
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 00-0615
	:	
SALMON RIVER WOOD PRODUCTS,	:	
	:	
Respondent.	:	

ORDER

On February 2, 2001, Salmon River Wood Products (Salmon) filed a Petition for Discretionary Review concerning the underlying proceedings in this case, and on February 13, 2001, it filed an Application for Award of Fees and Expenses under Equal Access to Justice Act (EAJA Application). Chairman Thomasina V. Rogers directed the case for review on March 2, 2001, and on the same date the Commission stayed proceedings on Salmon’s EAJA Application. The parties have now filed a Stipulation and Settlement Agreement, and Salmon has moved to dismiss its EAJA Application.

In view of the Stipulation and Settlement Agreement, we conclude that no further review by the Commission is warranted. Accordingly, we approve the Stipulation and Settlement Agreement and we grant Salmon’s motion to dismiss its EAJA Application.

We incorporate the Stipulation and Settlement Agreement into this Order and set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Stipulation and Settlement Agreement. This is the final order of the Commission.¹

Date: September 20, 2001

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

¹ Salmon filed a Net Worth Exhibit as part of its EAJA Application and moved that the contents be held confidential. Because we have granted Salmon's motion to dismiss its EAJA Application, we direct the Executive Secretary to return the Net Worth Exhibit to Salmon's counsel upon issuance of this Order.

00-0615

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Counsel for Regional Trial Litigation
Orlando J. Pannocchia, Esq.
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, DC 20210

Michael A. Stabler, Regional Solicitor
Office of the Solicitor, U.S. DOL
1210 City Center Square
1100 Main Street
Kansas City, MO 64105

Richard A. Reep, Esq.
Reep, Spoon & Gordon, P.C.
320 West Broadway-Second Floor
P.O. Box 9019
Missoula, MT 59807-9019

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

SALMON RIVER WOOD PRODUCTS,

Respondent.

OSHR DOCKET NO. 00-0615

APPEARANCES:

For the Complainant:

Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Richard A. Reep, Esq., Reep Spoon & Gordon, P.C., Missoula, Montana

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Salmon River Wood Products (Salmon River), at all times relevant to this action maintained a place of business near Daisy Creek, off Gold Creek Road, Bonner, Montana, where it was engaged in logging. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 21, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Salmon River's Bonner, Montana work site, following a fatality. As a result of that inspection, Salmon River was issued a citation alleging violations of the Act, together with proposed penalties. By filing a timely notice of contest Salmon River brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Background

On December 17, 1999, Val Loesch and Jake Woirhaye were partnered, logging timber at Salmon River's Bonner site (Tr. 39-41, 175, 255, 261). Woirhaye was working alone, cutting trees in the bottom land near Daisy Creek, when he felled a western larch (Tr. 54-55, 92; Exh. C-5, C-7). The larch fell against a Douglas fir that was rotted at the base (Tr. 60; Exh. C-5). The Douglas fir then fell back on Woirhaye, killing him (Tr. 64, 79).

Alleged Violation of §1910.266(h)(1)(vi)

Serious citation 1, item 1 alleges:

29 CFR 1910.266(h)(1)(vi): The employer did not assure that each danger tree was felled, removed or avoided. Each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. If the danger tree is not felled or removed, it shall be marked and no work shall be conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard of an employee:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were working within the fall radius of a danger tree approximately 100 feet tall.

Facts

David Vaughn, an OSHA Compliance Officer (CO), testified that he examined and videotaped all the stumps he could locate in that portion of Salmon River's cutting block where the accident occurred (Tr. 40, 80-81; Exh. C-5). Vaughn and measured eight to ten stumps in the area, and found that each of the eight to ten stumps was located within the fall distance, *i.e.*, two tree lengths, of a leaning "danger tree" (Tr. 68-69, 80, 84; Exh. C-5, C-14). Vaughn admitted that the identification of a danger tree is somewhat subjective; not every dead tree is dangerous (Tr. 72, 74, 126). The sawyer must take into account the tree's lean, whether the tree has limbs and/or bark, and whether the tree is sound (Tr. 127-28). Vaughn testified that, although he did not see the Douglas fir that killed Mr. Woirhaye prior to the accident, on December 21, 1999 the downed tree had no bark on the bottom, and had only stub limbs and a crown on it (Tr. 61, 63, 127). The roots of the tree were partially exposed, and the base of the trunk was rotted through (Tr. 128). Vaughn stated that the Douglas fir is generally a dangerous tree when dead because of its shallow root system (Tr. 129).

Joe Fraser, Salmon River's owner, defined a danger tree as a tree that is deemed unsound upon visual observation (Tr. 187). A potential danger tree might have no top, or be full of woodpecker holes; the roots might be burned out; the tree might be wind thrown, or have another tree leaning against it; it could be red needled, or missing needles or limbs (Tr. 209-10). Fraser stated that a danger tree would be

obvious to an experienced sawyer (Tr. 187). Fraser testified that there were standing snags² in the bottom land area that did appear to be danger trees (Tr. 187-190, 209). The suspect trees were leaning, and had no bark (Tr. 209). Fraser noted that not all dead trees are dangerous; however, there were a number of dead trees in the area that were barked all the way to the top and did not appear unsound (Tr. 187-89).

Though he observed the bottom land before the accident, Fraser could not specifically recall the Douglas fir that struck and killed Woirhaye (Tr. 221-22). Fraser admitted that the downed tree was obviously dead, had few branches and appeared to have been rotted from about four to six feet above the base (Tr. 211, 221, 223-24). Both Val Loesch, and Greg Johnson, a Salmon River sawyer with 23 years of experience, testified that the top of the Douglas fir appeared sound, though neither saw the tree before the accident (Tr. 268, 285). Both Fraser and Loesch believed that Woirhaye reasonably failed to identify the Douglas fir as a danger tree (Tr. 187-88, 268).

Fraser stated that it is Salmon River's policy to cut down identified danger trees, when possible, thereby eliminating the hazard those trees pose to sawyers (Tr. 166, 210-11). The sawyer has discretion, however, to walk away and simply avoid working around the danger tree (Tr. 210-11; *see* testimony of Greg Johnson, Tr. 281, 286). Salmon River's policy does not provide for marking identified danger trees (Tr. 166). No trees were marked and/or avoided on the Bonner site (Tr. 224). There were no downed danger trees, and no evidence that Woirhaye had made any attempt to remove any snags or leaning trees in the cutting block prior to working in the area (Tr. 129-30).

Fraser testified that he neither examines, nor provides cutting advice on individual trees. It is the sawyer's responsibility to determine the appropriate method of felling individual trees (Tr. 191). Fraser stated that he could not say whether Woirhaye should have been working around the other potential danger trees in the cutting block (Tr. 211). He stated that Woirhaye had more experience in assessing trees than he had, and that he assumed Woirhaye concluded the dead trees and snags in the area were safe to work around (Tr. 212, 215).

Discussion

Section 1910.266(h)(1)(vi) provides:

Each danger tree shall be felled, removed or avoided. Each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. If the danger tree is not felled or removed, it shall be marked and no work shall be

² §1910.266(c) defines a snag as: Any standing tree or portion thereof.

conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard for an employee:

Section 1920.266(c) defines *Danger tree* as:

A standing tree that presents a hazard to employees due to conditions such as, but not limited to, deterioration or physical damage to the root system, trunk, stem or limbs and the direction and lean of the tree.

It cannot be disputed that the Douglas fir that killed Woirhaye was a danger tree as defined by the standard, or that Woirhaye was working within the fall radius of the tree when the accident occurred. Salmon River maintains, however, that if Woirhaye had realized the Douglas fir was a danger tree, he would have removed it before commencing work in its fall radius; therefore, Woirhaye must have failed to identify the tree as dangerous.

Respondent can only speculate about what Woirhaye knew or thought prior to cutting the western larch. There is little support in the record, however, for the premises of Salmon River's argument.³ It has been established, by Fraser's own admission, that there were danger trees on the cutting block Woirhaye was working. Moreover, according to Fraser, danger trees are obvious to experienced sawyers like Woirhaye. Nonetheless, CO Vaughn's inspection revealed that Woirhaye had not marked, felled, or otherwise removed a single potentially hazardous tree. Finally, Vaughn testified, without contradiction, that Woirhaye felled timber within the fall radius of *other* leaning snags, which Vaughn videotaped and identified as danger trees. This judge notes that, even if the Douglas fir was not clearly identifiable as a danger tree, the leaning snags depicted on Complainant's Exhibit C-5 were. Vaughn's testimony that felling took place within two tree lengths of *those* danger trees is sufficient to establish the violation.

This judge notes that CO Vaughn, though not a sawyer himself, demonstrated an understanding of the standard's requirements as well as the definition of a danger tree. His testimony regarding danger trees on the subject cutting block is not inconsistent with the other testimony and is specifically credited.

Penalty

A penalty of \$2,500.00 is proposed for this item. The gravity of the violation is high, in that a sawyer's failure to remove or avoid danger trees can result in death (Tr. 115, 117). CO Vaughn testified that, in proposing the penalty, he ascertained that Salmon River has 28 employees, and took into account

³ The Secretary's theory of the case, *i.e.*, that Woirhaye attempted to bring down the leaning Douglas fir by deliberately felling the western larch into it (Tr. 136, 143-44), though also speculative, is actually more consistent with the testimony. Fraser testified that Woirhaye's fall pattern in this cutting block was excellent (Tr. 185). Loesch testified that his felling was perfect (Tr. 271). Respondent repeatedly stressed that it appeared that every tree had fallen in its intended direction (Tr. 154-58).

its small size (Tr. 115). Vaughn testified that he gave Respondent credit for history, as Salmon River had not received any serious or repeat violations within the prior three years (Tr. 115). No credit was, or should have been, provided for good faith. As discussed more fully in item 4 below, the record establishes that Salmon River's sawyers regularly substitute their own judgment for that of OSHA, as embodied in regulations duly promulgated following notice and comment (Tr. 271-73, 282). Respondent's sawyers follow or disregard OSHA instructions at their own discretion, as well as at their own peril. The record shows that Salmon River leaves the disposition of danger trees entirely up to the sawyer's discretion, making no attempt to ensure that its sawyers comply with OSHA regulations, so long as the sawyers lay out the trees as directed (Tr. 197-229).

It would not have been inappropriate, in this judge's view, for OSHA to propose a penalty greater than the \$2,500.00 suggested by the agency. However, the agency's penalty calculations were supported, and will not be disturbed.

Alleged Violation of §1910.266(h)(ii)

Serious citation 1, item 2 alleges:

29 CFR 1910.266(h)(ii): The immediate supervisor was not consulted when unfamiliar or unusually hazardous conditions necessitated the supervisor's approval before cutting was commenced:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations fell a tree into a danger tree.

Facts

CO Vaughn believed that Woirhaye chose to dispose of the danger tree that was the Douglas fir by felling the larch into it (Tr. 136, 144). Vaughn testified that downing the fir with another tree was a hazardous means of dealing with the snag, though it would not necessarily constitute a violation of OSHA regulations (Tr. 144). It is undisputed that the deceased, Jake Woirhaye, made no attempt to contact Joe Fraser, his immediate supervisor and Salmon River's owner, prior to cutting the western larch (Tr. 88-89, 138, 169).

Discussion

Section 1910.266(h)(ii) provides:

The immediate supervisor shall be consulted when unfamiliar or unusually hazardous conditions necessitate the supervisor's approval before cutting is commenced.

The work site specific language at item 2, sub-paragraph (a) specifically refers to Woirhaye's failure to contact a supervisor before felling the western larch into a danger tree, *i.e.*, the Douglas fir. CO Vaughn testified that such undertaking was "unusually dangerous," as contemplated by the standard.⁴

Though the logging standard contains no definition of what conditions shall be deemed unfamiliar or unusually hazardous, the preamble to the Final Rule provides some guidance, stating that:

While OSHA cannot provide an exhaustive list of the situations which may necessitate the employee consulting with a supervisor, there are certain situations which are clearly covered by this paragraph. These situations include worsening weather conditions (e.g., weather changes which begin to impair the loggers vision; deepening snow or mud which begins to affect a logger's mobility; felling very large or very tall trees; cutting trees whose lean, structure or location make it difficult to fell in the desired or safest direction; and using a driver tree to fell a danger tree.

60 Fed. Reg. 47022 (September 8, 1995). The preamble to the Final Rule specifically lists the use of a driver tree to fell a danger tree as an unusually dangerous activity governed by §1910.266(h)(ii).

It is undisputed that there were no witnesses to the accident. No one can know what Woirhaye's intent was when he felled the larch. A violation cannot be affirmed based on the Secretary's guess, even its educated guess, that Woirhaye actually identified the Douglas fir as a danger tree, or that his objective in felling the larch was to knock down the fir. Because there is insufficient evidence to conclude that Woirhaye intended to use the larch as a driver tree to bring down a known danger tree, this judge cannot conclude that his supervisor's approval was required prior to his cutting the tree.

The cited violation is vacated.

Alleged Violation of §9110.266(i)(3)(iii)

Serious citation 1, item 3 alleges:

29 CFR 1910.266(i)(3)(iii): At a minimum training did not include recognition of safety and health hazards associated with the employee's specific work tasks, including the use of measures and work practices to prevent or control those hazards:

⁴ The work site specific language in Item 2, Subparagraph (a) does not refer to the logging of the Daisy Creek area of the Bonner site in general, and the Secretary made no attempt to amend the cited violation to include an allegation that all logging in the block Woirhaye was working was hazardous. Nonetheless CO Vaughn testified that the entire cutting block where the accident occurred was "unusually hazardous," due to the numerous leaning and dead trees he observed in the area, and the number of blow downs in the bottom land (Tr. 67-68, 88-90, 138).

Though CO Vaughn's testimony is not relevant to the cited violation, it was answered, at length, by Respondent during the hearing. In order to avoid possible remand, therefore, this judge finds that neither the mere presence of danger trees, nor the occurrence of an accident establish that the entire Daisy Creek area was unusually hazardous, or that more than a general warning from the supervisor was required before commencing cutting. Fraser testified that he assessed the area before cutting began, and warned his sawyers to check each tree out as they went through the area, and to watch what they were doing (Tr. 134, 172-73, 183; *see also*, testimony of Loesch, Tr. 261). CO Vaughn admitted that such a general warning would satisfy the requirements of the standard (Tr. 140-41).

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were not trained on how to assess and deal with the hazard of danger trees.

Facts

CO Vaughn testified that when he interviewed Val Loesch, Loesch could not tell him how close to a danger tree he was allowed to work (Tr. 103). According to Vaughn, Joe Fraser told him that Salmon River had no written guidelines for assessing and/or dealing with danger trees (Tr. 124). Fraser told Vaughn that all such training was “word of mouth” (Tr. 103). At the hearing, however, Salmon River introduced a written safety program that covers, *inter alia*, safe felling procedures (Tr. 179; Exh. R-4 through R-14). The rules specify that a sawyer may not work within two tree lengths of a fall snag or other danger tree (Exh. R-14, ¶25).

At the hearing Loesch testified that he knows to work two tree lengths from a danger tree, and knew it at the time of the interview with CO Vaughn. Loesch stated that he was upset and not thinking clearly at that time (Tr. 266-67). Loesch testified that both he and Woirhaye knew to get a tree on the ground if they were worried about it (Tr. 261). Greg Johnson also testified that he had been trained to cut a tree if it appeared it would fall should another tree hit it (Tr. 281).

Joe Fraser testified that while he hires only experienced sawyers, he goes through the safety program with all new hires, and observes their cutting techniques before allowing them to work unsupervised (Tr. 132, 176-177, 180, 224-25; *See also*, concurring testimony of Val Loesch, Tr. 257). Fraser stated that he spoke to Jake Woirhaye’s previous employer, Charlie Parke, about both Loesch and Woirhaye’s experience. Though Parke did not specifically discuss Loesch and Woirhaye’s training with Fraser, he did tell Fraser that both were competent sawyers (Tr. 195-96, 239). Parke testified that Val Loesch worked for him 8 or 10 years; Woirhaye worked for him approximately 12 years (Tr. 235). Parke testified that Loesch and Woirhaye received yearly safety training (Tr. 237). In addition, at least twice a year Parke’s workers compensation carrier, or the Montana Logging Association (MLA) visited Parke’s work site to observe and correct the sawyers’ techniques (Tr. 237-38). Parke testified that the MLA training included instruction on OSHA requirements generally, and on OSHA’s definition of danger trees in particular (Tr. 238-39).

Val Loesch testified that he and Woirhaye received a pamphlet, and instruction in the identification of danger trees from Paul Uken, a field representative for the Montana Logging Association, while they were in the employ of Charlie Parke (Tr. 258-60; Exh. R-1). Loesch stated that he was familiar with OSHA regulations regarding danger trees (Tr. 264). Loesch correctly identified the characteristics of a danger tree, *i.e.*, the presence or absence of limbs and/or bark (Tr. 268-69).

Greg Johnson also correctly described the means of assessing a danger tree, stating that the sawyer looks for signs of rot, broken tops, and the presence or absence of bark (Tr. 285).

Discussion

The cited standard, §1910.266(i)(3)(iii), requires that the employer provide training which includes, at a minimum, “[r]ecognition of safety and health hazards associated with the employee’s specific work tasks, including the use of measures and work practices to prevent or control those hazards.” However, OSHA regulation §1910.266(i)(5) recognizes that logging training is portable, and specifically states that employees who have received the training required under §1910.266(i)(3), *et seq.* need not be retrained in those elements.

Salmon River was cited based on Loesch’s inability, shortly after the accident, to correctly answer one specific question from CO Vaughn regarding the distance a sawyer must maintain from a danger tree. In her brief, the Secretary’s counsel further states that Loesch and Johnson’s answers at the hearing demonstrate the inadequacy of their training (Secretary’s Brief, at p. 15). This judge finds that there is insufficient evidence to support a violation.

Joe Fraser testified that he hired only experienced sawyers. Fraser confirmed that Woirhaye and Loesch had 8 and 12 years experience, respectively, with their prior employer, Charlie Parke. Fraser testified that he spoke with Parke before hiring the men; he also reviewed Salmon River’s safety program with each man when he was hired, assuring that each was familiar with the material. Fraser observed Loesch and Woirhaye’s work before allowing them to work independently.

Loesch and Johnson’s testimony at trial indicate a familiarity with criteria for assessing whether a tree is dangerous, and with the means of dealing with such trees. Section 1910.266(h)(1)(vi) specifically requires that a danger tree be either felled, removed or avoided, as recommended by both Loesch and Johnson. The Secretary’s implication that the employee’s answers at hearing were deficient is rejected.

The preponderance of the evidence establishes that Salmon River’s sawyers were trained in the recognition of and means to avoid the safety and health hazards associated with danger trees. The standard specifically exempts employers such as Salmon River from repeating relevant training where, as here, there is ample reason to believe its employees are already familiar with the required material. The cited violation is vacated.

Alleged Violations of §1910.266 et seq.

Serious citation 1, item 4a alleges:

29 CFR 1910.266(h)(2)(v): An undercut was not made in each tree being felled, of a size so the tree(s) would not split and will fall in the intended direction:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were not sawing an undercut of sufficient size for the diameter of the trees being cut.

Serious citation 1, item 4b alleges:

29 CFR 1910.266(h)(2)(vi): A backcut was not made in each tree being felled that allowed sufficient hinge wood to guide the tree's fall and prevent it from prematurely slipping or twisting off the stump:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were cutting through the necessary hinge wood on trees being felled.

Serious citation 1, Item 4c alleges:

29 CFR 1910.266(h)(2)(vii): The backcut of trees being felled was not above the level of the horizontal cut of the undercut:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations had back cuts less than 1 inch above the horizontal face cut (match cut).

Facts

Vaughn testified that each of the eight to ten stumps he observed were the result of a Humboldt notch and a matched, *i.e.*, not elevated, back cut (Tr. 97, 111).

The Humboldt notch consists of a horizontal upper cut, and an undercut that meets the upper cut at an angle (Exh. C-22). Vaughn testified that, ideally, the undercut should meet the upper cut at a 45° angle, though the lean of the tree can affect the amount of face or undercut that is required (Tr. 82, 85; Exh. C-22). Vaughn stated that he would not cite an employer if his sawyers were making undercuts of at least 30° (Tr. 85). CO Vaughn testified that the intent of the standard is to ensure that the undercut is of a sufficient size to prevent splitting, and to control the tree's fall (Tr. 154). Vaughn testified that, on this block, the sawyers' face cuts were not open enough to control the fall of the trees (Tr. 48). Vaughn used a clinometer to measure the undercuts on the stumps he examined; he found the undercuts met the upper cuts at various angles between 15° and 25° (Tr. 50-51, 75, 79, 81, 85; Exh. C-17, C-18, C-19). According to CO Vaughn, an inadequate face cut closes before the tree is committed to its fall and can cause the hinge wood to pull free prematurely (Tr. 52). The sawyer may then lose control of the tree's fall (Tr. 52). Joe

Fraser disagreed with Vaughn's conclusion, stating that it does not take a 45° face cut to direct the fall of a tree (Tr. 218).

In addition, Vaughn testified that the sawyer working the Bonner block left insufficient hinge wood on the stumps (Tr. 46, 87). According to CO Vaughn, if the sawyer leaves inadequate hinge wood (the wood left between the horizontal face cut and the back cut), the tree will break free before it is committed to its fall, and the sawyer may lose control of the tree (Tr. 106-07). Vaughn stated that in determining the amount of hinge wood necessary to control the fall of a tree, the sawyer should measure the diameter of the tree four to five feet above the ground (Tr. 87). The sawyer should leave hinge wood equaling 80% of that diameter (Tr. 87). Salmon River's felling procedures require the sawyer leave adequate holding wood (Exh. R-14, ¶8).

Finally, CO Vaughn noted that OSHA regulations require sawyers to place the back cut approximately one inch above the perpendicular cut of the face, or lead notch to create a step; which prevents the tree from kicking back into the sawyer as it falls (Tr. 86). Vaughn testified that Salmon River's sawyers routinely matched their back and face cuts, leaving too little stump shot, or step, to prevent kick-back (Tr. 53-54). Complainant's videotape of the inspection site shows both tree stumps and butts with matched cuts (Tr. 62, 79; Exh. C-5). Vaughn testified that Salmon River's owner, Joe Fraser, had daily opportunities to observe the stumps that Vaughn videotaped (which had been cut over a period of several weeks) and to take corrective action (Tr. 165, 167). Salmon River's felling procedures direct the sawyers to place their back cuts higher than the flat cut of the lead notch (Exh. R-14, ¶9).

MLA's Uken testified that he has been inspecting Salmon River's safety programs and falling techniques since 1998, to ensure that they are OSHA compliant (Tr. 246). Uken remembered speaking to both Loesch and Woirhaye repeatedly, asking them to raise their back cuts (Tr. 249).

Fraser testified that he and his sawyers were aware of the OSHA regulation requiring a 1 inch step (Tr. 216, 240). He admitted, however, that as long as the trees are laid the way he wants them, and he sees no evidence of splitting, he does not examine his sawyer's stumps to ensure their compliance with OSHA regulations regarding undercutting (Tr. 197, 227). Fraser is aware that his sawyers do not agree with OSHA regulations requiring a one inch step; and testified that Salmon River is working with them, trying to secure their compliance (Tr. 198, 200-02). Salmon River has never disciplined a sawyer for failing to follow either the OSHA regulation in question, or any other safe logging rule (Tr. 229).

Val Loesch admitted that both he and Mr. Woirhaye believed that the one inch step is dangerous, as it causes the sawyer to lose control over the tree faster. Although they knew that OSHA requires the step, they chose not to comply, believing it to be hazardous (Tr. 271-73). Though verbally chastised,

Loesch was never disciplined in any way for matching his front and back cuts (Tr. 274-75). Vaughn admitted that some hinge wood did remain on the butt of at least one of the trees he videotaped (Tr. 48-49, Exh. C-7). Vaughn saw no evidence that any of the trees felled in the area split, or fell anywhere other than where intended; he did not believe any of the trees had kicked back (Tr. 75, 82, 119-20, 155, 158, 161).

Paul Uken testified that he has been reviewing Salmon River's safety programs and felling techniques since 1998 (Tr. 246). Uken specifically recalled observing Val Loesch, and Jack Woirhaye, and concluding that their felling practices were satisfactory (Tr. 248-49).

Discussion

Item 4a. Section 1910.266(h)(2)(v) provides:

An undercut shall be made in each tree being felled unless the employer demonstrates that felling the particular tree without an undercut will not create a hazard for an employee. The undercut shall be of a size so the tree will not split and will fall in the intended direction:

The record establishes that an undercut of somewhere between 15° and 25° was made in each of the trees CO Vaughn examined. Vaughn admitted that the trees he saw all appeared to have fallen in the intended direction, and stated that he would not have cited Salmon River if their undercuts approached 30°.

The Secretary points to a diagram in its own "Logging Advisor," which was admitted for illustrative purposes only (Tr. 97-101; Exh. C-22). Complainant's exhibit purports to describe the different kinds of notches used in logging, their characteristics, and their advantages and disadvantages. Complainant's exhibit describes the total angle of a Humboldt face as 45° (Exh. C-2). The Secretary further points to language in the preamble to the Final Rule which states that:

In logging operations where the Humboldt method is most heavily used, fellers most often only cut a notch that is *no greater than* 45 degrees, making the openness of the notch similar to that of conventional felling. . . . At 45 degrees, the face notch alone does not fully address both the hazards of misdirected falling and kickback. (*emphasis added*).

While some deference is due to the Secretary's interpretation of a cited standard where her position is set forth in litigation before the Commission, a reviewing court should defer to the Secretary only if her interpretation is reasonable. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991); *Secretary of Labor v. American Cyanamid Company*, 15 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,598 (No. 86-681, 1992). It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of the regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC*, 613

F.2d 1227, (3rd Cir. 1980). The Commission has held that adequacy of notice to the regulated parties bears on the reasonableness of the Secretary's interpretation of a standard. *Arcadian Corp.*, 17 BNA OSHC 1345, 1351, 1995 CCH OSHD ¶30,856 (No. 93-3270, 1995).

The cited standard requires only that the undercut be of a size so the tree will not split and will fall in the intended direction. There is no evidence that any of the trees felled by Salmon River's sawyers did otherwise. The language in both the preamble and OSHA's Logging Advisor are descriptive, not advisory. Neither purports to set forth a minimum angle for undercuts. None of the evidence introduced into the record would have placed Salmon River on notice that the Secretary requires each Humboldt face be between 30° and 45°.

The Secretary's interpretation of the reach of the cited standard is not reasonable and is accorded no deference. In the absence of reasonable notice of the standard's requirements, the violation cannot stand. Item 4a is vacated.

Item 4b. Section 1910.266(h)(2)(vi) provides:

A backcut shall be made in each tree being felled. The backcut shall leave sufficient hinge wood to hold the tree to the stump during most of its fall so that the hinge is able to guide the tree's fall in the intended direction.

Though CO Vaughn testified that he did not believe the stumps he examined evidenced adequate hinge wood, he also testified that all the trees he observed seemed to have fallen in the intended direction. CO Vaughn stated that the sawyer should leave hinge wood totaling approximately 80% of the diameter of the tree, as measured four to five feet above the ground. Vaughn's observations, however, did not address this criterion. Vaughn did not measure the diameter of any of the trees, or establish how much hinge wood would be left on the stump of an adequately hinged tree.

The Secretary failed to introduce any objective evidence by which this judge might ascertain how much hinge wood was, or should have been left on the subject trees. The amount of hinge wood left by Salmon River's sawyers appears to have been sufficient insofar as the trees all fell in the intended direction. This judge cannot find, by a preponderance of the evidence, that the cited standard was violated. Citation 1, item 4b is vacated.

Item 4c. Section 1910.266(h)(2)(vii) provides:

The backcut shall be above the level of the horizontal facecut in order to provide an adequate platform to prevent kickback.

Salmon River concedes that the cited OSHA regulation requires a one inch step above the horizontal cut of the lead notch. *See, Don Brown Logging v. OSHRC*, No. 99-70181, slip op. (9th Cir.

November 14, 2000); preamble to the Final Rule, 60 Fed. Reg. 47022, 47028 (September 8, 1995). Salmon River further admits that its sawyers were aware of the requirement, and that it was “working with them” to secure their compliance. Salmon River argues that it never suggested to its sawyers that they ignore OSHA regulations, and, in fact, repeatedly instructed its sawyers to lift their back cuts as mandated by OSHA (Respondent’s Brief, p. 12). Salmon River implicitly raises the affirmative defense of employee misconduct, maintaining that it should not be held responsible for its employees’ willful refusal to follow OSHA requirements.

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

As noted, Salmon River has a rule requiring that their sawyers place their back cuts higher than the flat cut of the face notch. The evidence shows, however, that Fraser knew his sawyers were not cutting OSHA compliant stumps. Paul Uken, who was brought on site to inspect for OSHA compliance, found Salmon River’s sawyers were matching their face and back cuts. Both Fraser and Uken testified that they directed the sawyers to raise their back cuts. Nonetheless, Fraser knew that his sawyers were opposed to cutting an “OSHA stump.” Despite ample notice of noncompliance, Fraser never inspected his sawyers’ stumps, or took any steps to ensure that OSHA rules were being followed. No sawyer was ever disciplined for matching their face and back cuts.

Salmon River failed to establish that the violations were the result of unpreventable employee misconduct, and the violation is affirmed.

Penalty

Penalties proposed by OSHA are not binding on the Commission. The determination of what constitutes an appropriate penalty is solely within the discretion of the Review Commission. Penalties may be lowered *or* raised by the judge, or the Commission. *See, Valdak Corporation*, 17 BNA OSHC 1135, 1995 CCH OSHD ¶30,759 (No. 93-0239, 1995), *affd.*, 73 F.3d 1466 (8th Cir, 1996).

Logging is an inherently dangerous undertaking. The utmost care must be taken to avoid injuries and fatalities. Under the Act, the employer is primarily responsible for safe practices. If the employer is not diligent in this responsibility, if the employer allows individual sawyers to supplement their judgment for established safe logging practices, accidents can, and do result. Despite having previously suffered a fatality on his work site (Tr. 230), Fraser’s acceptance of OSHA safe logging practices remains

unenthusiastic at best. OSHA has determined that match cutting can result in falling trees “kicking back,” and fatally injuring the sawyer. This practice is widespread and longstanding at Salmon River’s work sites. Clearly Joe Fraser has knowledge of this practice, and tacitly condones it by allowing his sawyers to continue using the technique without repercussions.

The gravity of this violation is extremely high. Credit should not be awarded for history, or for good faith. Based on Salmon River’s reluctance to secure its employees compliance with the Act, a penalty of \$5,000 is deemed appropriate and will be assessed.

Alleged Violation of §1910.266(i)(2)(iv)

Serious citation 1, item 5 alleges:

29 CFR 1910.266(i)(2)(iv): Training was not provided whenever an employee demonstrated unsafe job performance:

(a) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were working within the fall radius of danger trees.

(b) Daisy Creek off Gold Creek Road: Employee(s) performing manual felling operations were not using safe felling techniques.

NOTE: Training may be limited to those elements in paragraph (i)(3) of this section which are relevant to the circumstances giving rise to the need for training.

Discussion

Complainant maintains that Salmon River failed to re-train employees who demonstrated that they did not recognize the hazards associated with working around danger trees, or who demonstrated unsafe cutting techniques. (Secretary’s Brief, p. 27).

With the exception of match cutting, discussed at item 4c above, there is no evidence in the record that any of Salmon River’s employees demonstrated any unsafe working practices prior to the OSHA inspection. In regard to match cutting, however, Salmon River’s sawyers had an admitted history of noncompliance, though they had been admonished by both their employer and a representative of the Montana Logging Association. His sawyers’ continued use of the match cut should have alerted Fraser to a need for *effective* retraining.

It is clear, however, that Fraser had no intention of requiring his sawyers to properly elevate their back cuts. Because, as noted in item 4 above, Salmon River knew, and tacitly approved match cutting, it cannot now lay the blame on its employees by alleging employee misconduct as a defense.

Item 5 is affirmed. For the reasons discussed in item 4 above, a penalty of \$5,000.00 is assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1910.266(h)(2)(vi) is AFFIRMED, and a penalty of \$2,500.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1910.266(h)(ii) is VACATED.
3. Serious citation 1, item 3, alleging violation of §1910.266(i)(3)(iii) is VACATED.
4. Serious citation 1, item 4a, alleging violation of §1910.266(h)(2)(v) is VACATED.
5. Serious citation 1, item 4b, alleging violation of §1910.266(h)(2)(vi) is VACATED.
6. Serious citation 1, item 4c, alleging violation of §1910.266(h)(2)(vii) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.
7. Serious citation 1, item 5, alleging violation of §1910.266(i)(2)(vi) is AFFIRMED, and a penalty of \$5,000.00 is ASSESSED.

/s/

James H. Barkley
Judge, OSHRC

Dated: January 25, 2001