



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

NELSON TREE SERVICES, INC.,
Respondent,

**THE UTILITY WORKERS UNION OF
AMERICA (AFL-CIO)-LOCAL #452,**
Authorized Employee
Representative.

**OSHRC DOCKET
NO. 93-1665**

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 7, 1994. The decision of the Judge will become a final order of the Commission on May 9, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before April 27, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation
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Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DOCKET NO. 93-1665

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. / SKA
Ray H. Darling, Jr.
Executive Secretary

Date: April 7, 1994

DOCKET NO. 93-1665

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant

v.

NELSON TREE SERVICES, INC.,

Respondent,

THE UTILITY WORKERS UNION OF
AMERICA (AFL-CIO) - LOCAL #452,

Authorized Employee
Representative.

OSHRC DOCKET
NO. 93-1665

APPEARANCES:

For Complainant:

**Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor,
Cleveland, Ohio**

For Respondent:

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

Before: Administrative Law Judge James H. Barkley

DECISION AND ORDER

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

Respondent, Nelson Tree Service, Inc. (Nelson) at all times relevant to this action, maintained a worksite at 29756 Route 30 West, Hanoverton, Ohio, where it was engaged in felling trees for public utility line clearances. Nelson admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 22, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Nelson's Hanoverton worksite (Tr. 103). As a result of the inspection, Nelson was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Nelson subsequently withdrew its contest to all items other than "serious" citation 1, item 1, which alleges violation of §5(a)(1). On November 17-18, 1993, a hearing was held in Cincinnati, Ohio, on the contested issue. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violations

Citation 1, item 1 states:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to:

On March 19, 1993, employees at 29756 Route 30 West, were subjected to the hazards of either being struck by the tree trunk or being caught between the tree trunk and the stump and/or ground resulting in fractures, crushing of body parts, multiple internal injuries or death due to the inadvertent falling of the tree trunk while felling and/or moving about in the work area.

Among other methods, one feasible and acceptable method to correct the hazard is to follow ANSI Z133.1-1988 National Standard Safety Requirement of the Tree Care Operations - Pruning, Trimming, Repairing, Maintaining, and Removing Trees, and Cutting Brush - Safety Requirements, Section 8 - Safe Work Procedures, Part 8.5 - Felling.

(a) Before beginning any felling operations, carefully consider the tree and surrounding area for anything that may cause trouble when the tree falls, the shape and lean of the tree, wind force and direction, decayed or other weak spots and the location of other persons.

(b) Each tree worker shall be instructed as to exactly what he/she is to do. Keep all workers not directly involved in the felling operations clear of the work area (to include the area the tree could fall).

(c) The depth or penetration of the notch shall be about one-third the diameter of the tree.

(d) The opening or height of the notch shall be about 2-1/2 inches (63.5mm) for each foot (0.3 meter) of the tree's diameter.

Alleged Violation of §5(a)(1)

The Commission has held that:

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. (*citations omitted*)

Secretary of Labor v. Tampa Shipyards, Inc., 15 BNA OSHC 1533, 1992 CCH OSHD ¶29,617 (Docket Nos. 86-360, 86-469, 1992).

Nelson is charged with failing to eliminate the hazard to employees of being struck by, or caught beneath an inadvertently, or prematurely, felled tree.

Donald Brzowski, OSHA area director, testified that in the logging industry, a tree being felled is considered hazardous from the time it is first notched (Tr. 233, 273). The wind, a lean, or a hidden defect such as root rot may cause a tree to fall unexpectedly at any time during the face cut or back cut, endangering persons within two tree lengths (Tr. 232-35, 268-69; Exh. C-26, p. 52, C-27, p. 53). The American National Standard Institute, Inc. (ANSI) consensus standard for tree care operations, Z133.1-1988, recognizes the same hazards as the logging industry; in order to protect workers from the danger of prematurely felled trees, §8.5 warns fellers to consider the wind, the tree's lean and any decay or weak spots prior to felling, and mandates that the work area be kept clear of all workers not directly involved in the felling operation (Tr. 108-11, 117; Exh. C-21). Nelson's safety manual also implicitly acknowledges the hazard presented to

workers by prematurely felled trees, tracking the relevant sections of the ANSI standard verbatim (Tr. 63-66; Exh. C-22).

The record establishes that being struck by a prematurely felled tree is recognized as a hazard in the tree felling industries, and was specifically recognized by Nelson.

The evidence further establishes that the cited hazard is likely to result in serious physical harm or death. The fatality which led to the citation in this matter resulted from a leaning tree falling prematurely while a Nelson employee passed through the work area (Tr. 35).

The Secretary suggests, as a possible abatement measure, that Nelson follow ANSI safety requirements contained in §8.5, specifically, keeping all workers not directly involved in the felling operation clear of the area in which the tree could fall, and limiting the size of the notch to "about one-third the diameter of the tree." The record establishes that the suggested abatement methods are feasible; those work rules are already contained in Nelson's safety manual §26 C) and E). The Secretary has also established that the suggested abatement methods would eliminate or materially reduce the cited hazard.¹

Requiring workers not actually felling a tree, who may not be focused on felling conditions, to stay clear of the area in which felling operations are taking place, would plainly reduce the chance of injury to those workers. Though Nelson's work rules require workers to be kept clear of the fall zone, that rule was not enforced until the notch was complete and the back cut initiated (Tr. 76, 86, 123-26, 296, 323). Employees regularly passed through the fall zone during facing or notching (Tr. 36).

The evidence also establishes that limiting the size of the notch would reduce the danger to workers of being struck by a prematurely felled tree. Brzowski stated that in a leaner, or a tree with hidden defects, removal of too much wood in the compression area, i.e. the notch, can cause the trunk to snap and the tree to fall prematurely (Tr. 247-

¹ The Commission has held that the Secretary need prove only that the abatement method would reduce the hazard, i.e. the "preventable consequence" of the work operation, *not* that the failure to utilize a suggested abatement method constitutes a recognized hazard in respondent's industry. *Morrison-Knudsen Co., Inc./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121-22, 1993 CCH OSHD ¶30,048, p. 41,279 (No. 88-572, 1993).

50). Rufin Van Bossuyt, an arborist testifying for Nelson, admitted that notching a tree affects its integrity, and that the larger the notch, the greater the effect (Tr. 368-69). Nelson's safety rules direct, and Nelson's employees were instructed to notch trees to approximately one-third of their diameter (Tr. 68, 95). However Nelson's employees believed the rule provided sufficient latitude to allow them to notch one-half or more the diameter of a tree, and the one-third mark was frequently exceeded (Tr. 203-04, 209, 306, 338-40). The tree involved in the accident which instigated the OSHA inspection was notched to more than one-half the diameter of the trunk (Tr. 33-34, 106-07, 276-79; Exh. C-2).

The Secretary has established the cited violation.

Penalty

Section 17(j) of the Act provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

The Commission has further instructed:

These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

In this case the Secretary proposed a gravity based penalty of \$2,500.00. The gravity of this violation was high. Two employees were exposed, one of which was fatally injured. The gravity based penalty was reduced for good faith and history, resulting in a proposed penalty of \$1,875.00 (Tr. 128). There was no evidence relating to size. Respondent did not contest the proposed penalty amount. The proposed penalty of \$1,875.00 is found to be appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Citation 1, item 1 is affirmed, and a penalty of \$1,875.00 is ASSESSED.


James H. Barkley
Judge, OSHRC

Dated: April 1, 1994