

Secretary of Labor,
Complainant,

v.

Nelson Tree Service, Inc.,
Respondent.

OSHRC Docket No. **00-1130**

APPEARANCES

Patrick L. DePace, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Gary W. Auman, Esq.
Dunlevey, Mahan & Furry
Dayton, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Nelson Tree Service, Inc. (Nelson Tree), is engaged in line clearance tree trimming from its office in Dayton, Ohio. On March 28, 2000, an employee died while loading tree limbs and brush into a wood chipper along a rural road in Millersburg, Ohio. As a result of an Occupational Safety and Health Administration (OSHA) inspection, Nelson Tree received repeat and “other” than serious citations on May 15, 2000. Nelson Tree timely contested the citations.

The repeat citation alleges a violation of 29 C.F.R. § 1910.132(a) for failing to require employees to wear reflective vests when working near an open automobile traffic lane. The Secretary of Labor at the hearing amended the citation by withdrawing the repeat classification and reclassifying it as a serious violation with a proposed penalty of \$2,500 (Tr. 5).

The “other” than serious citation alleges a violation of 29 C.F.R. § 1904.2(a) (item 1) for failing to total the columns on the log and summary of occupational injuries and illness (OSHA 200 log) for the years 1997-1999, and 29 C.F.R. § 1904.8 (item 2) for failing to report a fatality within eight hours of the occurrence. No penalty is proposed for item 1, and a penalty of \$5,000 is proposed for item 2.

The hearing was held on November 20, 2000, in Columbus, Ohio. The parties stipulated jurisdiction and coverage (Exh. J-1, Tr. 4). Also, the parties filed post-hearing and reply briefs.

Nelson Tree denies the alleged violations. It asserts that § 1910.132(a) does not require reflective vests. With regard to the OSHA 200 logs and its reporting of the fatality to OSHA, Nelson Tree argues that it complied with the cited standards. It asserts that it is not required to total the columns on each page of the OSHA 200 logs and that it did report the employee's death within 8 hours from the time that it determined the fatality was work-related.

For the reasons discussed, the alleged violations of § 1910.132(a) and § 1904.2(a) are vacated. The violation of § 1904.8 is affirmed.

The Inspection

Nelson Tree, a corporation with offices in Dayton, Ohio, is in the business of line clearance tree trimming (Joint Exh. J-1). Nelson Tree is a large employer with approximately 2,500 employees (Tr. 165).

Pursuant to a contract with American Electric Power (AEP), Nelson Tree agreed to trim and remove trees and branches along Hardy Street Township Road 319, Millersburg, Ohio. Township Road 319 is a rural road with hills and sloping curves. The road is two lanes, approximately 16 feet wide, without lane markings. The speed limit is 55 m.p.h. (Exhs. C-4, C-5; Tr. 14-15, 17, 62, 115, 118). The traffic on the road was light during OSHA's inspection; approximately ten vehicles, including a UPS truck, in three hours (Tr. 62-63, 154).

On March 28, 2000, Nelson Tree employees Don Sundheimer and James Rowe were removing the debris along Township Road 319. Sundheimer and Rowe worked from behind the truck on the bank side of the road. Rowe was stripping tree limbs from an aerial bucket on the truck. Sundheimer was stacking the brush and running it through the wood chipper attached behind the truck. Sundheimer wore safety shoes, a hard hat, ear protection and safety glasses (Exh. C-6; Tr. 22, 82-83, 102-103, 144). Sundheimer was not wearing, nor was he required by Nelson Tree to wear, a reflective vest (Tr. 89-90, 92-93).

Prior to starting work, the employees established a "safety zone" in accordance with Nelson Tree safety policy around the truck and chipper, using cones and signs. One lane remained open to vehicular traffic. The other lane was closed to traffic by the truck and chipper. Orange cones were placed behind the truck from the traffic side of the truck to the shoulder side of the road approximately 75 feet behind. Approximately 300 feet before the truck, a "Lane

Closed” sign was posted. Also, a “Men Working” sign was posted approximately 500 feet before the truck. Flashers on the truck and chipper were activated. Reflective tape was on the back of the truck. There was a long sloping curve that continued up a hill approximately 25-30 feet in front of the truck. There was ample line of sight distance for approaching drivers. The day was clear and no employee was directing traffic (Exhs. C-4, C-5, C-6, Tr. 83-86, 101-102, 116).

At approximately 4:30 p.m. on March 28, 2000, Sundheimer died from being hit by a log.¹ Prior to his death, Nelson Tree District Manager Merlin Pritt and Andrew Mitchell of AEP separately visited the worksite earlier in the day. Neither Pritt nor Mitchell observed any safety problems (Tr. 82, 90-91). Sundheimer’s fatality was reported to OSHA at 10:00 a.m. on March 30, 2000, approximately 41 hours after the fatality (Exhs. J-1, C-2, C-3; Tr. 10-11, 96, 148-149, 174-175).

OSHA Compliance officer Linda Harrington conducted an inspection into the fatality on March 31, 2000. She visited the worksite and reviewed Nelson Tree’s OSHA 200 logs (Exhs. J-1, C-10, C-11, C-12, C-13; Tr. 9, 11-12, 31-32).

Discussion

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

For the most part, the facts are not in dispute. Also, the application of the cited standards, employee exposure and employer’s knowledge are not in issue.

Citation No. 1

¹Nelson Tree did not know the cause of death until the autopsy report and Rowe admitted seeing the accident several days after Sundheimer’s death (Tr. 151-152).

Item 1 - § 1910.132(a)

The citation alleges that an employee loading tree limbs and brush into the chipper was working near a vehicular traffic lane without wearing a reflective vest. Section § 1910.132(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Compliance with § 1910.132(a) requires the use of personal protective equipment (PPE) when the employer has actual knowledge of a hazard requiring its use or a reasonable person familiar with the situation, including facts unique to the particular industry,² would recognize a hazard warranting the use of such PPE. *Armour Food Co.*, 14 BNA OSHC 1817 (No 86-247, 1990). Section 1910.269(r)(2)(v) which is a specific standard applicable for line and tree trimming, requires that the brush chipper operator and others in the immediate area wear PPE required by § 1910.132(a).

It is undisputed that employees, including Sundheimer, were not wearing reflective vests and the chipper was next to an open traffic lane. The chipper was approximately 2 feet from the open traffic lane (Exh. J-1). Unless an employee is directing traffic, Nelson Tree does not require employees to wear reflective vests (Exh. R-5). Nelson Tree argues that a reflective vest may be a hazard to the operator because of its potential of getting it caught in tree limbs being pushed into the chipper (Tr. 104-105).³

²The Review Commission and the 6th Circuit have found industry practice to be relevant to the reasonable person test but not dispositive because otherwise it may permit an entire industry to avoid liability by maintaining inadequate safety. *Ray Evers Welding Co. v OSHRC*, 625 F.2d 726, 731-32 (6th Cir. 1980); *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1973, 1974 (No. 90-998, 1992) (Review Commission vacated citation requiring reflective vests for brush clearing workers while they were placing cones and signs based on no showing of industry practice or actual knowledge).

³Nelson Tree's concern about loose fitting reflective vests being a hazard around the chipper is misplaced. Although district manager Pritt testified to observing an employee almost getting the reflective vest caught by tree

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Township Road 319 is a rural unmarked two-lane road with light traffic volume. The worksite was located in an area with ample line of sight distance for an approaching driver. CO Harrington observed approximately 10 vehicles pass the worksite in three hours.

Nelson Tree asserts that § 1910.132(a) does not require reflective vests. It argues that § 1910.132 does not contemplate PPE to be a device warning another person controlling the hazard that the employee wearing the warning equipment is present and may be struck by the hazard (Nelson Tree's Brief, p. 16-17). The hazard of being struck by an automobile is not prevented by a reflective vest. Also, Nelson Tree notes that ANSI and other tree trimming employers do not require reflective vests (Exh. R-6; Tr. 92, 94).

The PPE worn by Nelson Tree's crew was hard hats, goggles, ear protection and safety shoes. A series of orange cones were set in front and to the rear of the truck and chipper. Also, "Men Working" and "Closed Lane" signs were placed on both ends of the road. Flashing lights on the front and rear of the truck were set. There were also reflective lights on the truck. The day was clear and visibility along the road was good.

The record fails to establish that § 1910.132(a) requires reflective vests while employees were operating the chipper based on the conditions at this jobsite. The failure to wear reflective vests was not shown to place the chipper operator in a hazardous situation because of the vehicular traffic. Nelson Tree's OSHA 200 logs did not show prior injuries from vehicular traffic. Sundheimer did not die from being struck by an automobile. Although not dispositive in this case, it is noted that a prior 1997 citation requiring reflective vests in a similar situation was withdrawn by OSHA (Exh. J-1).

As long as the chipper operator works and remains within the area established by the orange cones, there is no showing of an additional hazard requiring reflective vests. The cones, signs and flashing lights prevent the same hazard as reflective vests. Such devices warn drivers of the employees working within the area. The Secretary's reliance on the testimony of district manager Merlin Pritt that he has seen employees in front or on the side of the truck is misplaced (Tr. 125-126). There is no evidence that Sundheimer went to the front or side of the truck in this case. Also, it was not shown whether the side or front was within the Nelson Tree's established

³(...continued)

limbs, there is no showing that the vest could not be taped and not loose fitting.

“safety zone” when observed by Pritt. If an employee is outside the safety zone in an open traffic lane, the need for a reflective vest may be shown. This was not shown in this case.⁴

The alleged violation of § 1910.132(a) is not established.

“Other” Than Serious Citation No. 2

Item 1 - Alleged Violation of § 1904.2(a)

The citation alleges that Nelson Tree failed to total the columns (1-13) on the workplace log and summary of occupational injuries and illnesses (OSHA 200 log) for the years 1997-1999.

Section § 1904.2(a) provides:

Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

OSHA 200 logs are maintained so that an employer can track hazards to which its employees are exposed and ascertain if there is a trend to the injuries and illnesses. The logs are also used by OSHA to evaluate an employer’s safety record. The reporting requirements are considered a “cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier.” *General Motors Corp. (Inland Division)*, 8 BNA OSHC 2036, 2041 (No. 76-5033, 1980).

As part of the inspection, CO Harrington requested Nelson Tree’s OSHA 200 logs or equivalent for 1997, 1998, and 1999. She was initially provided computer generated OSHA 200

⁴Section 1926.201(a), under the construction standards, requires flagmen with a reflective vest “when operations are such that signs, signals, and barricades do not provide the necessary protection on or adjacent to a highway or street.” This standard indicates that circumstances exist where reflective vests are not necessary for all work on the roadway. Another standard may be used to give meaning to an undefined, broad term in a cited standard. *Baumgartner, Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1857-58 (No. 89-1300, 1992), *aff’d. on other grounds*, 3 F.3d 1 (1st Cir. 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1825 (No. 86-247, 1990).

logs for 1997 through March 31, 2000, which provided injury/illness information except the individual columns were not totaled (Exhs. C-10, C-11, C-12, C-13, Tr. 37-40). These documents reflected the individual occurrences but did not list yearly totals for the columns on each page. She was later provided the totals (Exh. C-9). CO Harrington found discrepancies in the totals when compared to the 200 logs (Tr. 31-32).

According to Nelson Tree, when CO Harrington asked for the OSHA 200 logs, Nelson Tree gave her their computer generated ones, believing they were in compliance. After a subsequent request, Nelson Tree sent her another 200 log that did contain the totals of the columns on the bottom of the last page (Tr. 172-173). According to Nelson Tree Safety Director Kevin Fogue, the instructions for completing the 200 log state that it is at the employer's discretion in regards to totaling the columns on the multiple pages of the log (Tr. 148).

The log is to be completed according to its instructions. The instructions on the back of the OSHA 200 log provide in part that "Yearly totals for each column (1-13) are required for posting. Running or page totals may be generated at the discretion of the employer."

CO Harrington was provided a computer generated list of employee injury and illness for the requested years. Column totals were not generated on the computer list (Exhs. C-10, C-11, C-12, C-13). She was later sent an OSHA 200 log form with totals for each year (Exh. C-9). Nelson Tree's computer automatically is constantly updating the log (Tr. 173).

The citation alleges that the columns were not totaled. CO Harrington admitted that although not totaled on the computer generated list, it was acceptable to have a separate form with the totals. There were yearly totals (Tr. 67). As the instructions indicate, running totals are discretionary with the employer. Although CO Harrington noted some discrepancies in the totals, such discrepancies, if they existed, were not the basis for the citation.

The alleged violation is vacated.

Item 2 - Alleged Violation of § 1904.8

The citation alleges that a fatality of the workplace was not reported within eight hours of the occurrence. Section § 1904.8 provides:

Within 8 hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more

employees as a result of a work-related incident, the employer of any employees so affected shall orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident, or by using the OSHA toll free central telephone number.

There is no dispute that Sundheimer died from a work-related incident on March 28, 2000; being struck by a log (Exh. J-1; Tr. 13, 164-165, 174-175, 183). The fatality occurred at 4:30 p.m. on March 28, 2000, and was not reported to OSHA until 10 a.m. on March 30, 2000; approximately 41 hours after his death (Exhs. J-1, C-2, C-3, R-7; Tr. 10, 96, 148-149, 174-175). The standard requires that a fatality be reported to OSHA within 8 hours.

Nelson Tree argues that the delay in reporting the fatality was because initially it considered Sundheimer's death to be the result of a heart attack (Tr. 100-101, 112-113, 149). When it learned that the death was caused by being struck by a log, Nelson Tree immediately reported the fatality to OSHA. Nelson Tree argues that under § 1904.8(c), an exception provides:

If the employer does not learn of the reportable incident at the time it occurs . . . the employer shall make the report within 8 hours of the time the incident is reported to any agent or employee of the employer.

Nelson Tree first learned of Sundheimer's death when Rowe reported it to Pritt on March 28 (Exh. R-7). At first, district manager Pritt testified that he initially thought Sundheimer had been struck by a car (Tr. 97). But, when EMS found no visible cause, he believed that Sundheimer had died of a heart attack (Tr. 112-113). Pritt had previously witnessed Sundheimer at another jobsite when Sundheimer was exhausted and was not allowed to continue working. Sundheimer was 60 years old and had been observed by Pritt having breathing problems and arm pain. He saw Sundheimer sitting under a tree breathing "heavy" and "real pale" (Tr. 100-101, 120, 175). Also, Rowe denied to Nelson Tree and OSHA any knowledge of the accident (Tr. 51, 112-113, 151-152).

It was not until Nelson Tree received the autopsy report on March 30, showing that Sundheimer died from internal injuries, that the fatality was reported to OSHA (Exh. C-3; Tr. 109-110, 149). Barbara Wagner, vice president for risk management, testified that she found out that the death was not from a heart attack at 9 a.m. on March 30 and contacted OSHA one hour

later at 10 a.m. (Tr. 175). Two weeks after the accident, Rowe came forward and admitted that Sundheimer had been struck by a tree he had cut (Tr. 152, 163-164).

An employer is required under § 1904.8 to report, within 8 hours of their occurrence, any work-related incident that results in the death of an employee, or in the in-patient hospitalization of three or more employees. The purpose of the standard is to provide OSHA with an opportunity to promptly investigate fatalities and to insure that surviving employees do not continue to be exposed to the same hazards. *Yelvington Welding Service*, 6 BNA OSHC 2013, 2014-2015 (No. 15958, 1978).

The record supports a violation. Sundheimer's death occurred on Nelson Tree's worksite while he was performing work. There is no evidence other than unsupported speculation that his death may have been caused by non-work related conditions.⁵ In fact, Sundheimer died from being struck by a tree limb. It is noted that doctors could not explain the swelling on Sundheimer (Tr. 113). To allow an employer time to conduct its own investigation into the cause of death negates OSHA's responsibility to promptly investigate the fatality. The standard does not require an employer to report a fatality upon learning for certain that it was work-related. The standard instead is unambiguous and is strict; a work related fatality must be reported within 8 hours of its occurrence.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Nelson Tree is a large employer with 2,500 employees (Tr. 165). It is not entitled to credit for history because of citations within 3 years (Exhs. R-3, R-4). Nelson Tree has a safety director, weekly safety meetings, and written safety programs.

⁵Even if Sundheimer died of a heart attack, as initially believed by Pritt, it may still be considered work-related caused or aggravated by the physical nature of the work. The comments from EMS and the hospital are not given weight based on third-party hearsay. It was not shown that Pritt personally spoke to the doctor and did not identify the EMS. Also, see *Brilliant Electric Signs, Inc.*, 1973-74 CCH OSHD ¶ 16,655 (No. 1799, 1973) (ALJ vacated citation because no evidence that the heart attack was an "occupational accident" under earlier standard). Case is not binding because it is an unreviewed ALJ decision.

A penalty of \$1000 is assessed for violation of § 1904.8. Nelson Tree's failure to report the fatality timely may have affected OSHA's inspection into the accident and causes.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation no. 1, item 1, alleged serious violation of § 1910.132(a), is vacated and no penalty is assessed.

Citation no. 2, item 1, alleged other than serious violation of § 1904.2(a), is vacated and no penalty is assessed.

Citation no. 2, item 2, alleged other than serious violation of § 1904.8, is affirmed and a penalty of \$1000 is assessed.

/s/

KEN S. WELSCH
Judge

Date: April 16, 2001