



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.

THE DAVEY TREE EXPERT COMPANY,

Respondent.

OSHRC Docket No. 12-1324

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Johnathan M. Crotty, Stacy K. Wood; Parker Poe Adams & Bernstein LLP, Charlotte, NC
For the Respondent

Melissa Bailey; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC
For Amicus Curiae Utility Line Clearance Coalition (ULCC)

Tressi L. Cordaro, Bradford T. Hammock; Jackson Lewis P.C., Reston, VA
For Amicus Curiae Tree Care Industry Association, Inc. (TCIA)

DECISION

Before: ATTWOOD, Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

The Davey Tree Expert Company provides tree care services for residential and commercial clients, and utility line clearance and vegetation management for electric utility companies. On December 8, 2011, a Davey Tree crew was engaged in line clearing work at a worksite near Prattville, Alabama. This work involved felling trees, which were left on the ground where they fell. One of the trees struck a Davey Tree employee as it fell, fatally injuring him. After an inspection, the Occupational Safety and Health Administration issued Davey Tree a citation alleging seven serious violations of the logging standard, 29 C.F.R. § 1910.266, five of

which were later withdrawn by the Secretary. Under the two remaining citation items, the Secretary alleged a violation of § 1910.266(d)(2)(ii) (first-aid kits in logging operations) with a proposed penalty of \$2,805, and a violation of § 1910.266(d)(6)(i) (work areas in logging operations) with a proposed penalty of \$7,000. Following a hearing, former Administrative Law Judge Ken S. Welsch issued a decision vacating the citation on the ground that the logging standard does not apply to the cited conditions.¹

In *The Davey Tree Expert Company*, OSHRC Docket No. 11-2556, which we also issue today, we held that the scope and application provisions of the logging standard, §§ 1910.266(b)(1)-(2), read together with the definition of “logging operations,” § 1910.266(c),² unambiguously establish that the phrase “felling and moving trees and logs from the stump to the point of delivery” describes the logging *process*, which involves both felling trees and moving the felled trees. In other words, both felling and moving must be present for the logging standard’s requirements to apply. Accordingly, we conclude that the logging standard does not apply to the line clearance work performed by Davey Tree at the cited worksite and vacate the citation.

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

/s/ _____
Heather L. MacDougall
Commissioner

Dated: February 26, 2016

¹ In his decision, the judge expressly stated he was applying the reasoning from Administrative Law Judge Dennis L. Phillips’s decision in *The Davey Tree Expert Co.*, No. 11-2556 (OSHRC ALJ Jun. 19, 2013), which involved the same type of work and the same applicability issue.

² The definition reads as follows:

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.

§ 1910.266(c).

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama Street, S.W., Room 2R90
Atlanta, Georgia 30303

SECRETARY OF LABOR,

Complainant

v.

THE DAVEY TREE EXPERT
COMPANY,

Respondent.

OSHRC Docket No. 12-1324

Appearances:

Melanie Paul, Esq., and Brooke D. Werner McEckron, Esq.
U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Stacy K. Wood, Esq., and Jonathan M. Crotty, Esq.
Parker Poe, Charlotte, North Carolina
For Respondent

Before: Administrative Law Judge Ken S. Welsh

DECISION AND ORDER

The Davey Tree Expert Company (Davey Tree) provides tree and landscape services for residential and commercial customers throughout the United States and Canada. On December 8, 2011, Davey Tree employees were felling dead trees located near power lines in Prattville, Alabama. One of the trees struck a Davey Tree employee as it fell, killing him.

The Occupational Safety and Health Administration (OSHA) conducted an inspection of the site of the fatality. On June 6, 2012, the Secretary issued a citation to Davey Tree alleging seven serious violations of 29 C.F.R. § 1910.266, OSHA's logging standard.

Davey Tree timely contested the citation. The court held a hearing in this matter on June 25, 26, and 27, 2013, in Atlanta, Georgia. Davey Tree stipulates the Commission has jurisdiction over the proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act) and that it is a covered business under § 3(5) of the Act (Tr. 5-6). The parties have filed post-hearing briefs.

Prior to the hearing. The Secretary withdrew Items 2, 3a, 4a, 4b, and 4c (Tr. 3-4). Left for consideration are Item 1 and Item 3b. Item 1 alleges a serious violation of 29 C.F.R. § 1910.266(d)(2)(ii), for failing to ensure its onsite first-aid kit contained the minimum required items. The Secretary proposed a penalty of \$2,805.00 for Item 1. Item 3b alleges a serious violation of 29 C.F.R. § 1910.266(d)(6)(i) for failing to ensure its employees were adequately spaced so that the actions of one employee would not create a hazard for any other employee. The Secretary proposed a penalty of \$7,000.00 for this item.

Davey Tree argues that it was not engaged in a logging operation at the time of the employee fatality and, thus, the logging standard is not applicable. If the logging standard is found to be applicable, Davey Tree contends it lacked fair notice of its applicability. Davey Tree asserts it is an arborist and its work near electrical lines is covered under 29 C.F.R. § 1910.269, “Electric power generation, transmission, and distribution.”

For the reasons discussed below, the court determines the Secretary failed to establish 29 C.F.R. § 1910.266 applies to the cited conditions. Item 1 and Item 3b are vacated and no penalties are assessed.

Background

Davey Tree was founded in 1880 by John Davey and is an employee-owned company with approximately 7,500 employees. Its corporate office is in Kent, Ohio. According to its corporate director of safety, Joseph Tommasi, Davey Tree “is the largest full-service tree and landscape company in the United States and Canada” (Tr. 447-448, 450).

Since the 1920s, Davey Tree has provided line clearance services to utility companies throughout the United States and Canada. Line clearance services include pruning trees and trimming vegetation away from the right-of-way on either side of electrical lines. Occasionally, Davey Tree will cut down (fell) dead trees that pose a hazard of falling onto the electrical lines. Approximately five percent of Davey Tree’s services involve the felling of dead trees (Tr. 452-453, 514).

Effective January 1, 2011, Davey Tree entered into a three-year contract with Alabama Power (Exh. C-16; Tr. 342). The contract required the felling of trees that were “less than 10 inches in diameter at breast height (“DBH”) and fast growing ‘weed’ trees that are under or within 15 feet of the central line of the pole line” (Exh C-16, Attachment 2, ¶ 6). The contract also required the felling of “trees that are dead, diseased, or otherwise threatening the operation

of the company's electrical system." *Id.* The contract covered the felling of dead trees that posed a danger to the electrical lines in Alabama Power's system throughout the state (Tr. 344-346).

Davey Tree performs two types of work under the Alabama Power contract: hot-spotting and mileage work. Under hot-spotting, Alabama Power designates the trees to be cut down and Davey Tree has the discretion to remove additional trees it identifies as hazardous. Under mileage work (which is regular maintenance work), Alabama Power pays Davey Tree by the mile and by the number of trees that it cuts down, although the price per tree varies by the DBH of the tree. Mileage work is done as part of a "full cycle" where Davey Tree starts at a substation and goes to the end, trimming vegetation, along with felling selected trees (Tr. 346-348, 400).

Davey Tree began working on a hot-spot ticket approximately one week before the accident. The General Foreman for Davey Tree, testified the company performed work along 39.81 miles of Alabama Power's electrical lines near the Prattville area. Five two-man crews performed the work. The General Foreman testified Davey Tree cut down approximately 80 trees in the Prattville area. Davey Tree felled approximately 20 of the trees from the stump. The other trees were taken out in pieces, using a bucket truck (Tr. 172, 183, 188-190).

Davey Tree's tree felling plan requires that notch cuts be used on all trees greater than 5 inches in DBH. Three cuts are required to fell a tree: the notch cut, consisting of a face cut and an undercut, and a back cut an inch or two above the notch cut. The notch cut controls the direction of the fall. The notch and back cut create a hinge (the portion of the tree left intact) which guides the tree to the ground. A bypass is a hazardous condition that occurs when a sawyer fails to match his horizontal and angle cuts. It can cause a tree to fall in an unintended direction.

Davey Tree instructs its employees to use ropes (pull lines) to help guide the trees away from electrical lines. Its safety policy calls for employees handling pull lines to stay at least 1½ times the height of the tree length away from the tree being felled (Exh. C-12).

December 8, 2011, Fatality

On December 8, 2011, a combined crew of seven Davey Tree employees set out to cut down five designated trees using a chainsaw and ropes. Normally the crew would have used a bucket truck to remove the trees in sections, but it had rained the previous night and it was too

wet to drive the truck across the ditch. Instead, the General Foreman instructed the employees to put a rope around each tree and fell them one at a time (Tr. 159-160, 192-193, 194, 426).

The General Foreman supervised the felling of the first tree (referred to as “Tree #1”) using a rope and a chainsaw. After Tree #1 was felled, the General Foreman received a phone call informing him he was needed at another site (Tr. 1989-202). He departed, leaving a Foreman in charge. The Foreman and the deceased employee decided to remove the next two trees (Trees #2 and #3) in tandem, which is prohibited by Davey Tree’s safety policy. Tree #2 was approximately 71 feet tall and 20 inches in diameter. Tree #3 was approximately 90 feet tall (Tr. 40-41). The crew placed a single rope around Tree #3 and looped it around Tree #2, then anchored the rope to a come-along secured to a sweet gum tree (Exh C-3; Tr. 210, 455). Four employees manned the ropes while the sawyer placed a single level back cut in Tree #2 and then made a notch cut and a back cut in Tree #3. After completing the cuts on Tree #3, the crew pulled on the come-along. Tree #3 came down, hitting Tree #2. Both trees fell in the direction of the crew members manning the come-along. Tree #2 struck and killed one of the crew members (Exhs. C-3 and C-4).

The next day, OSHA compliance and safety and health officer (CSHO) Stephen Day arrived at the Prattville site. Over the course of several days, he interviewed employees and took measurements and photographs. On June 6, 2012, the Secretary issued the instant citation.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Davey Tree stipulates elements (3) and (4) of the Secretary’s burden of proof. It concedes its employees were exposed to a hazardous condition and it was aware of the hazard. Davey Tree argues, however, that it works in the arborist industry and not the logging industry. Davey Tree asserts the Secretary has cited it under an incorrect standard, and that the Citation should be vacated.

**Items 1 and 3b: Alleged Serious Violations of
§§ 1910.266(d)(2)(ii) and 266(d)(6)(i)**

Item 1 of the Citation alleged a serious violation of § 1910.266(d)(2)(ii):

Tree felling operations, 1243 Lower Kingston Rd., Prattville, AL 36067: On or about December 08, 2011, and at times prior to; the employer failed to ensure that the first-aid kit contained the minimum listed items in Appendix A to include: two triangular bandages, scissors, at least one blanket, tweezers, splint, and directions for requesting emergency assistance.

Section 1910.266 (d)(2)(ii) provides:

At a minimum, each first aid kit shall contain the items listed in Appendix A at all times.

Davey Tree concedes its onsite first aid kit did not include all of the items listed in Appendix A (Tr. 239).

Item 3b of the Citation alleges a serious violation of § 1910.266(d)(6)(i):

Tree Felling operations, 1243 Lower Kingston Rd., Prattville, AL 36067: On or about December 08, 2011, and at times prior to: the employer failed to ensure that adequate spacing was provided between employees so that employee actions would not create struck-by or crushing hazards for employees.

Section 1910.266 (d)(6)(i) provides:

Employees shall be spaced and the duties of each employee shall be organized so the actions of one employee will not create a hazard for any other employee.

Joseph Tommasi, Davey Tree's Director of Corporate Safety, stated that the crew involved in the December 8, 2011, fatality did not follow Davey Tree's own safety policies that day. He stated that, had the Secretary cited the company under the appropriate standard, he would have recommended that the company accept the citation (Tr. 511). Counsel for Davey Tree stated, "We concede the employees were too close to the tree being felled whether the cut was proper or not. We will concede the employees were too close" (Tr. 91).

Applicability of the Cited Standard

Section 1910.266(b)(1) defines the scope of the logging standard. It states § 1910.266 covers "all types of logging, regardless of the end use of the wood." Section 1910.266(b)(2) provides, "This standard applies to all logging operations as defined by this section." "Logging operations," as defined by § 1910.266(c), are:

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 the between logging sites.

Davey Tree's first line of attack starts with the fifth word of the "logging operations" definition. Davey Tree contends that since "logging operations" is defined as "felling *and* moving trees," its activities are not covered by the definition. It is undisputed that Davey Tree does not move the trees once they are felled. In fact, Davey Tree prohibits its employees from selling any trees or vegetation it removes (Tr. 397-398, 480).

At first blush, Davey Tree's argument appears to be the logical conclusion based on the plain language of the definition. However, earlier this year Judge Dennis Phillips issued a decision addressing this exact question in great detail and finding that the Secretary's interpretation holds sway. Judge Phillips's decision *Davey Tree Expert Co.*, (No. 11-2556, 2013), hereinafter *Davey Tree Pennsylvania*, is currently an unreviewed judge's decision that is not binding on the court.¹ "[I]t is well-settled that an unreviewed administrative law judge's decision has no precedential value. See *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (holding that "[a]n unreviewed ALJ decision does not bind the OSHRC or the courts as precedent") (citations omitted)." *Elliot Construction Co.*, 23 BNA OSHC 2110 (No. 07-1578, 2012).

While *Davey Tree Pennsylvania* is not precedential, the court finds it apposite to the case at hand. The fact pattern is close to the one in the instant proceeding. In that case, a Davey Tree employee was struck and killed during a tree felling undertaken pursuant to a line-clearing contract with the Pennsylvania Electric Company. The Secretary cited Davey Tree for a serious violation of § 1910.266(d)(6)(1), the adequate spacing standard that is cited in one of the two items at issue here. The sole issue Judge Phillips deals with in his 86-page decision is whether the § 1910.266 logging standard applies to the work Davey Tree's Pennsylvania crew was performing at the time of the employee fatality. Judge Phillips's discussion of the applicability issue is comprehensive, exhaustive, and, for this court, ultimately persuasive. For that reason, the court will summarize the *Davey Tree Pennsylvania* case and apply its reasoning to the instant proceeding.

¹ The Review Commission directed *Davey Tree Pennsylvania* for review on July 31, 2013.

Davey Tree Pennsylvania

Davey Tree was under contract with Pennsylvania Electric to keep its electrical lines and right-of ways clear of trees and vegetation. On February 23, 2011, a Davey Tree crew was working inside a gated community named Treasure Lake. The area was “residential, with woods, back roads, back lots, empty lots, and areas with no roads or houses.” *Davey Tree Pennsylvania*, pp. 5-6.

The crew decided to fell a “danger” tree, estimated to be 70 to 80 feet tall and located 25 to 30 feet from the power lines. The crew attached a rope to the tree and then attached it to a come-along secured to an anchor tree. The sawyer made the notch cut and back cut while crew members took turns cranking the come-along. As the tree started falling, one of its limbs hit the limb of another tree. This caused the falling tree to spin off its stump. The falling tree then hit a third tree knocking it over. The third tree struck and killed a member of the Davey Tree crew.

The Secretary cited Davey Tree for inadequate spacing (as in this case) under the § 1910.266 standard. As in this case, Davey Tree argued that it was not engaged in a logging operation. Instead, Davey Tree argued that § 1910.269(r) is the applicable standard. Section 1910.269(r) is captioned “Line-clearance tree trimming operations” and provides, “This paragraph provides additional requirements for line-clearance tree-trimming operations and for equipment use in these operations.”

Davey Tree also cites American National Standards Institute (ANSI) Z133.1, which addresses arboricultural conditions and practices when working near energized electrical lines. These conditions are not fully addressed by § 1910.269 and are not addressed at all in the § 1910.266 logging standard.

Interpretation of “Felling and Moving Trees”

Judge Phillips first discusses the troublesome phrase “felling and moving trees” in the definition of “logging operations” found at § 1910.266(c). Judge Phillips notes that under *Martin v. OSHRC (CF&I)*, 499 US. 144, 157-158 (1991), the Supreme Court held the Commission must defer to the Secretary’s interpretation of an ambiguous regulation only if it is reasonable, taking into account “whether the Secretary has consistently applied the interpretation embodied in the citation,” “the adequacy of notice to regulated parties,” and “the quality of the Secretary’s elaboration of pertinent policy considerations.”

Judge Phillips then conducts a review of cases where the Commission considered whether “and” can sometimes mean “or” and concludes that the Commission has found that it can. *Davey Tree Pennsylvania* at 50-51. Judge Phillips finds that the entire definition of “logging operations” shows that “and” is used in a cumulative or disjunctive sense, not in the strictly conjunctive sense urged by Davey Tree. He also finds the Secretary’s interpretation to be consistent with a formal pronouncement the Secretary issued in 2006, in his brief for *Petty Oil Field Services, Inc.*, 2006 WL 2050961 at **1,4. (No. 05-1039, 2006). In that case, the Secretary cited an employer under § 1910.266 for allowing its employees to push down trees with heavy machinery to clear an area for the installation of gas lines. The trees were not moved from the site, but pushed to the side and cut into pieces, where they were left to decompose. Judge Phillips concludes *Petty Oil Field* establishes that since at least 2006, the Secretary has formally interpreted “logging operations” to “include felling operations in which the wood is left onsite to decompose. There is no evidence that the Secretary has ever departed from that interpretation in any proceeding before the Commission. [His] consistent interpretation of ‘logging operations’ is pronounced through the formal means of an administrative adjudication suggests that it is entitled to deference.” *Davey Tree Pennsylvania* at 54.

Judge Phillips “finds the Secretary’s interpretation to be reasonable and concludes that the logging standard can apply where there is felling but no moving of trees.” *Id.* at 55. In the present case, the arguments made by the Secretary and Davey Tree on this issue are virtually identical to the ones they made before Judge Phillips. The court agrees with Judge Phillips’s reasoning and accordingly finds that § 1910.266 applies to conditions where trees are felled but not moved.

Deference to the Secretary’s Directives

Finding that the logging standard applies to felled but unmoved trees does not end the inquiry, however. The Secretary must still establish Davey Tree was engaged in a logging operation at the time of the December 8, 2011, fatality. Over the years the Secretary has issued a number of contradictory documents in his attempts to clarify his position as to what constitutes a logging operation.

In *Davey Tree Pennsylvania* and in the instant case, the respective CSHOs relied on a compliance directive in recommending the citations. CPL-02-01-045 (Directive 45), was issued

by the Secretary on August 12, 2008 (Exh. C-14). Directive 45 is entitled, “Citation Guidance Related to Tree Care and Tree Removal Operations.”

In his decision, Judge Phillips recounts the history of the Secretary’s conflicting statements over the years leading up to issuance of Directive 45. He states, “That history demonstrates that the path the Secretary traveled here in arriving at [his] current interpretation is a twisted and winding road that is anything but a model of consistency.” *Id.* at 57.

Judge Phillips goes on to provide an in-depth review of the Secretary’s various interpretations. In the interest of judicial economy, the court will not repeat the history here (it can be found at pages 57 through 70 of *Davey Tree Pennsylvania*). The court notes, however, that the same evidence and arguments were advanced in the instant case on this issue which is a wholly legal one. The court agrees with Judge Phillips’s conclusion that “the Secretary is not entitled to deference insofar as [he] interprets the logging standards to be applicable to arborists in the line clearing industry whenever they are involved in removing trees from the stump.” *Id.* at 70.

Directive 45

In his decision, Judge Phillips finds that Directive 45 was not a proper instrument to announce an expansion of the applicability of the logging standard to the line clearing industry without engaging in Notice and Comment rulemaking as required by the Administrative Procedure Act (APA). He finds, however, that Directive 45 “provides a framework for determining when the logging standard may apply to line clearance.” *Id.* at 73. He proceeds to apply the factors in Directive 45 to the facts in his case and finds “that neither Davey Tree nor a reasonable person in the line clearing industry would conclude that 29 C.F.R. § 1910.266(d)(6)(i) applied to” the work the Pennsylvania Davey Tree crew was performing. *Id.*

Directive 45 lists six factors the CSHO should consider when deciding whether or not to cite an employer under the § 1910.266 logging standard: (1) the scale and complexity of the tree removal project; (2) the number of trees removed; (3) the type of equipment or machines used to perform the tree removal; (4) the location of the tree removal project; (5) the size of the land/lot where the tree removal project is performed; and (6) the use of mechanical equipment to fell and remove trees.

CSHO Stephen Day conducted OSHA’s inspection in the instant case. He conceded Directive 45 provides no guidance regarding how much weight should be given to any particular

factor. It offers no clarification for vague terms such as “substantial” number of trees, “large” tract of land and “rural” or “remote” areas. CSHOs must use their own subjective judgment when applying the factors (Tr. 153-157).

CSHO Day testified he determined the logging standard applied based on this assessment:

The employees were engaged in an activity where they were cutting down a large number of trees in a rural area. The project was ongoing. It had been underway for a couple of weeks and was likely to go on for several more. The employees were engaged in removing trees whole while they were on the site. They were also engaged in removing trees that were damaged and dead trees.

The technique that they were using, the manual felling techniques, were commonly – or the type of techniques that are commonly used in a logging operation.

Because of the type of work that the employees were doing, they were subjected to struck-by hazards and other hazards that would be logging-related hazards. Therefore, the employer in my view would have been required to adhere to the 266 requirements while engaged in an activity.

(Tr. 113).

The court must determine whether, based on the factors set forth in Directive 45, the Secretary established that a reasonable person familiar with the logging industry would recognize that Davey Tree was involved in logging operations the day of the fatality in Prattville, Alabama.

Factors

Factor A

A. The Scale and Complexity of the Tree Removal Project:

1. The scale and complexity of tree removal are key factors in determining whether the *Logging operations* standard applies.
 - a. The scale of logging operations typically includes cutting down a substantial number of trees on a large tract of land
 - b. In contrast, there are small-scale tree removal activities, such as when an employer is asked to remove one or a few trees from the yard of a private residence, that typically would not be considered logging.
2. Complexity of a tree removal project takes into account concepts such as the amount of time and equipment needed to perform the project. For example:
 - a. Logging operations typically takes days to months to complete and involve the use of a variety of rough terrain machinery.

- b. In comparison, the removal of several trees from a residence may take only a few hours to a few days and generally would not be considered a logging operation.
3. The presence of unusually hazardous conditions also may be relevant in assessing the complexity of a tree removal project. For example, removing a significant number of trees damaged in a major storm (e.g., a tornado, hurricane, flood, or ice storm) may expose employees to additional or unfamiliar hazards (e.g., lodged trees or spring poles) that may more closely represent the type of hazards present in the logging industry and predictably would require more extensive protective measures.

(Exh C-14).

CSHO Day testified with regard to Factor A:

We considered the scale and complexity of this tree removal project. As it points out here, a typical logging operation is different from a tree care on line clearing operation because of the number of trees that are removed over the course of a longer period of time where a line clearance would be a few trees over a short duration in a neighborhood or a non-rural area, maybe in someone's backyard or something like that. I considered each one of these three items under (A).

Also, there were unique hazards involved in this inspection (sic) as listed here in Item Number 3, this operation in Prattville involved the removal of dangerous trees because of their condition, and that was taken into account as well

[T]his project that Davey Tree was engaged in took place over several weeks and could go into several months. It involved more than just a few trees. It involved a growing number of trees as they progressed from site to site.

(Tr. 119-120).

Davey Tree's General Foreman testified his crews felled approximately 80 trees total, only 20 of which were felled from the stump (Tr. 188, 246-247, 252-253). The Prattville hot-spotting work lasted for approximately two weeks (Exh. C-2, C-3, C-4). In a logging operation, an individual logger may fell 60 to 120 trees a day from the stump (Tr. 317-318, 759).²

Paul Cyr is a consultant in occupational safety and health matters in relation to forest product industries and the arborist industry, among others (Tr. 714). He worked as an OSHA CSHO for 22 years, under the designation of "logging safety specialist" (Tr. 715). Cyr assisted in drafting the § 1910.266 logging standard (Tr. 725-728). He was qualified as an expert in the areas of manual felling techniques and spacing; the operation of loggers and logging companies;

² According to the Contracts Manager for Davey Tree's eastern utility services, Davey Tree felled at least 350 trees pursuant to the Alabama Power contract from January 1, 2011, to December 8, 2011 (Exh. C-23; Tr. 709, 712).

and whether Davey Tree's activities in Prattville, Alabama, on December 8, 2011, were consistent with logging operations as the term is understood in the industry (Tr. 746-753). Cyr visited the Prattville site prior to the hearing (Tr. 768).

Cyr testified, "A typical acreage for a viable logging operation will involve felling trees on many dozens and dozens of acres. It can run into the hundreds and even thousands of acres" (Tr. 758-759). In contrast, Cyr testified the area where the Davey Tree crew was working on December 8, 2011, was small: "[I]f you draw a square around from Tree #1 up to the sweet gum tree, back to Tree #3, back to the power line and back to Tree #1, I would say it's less than an acre" (Tr. 774).

Cyr assessed the scale and complexity of the Prattville operation in accordance with Factor (A):

The scale was very small. There were only three trees that were felled. The trees that were felled were in fairly close proximity to a power line that was there. There were no logging machines, there were no log yards, there was no indication that anything at that site was on the scale of a typical logging operation.

The complexity, it was very, very noncomplex, if you will. It did not involve any rough terrain, it did not involve any environmental obstacles like brooks or environmentally sensitive areas in the woods.

It was a very simple job of removing three trees that were in danger during a storm of striking a power line.

(Tr. 770).

Based on the record, a reasonable person would not conclude that the scale and complexity of the Prattville operation was commensurate with a logging operation. It was commensurate, however, with a typical line clearance operation.

Factor B

B. Number of Trees Removed.

1. The number of trees being removed on a particular project is an example of the concept of project scale and information that the CSHOs shall document in determining whether the *Logging operations* standard applies.
 - a. Logging operations typically involve harvesting large numbers of trees for usable wood.
 - b. In contrast, the removal of one or several trees from a lot typically would not be considered a logging operation.
2. Projects that involve the removal of multiple trees would be expected to present greater complexity, for example, if the trees are very large or tall.

Such projects may involve several work areas and work crews, and require the use of particular felling methods to ensure the trees fall in the intended direction, and necessitate the use of heavy machinery.

(Exh. C-14).

CSHO Day explained his application of Factor B to the Prattville operation:

The number of trees removed in this project, we were not talking one or two or just a few trees in one location in an urban or suburban area. We were talking about trees that were removed in a rural area, and as they moved from site to site, the number of trees that would be removed.

(Tr. 120).

The number of trees felled (three on December 8, 2011; twenty from the stumps overall) is addressed under Factor A. It is undisputed that Davey Tree was not “harvesting large numbers of trees for useable wood” as provided by Factor B(1)(a). It is also undisputed that Davey Tree did not use heavy machinery, as provided by Factor B(2).

A reasonable person applying Factor B to the number of trees felled at the Prattville location would not conclude that Davey Tree was engaged in a logging operation on December 8, 2011.³

Factor C

C. Type of Equipment or Machines Used to Perform Tree Removal Project.

1. Logging operations usually involve the use of heavy machinery to cut, move, and load trees [59 FR 51700, 51714-20]. For example:
 - a. Logging operations often use mechanical felling machines, such as tree shears or feller-bunchers to cut trees off at the base and bulldozers are often used to clear trees from land in preparation of

³ On the second day of the hearing, the Secretary learned for the first time of the existence of billing records relating to the felling of trees pursuant to the contract between Davey Tree and Alabama Power. Davey Tree had not produced these records to the Secretary despite the Secretary’s Request for Production No. 18, which asked for any documents “detailing how many trees were felled pursuant to the contract.” Davey Tree responded to this request that it was “unaware of any responsive documents.” Davey Tree’s counsel asserted she was unaware of the documents until Davey Tree’s Account Manager testified to their existence (Tr. 348, 373-378). Arrangements were made for Davey Tree’s Contracts Manager to testify via telephone regarding the number of trees felled in 2011, as indicated by the billing records. She determined Davey Tree felled at least 350 trees between January 1 and December 8, 2011 (Tr. 709, 712).

The Secretary maintains he has been prejudiced by the late disclosure of the billing records. At the hearing, the Secretary requested the court to strike Davey Tree’s Notice of Contest and grant default judgment, or to draw an adverse inference from the failure to disclose the records. The court denied the request (Tr. 374-375).

Even if the number of trees felled was significantly underestimated based on the billing records, the Secretary still failed to establish Davey Tree was engaged in a logging operation in accordance with the criteria listed in Directive 45. The “number of trees removed” is just one of six factors to be considered, and no one factor is dispositive of the determination whether an operation is a logging operation. The Secretary’s claim he was prejudiced by the late disclosure of the billing records is rejected.

construction activities. Logging operations also typically involve the use of yarding machines (e.g., skidders, tractors, or forwarders) to carry or drag felled trees to a landing for transport or further processing, and log loaders, log stackers and knucklebooms to lift logs onto trucks or into whole tree chippers. The logging standard contains provisions designed to protect employees from hazards associated with use of this equipment [59 FR 51698]. If a tree removal project involves these various types of rough terrain machines, then it is likely the *Logging operations* standard applies.

- b. By contrast, a simple tree removal using a chain saw to cut down a tree, and a chipper to dispose of the branches and trunk pieces would not likely fall under the *Logging operations* standard.
2. It is important to note that the use of additional machinery (e.g., crane, aerial lift) to facilitate the tree removal is not itself a conclusive factor in determining if the Logging operations standard applies to the operation. Generally, overhead and gantry cranes, crawlers, locomotive cranes and truck cranes are either not used, or infrequently used in logging operations covered by the Logging operations standard [59 FR 51715].

(Exh. C-14).

It is undisputed that Davey Tree used none of the heavy machinery listed under Factor C in its Prattville operation. This factor weighs heavily in concluding Davey Tree was not engaged in a logging operation.

Factor D

D. The location of the Tree Removal Project.

Typically, logging operations take place in rural or remote areas, on undeveloped land, or on land that is to be developed. Performing tree removal in rural or remote locations can add to the project complexity. For example, in such locations hospitals and other medical services may not be available or able to reach the worksite quickly enough to ensure effective intervention. The first aid provisions of the *Logging operations* standard are designed with these circumstances in mind. If a number of trees are being removed in a remote or rural location, it is likely that the *Logging operations* standard applies [59 FR 51704-5]. However, the location of the tree removal project, by itself, does not determine whether the *Logging operations* standard applies. For example, clearing a number of trees from a tract of land in preparation for construction activities generally would be a logging operation wherever it is performed (e.g., undeveloped parcel in urban or suburban area) [59 FR 51699]. See Appendix A, Example 1.

(Exh. C-14).

CSHO Day classified Davey Tree's worksite on December 8, 2011, as rural. He stated, "Being a rural area, the location of medical services would not be as easy to come by if the activities were taking place in an urban setting or in a neighborhood in town" (Tr. 122).

The record does not support CSHO Day's contention that the worksite was in a rural area far removed from medical services. Davey Tree's Account Manager testified, without contradiction, that the distance between the accident site and the Autauga County Rescue Department, located in Prattville, is 2.5 miles, with a driving time of approximately 4 minutes (Tr. 405, 407). The distance between the accident site and Prattville's Baptist Hospital is approximately 4 miles. The Account Manager made the drive in approximately 9 minutes, driving the speed limit in a non-emergency vehicle (Tr. 407-408).

Cyr testified the accident site "was along a paved road, there was a house across the street, there was a house just up a short distance, probably three or four hundred feet up from where the felling site was, up along the power line" (Tr. 774).

The General Foreman testified that the day of the accident, the drive from the accident site to Wetumka, where he was meeting another crew, took 20 to 25 minutes (Tr. 208). He received the phone call informing him of the accident as he pulled up to the Wetumka site. He immediately turned around and drove back to the accident site. He stated he "flew back" with his emergency flashers on, and estimates he made the return trip in 15 to 20 minutes (Tr. 209, 213). Using the uppermost of the General Foreman's uncontested estimates, his round trip lasted 45 minutes. Presumably the accident did not occur the minute the General Foreman left, since it would take some time for the crew to arrange the ropes on the trees and for the sawyer to make the cuts. Even so, when the General Foreman returned to the site 45 minutes later, emergency medical services had already arrived at the site and had departed with the body of the deceased employee (Tr. 209).

The Secretary has failed to show that the worksite's location affected the availability of medical services, paved roads, or cell phone service. A reasonable person would not conclude the worksite was rural or remote as contemplated by Factor D. This factor supports Davey Tree's contention that it was not engaged in a logging operation the day of the accident.

Factor E

E. Size of Land/Lot Where Tree Removal Project is Performed.

Typically, logging operations are performed on large tracts of land where there is space to cut trees down at once at the stump [59 FR 51706-8]. By contrast, on smaller lots, it may not be possible to remove a tree simply by cutting it at the stump.

(Exh. C-14).

“Large” is not defined in Directive 45. CSHO Day testified Davey Tree’s activity “was taking place . . . over a large area, and it was not in one location where a few trees were being removed. It was several locations, several work sites over a large area” (Tr. 123).

This factor is duplicative of Factor A (“Scale and Complexity of the Tree Removal Project”). As noted, logging operations involve felling hundreds of trees over dozens or hundreds of acres (Tr. 758-759). Here, the worksite the day of the accident occupied less than one acre (Tr. 774). The entire two-week project spanned 39.81 miles, for a width of 30 feet.

A reasonable person applying the vague word “large,” could conclude that the size of the tract of land being serviced by Davey Tree was consistent with both line-clearing work and a logging operation.

*Factor G*⁴

G. Tree Removal Operations Using Mechanical Equipment.

In some instances, instead of removing a tree or trees by cutting them at the base or piecing them out, employers remove them using equipment and machines. This process, called mechanical felling, involves using equipment such as bulldozers to knock or push down standing trees. Mechanical felling often is used to clear land for construction. This type of mechanical felling operations will

⁴ Factor F is, counterintuitively, a list of factors that should play no part in the CSHO’s determination of the application of the logging standard:

F. Factors that Do Not Apply.

The following factors should not affect the CSHO’s determination about whether the Logging operations standard applies to a particular tree removal project:

1. Whether the activity is done by a tree care employer or an outside contractor;
2. Whether the activity is a regular part of the employee’s work;
3. Whether the activity is done by an employee, contracted on a temporary employment basis, such as a day laborer;
4. Whether the tree removal project is performed on private or public property;
5. Whether the removed tree(s) has/have commercial value; and
6. Size of trees removed.

(Exh. C-14).

generally be subject to the requirements of the Logging operations standard, regardless of the employer's industry sector or the reason the trees are being removed.

(Exh. C-14).

It is undisputed Davey Tree used no mechanical equipment to fell trees. Curiously, instead of weighing this factor against determining Davey Tree was engaged in a logging operation, CSHO Day dismissed it entirely from his calculations: "Well, there was no mechanical equipment involved in this type of activity that Davey Tree was using or actually what they were engaged in. I considered that section was not really applicable here" (Tr. 124).

A reasonable person assessing Factor G would conclude that, since Davey Tree was not using heavy equipment at the Prattville site, this factor weights against the classification of its work activity as a logging operation.

Weighing of Factors

Weighing the factors set forth in Direction 45, the court concludes that neither Davey Tree nor a reasonable person in the line-clearing industry would conclude that the § 1910.266 logging standard generally, nor §§ 1910.266(d)(2)(ii) and (d)(6)(i) specifically, applies to the work in which Davey Tree was engaged in Prattville, Alabama, on December 8, 2011. In the words of Cyr, the Prattville worksite "was in no way, shape, or form a logging operation" (Tr. 776).

The court determines §§ 1910.266(d)(2)(ii) and (d)(6)(i) are not applicable to the cited condition.

Findings of Fact and Conclusions of Law

This decision constitutes the findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a)(1).

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1910.266(d)(2)(ii), is vacated and no penalty is assessed;
2. Item 2 of Citation No. 1, alleging a serious violation of § 1910.266(h)(1)(vi), is withdrawn by the Secretary. Item 2 is vacated and no penalty is assessed;
3. Item 3a of Citation No. 1, alleging a serious violation of § 1910.266(h)(1)(ix), is withdrawn by the Secretary. Item 3a is vacated and no penalty is assessed;

4. Item 3b of Citation No. 1, alleging a serious violation of § 1910.266(d)(6)(i), is vacated and no penalty is assessed;
5. Item 4a of Citation No. 1, alleging a serious violation of § 1910.266(h)(2)(v), is withdrawn by the Secretary. Item 4a is vacated and no penalty is assessed;
6. Item 4b of Citation No. 1, alleging a serious violation of § 1910.266(h)(2)(vi), is withdrawn by the Secretary. Item 4b is vacated and no penalty is assessed; and
7. Item 4c of Citation No. 1, alleging a serious violation of § 1910.266(h)(2)(vii) is withdrawn by the Secretary. Item 4c is vacated and no penalty is assessed.

SO ORDERED.

/s/
KEN S. WELSCH
Administrative Law Judge

Dated: December 23, 2013
Atlanta, Georgia