

Secretary of Labor,
Complainant,
v.
Brian Hanley Logging,
Respondent.

OSHRC Docket No . **02-1152**

Appearances:

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

Brian and Tamra Hanley, Brian Hanley Logging, Libby, Montana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Brian Hanley Logging (BHL) is a small skyline logging operation in Libby, Montana. On June 5, 2002, BHL was working at the Alder Jam Timber sale when the site was inspected by the Occupational Safety and Health Administration (OSHA). As a result of OSHA's inspection, BHL received a repeat citation on June 14, 2002. BHL timely contested the citation.

The citation alleges a repeat violation of § 5(a)(1) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 654, for anchoring three guy lines (safety lines) from the yarder machine to standing trees. The citation proposes a penalty of \$2,000. The citation is classified as repeat based on a prior citation for the same alleged violation received on January 2, 2001, by BHL. The prior citation was not contested and resolved through an informal settlement agreement.

The hearing in this case was held in Kalispell, Montana, on March 7, 2003. The parties stipulated jurisdiction and coverage (Tr. 6-7). BHL is represented *pro se* by owner Brian Hanley and his wife, Tamra Klein.

BHL denies the alleged violation and asserts that employees were not exposed to an unsafe condition, and the Montana Logging Association permits anchoring of guy lines to standing trees under some circumstances (Tr. 10-11).

For the reasons discussed, a repeat violation of § 5(a)(1) of the Act is affirmed and a penalty of \$1,500 is assessed.

BHL's Skyline Operation

BHL, a sole proprietorship, has engaged in skyline logging operations¹ with a yarder since 1972. At the time of OSHA's inspection, BHL had three employees; a yarder operator, loader operator, and an employee to attach the lines on the carriage to the cut logs. Brian Hanley is the owner of BHL and has been logging since 1967 (Tr. 4, 19, 88-89, 90).

A yarder also referred to as a jammer is a machine with a truck base and an approximate 30 foot boom or tower. BHL's yarder which was manufactured in the 1950s is a multi guy line machine. The yarder is used to drag cut logs uphill to an area where a loader machine can stack the logs for transportation to the mill. A skyline with a floating carriage is attached to the cut logs downhill and reeled uphill to the loader (Tr. 19-20, 139).

To prevent the yarder from tipping over when dragging cut logs uphill, guylines which are made of 5/8 inch wire are attached to drums on the yarder, fed through the boom, and used to anchor uphill from the yarder. A guyline is 250 feet long and is anchored approximately 100 feet from the yarder. The yarder used by BHL has the capacity to run 5 guylines, but usually only 2 or 3 guylines are used to anchor. The boom angle on the yarder is set at approximately 14 degrees. The proper anchoring of the guylines counters the weight of pulling cut logs uphill from the opposite direction. BHL maintains that approximately 80 percent of the time, it anchors the guylines to other pieces of equipment, such as a bulldozer or tree stumps (Tr. 19-20, 63-64, 103, 107, 127, 139-141).

On June 5, 2002, OSHA safety compliance officers Gary Wild and Ken Casto initiated a complaint inspection² of BHL's worksite at a timber sale referred to as the Alder Jam³ in Libby, Montana. When the compliance officers arrived on site, Brian Hanley and the yarder operator were performing repair work on the yarder and the loader operator was stacking logs.⁴ The yarder and

¹Also, referred to as line skidding logging operation (Tr. 19).

²The items in the complaint were not verified and not the subject of the citation issued in this case (Tr. 70-71).

³The name given by the timber owner to a section of land to be logged (Tr. 71).

⁴The loader operator was David Peebler. The yarder operator was Robert Nelson (Tr. 94).

loader were located on a dirt road. Three guylines from the yarder's boom were attached uphill to standing trees of approximately 50 to 60 feet in height (Exhs. C-4, C-7, C-8, C-9; Tr. 21, 38, 72, 105-106).

During OSHA's inspection, the yarder was not pulling cut logs uphill to the road area for stacking. However, Hanley acknowledged that the yarder had been used to pull logs during the preceding eight hours with the same anchorage to standing trees. The left guyline was anchored to a standing tree approximately 25 feet from the dirt road on which the loader and yarder were located. The center guyline was anchored to a standing tree 85 feet from the dirt road, and the guyline on the right was anchored to a standing tree 40 feet from the road (Exh. C-10; Tr. 54, 56-57, 73, 105-106).

Previously, safety compliance officer Casto had inspected BHL's worksite at New Fawn Line, Libby, Montana, on November 1, 2001. As a result of his inspection, BHL received a citation alleging a violation of § 5(a)(1) of the Act for exposing employees to the "hazard of being struck by falling trees which were being used for yarder guyline anchors." The citation was resolved by an informal settlement agreement dated January 2002 in which the § 5(a)(1) violation and proposed penalty of \$750 were not contested, and BHL agreed to correct the condition. There is no dispute that the prior citation became a final order in accordance with § 10 of the Act, 29 U.S.C. § 658 (Exh. C-11; Tr. 61-62, 75).

Discussion

Alleged Violation of § 5(a)(1)

_____The citation alleges that BHL violated § 5(a)(1) of the Act by anchoring three yarder guylines to standing trees, which exposed employees to falling trees. Section 5(a)(1) of the Act requires that each employer:

shall 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 employees.

Section 5(a)(1) of the Act is referred to as the general duty clause, in that no specific OSHA standard applies to the alleged hazard or unsafe condition. "The general duty clause, while intended to protect employees from hazards that have yet to be addressed by standards, is not intended to

replace standards as an enforcement mechanism.” *Weldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993).

There is no dispute in this case, and the record does not show, that a specific OSHA standard addresses the same hazard and conditions as cited under § 5(a)(1) (Tr. 27). The Secretary’s standards involving logging operations state that “this standard does not cover the construction or use of cable yarding systems.” 29 C.F.R. § 1910.266(b)(1). Although the logging operation standards states that “hazards and working conditions not specifically addressed by this section are covered by other applicable sections of part 1910, no other specific standard is alleged applicable and the record does not find any other standard applicable. *See* 29 C.F.R. § 1910.266(b)(3). Therefore, to allege a violation under § 5(a)(1) for the conditions cited is appropriate.

To establish a violation of § 5(a)(1) of the Act, the Secretary must show that (1) there was an activity or condition in the employer’s workplace that constituted a hazard to employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1168 (Nos. 91-3144, 92-238, 92-819, 92-1257, 2000).

The Hazard

The Secretary argues that anchoring guylines for a yarder machine to standing trees poses a potential hazard of falling the tree and exposing employees to the hazard of being struck by the falling tree (Tr. 41, 63). Also, the failure of the anchor, due to the extra leverage posed by a standing tree, creates a greater risk of tipping over the yarder and exposing the operator (Tr. 135-136). Instead of anchoring to standing trees, the Secretary asserts that appropriate anchorage includes pieces of equipment or tree stumps (Tr. 64).

Yarding is defined by the Secretary as “the movement of logs from the place they are felled to a landing.” 29 C.F.R. § 1910.266(c). The purpose of anchoring the yarder is to prevent it from tipping over from the forces generated in dragging a cut log uphill (Tr. 19).

A hazard is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrisson-Knudson Co./Yonkers Contacting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993). However,

“there is no requirement that there be a ‘significant risk’ of the hazard coming to fruition, only that if the hazardous event occurs, it would create a ‘significant risk’ to employees.” *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1060 (No. 89-2804, 1993). “[T]he existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.” 16 BNA OSHA at 1060.

In this case, there is no evidence that any standing trees used as anchors by BHL to anchor its yarder have ever fallen. However, Hanley concedes that he has observed trees “slump over” from the force of the guyline (Tr. 124). Also, the record in this case shows a guyline completely embedded in a standing tree used as an anchor (Exhs. C-4, C-7; Tr. 43, 46).

BHL does not deny that at the time of OSHA’s inspection the yarder was anchored to standing trees. Although 3 guylines were secured to 3 standing trees, BHL claims that only 2 guylines were actually being used (Tr. 107). The tree on the left was not being used (Tr. 121).

BHL’s argument is rejected. The guyline to the standing tree on the left is shown wrapped around the tree and, if force was applied in the opposite direction, the guyline would have functioned as an anchor.

The record in this case establishes a hazard of anchoring guylines for a yarder machine to standing trees. The hazard is that a standing tree may fall in the direction where the employees are working from the pressure of dragging cut trees uphill. Two standing trees used as anchors which stood approximately 60 feet high were less than 40 feet from the dirt road where the three employees were working (Tr. 56-57). There is no dispute that anchoring guylines to standing trees may expose employees to falling trees if the tree fails. Hanley agreed that “the tree was tall enough to reach and strike the loader if it was right below it” (Tr. 122). He acknowledged that the loader continuously moved along the dirt road, and it was possible that the loader was “directly downhill from the left tree” which was only 25 feet from the road (Tr. 122). The parties agree that considerable stress or force is placed on the anchor points from pulling cut logs uphill. A hazard is established when anchoring yarder guylines to standing trees.

The Hazard Was Recognized

In order to establish a § 5(a)(1) violation, the Secretary must also show that the hazardous condition was recognized either by the particular employer or its industry. *Waldon Healthcare*

Center, 16 BNA OSHC at 1061. A hazard is deemed ‘recognized’ when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (No. 89-0265, 1997).

The hazard of anchoring to standing trees as opposed to notched stumps or equipment is recognized by the Montana Logging Association (MLA) who jointly, with the Montana Department of Labor, published safety rules for logging operations. According to Section 3, D.(8) of the MLA rules, “[s]tanding trees shall not be used for yarder guyline anchors” (Exh. C-5). The rules permit “[n]otched stumps, deadmen, or items of equivalent holding power shall be used for anchors” (Exh. C-5, Section 2, D(2)). Similarly, safety standards for logging operations published by the State of Washington, Department Labor and Industries, states that “[g]uylines of portable spars or towers shall not be anchored to standing trees if the unit is used for yarding as a head tree” (Exh. C-6, WAC 296-54-553(12)).

BHL, a 10 year member of the MLA, does not dispute that the association rules prohibit the anchoring of guylines to standing trees (Tr. 104). He even keeps a copy of the MLA handbook in his pickup truck (Tr. 105).

However, BHL understood from John Hanson, Montana Logging Association Field Safety Representative, that under certain conditions when using multi-guylines, it may be safer to anchor the guylines to standing trees. Hanson wrote a letter for BHL to that affect⁵ (Exh. R-1; Tr. 109-110).

Despite BHL’s belief that MLA permits exceptions to the prohibition against anchoring to standing trees, the record in this case establishes a recognized hazard by the industry as reflected by MLA and actually known by BHL. Hanley knew the rule and in fact testified that, at least 80 percent of the time, he anchors his guylines to equipment or tree stumps (Tr. 103, 127). Hanley also agreed that, as far as the MLA rules, he knew that on the day of OSHA’s inspection, he was not in compliance (Tr. 122-123). A recognized hazard, as required by § 5(a)(1), is defined in terms of preventable consequence of the work operation. *Morrisson-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993).

⁵The record was left open for the parties to take a trial deposition of John Hanson to supplement the record in this case (Tr. 114-115). The parties, however, decided not to take the deposition, and the record was closed.

Also, the MLA written rules do not provide for exceptions. And, even if there is an exception, the circumstances described by MLA safety officer Hanson does not apply in this case (Exh. R-1). Hanson's letter states that anchoring to standing trees is "not a common practice, but is done at times if the anchoring tree is greater than two tree lengths from the yarder and as in the case with many safety issues in the logging world, depends on the conditions at the time." Hanson's letter concludes that the hazard would be minimal "if the standing trees are greater than two tree lengths from the yarder" and the "guylines are [not] out lead with the skyline and/or there are [no] poor angles utilized on the side guylines" (Exh. R-1).

Hanson's conditions, even if accepted as exceptions to the MLA published safety rules, do not apply in this case. The standing trees used by BHL as anchors at the time of OSHA's inspection were estimated to be 50 to 60 feet in height. The trees, however, were only 25 feet, 85 feet, and 40 feet from the road where the yarder and loader were located. Clearly, the anchor trees were not greater than two tree lengths from the yarder. According to compliance officer Wild, he observed the loader operator in a direct line of the standing tree, which was 25 feet from the road (Tr. 57). Hanley agreed (Tr. 122).

Additionally, BHL had actual knowledge of the requirements. He has a copy of the MLA rules. Also, the previous citation issued to BHL was based on not complying with the same MLA rule as in this case (Exh. C-11). BHL did not contest the previous citation and entered into an informal settlement agreement affirming the citation. BHL as part of the settlement agreed to comply in the future. However, BHL admits that it tied off the guylines to standing trees in this case (Tr. 111). BHL also admits that this violated the MLA rule against anchoring guylines to standing trees (Tr. 123).

The Hazard Was Likely to Cause Serious Injury

There is no record that BHL has had an employee injured due to anchoring guylines to standing trees. However, Hanley testified that he has observed standing trees "slump over" from the pressure or force exerted by the anchoring (Tr. 124).

OSHA compliance officer Wild, who has inspected approximately 100 logging operations in Montana, testified that he has investigated approximately 4 fatality accidents where employees

had been struck from falling trees (Tr. 18, 57).⁶ However, none of the accidents involved anchoring guylines to standing trees, but from cutting the trees (Tr. 69).

The lack of injuries is not dispositive of whether employees are exposed to an unsafe condition. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1150 (No 88-1250, 1993), *rev'd. in part on unrelated grounds*, 25 F.3d 653 (8th Cir. 1994). The criteria is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious injury. *Waldon Healthcare Center*, 16 BNA OSHC at 1060. There can be no issue that the hazard of being struck by a falling tree approximately 60 feet in height can result in serious injury or death to employees (Tr. 67).

Feasible Abatement

As an element of a § 5(a)(1) violation, the Secretary must finally show that the proposed abatement will “eliminate or materially reduce the hazard.” *See Cardinal Operating Company*, 11 BNA OSHC 1675, 1677 (No. 80-1500, 1983). The Secretary must show that the abatement measure reduces the risk of severe injury from the hazard.

The means for anchoring the yarder are set out in the MLA written rules, which require the use of notched stumps or other suitable anchorage, such as equipment. BHL does not dispute that notched stumps could have been used (Tr. 129). Prior to OSHA’s inspection, BHL admits that it tied off the guylines to equipment and, sometimes to stumps, at other locations (Tr. 127).

Hanley testified that he made a conscious decision in this case to use standing trees in order to avoid anchoring further up the hill (Tr. 128). Although BHL claims that most of the time (80 percent) it anchors its guylines to equipment or stumps, it felt that anchoring to standing trees gave a better warning than a stump being pulled out (Tr. 103, 124, 127). BHL believes that anchoring to standing trees in certain situations may be preferable to anchoring to notched stumps because it is easier to see if the standing tree is being stressed and a potential problem (Tr. 127-128). He testified that he “wanted to have something that I could visibly watch and monitor” (Tr. 129). Stumps are not as observable from where the yarder operator is located from the road. Also, Hanley claimed that to tie off, he would “have to go up to the upper road and drive down through the trees. And then,

⁶Wild had heard from another compliance officer of an injury to an employee from anchoring the guyline to a standing tree in Alaska (Tr. 70). This incident is given little weight because of the hearsay.

of course, I would have been sitting there above the cut bank and would have to dive off into the road and that's not very fun" (Tr. 127).

"Under the general duty clause, if a proposed abatement method creates additional hazards rather than reducing or eliminating the alleged hazards, the citation must be vacated for failure to prove feasibility." *KoKosing Construction Co., Inc.*, 17 BNA OSHC 1869, 1875, fn. 19, (No. 92-2569, 1996).

In this case, the reasons given by BHL for anchoring to standing trees appear to be more for convenience and accessibility, as opposed to infeasibility or greater hazard, which affirmative defenses were not asserted. Hanley acknowledges that stumps were available, and he provided no explanation why a piece of equipment was not used (Tr. 129). Also, the hazard from pulling out a stump was not shown to be greater than being struck by a falling tree. The stump would simply pull out (Tr. 135-136). Also, in both situations, the same hazard to a yarder being tipped over would exist if the tension to an uphill anchor was suddenly released (Tr. 136). However, the potential hazard from being struck by a falling tree is greater than a pulled out stump. Feasible abatement by anchoring to equipment or a stump is shown.

Therefore, a violation of § 5(a)(1) by BHL is established.

Repeat Classification

_____The violation of § 5(a)(1) is alleged as a repeat violation under § 17 of the Act. 29 U.S.C. § 666. A violation is considered repeat if, at the time of the alleged repeat violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). If the violation involves a general standard such as § 5(a)(1), the Secretary establishes substantial similarity by showing that violative conditions result in substantially similar hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

A review of the prior citation issued to BHL on January 2, 2001, establishes that the § 5(a)(1) violation in this case involves the same conditions and hazards. The prior citation was also for anchoring guylines to standing trees and abatement was compliance with the MLA rules. BHL did not contest the prior citation and entered into an informal settlement agreement with OSHA (Exh. C-11). The citation became a final order pursuant to § 10(a) of the Act.

BHL agrees that “this current charge is identical” (Exh. C-2, response no. 6). BHL does not dispute the similarity. A review of the citations shows that the only differences between the citations are the different inspection dates and locations of the violations, which are irrelevant factors in determining a repeat classification. Therefore, the record establishes that the citation in this case was properly classified as repeat.

Penalty Considerations

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.

BHL is a small employer with 3 employees at the time of the OSHA inspection. BHL is therefore entitled to credit for size as a small employer. However, BHL is not entitled to credit for good faith and history because of the prior serious citation for the same alleged hazard and BHL’s failure to comply.

A penalty of \$1,500 is reasonable for violation of § 5(a)(1). Two employees and owner Hanley were exposed to the hazard of falling trees for 8 hours. Hanley made a conscious decision to anchor to standing trees for convenience. Although not applicable in this case, he believed that in some circumstances, it was permissible by the MLA to anchor to standing trees.

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:

1. Citation 1, item 1, alleged violation of § 5(a)(1) of the Act, is affirmed as repeat and a penalty of \$1,500 is assessed._____

/s/
Ken S. Welsch
Judge

Date: May 8, 2003