno Mercantile, and Blair’s Arborist Equipment. (Tr. 157-160; Ex. S-3). He is a certified tree safety professional and helped design the certification for tree safety professionals. (Tr. 161-162). Mr. Blair also assisted in authoring various industry standards, publications, and books relating to the arborist industry. (Tr. 162-167; Ex. S-3). He specifically helped draft the ANSI Z-133 standards. (Tr. 162-167).

also called two witnesses: 1) an expert witness, Paul Cyr,⁶ and 2) Respondent's senior safety specialist, Robert Vince.⁷ Both parties filed post-hearing briefs.⁸

For the reasons that follow, the Citation items are affirmed as serious violations of section 5(a)(1) of the Act, and a penalty of \$13,494 is assessed.

I. Jurisdiction

The parties stipulated that at all relevant times, Respondent engaged in a business affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) & (5), and that jurisdiction of this action is conferred upon the Commission by section 10(c) of the

⁶ Mr. Cyr worked for OSHA for 23 years beginning as a compliance officer, and progressing to various supervisory, and technical expert positions. (Tr. 259, 261-262; Ex. R-4). Relevant to this proceeding, he served as an OSHA technical expert in the areas of forest products, including logging and arborists issues. *Id.* He was a representative for federal OSHA on the ANSI Z-133 committee, for a period predating the ANSI Z133-2012, and ANSI Z133-2017 standards relevant in this proceeding. (Tr. 266-267). In 2002, Mr. Cyr started Paul Cyr's Safety Services, which provided consulting on safety and health issues. (Tr. 262-263). Mr. Cyr has testified many times as a technical expert for OSHA. (Tr. 263-264; Ex. R-4). Mr. Cyr's testimony was helpful.

At the hearing, Mr. Cyr was qualified as an expert regarding arboricultural issues, the ANSI Z311 standard, safe tree removal and related work practices, including the level of protection required by the Bobcat E35 Excavator. (Tr. 270; Ex. R-4). Following review of Mr. Cyr's hearing testimony, he is not regarded in this decision as an expert in the International Standard ISO 10262. (Tr. 270; Ex. S-2). His familiarity with the ISO standard was limited and his testimony regarding the standard was unhelpful. (Tr. 267-270, 293-294, 316-318, 320; Ex. S-2). Likewise, as discussed below, his testimony regarding the E35 Bobcat Excavator conflicted with undisputed facts regarding the size and weight of the tree that fell, and therefore is accorded little weight. (Tr. 293-295, 313-315).

In many respects, both hearing experts agreed regarding the hazard posed to employees working to fell dead ash trees and safe work practices. Where the experts offered different opinions, I accord Mr. Blair's opinions greater weight, as it was consistent with the undisputed record facts, the photographs of the worksite, his long experience in the arboriculture industry, and deeper understanding of ANSI Z-133.

⁷ Mr. Vince worked for Respondent for approximately 27 years. (Tr. 329). He has been Respondent's senior safety specialist for the past 23 years. *Id.*

⁸ In its Answer, Respondent raised several affirmative defenses, including employee misconduct, that Respondent did not pursue at the hearing or in its post hearing briefing. The undersigned deems these affirmative defenses abandoned. *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).

Act. (Tr. 11-12; Stips. 1, 2). Based on the stipulations and the record evidence, the undersigned finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Respondent is a covered employer under § 3(5) of the Act.

II. Background and Fact Findings

Respondent owns, operates, and transports natural gas via storage wells and pipelines in western Pennsylvania. (Tr. 274, 339). Its regular business activities include maintaining access roads to its transmission and other equipment. (Stip. 2). Maintenance of these access roads periodically requires the removal of trees. (Tr. 356; Stips. 2-3). Respondent's employees often remove small trees and hire third parties to handle larger trees. (Tr. 351-352; Stips. 2-3).

An employee who worked as a well tender notified Respondent that dead ash trees were present along a well access road and needed to be removed. (Exs. J-5 p. 1; J-7 p. 1; J-9, J-31). Respondent assigned RF and Mr. Troup to remove these dead ash trees on January 2, 2020. (Tr. 36; Stip. 1). At that point, RF had worked for Respondent as a fieldman for approximately two years. (Ex. J-7 p. 1). As part of his routine work assignments, RF cut trees and performed the task over two dozen times. *Id.* at 3. Mr. Troup had worked for Respondent as an equipment operator for approximately 11 years. (Ex. J-9). Like RF, his regular work tasks included felling trees near equipment or access roads. (Ex. J-9; Tr. 40-43). Respondent previously trained RF and Mr. Troup on tree felling procedures, tree evaluation prior to tree removal, and manual tree felling.⁹ (Tr. 297-299, 336-338; Exs. J-7 p. 3; J-11, J-12, J-33, J-34; Stip. 4). RF and Mr. Troup received annual chainsaw training from a third party. (Tr. 337; Exs. J-9, J-31 pp. 4-5; J-32, pp. 23-24; J-33, J-34). Their training covered the advice set out in American National Standards Institute (ANSI)

⁹ RF and Mr. Troup had not been trained in mechanical tree felling. Respondent did not view using the Excavator involved in the January 2, 2020 incident as a mechanical means of tree felling. (Tr. 337-338).

Standard for Arboricultural Operations, Z-133 (ANSI Z-133), which was developed under ANSI's procedures by the Accredited Standards Committee on Safety in Tree Trimming. (Ex. J-12). ANSI Z-133 addresses tree trimming operations, including the safe removal of trees. (Tr. 297-299; Exs. J-11, J-12, J-33, J-34).

Before leaving for the worksite, on January 2, 2020, RF and Mr. Troup discussed the equipment to be used for the task. (Ex. J-7 p. 2). It was determined that RF and Mr. Troup would use a chainsaw and the Bobcat E35 Excavator (Excavator) to fell the trees that presented a danger. (Exs. J-7 pp. 2-3; Stip. 8). Mr. Troup had been using the Excavator for approximately 1 to 2 years. Mr. Troup took the Excavator with him from job to job. (Ex. J-9). Once at the worksite, the employees performed an initial job safety brief. (Tr. 64; Ex. J-13). This job safety brief included a description of the task to be performed, the tools needed for the job, potential hazards, and steps to assure proper safety. (Ex. J-13). "Entangled trees" were not identified as a safety hazard. (Tr. 352-354; Exs. J-7 p. 3; J-13; Stip. 5). The Job Safety Brief was signed by Mr. Troup as JSB Leader. (Ex. J-13). RF also signed the Job Safety Brief. *Id.*

After completing the job safety brief, but "before beginning to fell trees at the worksite [RF] and Mr. Troup walked down the service road, evaluating the trees, determining which were dangerous and needed to be removed." (Tr. 351-352; Exs. J-7 pp. 2-3; J-9; Stips. 6, 7). Vines entwined several of the trees. (Ex. J-9). Also, tree pieces would break off and become stuck in other parts of the trees. *Id.* Trees identified as dangerous (*i.e.*, "danger trees") were either cut down with a chainsaw RF operated or pushed over by Mr. Troup using the compact Excavator. (Tr. 43; Exs. J-7 p. 2; J-9; Stip. 8). "Once a tree was down, it was cut up and pushed off the road." (Exs. J-6, J-7, J-8; Stip. 9).

RF and Mr. Troup realized that the last tree they intended to remove was entangled with other trees. (Tr. 177-178, 285; Exs. J-7, p 2; J-9; Stip. 10). Mr. Troup said he would push over the tree using the Excavator. (Tr. 117, 177; Ex. J-7, p. 2; Stip. 11). The Excavator weighed 3,417 kilograms.¹⁰ (Tr. 103, 293-295; Ex. J-29). It had a Level 1 falling object protection structure (FOPS) on its roof. (Tr. 293-295). The Level 1 FOPS on the Excavator was designed to protect against a 46 kg weight dropped from a height of 3 meters. (Tr. 74; Ex. S-2 p. 6). It did not have a similar system on the front window, which was facing the trees Mr. Troup was pushing over. (Tr. 72; Exs. J-4 p. 4; J-10 p. 11; J-17, J-28, J-30). There are FOPSs that provide greater levels of protection. However, the Excavator could not be modified to incorporate Level 2 protection because it was too small. (Exs. J-4, J-5).

RF was not involved in removing the final tree. (Tr. 117, 200, 228, 326). He had walked uphill away from the dead ash tree Mr. Troup would push over with the Excavator. (Tr. 177). As RF proceeded uphill and Mr. Troup worked with the Excavator, they could not see one another. (Tr. 177, 236, 249). When Mr. Troup began pushing the tree with the Excavator, RF was wearing a hard hat, ear-muffs, chaps, a full face shield, and gloves, but was not otherwise protected from falling objects. (Tr. 178; Exs. J-7 p. 3l; J-9, J-13, R-2 p. 2; R-3).

When Mr. Troup pushed the standing dead ash tree using the Excavator, vines entwined the tree being pushed with other trees. The entwined trees moved in conjunction with the tree being pushed. When the forces acting upon the second entwined tree became great enough, a large section of the trunk snapped off. (Tr. 43, 177-178, 281-282; Exs. J-25; R-2).

¹⁰ Mr. Vince prepared an “injury alert” of the incident. (Tr. 343-344). This document describes the Excavator as a “mini-excavator.” (Ex. R-3).

Although he had moved uphill a bit, RF was struck by the tree trunk and seriously injured. (Tr. 45-46, 68, 85, 281-282, 348-350; Exs. J-17, J-18, J-20, J-23, J-24, J-26, R-2, R-3; Stip. 11). When struck, RF was approximately 42 feet away from where Mr. Troup was pushing the base of the tree with the Excavator. (Tr. 44-46; Exs. J-23, J-24, J-26, R-2; Stip. 11). The tree trunk that stuck RF was over 50 feet in length. (Tr. 195-96, 304; Exs. R-2, R-3).

RF suffered a broken back, with the injury extending from the T2 vertebra down to the T11 vertebra. (Tr. 68; Exs. J-2 p.3; J-7 p. 3). Thus, nearly every vertebra in the middle of his back broke when the tree hit him. The injury required hospitalization and surgery. (Ex. J-2). He also suffered a head laceration, contusions, and a sprained ankle. (Tr. 68; Exs. J-2 p.3; J-7 p.3; R-2, R-3). As a result of his injuries, RF was out of work for more than four and a half months. (Tr. 65, 340, 371; Exs. J-2 p. 3; J-7 p. 3; R-2).

Respondent notified OSHA on the same day the incident occurred as part of the Rapid Response Inquiry (RRI) program. (Tr. 34-35). OSHA assigned CO Frost to investigate the matter, and she headed to Respondent's office the following day.¹¹ (Tr. 34-36).

Upon arriving, the CO held an opening conference with Respondent's representatives, Bill Ruffner and Area Director William Murphy, and the union representative Bill Kyper. (Tr. 35-36, 340; Ex. J-5, p. 3). Respondent's representatives gave the CO a brief overview of the incident. (Tr. 36). The CO also interviewed Mr. Troup, the Excavator operator. (Tr. 36-43; Ex. J-8). The CO then traveled to the worksite to continue the investigation. She took several photographs of the access road, the Excavator, and the fallen tree. (Tr. 43-50; Exs. J-26, J-27, J-28, J-30). At that time, the fallen tree had been cut up and moved from its prior location. (Tr. 46-48; Ex. J-27).

¹¹ The RRI form submitted did not have a specific address for the worksite where the incident happened so the CO went to Respondent's main office first. (Tr. 35).

However, both experts estimated that the tree, part of which broke off and struck RF, was in the range of 50 feet tall. (Tr. 194-196, 303-305; Ex. J-24). Mr. Cyr estimated that the part that hit RF weighed at least 390 pounds. (Tr. 305-306). During the investigation, the CO interviewed RF when he returned home from the hospital. (Tr. 65; Ex. J-6). The CO also reviewed documents, including the Bobcat E35 Operator's Handbook (Bobcat Manual), the International Standard ISO 10262, and ANSI Standard Z133-2012.¹² (Tr. 68-85, 81, 87, 105; Exs. J-10, J-11, S-2).

As a result of OSHA's inspection, the Secretary issued Respondent the Citation for violations of the general duty clause. The Citation refers to two distinct but interrelated hazards. The first, Item 1(a), is focused on falling objects and crush injuries employees were allegedly exposed to when working removing dead trees. The second, Item 1(b), is focused on falling object and crush injuries employees were allegedly exposed to when using an excavator for tree removal work. (Exs. J-1 through J-5).

III. Analysis

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;

¹² The CO recalled reviewing ANSI Standard Z133-2012, Section 8.5.1 which states:

Before beginning any tree removal operation, the chain saw operator, equipment operator, and/or crew leader shall carefully consider relevant factors pertaining to the tree and site and shall take appropriate actions to ensure a safe removal operation. Factors to include may be, but are not limited to, tree decay, tree lean, and wind (see Annex C.3, Manual Tree Felling Procedure, for a more inclusive list).

(Tr. 81; Ex. J-11, p. 41).

(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); see also *W. World, Inc. v Sec’y of Labor*, 604 F. App’x 188, 192-93 (3d Cir. 2015) (unpublished); *Babcock & Wilcox Co. v OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980); *N. Y. State Elec. & Gas Corp.*, No. 91-2897, 2000 WL 35301892 (O.S.H.R.C., Oct. 17, 2000).

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 bears the burden of proof on each element of the violation by a preponderance of the evidence. *Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1790 (No. 89-1791, 1992).

A. CITATION 1, ITEM 1(a)

The Secretary alleges that Respondent violated the general duty clause by exposing employees “to danger trees including but not limited to dead ash trees that were intertwined with trees to be felled.” These danger trees could fall and “crush employees.”¹³ The Secretary contends that this hazard can be feasibly abated by requiring employees to “carefully consider” various factors related to tree removal operations and “take appropriate actions to ensure a safe removal.”

For the reasons set out, the undersigned finds that the Secretary met his burden and established Respondent’s violation of the general duty clause.

¹³ Hereafter collectively referred to as the “danger tree hazard.”

1. 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, he 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 at 2007 (No. 93-0628, 2004); *see also Waldon Health Care Ctr.*, 16 BNA OSHC 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.

Respondent argues that, for both items, the Secretary defined the hazard too broadly. (Resp’t Br. 9-14). Essentially, it argues that trees falling is a condition in nature and because it cannot be eliminated, the Citation must be vacated. *Id.* at 14. In so doing, it mischaracterizes the hazard at issue here and the Secretary’s burden.

The Secretary does not rely on the general principle that trees can fall as support for the Citation. He does not contend that Respondent needed to remove every dead tree from its access

roads and well sites or prevent trees from falling. His allegation is limited to “danger trees” falling or crushing employees during removal operations. While acknowledging that this hazard cannot be eliminated, the Secretary argues that it can be materially reduced by adopting its proposed abatement. *See Arcadian*, 20 BNA OSHC at 2011 (finding that the Secretary’s burden is limited to showing how the abatement method would materially reduce the hazard, not that it would eliminate the hazard); *Morrison-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993) (same).

While alleging that the hazard was improperly defined, Respondent does not dispute that trees fell at its worksites. It was aware of various dead tree limbs in the area where it sent RF and Mr. Troup. (Exs. J-6, J-8; Stip. 6). It wanted them to remove the trees because of their dangerous nature. (Tr. 356-357; Exs. J-8, J-9; Stip. 6). Removing trees at risk of falling onto access roads or equipment was a routine practice. (Tr. 38-39, 42-43, 274-275, 355-357; Exs. J-6, J-8; Stips. 2-4).

Respondent’s expert, like the Secretary’s, explained that the dead ash trees the employees routinely removed are danger trees. (Tr. 179-182, 308-309). Dead ash trees become particularly brittle and weak the longer they are dead. (Tr. 179-82). If left upright (*i.e.*, standing), when and how they fall is unpredictable, with the risk of falling unexpectedly increasing the longer they stay standing dead. (Tr. 179-182, 308-309). Such trees could fall and crush workers.

The Secretary alleges that danger trees present a hazard during such removal operations because they fall on or otherwise crush employees. There is no dispute that felling danger trees, such as dead ash trees, could lead to trees falling and crushing employees. (Tr. 176-182). Nor is there a credible dispute that RF and Mr. Troup were exposed to a hazard of danger trees falling and crushing them when they were assigned to fell those trees. The Secretary established the presence of a hazard (danger trees falling and crushing people) at the worksite to which employees

were exposed. *See Davey Tree Expert Co.*, 11 BNA OSHC 1898 (No. 77-2350, 1984) (to establish an employer violated the general duty clause, the Secretary must prove that a hazard was present and was recognized by the employer or employer's industry).

2. 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 (O.S.H.R.C., Mar. 4, 2019). The Secretary argues that Respondent was aware of the hazard presented by dead trees at its worksites and that its employees were exposed to this hazard. (Sec'y Br. 8-9). Besides Respondent's own recognition, the Secretary argues that the industry also recognized the hazard of danger trees falling and crushing employees. *Id.*

i. Respondent's recognition of the hazard

In support of its contention that Respondent recognized the hazard, the Secretary relies primarily on the obvious nature of the hazard and Respondent's training regarding it. (Sec'y Br. 9-11).

Respondent disputes the Secretary's framing of the hazard as open and obvious. 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. 27-30).

Despite this contention, both parties' experts agreed that dead ash trees are dangerous. They agreed, and the facts of the case showed, they may cause severe injury because of their unstable and unpredictable nature. (Tr. 179-182, 308-309, 313). Supervisory personnel also recognized the hazard from danger trees. Respondent routinely directed employees to assess and fell danger trees as part of its work maintaining service roads. (Tr. 38-39, 42-43, 274-275, 355-357; Exs. J-6, J-8; Stip. 6). It assigned RF and Mr. Troup to fell danger trees at the worksite

precisely because they posed a hazard to employees. (Exs. J-6, J-8; Stip. 6). Mr. Vince, Respondent's senior safety specialist, recognized the hazard and identified the training to address it. (Tr. 355-356, 368). Respondent provided training on the hazard and discussed danger tree hazards at regular safety meetings. (Tr. 355-356, 366-368). Its written training materials define the hazard danger trees pose to employees and include information designed to address the hazard danger trees present.¹⁴ (Tr. 297-299, 336-338, 355-357; Exs. J-6, J-12, J-11, J-31 pp. 23-24; J-33, J-34; Stip. 4). Respondent's training materials reference ANSI Z-133. (Exs. J-31, J-32, J-33, J-34). *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)."). The tree felling safety requirements of ANSI Z-133 specifically instruct workers to stay 1.5 to 2 times the height of a tree being felled away unless they are actively involved in the felling of the tree. (Ex. J-12 pp. 46-47). Respondent trained its employees on the safety measures set out in the written materials. (Exs. J-31, J-32, J-33, J-34).

Citing *H-30, Inc., v. Marshall*, 597 F.2d 234 (10th Cir. 1979), and *Magma Copper Co. v. Marshall*, 608 F.2d 373 (9th Cir. 1979), Respondent argues that ANSI Z-133 should not be considered as evidence of hazard recognition because it is not in the arborist industry. (Resp't Br. 16-19). However, Respondent was well aware of arborist industry guidelines, particularly ANSI Z-133. (Tr. 297-299, 336-338, 355-357; Exs. J-6, J-12, J-11, J-31, pp. 4-5, J-32, pp. 23-24, J-33, J-34; Stip. 4). Unlike the situations in *H-30* and *Magma Copper*, there is substantial evidence in the record that Respondent recognized the hazard of danger trees and the applicability of ANSI Z-133 to its business. (Tr. 297-299, 336-338, 355-357; Exs. J-6, J-12, J-11, J-31, pp. 4-5, J-32, pp.

¹⁴ The training materials include "Chain Saw Safety Awareness, Tree Felling Procedures, Approved tree felling procedures, ANSI Z-133 tree felling safety requirements," and "Tree evaluation prior to removal." (Exs. J-31, pp. 4-5, J-32, pp. 23-24, J-33, J-34; Stip. 4).

23-24, J-33, J-34; Stip. 4). Respondent's training specifically included ANSI Z-133 tree felling safety requirements and using chainsaws to fell trees. (Exs. J-31, J-32, J-33, J-34).

Respondent's argument that industry safety standards, referenced in its own training and not followed resulting in severe injuries, are inapplicable is unpersuasive. Employees routinely engaged in felling trees. (Tr. 42-43, 356-357; Exs. J-6, J-7, p. 3; J-8; Stip. 6). Such work tasks were not an anomaly or rare. (Tr. 356; Exs. J-6, J-8). Felling trees was routine, and routinely has unpredictable outcomes. (Tr. 179-182, 308-309, 313; Exs. J-6, J-8, J-12, pp. 46-47; J-33). The Secretary does not dispute that Respondent's primary business is gas transmission. (Sec'y Br. 2). His contention is that such work requires, as Respondent itself recognizes, tree felling and consideration of how to appropriately complete such necessary tasks.

Respondent's training on how to address the hazard from danger 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 danger trees, and supervisors directed employees to remove such trees because of the risks they posed to employees. Although the precise nature of the January incident may not have been foreseen, the fact that dead trees fall over is neither freakish nor unforeseeable. (Tr. 179-182, 308-309, 313; Exs. J-12 p. 46-47; J-33).

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 hazard. (Sec’y Br. 11-14). 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. (*See Ex. J-12*, p 11). 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).

Both experts agree that ANSI Z-133 applies to danger trees like those at Respondent’s worksite. (Tr. 196-201, 311-313; Ex. J-12). The arborist industry and Respondent’s industry both recognize the same dangers of being struck by or caught beneath danger trees when they are being felled. If an employer is engaged in tree felling, the danger posed and the hazard remains the same “regardless of why the tree is being felled.” *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207, 1210 (6th Cir. 1995). “Falling a tree is falling a tree” whether it is Respondent’s industry or the arborist industry, the danger posed remains the same. *Id.* Respondent adopted ANSI Z-133 and trained employees, including RF and Mr. Troup, on it. (Tr. 182; Exs. J-31, J-32, J-33, J-34). There is sufficient similarity between Respondent’s industry and the arborist industry to find ANSI Z-133 supports finding industry recognition of the danger tree hazard. (Tr. 185-186); *see Pride Oil*

Well Serv., 15 BNA OSHC 1809, 1813 (No. 87-692, 1992) (ANSI standard provides evidence of industry recognition of a hazard).

Beyond ANSI Z-133, the testimony of both the Secretary's and Respondent's experts bolsters the evidence of industry recognition. (Ex. J-12 p. 4). Both experts agree that individuals not involved in felling a tree should be a safe distance away. (Tr. 196-201, 311-13). They agreed it is well-known that when felling danger trees, individuals need to be aware of a variety of factors, including tree decay, tree lean, and wind. (Tr. 189-192, 309; Ex. J-12). This testimony, combined with the other record evidence, presents strong evidence of industry recognition of the cited hazard. *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 hazard. Therefore, he carried this element of his burden of proof.

3. 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).

The portion of the tree which struck RF weighed at least 390 pounds. (Tr. 305). The possibility of death or serious physical harm resulting from an employee being struck by a 390-pound object 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. The Secretary’s expert described the tree as a “widowmaker.” (Tr. 233). Further, even after the incident there were still multiple dangerous “widowmakers” visible at the worksite, any one of which could have caused a fatal injury.¹⁵ (Tr. 180-182; Ex. J-25).

Further, the injured employee 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 being struck by a tree trunk as Mr. Troup used the Excavator to fell a tree, RF was hospitalized. (Tr. 65; Ex. R-3). He suffered a broken back, a laceration to his head that required sutures, and a left ankle sprain. (Tr. 149, 371; Exs. J-2, pp. 2-3; J-7, p. 3; R-2, R-3). The CO explained that trees or limbs falling could result in multiple fractures or death. (Tr. 142). Broken bones constitute serious physical harm even if a worker recovers with no permanent side effects. *Waldon*, 16 BNA OSHC at 1060 n.6.

¹⁵ Both experts agreed on several key points. The undersigned finds Mr. Blair’s testimony highly credible. (Tr. 204-207, 216-218). He helped draft ANSI Z-133 and worked on the related committee for thirty years. (Tr. 164-66, 222; Exs. J-11, J-12, S-3). He has worked as an arborist and published in the industry. (Tr. 155, 159, 162-63; Ex. S-3). In contrast, Mr. Cyr’s work experience was more focused on the forest products and logging industries. (Tr. 260-263; Ex. R-4). It was less focused on arboriculture and the record does not indicate any publications in the relevant field. *Id.* Although Mr. Cyr also served for a time as a representative to the ANSI Z-133 committee, he was not involved with either the 2012 or 2017 revisions at issue in this matter. (Tr. 263, 266-267). In contrast, Mr. Blair repeatedly served as the Committee’s Vice Chairman, including for the 2012 and 2017 revisions. (Tr. 165-166, 212, 222; Exs. J-11, J-12).

The Secretary established that the danger tree hazard presented by felling danger trees, including standing dead ash trees, was likely to cause death or serious physical harm.

4. Feasible Means of Abatement

As a preliminary matter, 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 refer to ANSI Z-133. (Tr. 297-299, 336-338, 355-357; Exs. J-31 pp. 4-5; J-32 pp. 23-24; J-33, J-34; Stip. 4). However, despite the references, RF explained that there were no work procedures for removing trees, and no one identified which were the hazardous trees.¹⁶ Respondent lacked a work rule requiring employees to remain in communication, evaluate tree lean carefully, and remain out of the area in which tree felling operations are taking place.¹⁷ (Tr. 213-214, 216; 353; Exs. J-6 p. 3; J-7 p. 3, J-13).

Respondent's safety manager, Mr. Vince, acknowledged there were training deficiencies. (Tr. 360). For example, because he did not "conceptualize" using the Excavator as a mechanical means of tree felling, training on this topic was not provided. (Tr. 337-38). Following RF's injury, his recommended actions and solutions states, in part, "[e]nhance chainsaw safety training to include specific items that address establishing and expanding upon the safe work zone for ground workers." (Ex. R-2 p. 2). Mr. Vince essentially recognized that Respondent did not follow the language in ANSI Z-133 that is the source of the Secretary's proposed feasible abatement. (Tr.

¹⁶ As noted above, there was a general job safety brief form that the employees completed. (Ex. J-13). This was a "broad" checklist for all jobs. (Ex. J-6). It did not identify any specific procedures for the tree removal work, including the consideration of relevant factors. (Exs. J-6, J-13).

¹⁷ Mr. Blair explained that in his opinion, Mr. Troup was focused only on one tree and did not take into consideration the entanglements or the condition of the trees. (Tr. 209-210).

359-360). Further, he did not dispute that Respondent could implement the proposed abatement and adhere to ANSI Z-133.

Respondent's training was inadequate for the assigned tasks and the equipment provided to the employees. *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, 565 (D.C. Cir. 2020) (finding incomplete and inconsistently implemented safety protocols were inadequate to address the cited hazard).

Given that Respondent's approach was inadequate, we turn to whether the Secretary's proposed abatement is feasible and would materially reduce the 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 communication, keeping noninvolved employees away from felling operations in accordance with ANSI Z-133, and recognizing and being cognizant of the likely direction that a tree will fall. (Sec'y Br. 17). Specifically, the Secretary proposes that Respondent alter operations related to tree removal by following these steps:

Before beginning any tree removal operation, the chain saw operator, equipment operator, and/or crew leader shall carefully consider relevant factors pertaining to the tree and site and shall take appropriate actions to ensure a safe removal operation. Factors to include may be, but not limited to, tree decay, tree lean, and wind.

This recommendation aligns with section 8.6.1 of ANSI Z-133.¹⁸ (Ex. J-12) . “Valid ANSI standards are evidence of feasibility.” *Fluor Constructors, Int’l Inc.*, 17 BNA OSHC 1947, 1949 at n. 8 (No. 94-1662, 1995). The Secretary’s expert explained that adopting the practices set out in the Citation is a feasible means of abatement that would materially reduce the hazard associated with the removal of danger trees.¹⁹ (Tr. 214-216). Respondent’s expert agreed that the Secretary’s stated abatement factors are assessments necessary before beginning a tree removal operation. (Tr. 309). *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 1207, 1211 (6th Cir. 1995) (“[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.”).

Respondent agrees that enhanced safety training is technically and economically feasible. (Tr. 358-360). Thus, while Respondent recognized the hazard and understood how to address it, it failed to fully implement the appropriate measures to substantially reduce the hazard. *See Sci. Applications Int’l Corp.*, No. 14-1668, 2020 WL 1941193, at *8 (O.S.H.R.C., Apr. 16, 2020) (proposed abatement measures feasible where cited employer could have and did subsequently

¹⁸ In particular, ANSI Z-133 directs:

Before beginning any tree removal operation, the chain saw operator and/or crew leader shall carefully consider relevant factors pertaining to the tree and site and shall take appropriate actions to ensure a safe removal operation. Factors to include may be, but are not limited to, tree decay, tree lean, and wind...

(Ex. J-12).

¹⁹ Both parties’ experts agree that RF was standing within the danger zone, contrary to the requirements of ANSI Z-133. (Tr. 196-200, 311-313).

implement procedures to reduce hazard); *SeaWorld*, 748 F.3d at 1215 (concluding that “abatement is feasible when it is economically and technically capable of being done); *ACME Energy Servs v. OSHRC*, 542 F. App’x 356, 367 (5th Cir. 2013) (Secretary only needs to show the abatement is feasible or capable of being done).

The Secretary has sufficiently established a feasible means of abatement that will materially reduce the hazard. Therefore, the Secretary met his burden of showing the existence of a hazard to which employees were exposed, Respondent and its industry recognized this hazard, the hazard was likely to cause death or serious physical harm, and the hazard could be materially reduced through feasible means of abatement identified by the Secretary. In addition, as discussed in more detail in Part IV, the Secretary established Respondent’s knowledge of the cited hazards.

B. CITATION 1, ITEM 1(b)

Citation 1, Item 1b, alleges that, in violation of the Act section 5(a)(1), “employees were exposed to crush by hazards from falling trees.” (Ex. J-3). This included exposure to dead ash trees falling on them when operating the Excavator. *Id.* The Secretary argues that there are feasible means to materially reduce this hazard. Specifically, “[b]efore beginning any tree removal operation,” the Employer shall furnish protection to the equipment operator, the employee exposed to the crush by hazard of falling dead ash trees, by ensuring “protection from falling objects entering the front of the excavator.”

1. Existence of a Hazard

As discussed above, to establish a violation of the general duty clause, the Secretary must define the hazard at issue “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 at 2007; *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*, 660 F.2d at 444.

Item 1(b) identified the hazard as exposure to “danger trees including but not limited to dead ash trees falling and crushing employees operating the Bobcat E35 Excavator.” The record evidence establishes that operating the Excavator exposed employees to the hazard of danger trees falling and causing crush injuries. Both experts agreed that dead ash trees are danger trees because of their unstable and unpredictable nature. (Tr. 179-182, 308-309).

The compact Excavator Mr. Troup used was only rated for protection against objects up to 101.4 pounds falling from around 9 feet.²⁰ (Ex. S-2 p. 6). The portion of the tree that struck RF far exceeded this height and weight limitation. (Tr. 194-196, 303-305; Ex. J-24). Despite this lack of protection, employees routinely used the Excavator to fell trees. (Tr. 204-207, 217-218; Exs. J-9; Stip. 8).

The Secretary’s expert explained that the type of excavator used would never be appropriate for tree removal work, let alone the situation RF and Mr. Troup faced on January 2, 2020. (Tr. 204-207, 216-218; *See* Exs. J-4 p.3; J-5 p. 2). The trees at the worksite were dead, brittle, and entwined. (Tr. 179-182, 191, 281-282, 308-309, 348-350; Ex. J-9). They were unstable. (Tr. 177, 181-182). During the tree removal, the trunk of one of the trees struck the Excavator’s bucket. (Tr. 208, 321-322; Exs. J-17, J-18, J-21, J-23, J-24, J-25). The same trunk also struck RF, severely injuring him. (Tr. 68, 281-282, 321-322, 348-350; Exs. J-2 p. 3; J-7 p. 3;

²⁰ Respondent knew its employees would use the Excavator to perform the assigned task. (Tr. 356-357; Ex. J-9). The Bobcat Manual makes plain that the equipment’s level of FOPS protection was inadequate to fell the standing dead ash trees. (Ex. J-10 p. 11). The top guard did not meet the requirements to protect the equipment operator from large objects that might fall, such as pieces and limbs from standing dead ash trees. (Exs. J-10 p. 11; S-2, pp. 4, 6). Further, there was no FOPS protection on the front of the Excavator. (Ex. J-30).

Stip. 11). Mr. Blair explained that it was “common” for a tree to fall towards a machine like the Excavator when that type of equipment was used to push over a dead tree. (Tr. 191). It was “just a matter of luck” that the tree trunk that broke off did not squarely hit the Excavator. (Tr. 208; Ex. J-24).

There was no way for the employees to ensure that a portion of, or the entire tree, would not break off and strike the operator of the Excavator. (Tr. 179-182, 191, 308-309). Neither the top nor front of the vehicle offered adequate protection to the employee from the trees. (Tr. 204-209, 217). Respondent assigned RF and Mr. Troup to remove danger trees from the service road because the dead and entwined trees could cause harm. (Tr. 186, 356-357; Exs. J-8; Stips. 6, 8).

The Secretary has established the presence of the hazard of felling danger trees, such as dead ash trees, falling and crushing employees operating a Bobcat E35 Excavator.

2. Hazard Recognition

As discussed, 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*, 2019 WL 1142920, at *7.

i. Respondent’s recognition of the hazard

There is no dispute that Respondent was aware that dead ash trees posed a hazard because they could fall and injure employees. (Tr. 355-356, 368). It assigned Mr. Troup to fell danger trees at the worksite with the Excavator because the trees posed a hazard to employees. (Exs. J-6, J-8; Stips. 1, 6, 8).

As discussed above, Respondent’s training materials contained information designed to address the danger tree hazard, including by referencing ANSI Z-133. (Tr. 297-299, 336-338, 355-357; Exs. J-6, J-12, J-11, J-31 pp. 4-5; J-32 pp. 23-24; J-33, J-34; Stip. 4). Training on addressing the danger tree hazard is significant evidence of Respondent’s recognition of the cited

hazard. *See Integra*, 2019 WL 1142920, at *8; *Waldon*, 16 BNA OSHC at 1062 (employer’s safety manual which defined and set forth “precautionary steps” to prevent the hazard was evidence of employer’s recognition of the hazard); *Gen. Dynamics*, 15 BNA OSHC at 1285 (safety bulletins issued by employer to employees was evidence of employer’s recognition of hazard).

Besides the training materials, hazard recognition can also be “inferred from the obvious nature of the hazard.” *Litton Sys., Inc.*, 10 BNA OSHC 1179 (No. 76-900, 1981). It does not require any specialized knowledge to realize that using a chainsaw or “pushing” into a dead ash tree with the Excavator could lead to falling trees and that workers in the area could be subject to crush by hazards. (Tr. 43, 177, 191). Respondent knew the trees were dangerous and assigned RF and Mr. Troup to remove them.²¹

Considering the nature of the hazard, why Respondent assigned the task (*i.e.*, because it knew the trees were dangerous), and its training on danger tree hazards, the Secretary established Respondent’s hazard recognition. *See Integra*, 2019 WL 1142920, at *8; *Beverly*, 19 BNA OSHC at 1186 (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).

²¹ As discussed above, the manual for the equipment Mr. Troup used states it does not provide sufficient protection from anything other than small objects. (Exs. J-10 p. 11; J-30; S-2, pp. 4, 6).

ii. *Industry recognition*

The Secretary also argues for a finding of industry recognition of the danger tree hazard in felling trees with the Bobcat E35 Excavator. (Sec’y Br. 18-20). For support, the Secretary relies on industry standards articulated in the Bobcat Manual and the ANSI Z-133 standard. *Id.* As stated above, industry recognition may be shown through the general understanding in the employer’s industry. ANSI standards can support a finding of that understanding. *See Integra*, 2019 WL 1142920, at *8; *Bethlehem Steel*, 607 F.2d at 874.

Here, the record demonstrates industry recognition of the danger tree hazard. The Bobcat Manual states that it is not rated to protect against large falling objects such as the trees that Respondent tasked Mr. Troup with removing. (Ex. J-10 p. 11). Manufacturers’ manuals or brochures can warn employers about the proper use of the equipment in question. *See Young Sales Corp.*, 7 BNA OSHC 1297, 1298-99 (No. 8184, 1979). The Bobcat Manual expressly warns of the danger of falling objects and explains that the equipment is rated only for small falling objects covered by ISO Standard 10262 Level 1 (Level 1). (Exs. J-10 p 11; S-2 p 6). Level 1 only encompasses “small objects, e.g. small rocks, small debris and other small objects.” (Ex. S-2 p. 4, ¶ 4.4(a)). The 390-pound tree trunk that struck RF far exceeds this level of protection. (Tr. 305). Further, the Secretary’s expert testified that the Excavator used by Respondent simply could not provide adequate protection from danger trees. (Tr. 204-207). Mr. Blair explained that the Excavator’s cab was not properly equipped to provide protection against falling objects such as falling tree limbs or trunks. (Tr. 204-207, 216-218). Thus, it was never appropriate equipment for the task the employees were assigned, *i.e.*, the Excavator should not have been used to remove standing dead ash trees.

Respondent's expert's testimony that the full weight of danger trees would have "probably only [caused] cosmetic damage to the excavator" is inconsistent with the evidence and his own testimony. (Tr. 68, 179-182, 294-295, 305, 308-309, 313-316; Exs. J-2 p. 3; J-7 p. 3). Mr. Cyr testified, in agreement with the CO, that the Excavator had no front glass protection against a 390-pound tree trunk nor the proper FOPS for large objects. (Tr. 68, 73-74, 305, 313-316). The Excavator was only rated for protection against falling objects up to 101.4 pounds. (Ex. S-2 p. 6). To say that a 390-pound tree would only cause cosmetic damage is disingenuous at best when the equipment was rated for less than one-third of that amount. *Id.* In particular, what is important in assessing a violation of the Act is the risk of physical harm to the worker, not the risk to equipment. The undersigned places little weight on Respondent's expert's testimony on this point. The Secretary's expert opined bluntly that he would not put himself in the Excavator's cab as it lacked heavy screening, metal mesh, or any protection from falling tree limbs. (Tr. 204-208).

As discussed above, the record demonstrates that the arborist industry and Respondent's industry recognize the same dangers of being struck by or caught beneath danger trees. "Falling a tree is falling a tree" whether it is Respondent's industry or the arborist industry, the danger posed remains the same. *Nelson*, 60 F.3d at 1210.

Because the Secretary can establish hazard recognition by showing either the employer's recognition or industry recognition, he has sufficiently established this element of the violation. *See Integra*, 2019 WL 1142920, at *7 (hazard recognition established through employer's recognition or industry recognition).

3. Death or Serious Physical Harm

As discussed with Item 1(a), to determine whether a hazard is "causing or likely to cause death or serious physical harm," the Commission assesses whether, if an incident occurs, are the results likely to cause death or serious harm. *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).

The portion of the tree which struck RF weighed at least 390 pounds. (Tr. 305). Although this falling trunk did not injure Mr. Troup, he was exposed to the very real possibility of death or serious physical harm resulting from being struck by it. (Tr. 142, 149; Ex. J-4). The Secretary's expert noted that a photograph taken immediately following the incident reveals how close the tree that struck RF came to hitting the roof of the Excavator's cab. (Tr. 208; Ex. J-24). The Excavator was not equipped to protect against falling tree limbs. (Tr. 204-207, 216-218; Exs. J-10 p 11; S-2 p 6). Even after the work done on January 2, 2020, dangerous "widowmakers" capable of causing fatal injury remained. (Tr. 180-182; Ex. J-25).

The Secretary has sufficiently established that the danger tree hazard presented by felling danger trees was likely to cause death or serious physical harm to employees operating equipment like the Excavator.

4. Feasible Means of Abatement

As discussed above, Respondent's abatement to the hazard of dead ash trees falling on employees was inadequate. Equipment operators, such as Mr. Troup, were not adequately protected when using the Excavator. (Tr. 207-208). The Secretary showed that the steps Respondent took were inadequate to address the hazard.

As discussed with Item 1(a), to meet his burden, 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 argues that the violation could feasibly be abated by using a different model excavator with an upgraded protection system or discontinuing the use of the Excavator in favor

of more appropriate equipment. (Sec’y Br. 19-20, 22). The Secretary’s expert explained that such equipment was available, and Respondent does not refute this. (Tr. 207-208, 217-18). *See Beverly*, 19 BNA OSHC at 1191 (feasibility burden can be met if experts have recognized the proposed actions as feasible).

By the time of the hearing, Respondent had implemented a policy prohibiting its employees from using an E35 Bobcat Excavator, like the one used on January 2, 2020, to fell trees. (Tr. 338, 357). Respondent continues to be able to remove danger trees and ensure safe passage on access roads since ceasing to use the Excavator. (Tr. 338, 357-358). This post-accident implementation demonstrates that the proposed abatement measure is technologically and economically feasible. *See Sci. Applications*, 2020 WL 1941193 at *8 (post-accident implementation of proposed abatement methods demonstrated feasibility); *SeaWorld*, 748 F.3d at 1215 (finding that evidence of post-citation actions supports finding that the proposed means of abatement were feasible).

Nor does Respondent contest that this proposed abatement materially reduced the hazard. The Excavator did not have adequate FOPS for felling trees. (Tr. 204-207, 216-218). As the Secretary’s expert explained, the Excavator’s protection was inadequate for such a task, and the machine could not be modified to be sufficiently protective. *Id.* However, there is equipment with appropriate cab protection to protect operators from the hazard of trees or limbs falling on the equipment. (Tr. 217-218).

Respondent does not challenge the technical or economic feasibility of the Secretary’s proposed abatement. Nor did it refute the Secretary’s evidence that the proposed abatement would

materially reduce the hazard.²² Therefore, the Secretary met his burden of showing the existence of a hazard to which employees were exposed, Respondent and its industry-recognized this hazard, and the hazard could be materially reduced through feasible means of abatement.

In addition, as discussed in more detail in the next section, Part IV, the Secretary established Respondent's knowledge of the cited hazard.

IV. 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 hazard of danger trees. Both parties' experts testified that dead ash trees are dangerous and can cause severe injury because of their unstable and unpredictable nature. (Tr. 179-182, 308-309, 313). Respondent, aware that dead ash trees posed a hazard to its employees, provided training on, and discussed danger tree hazards at regular safety meetings. (Tr. 355-356, 368). Respondent knew that the worksite where RF and Mr. Troup were assigned to work had danger trees that needed to be removed.

Respondent routinely directed employees to assess and fell danger trees precisely because Respondent knew they posed a hazard to its employees. (Tr. 38-39, 42-43, 274-275, 355-357; Exs. J-6, J-8; Stip. 6). Further, the Bobcat Manual, which was in Respondent's possession, expressly

²² The Secretary does not have to show that his proposed method is the only way to address the hazard. Employer's can adopt equally effective alternative methods. *See e.g., Chevron Oil Co.*, 11 BNA OSHC 1329, 1334 n. 16 (No. 10799, 1983). The Secretary does not dispute that Respondent's cessation of the Excavator's use sufficiently abated Item 1(b). (Sec'y Br. 22).

warned against using the equipment in the scenario for which Respondent had elected to use it. (Exs. J-10 p 11; S-2 p 6). Respondent's argument that the Bobcat Manual failed to put it on notice of the need for additional operator protection is unpersuasive. (Resp't Br. 31-40). The Bobcat Manual warned Respondent that the Excavator simply was not equipped to protect its operator against large falling objects, such as pieces and limbs of standing dead ash trees. (Tr. 204-207, 305; Exs. J-10, p 11; S-2, p 6). It clearly states that the Excavator's FOPS was designed to only meet ISO Standard 10262 Level 1. (Exs. J-10, p. 11; S-2, p. 6). This Level 1 protection was inherently inadequate for the assigned task. It simply could not protect an employee from a large tree or portion of one, such as the 390-pound trunk that fell on January 2, 2020, striking RF, striking the Excavator's bucket, and nearly striking the roof of the Excavator's cab. (Tr. 208, 305; Exs. J-7, p. 2; J-9, J-24, S-2, p. 4, ¶ 4.4(a)).

Respondent cites to *K.E.R. Enterprises* arguing the Bobcat Manual does not provide, as was the case in the cited precedent, a safety warning or link between noncompliance and a safety hazard. (Resp't Br. 32, 35). This fails to persuade. In this matter, the Bobcat Manual expressly cites to ISO Standard 10262, which warns of the danger of falling objects, such as falling trees, and explains that the equipment only provides operator protection for small falling objects. (Exs. J-10 p. 11; S-2 pp. 4, 6). The statements in the Bobcat Manual here were undoubtedly intended to provide safety warnings to Respondent about the Excavator's protection limitations. To permit Respondent to ignore the Bobcat Manual's warning that the Excavator is only rated for small falling objects covered by ISO Standard 10262 Level 1 protection would undermine the general duty clause. (Exs. J-10, p 11; S-2, pp. 4, 6); *See Young*, 7 BNA OSHC at 1298-99 (holding to allow employers to ignore safety notices on a manufacturers' brochure "of the potential dangers inherent in the use of a product would undermine the general duty clause...")

In addition, the Secretary asserts that Respondent had constructive knowledge of the violations. (Sec’y Br. 16-17). 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).

Removing danger trees was a routine part of employee tasks. Respondent’s training materials acknowledged the hazard associated with felling danger trees. (Tr. 297-299, 336-338; Exs. J-6, J-12, J-11, J-31 pp. 4-5; J-32 pp. 23-24; J-33, J-34; Stip. 4); *See Gen. Dynamics*, 15 BNA OSHC at 1285 (employer’s safety bulletins were evidence of its recognition of an existing hazard). However, Respondent did not have any work rules related to this hazard. It did not, as ANSI Z-133 directs, require employees to remain in communication, to carefully evaluate tree lean, or to stand a safe distance away while a tree was pushed over. (Tr. 353; Exs. J-6, J-13, J-12 pp. 45-47; Stip. 6). Further, Respondent lacked work rules regarding ensuring equipment was appropriate for the job and of suitable size. (Exs. J-7 p. 3; J-12, pp. 45-47). It permitted the use of the Excavator even though it lacked proper protection against large falling objects such as falling tree limbs. (Tr. 204-207, 216-218; Exs. J-9, J-10 p. 11; Ex. S-2 pp. 4, 6; Stip. 8).

Respondent’s complete failure to have adequate work rules to enforce its safety training programs is sufficient to find that it had constructive knowledge of the violation. *See Gen. Motors*

Corp., 22 BNA OSHC 1019, 1037 (No. 91-2834E, 2007); *see also Atl. Battery Co., Inc.*, 16 BNA OSHC 2131, 2160 (No. 90-1747, 1994).

The Secretary established Respondent's actual and constructive knowledge of the violative conditions.

V. Serious Classification

The Secretary classified Respondent's general duty clause citation 1, item 1(a), and citation 1, item 1(b) violations as serious. Respondent does not challenge the serious classification of general duty clause citation 1, item 1(a), but does contend that citation 1, item 1(b) should not be characterized as serious. (Resp't Br. 41-42).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Wal-Mart Stores, Inc., v. Sec'y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1388 (D.C. Cir. 1985).

The Commission's test for determining whether a violation is likely to cause death or serious harm for purposes of a violation of the general duty clause is nearly identical to the test for determining whether a violation is serious for purposes of section 17(k) of the Act. *Compare Waldon*, 16 BNA OSHC at 1060, *with Mosser*, 23 BNA OSHC at 1046. Thus, a finding that a violation is "likely to cause death or serious harm [under the general duty clause] is equivalent to a finding under section 17(k) that the violation gives rise to a substantial probability of death or serious harm." *Gearhart-Owen Indus., Inc.*, 10 BNA OSHC 2193, 2199 (No. 4263, 1982).

As discussed above, these violations were capable of causing serious injury or death. (Tr. 142, 149, 371). The violations were appropriately characterized. *See* 10 BNA OSHC at 2199; *Acme Energy*, 23 BNA OSHC at 2129 (finding a general duty clause violation was serious based on the same factors considered in finding the general duty clause violation).

VI. Penalty

Under section 17(j) of the Act, the Commission has the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of their hazard exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

The Secretary grouped the penalty for Items 1(a) and (b), proposing a penalty of \$13,494.²³ (Tr. 148). While Respondent challenged the likelihood of injury concerning citation 1, item 1(b),

²³ The Bipartisan Budget Act of 2015 incorporated the Inflation Adjustments Act of the same year and required the Secretary to increase OSHA's statutory penalty annually. Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701; 28 U.S.C. §§ 1 note and 2461 note. The Secretary assessed his penalty for these alleged violations by issuing the Citation on April 9, 2020. The maximum penalty amount was therefore governed by the Secretary's adjustment rule effective January 15, 2020. *See* Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020, 85 Fed. Reg. 2292, 2298-99 (Jan. 15, 2020) (to be codified at 29 C.F.R. pt. 1903).

it did not rebut the Secretary's evidence that any accident could, and did, result in serious injuries regarding citation 1, item 1(a). (Resp't Br. 41-42).

Looking first at gravity, the CO explained that OSHA believed the violation's gravity was high because of the high likelihood of multiple bone fractures and the actual serious physical harm suffered by Respondent's injured employee. (Tr. 68, 141-142, 147; Exs. J-2 p. 3; J-7 p. 3). Multiple vertebra in RF's back were broken, he suffered a head laceration and other injuries. (Tr. 68, 371; Exs. J-2 p. 3; J-7 p. 3). The Secretary's expert viewed several of the trees as "widowmakers," any one of which could have seriously injured an employee. (Tr. 180-182; Ex. J-25). The record supports finding that the gravity of the violations warrants a high penalty. *See Nelson Tree Servs., Inc.*, 1994 WL 184445, at *3 (gravity of similar general duty clause violation found to be high). The CO noted that two employees were exposed to the violative conditions on the day of the accident. (Tr. 142-143). Additionally, Mr. Troup felled trees approximately once a month, and RF typically cuts trees a couple times a month. (Tr. 42-43; Exs. J-6, J-7 p. 3; J-9). RF had performed the task over two dozen times. (Ex. J-6).

The Secretary proposes that the penalty should not be reduced for good faith because of the severe nature of the violation. (Tr. 145-147; Sec'y Br. 8, 22). Respondent had a safety and training program. (Exs. J-31 pp. 4-5; J-32 pp. 23-24; J-33, J-34; Stip. 4). However, as discussed, it lacked adequate work rules regarding known hazards related to felling trees.

Turning to history, although Respondent did not have any recent citations, it had not been inspected by OSHA within the previous five years of this current inspection. (Tr. 147-148). Therefore, the Secretary proposed no increase or decrease for history. *Id.*

As for size, at the time of OSHA's investigation, Respondent employed between 1,100 and 1,300 workers. (Tr. 370). Given this, the Secretary proposes that Respondent is a sufficiently

large employer that there should be no reduction for size. *See S&G Packaging Co., LLC*, 19 BNA OSHC 1503, 1508 (No. 98-1107, 2001) (no reduction given for large employer with 279 employees).

Respondent made no contrary arguments as to the appropriate penalty. Upon due consideration of section 17(j) of the Act, with regard given to the penalty calculation factors, the undersigned finds that a grouped penalty for serious citation 1, item 1(a) and serious citation 1, item 1(b) of \$13,494 is appropriate.

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(a) and Citation 1, Item 1(b) alleging serious violations of section 5(a)(1) of the Act, are AFFIRMED and a grouped penalty of \$13,494 is ASSESSED.

SO ORDERED.

Dated: September 27, 2021
Washington, D.C.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC