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. PETTEY OIL FIELDS SERVICES, INC. Respondent.	OSHRC Docket No. 05-1039

DIRECTION FOR REVIEW AND REMAND ORDER

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

In an order dated June 22, 2006, Administrative Law Judge John H. Schumacher issued a ruling on cross-motions for summary judgment in the above-captioned case. The judge filed his order with the Commission's Executive Secretary, who docketed the matter pursuant to Commission Rule of Procedure 90(b)(2), 29 C.F.R. § 2200.90(b)(2) (procedure for docketing of judge's report with Executive Secretary). On June 26, 2006, Pettey Oil Fields Services, Inc. (Pettey) filed a petition seeking review of the judge's order. For the following reasons, we direct this case for review and remand to the judge.

Background

On May 9, 2006, OSHA inspected a worksite in Logan, West Virginia, where Pettey was excavating ground to run a gas line. Following the inspection, OSHA issued Pettey three citations alleging three violations under OSHA's hazard communications standard and numerous violations under OSHA's logging standard. During discovery, Pettey filed a motion for summary judgment, arguing that the citation items issued under the logging standard should be dismissed because the standard does not apply, or alternatively, because Pettey did not have

fair notice of its application. The Secretary filed a cross-motion for summary judgment, arguing that the citation items issued under the logging standard should be affirmed because the standard does apply and Pettey had fair notice of its application. In his June 22, 2006 order, the judge found that the logging standard applies to the work performed by Pettey and that Pettey had adequate notice of its application. He therefore denied Pettey's summary judgment motion, granted the Secretary's summary judgment motion, and "affirmed" the citation items issued under the logging standards.

Discussion

Upon consideration of the judge's June 22, 2006 order, we find that this matter is not ripe for review by the Commission. Regarding a judge's decision filed with the Executive Secretary for docketing, Commission Rule 90(a) states in relevant part:

> The decision shall … include findings of fact, conclusions of law, and the reasons or bases for them, on *all material issues of* fact, law or discretion presented on the record. The decision shall include an order affirming, modifying or vacating *each contested citation item and each proposed penalty*, or directing other appropriate relief.

29 C.F.R. § 2200.90(a) (emphasis added). Here, the judge's June 22, 2006 order fails to dispose of all material issues of fact, law or discretion presented on the record, and does not affirm, modify or vacate each contested citation item and each proposed penalty.

First, the judge's order does not address the three citation items issued under OSHA's hazard communication standard. Neither party asked the judge to rule on these items in their respective summary judgment motions. While the judge's order does state that the Secretary represented in her motion that she intends to dismiss two of the three items, the official file does not contain an executed stipulation or other signed document withdrawing any of these items, or otherwise indicate that the parties have settled the items.

Second, the judge's order does not determine the characterization of, or assess a penalty for, the citation items alleged under the logging standard. Indeed,

the judge acknowledged in his order that, "[t]he classification of the [logging] items, and the penalties therefore, will be resolved by the parties' settlement in this matter." (Order 8 n.9.) Again, however, the official file contains no proof that these issues have been resolved. Moreover, while the judge's order does address the applicability of the logging standard to the cited conditions, it does not resolve the other elements of the Secretary's burden of proving a violation, namely whether: (1) Pettey violated the terms of the standard; (2) its employees had access to the violative conditions; and (3) Pettey had actual or constructive knowledge of the violative conditions. *See Gary Concrete Prods. Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶39,448, p. 39449 (No. 86-1087, 1991), *citing Trumid Constr. Co. Inc.*, 14 BNA OSHC 1784, 1788, 1990 CCH OSHD ¶29,079, p. 38,859 (No. 86-1139, 1990) (elements of Secretary's burden of proving a violation of specific standard promulgated pursuant to section 5(a)(2), 29 U.S.C. § 654(a)(2), of the Occupational Safety and Health Act).

Under these circumstances, we find that the judge's June 22, 2006 order does not satisfy the requirements for a decision as set forth in Commission Rule 90(a). Therefore, the order should not have been filed for docketing with the Executive Secretary. Accordingly, we direct review of this case and remand the matter to the judge for the resolution of all outstanding issues.

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

_/s/_____
Thomasina V. Rogers
Commissioner

_/s/_____
Horace A. Thompson, III
Commissioner

Dated: _July 12, 2006

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 05-1039
	:	
PETTEY OIL FIELDS SERVICES, INC.,	:	
	:	
Respondent.	:	

ORDER

On May 9, 2005, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a work site of Pettey Oil Fields Services, Inc. ("Pettey" or "Respondent"). As a result, on May 20, 2005, OSHA issued to Pettey a six-item serious citation, a one-item "other" citation, and a four-item "repeat" citation. Pettey filed a timely notice of contest with respect to all of the citation items and proposed penalties, bringing this matter before the Commission.

To avoid the expense of an evidentiary hearing in this matter, each party has submitted its Motion for Summary Judgment ("Motion"); in addition, Pettey has filed a reply to the Secretary's Motion.[1] The undersigned judge has considered all of the parties' filings in issuing this Order.

Background

Respondent Pettey is in the oil and gas business, and its operations include monitoring, repairing and installing gas lines. On May 9, 2005, employees of Pettey were pushing down trees with machinery at the Nickel Branch Tract in Logan, West Virginia, to clear the area so that employees could dig a ditch and install a gas line. *See* Affidavit of Ronald Pettey ("Pettey

[1]As explained *infra*, Pettey's Motion is based upon its contention that OSHA's logging operations standard did not apply to its work at the subject site, while the Secretary's Motion is based upon her contrary contention. The purpose of this order is to decide whether Pettey's work at the site was in fact covered by the logging standard. The parties have indicated that following this determination, they will settle this matter; they have also indicated that to reach a settlement, they may require a brief hearing to resolve certain issues.

Affidavit") ¶ 3; Affidavit of Chuck Green ("Green Affidavit") pp. 1-2).[2] Chuck Green, the OSHA compliance officer ("CO") who conducted the inspection, observed Pettey employees, who "used bulldozers and endloaders to push down trees, and then used chainsaws to cut the felled trees into smaller sections." (Green Affidavit p.1). Pettey employees apparently were not observed hauling or moving the logs to any other locations but, rather, were seen pushing aside trees to clear a path for installation of a gas line. (Pettey Affidavit ¶¶ 4, 5). Respondent contends that employees were not cutting the trees from the stump. (Pettey Affidavit ¶ 3). This is borne out by CO Green, whose affidavit states that "these employees were not cutting down trees with chainsaws, saws, or axes..." (Green Affidavit p. 2).

Respondent's employees were not wearing any hard hats, goggles, or protective leg coverings, although these personal protective items were provided by Respondent and were available on site. (Pettey Affidavit ¶ 2; Green Affidavit pp. 1-2). This observation prompted a more thorough inspection by CO Green. After the CO's inspection, OSHA issued citations alleging a number of violations under the logging operations standard as well as violations under the hazard communication ("HAZCOM") standard. Specifically, the citations allege as follows:[3]

Citation 1, Item 1a, alleges a serious violation of 29 C.F.R. 1910.266(f)(3)(viii)(D), in that the sides were not guarded on the 1978 CAT D5C Dozer, that was available for use.

Citation 1, Item 2a, alleges a serious violation of 29 C.F.R. 1910.266(i)(1), in that the employer did not ensure that all employees had been successfully trained on the requirements of the 1910.266 logging operations standard.

Citation 1, Item 2b, alleges a serious violation of 29 C.F.R. 1910.266(i)(10)(i), in that the employer did not prepare a written certification of training record for each employee.

Citation 1, Item 3a, alleges a serious violation of 29 C.F.R. 1910.266(i)(7)(i), in that the employer did not ensure that the cutter/supervisor and another cutter had been trained in first aid and CPR.

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[2]The Pettey Affidavit is Exhibit A to Respondent's Motion, while the Green Affidavit is Exhibit 1 to the Secretary's Motion.

[3]All of the items allege that the violations occurred on or about May 9, 2005.

Citation 1, Item 3b, alleges a serious violation of 29 C.F.R. 1910.266(d)(2)(ii), in that the first aid kit did not contain minimum items, such as 4 x 4 gauze pads, triangular bandages, a blanket, and resuscitation equipment.

Citation 1, Item 4a, alleges a serious violation of 29 C.F.R. 1910.266(d)(1)(vi), in that the cutter/supervisor and another cutter were not wearing head protection while using chain saws to cut and trim trees that had been pushed over.

Citation 1, Item 4b, alleges a serious violation of 29 C.F.R. 1910.266(d)(1)(vii)(B), in that the cutter/supervisor and another cutter were using chain saws without wearing face protection.

Citation 1, Item 4c, alleges a serious violation of 29 C.F.R. 1910.266(d)(1)(v), in that the cutter/supervisor and another cutter were not wearing cut resistant boots while operating chain saws.

Citation 1, Item 4d, alleges a serious violation of 29 C.F.R. 1910.266(d)(1)(iv), in that the cutter/supervisor and another cutter were not wearing leg protection while operating chain saws.

Citation 1, Item 5, alleges a serious violation of 29 C.F.R. 1910.266 (d)(3)(i), in that no seat belt was located on the 1978 CAT D5C Dozer that was available for use.

Citation 1, Item 6, alleges a serious violation of 29 C.F.R. 1910.266(d)(4), in that the employer did not provide and maintain a portable fire extinguisher on either the 1978 CAT D5C Dozer or the 2004 CAT 315 Excavator.

Citation 2, Item 1, alleges an other-than-serious violation of 29 C.F.R. 1910.266 (f)(1)(iii), in that no operating and maintenance instructions were located on the 1978 CAT D5C Dozer.

Citation 3, Item 1, alleges a repeat violation of 29 C.F.R. 1910.1200 (e)(1), in that the employer did not maintain a written HAZCOM program on the site for chemicals employees might have been exposed to, such as gasoline, oil, and diesel fuel.[4]

Citation 3, Item 2, alleges a repeat violation of 29 C.F.R. 1910.1200 (g)(1), in that the employer did not maintain a Material Safety Data Sheet on the site for chemicals employees might have been exposed to, such as gasoline, oil, and diesel fuel.

[4]The Secretary's Motion indicates that of the items alleging violations of the HAZCOM standard, that is, Items 1-3 of Citation 3, Items 2 and 3 will be dismissed. However, as set out above, this order addresses only the applicability of the logging operations standard in this case.

Citation 3, Item 3, alleges a repeat violation of 29 C.F.R. 1910.1200 (h)(1), in that each employee had not been trained regarding the hazards associated with the chemicals they were exposed to, such as gasoline, oil, and diesel fuel.

Citation 3, Item 4, alleges a repeat violation of 29 C.F.R. 1910.266 (d)(1)(vii)(A), in that a dozer operator and an excavator operator were not wearing eye protection.

Discussion

Respondent contends that its Motion should be granted and the citation items vacated because the Secretary has not shown that the logging standard applies to Pettey's activities at the work site. The Secretary, on the other hand, contends that her Motion should be granted and the citations items affirmed because she has shown that the standard applies to the activities at the site.

The parties' motions for summary judgment were made pursuant to Commission Rule 61, 29 C.F.R. 2200.61, and to Federal Rule of Civil Procedure 56(a), which states that:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 467 (1962).

As Respondent points out, in determining whether to affirm a citation, the administrative law judge must first address the applicability of the cited standard, which involves a consideration of the text and structure of the standard at issue. *Superior Masonry Builders*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). "If the meaning of the language is not ambiguous, the inquiry ends there." *Id.* It is only when the meaning of the standard is ambiguous that consideration should be given to "contemporaneous legislative history, and then to the Secretary's interpretation so long as it is reasonable." *Id.*

Respondent contends that the meaning of the logging standard set out at 29 C.F.R. 1910.266 is not ambiguous. The standard "establishes safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood," and includes, but is not limited to,

"pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products." 29 C.F.R. 1910.266(b)(1). Further, the standard applies to logging operations "*as defined by this section*." 29 C.F.R. 1910.266(b)(2) (emphasis added). For those hazards and working conditions not specifically addressed by this section, or when the regulation does not apply to the employer's operations, other applicable sections of Part 1910 govern the employer's conduct. 29 C.F.R. 1910.266(b)(3).

The term "[l]ogging operations" is defined as "[o]perations associated with felling and moving trees and logs[5] from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites." 29 C.F.R. 1910.266(c). The word "fell" is expressly defined in the standard as "[t]o *cut down* trees." *Id*. (Emphasis added). Respondent asserts that pushing trees over with machinery does not meet the definition of "fell" set out in the standard. Respondent also asserts that the standard applies only where the employer is engaged in the "felling *and* moving" of trees and logs and that the use of the conjunctive word "and" rather than "or" indicates that both activities must be present for the standard to apply. Respondent concludes that because it was not "felling and moving" trees at the site, and because the meaning of "logging operations" set out at 29 C.F.R. 1910.266(c) is unambiguous, the logging standard is not applicable in this matter.

I do not agree with Respondent's position that the standard is unambiguous, and I find that the language of Sections1910.266(b)(1) and 1910.266(c) requires interpretation. In this regard, I note that the Commission has stated that "in interpreting a disputed term in a standard, we look to the provisions of the whole law, and to its object and policy." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995), citing to *Aulston v. U.S.*, 915 F.2d 584, 589 (10th Cir.1990); *Smith v. U.S.*, 113 S.Ct. 2050, 2054 (1993) (definition of disputed phrase not limited to meaning "that most immediately comes to mind").

I address first Respondent's argument that it was not "felling and moving" trees at the site. The record shows that Pettey's employees were pushing down trees with machinery and then using

[5]A "log" is defined as "[a] segment sawed or split from a felled tree, such as, but not limited to, a section, bolt, or tree length." 29 C.F.R. 1910.266(c).

the machinery to move the trees out of the way; they also cut the trees into 4 to 5-foot sections to comply with West Virginia's oil and gas regulations, which require that trees be cut into such sections and left to decompose naturally. (Pettey Affidavit ¶¶ 3-4). The Secretary contends that Pettey's interpreting the definition of "fell" to exclude the activities at the site ignores common sense and is too narrow. She notes that the definition of "fell" includes "to cause to fall by striking; cut or knock down," citing to the *American Heritage Dictionary of the English Language* (4th ed. 2000). She further notes that "cut down" is also defined as "to strike down." *Id*. Finally, she notes that "cut" is defined as "to penetrate with or as if with an edged instrument" and "to strike sharply with a cutting effect," citing to *Webster's New Int'l Dictionary* (3rd ed. 2002). She concludes that downing trees with machines results in the trees being "cut down" just as surely as they would be by the use of a saw or an axe. I agree, and I find that Pettey's activities at the site involved "felling and moving trees and logs" as set out in the standard.

I next address Section 1910.266(b)(1), which establishes the scope and application of the logging regulations, as follows:

> b) Scope and application.
> 1) This standard establishes safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood. These types of logging include, *but are not limited to*, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products. This standard does not cover the construction or use of cable yarding systems.

29 C.F.R. 1910.266(b)(1) (emphasis added).

The foregoing language shows that the end use of the wood, whether it is used to make paper or is left in the woods to decompose after felling, is not relevant to whether an activity is considered logging. Moreover, while a number of types of logging operations are explicitly set out, Section 1910.266(b)(1) makes it clear that the application of the regulation is not limited to the enumerated types of operations; stated another way, the phrase "but are not limited to" anticipates that there will be logging activities that are not specifically listed in Section 1910.266(b)(1). Section 1910.266(b)(2) goes on to state that "this standard applies to all logging operations as defined by this section," and Section 1910.266(c) further defines "logging operations," as follows:

> Logging operations. Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, *but not limited to*, marking danger

> trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

29 C.F.R. 1910.266(c) (emphasis added).

Again, the use of the phrase "but not limited to" plainly demonstrates that the listed activities are not meant to be the exclusive list of what constitutes logging under the standard. I find, accordingly, that the activities set out in Sections 1910.266(b)(1) and 1910.266(c), are examples only and are not the sole kinds of logging operations contemplated by the standard.

I further find that the Secretary has interpreted her definitions and regulations to provide the most protection possible to workers exposed to the hazards specific to logging operations. This goal is consistent with the purposes of the Act. Furthermore, the Secretary's interpretation of a regulatory provision is owed deference and is entitled to affirmance as long as it is reasonable. *N & N Contractors, Inc., v. OSHRC*, 255 F.3d 122,125 (4th Cir. 2001). I conclude that the Secretary's interpretation of her regulations in this case is reasonable.

Respondent's final argument is that it did not have adequate notice that its activities would be subject to the OSHA logging standard. The record shows that Pettey's employees were pushing down trees in order to prepare for a construction activity, the laying of a gas line. (Green Affidavit; Pettey Affidavit). As the Secretary points out, the removal of trees in preparation for a construction activity is clearly covered by the logging standards, as explained in the OSHA Logging Preamble:[6]

> [T]he felling of trees in preparation for the construction activities ... is considered to be a logging operation. To the extent that any employee is performing a logging operation in preparation for construction activities, the employee is performing general industry work, and the requirements of this standard as well as other applicable sections of part 1910, apply in order to safely fell those trees.

In addition, an OSHA "e-Tool" for Oil and Gas Well Drilling and Servicing states that "[s]ite preparation for an oil and gas well, in most instances, looks like any other construction site."[7] Finally, the OSHA web site also describes the activities of "limbing and bucking" in logging and the

[6]The OSHA Logging Preamble, Section V: Summary and Explanation of the Final Standard, Paragraph (b) Scope and Application, is Exhibit 4 to the Secretary's Motion; the cited section is the last paragraph of Exhibit 4.

[7]The OSHA "e-Tool" for Oil and Gas Well Drilling and Servicing is Exhibit 2 to the Secretary's motion..

hazards of those two activities.[8] "Bucking" is one of the logging operations specifically listed in Section 1910.266(c), and the standard defines the activity as "cut[ting] a felled tree into logs." *See* 29 C.F.R. 1910.266(c). The record shows that Pettey's employees were "bucking" at the site, that is, they were cutting the felled trees into smaller sections. (Green Affidavit; Pettey Affidavit). Based on the record, Respondent clearly had adequate notice that operations such as those performed at the subject site were covered by the logging operations standard.

In view of the foregoing, Respondent's Motion is DENIED, the Secretary's Motion is GRANTED, and the citation items alleging violations of the logging operations standard are AFFIRMED.[9]

So ORDERED.

/s/
JOHN H. SCHUMACHER
Judge, OSHRC

Dated: June 22, 2006
Washington, D.C.

[8]The "Limbing and Bucking" excerpt is Exhibit 3 to the Secretary's motion. Moreover, another excerpt from OSHA's website that addresses the scope of the logging standard explicitly states that the standard applies to "bucking." *See* Exhibit 5 to the Secretary's motion.

[9]The classification of the items, and the penalties therefor, will be resolved by the parties' settlement of this matter.