United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Townsend Tree Services Corporation, Respondent.	OSHRC Docket No. **04-1157**

Appearances:

Jamison Poindexter Milford, Esq., U. S. Department of Labor, Office of the Solicitor,, Kansas City, Missouri
For Complainant

John B. Renick, Esq., McMahon, Berger, Hanna, Lanihan, Cody & McCarthy, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

On March 30, 2004, Paul Ney, a foreman for Townsend Tree Services Corporation (TTS), was killed in a horrific accident when he came into contact with a piece of tree trimming equipment. On June 4, 2004, the Secretary issued a citation following an investigation of the fatality conducted by Occupational Safety and Health Administration (OSHA) compliance officer Kevin J. Kolesa. TTS contests the citation, which alleges serious violations of five standards of the Occupational Safety and Health Act of 1970 (Act).

The citation alleges violations of five different sections of § 1910.147, the lockout/tagout (LOTO) standard. Item 1 alleges a violation of § 1910.147(c)(1) for failing to establish an energy control program. Item 2 alleges a violation of § 1910.147(c)(4)(i) for failing to develop, document, and utilize procedures for the control of potentially hazardous energy. Item 3a alleges a violation of § 1910.147(c)(7)(i)(A) for failing to provide training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available, and the methods and means necessary for energy isolation and control. Item 3b alleges a violation of § 1910.147(c)(7)(i)(B) for failing to instruct each affected employee in the purpose and use of the energy control procedure.

Item 4 alleges a violation of § 1910.147(f)(1)(ii) for failing to remove employees from the equipment area.

A hearing was held in this matter on February 8 and 9, 2005, in St. Louis, Missouri. The parties have filed post-hearing briefs. TTS contends that the LOTO standard is inapplicable to the Timberland Trimmer, the vehicle at issue. TTS argues that items 1, 2, 3a, and 3b are duplicative. TTS asserts the affirmative defense of employee misconduct. TTS also argues that Kolesa's OSHA inspection was inadequate and prejudicial to the company.

For the reasons discussed below, items 1, 2, 3a, and 3b of the citation are vacated, and item 4 is affirmed.

Background

Since 1945, TTS has been in the business of tree clearing. TTS employs approximately 1,800 employees in five states, with its home office in Parker, Indiana. In March 2004, a TTS crew consisting of foreman Paul Ney and ground man Bobby McMahan was working in Steelville, Missouri, reclearing the right-of-way under and beside an existing overhead electric distribution facility (Exh. J-1). [1] Ney had worked for TTS since April 3, 1986, and McMahan had worked for the company since May 5, 1996.

On March 30, 2004, Ney and McMahan were on Czar Tower Road, a rural area near Steelville, Missouri. Their assignment at that location was to clear and trim trees, brush, and other debris. Purn Gilliam, a hired hand for the property owner where the TTS crew was located, was also present. At approximately 11:30 a.m., they changed the blades and the belt on a Timberland Remote Trimmer. The trimmer is a four wheel drive cab tractor with an articulated boom on one side and a bulldozer blade on the opposite side. The trimmer is 54 feet long with its boom extended to the rear. Five circular saws, 15 inches in diameter, are mounted toward the far end of the boom on an attached wand. Before changing the blades and belt, the crew lowered the boom to a horizontal position. The machine was not on. The cab of the trimmer was locked and the key was in the ashtray of the company pickup truck.

[1] Exhibit J-1 is a copy of the parties stipulations for hearing. Attached to the exhibit is a copy of TTS's incident investigation, which the parties agree accurately states the known facts of Ney's accident, except for dating the accident as March 29, instead of March 30, 2004.

After Ney and McMahan finished changing the belt and blades, they moved to the front of the trimmer near the cab. Ney unlocked the cab, entered it, and started the trimmer. He engaged the blades and exited the cab with the machine still running. Ney walked to the rear of the trimmer near the rotating blades. Ney shouted at McMahan to get into the cab and accelerate the engine so as to speed the rotation of the bleeds. McMahan did so and was exiting the cab when he heard Gilliam yell to Ney to sit down.

Gilliam had seen Ney squat down within 3 feet of the rotating blades. He saw the trimmer jerk and the blades made contact with Ney on his face, neck, and chest. Ney started to walk away when Gilliam yelled for him to sit down and ran over to him. McMahan went to Ney with the intent of providing first aid but did not do so when he saw the extent of Ney's injuries. McMahan went to the pickup truck and radioed TTS employee Norm Wilkinson, who in turn called 911. Ney was dead when the emergency medical team arrived. McMahan later stated he believed that he had bumped the steering wheel while exiting the cab, causing the boom to swing into Ney (Exh. J-1).

Kolesa arrived at the scene of the fatality the next day, on March 31, 2004. He held an opening conference with TTS management personnel and took photographs of the site. Kolesa did not hold a closing conference with (TTS) (Tr. 117-118). The Secretary issued the citation at issue on June 4, 2004.

Adequacy of Kolesa's Inspection

TTS argues that Kolesa's inspection was inadequate because (1) his testimony was "incredible, inconsistent, and unreliable" (TTS's brief, p.6), and (2) he failed to hold a closing conference with the company. TTS's argument is rejected on both counts.

TTS spends a considerable portion of its brief detailing perceived inconsistencies in Kolesa's testimony. Without passing judgment on these alleged inconsistencies, the undersigned notes that her findings of facts are based upon the stipulated facts contained in Exhibit J-1 and the testimony of the other witnesses. The one item that is affirmed (item 4) was decided without regard to Kolesa's testimony. Therefore, TTS's allegation that his testimony was inconsistent and unreliable is irrelevant to the determination of the items.

Kolesa admitted that he did not hold a closing conference with TTS (Tr. 40). Section 1903.7(e) requires the compliance officer to hold a closing conference "[a]t the conclusion

of the inspection." While omission of the conference is not condoned, TTS has not shown that it was prejudiced by Kolesa's failure. Such a showing is required to invalidate the inspection in its entirety. *Kast Metals Corp.,* 5 BNA OSHC 1861 (No. 76-657, 1977). In the present case, TTS has not shown that it could have provided any new information that would have altered the course of the proceedings. Kolesa's conduct of the inspection was adequate and not prejudicial to TTS.[2]

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

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

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of the LOTO Standard

TTS's central argument is that the LOTO standard does not apply to the Timberland Trimmer at issue. The company argues that § 1910.147 is a general industry standard that does not apply to equipment such as mobile cranes and bulldozers, which the trimmer resembles. The scope section of the LOTO standard (at § 1910.147(a)(ii)(A)) specifically excludes construction employment. TTS argues that the LOTO excludes construction employment because of OSHA's concern that equipment and vehicles routinely used in construction present unique hazards not addressed in § 1910.147.

In support of its position, TTS cites the preamble to the LOTO standard, in which the Secretary states (54 Fed. Reg. 36644 (September 1, 1989)):

> Of additional concern in the imposition of regulations in the construction industry is the uniqueness of the earthmoving equipment, such as lattice boom mobile cranes, front-end loaders, bulldozers, scrappers and dump trucks. As opposed to maintenance on automobiles, buses and over-the-road trucks where removal of the ignition key

[2] TTS also cites a condolence letter sent by OSHA's assistant secretary to Ney's widow as evidence of some sort of prejudice on the part of OSHA (Exh. R-4). This generally worded letter, expressing sympathy and informing Mrs. Ney that OSHA is conducting an investigation, (as it does in the event of a fatality), in no way supports TTS's negative inference.

> usually insures that the engine cannot be started and the vehicle may be worked upon, some of the maintenance of the above earthmoving equipment involves the positioning of components, such as buckets, blades and machine body parts, which present extraordinary hazards to maintenance or servicing personnel. These hazards and the means to minimize the potential for injury to employees involve additional considerations, which were not adequately addressed during the course of the rulemaking proceeding.

The Secretary counters that § 1910.147 is a performance-based standard, and does not apply to individual pieces of equipment. Because TTS was not engaged in construction employment, as defined in § 1910.12,[3] there are no grounds, the Secretary contends, for exempting the trimmer from the LOTO standard.

The undersigned agrees the language in the preamble supports TTS's contention that the LOTO standard was not intended to apply to an off-the-road vehicle such as the trimmer. The Secretary is correct, however, that the language of the LOTO standard itself provides for no such exemption. "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The Secretary rightly points out that it is the nature of the work, and not the type of machine or equipment, that determines applicability of the LOTO standard. While it seems inconsistent that the LOTO standard would be inapplicable to an off-the-road vehicle one day while it is used for construction employment, and then would apply the next day when the vehicle was used for non-construction work, that is the plain meaning of the language of the standard.

The application section of the standard states that § 1910.147 "applies to the control of energy during servicing and/or maintenance of machines and equipment." Section 1910.147(a)(2).

---

[3]Section 1910.12(b) provides:

> For purposes of this section, *Construction work* means work for construction, alteration, and/or repair, including painting and decorating.

Section 1910.12(d) provides in pertinent part:

> "[C]onstruction work" includes the erection of new electric transmission and distribution lines and equipment.

TTS was clearing trees and underbrush away from existing electrical distribution equipment. It was not engaged in construction employment.

In the instant case, the TTS employees changed the blades and belt of the trimmer, which is clearly a servicing and maintenance activity. The testing of the machine after the actual servicing and maintenance is completed is part of the servicing and maintenance process. It is determined that the LOTO standard applies to the trimmer at issue.

Items 1, 2, 3a, and 3b:
Alleged Serious Violations of
§§ 1910.147(c)(1); (c)(4)(i); (c)(7)(i)(A); and (c)(7)(i)(B)

The Secretary alleges that TTS violated four subsections of the LOTO's section regulating the energy control program. Those subsections provide:

> § 1910.147(c)(i):
>
> Energy control program. The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative.
>
> § 1910.147(c)(4)(i):

Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

> § 1910.147(c)(7)(i):
> The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:
>
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.
>
> (B) Each affected employee shall be instructed in the purpose and use of the energy control procedure.

Each of the subsections apply only "where the unexpected energizing, start up or release of stored energy could occur and cause injury." The Review Commission has noted that it is the Secretary's burden to prove that these conditions exist:

> The Secretary must show that there is some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee.

General Motors Corp., 17 BNA OSHC 1217, 1220 (Nos. 91-2973, 91-3116, and 91-3117, 1995), *aff'd Reich v. General Motors Corp.,* 89 F.3d 313 (6th Cir. 1996).

The servicing and maintenance of the blades and belt occurred in two different phases: (1) the physical changing of the blades and belt and (2) the testing of the changed blades and belt. It is undisputed that the trimmer was not energized during the physical changing of the blades and belt. The record establishes that during that time, the trimmer was off, the cab was locked, and the ignition key was in Ney's pickup truck. The Secretary presented no evidence showing that the trimmer could energize, startup, or release stored energy while the ignition key was in the pickup truck. TTS area vice president Raymond Swaringin testified that it is impossible for the steering wheel to move the boom unless the trimmer's engine is running (Tr. 173-174). Kolesa stated explicitly that OSHA was not citing TTS for unexpected energization of the trimmer while the engine was not running (Tr. 84): "In this case, the stored energy is when the equipment is running, the hydraulic pump is building up pressure in the hose, and if you turn the steering wheel, that moves the hydraulic cylinders which rotate the wheels and the boom on the tree trimmer." Kolesa testified that the release of stored energy could be caused by "moving or touching or bumping the steering wheel which could unexpectedly energize the hydraulics which would cause the machine to flex, move, causing the boom to move" (Tr. 48).

The Secretary must prove, then, that the trimmer could have unexpectedly energized during the testing phase of the servicing and maintenance process. During the testing process, however, the trimmer was already energized. Ney himself started the trimmer so that he could observe the blades and belt running. He instructed McMahan to enter the cab and rev the engine so that Ney could observe the blades and belt running faster. Neither Ney nor McMahan were subject to the unexpected energization of the machine. They had both participated in energizing it. In *Reich v. General Motors Corp,* the Sixth Circuit held that the LOTO standard did not apply in a situation where the machine was not yet energized, but the employees were aware that it soon would be (*Id. at* 315):

> We conclude that the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, "energization" of the machine cannot be said to be "unexpected" since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up without the employee's foreknowledge. In the context of the regulation, use of the word "unexpected" connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a service employee notice of what is about to happen.

In the present case, not only did the two employees servicing the machine receive notice that the machine was starting up, they themselves started it and were fully cognizant that it was energized. The Secretary has failed to establish that TTS violated the terms of the standard by having its employees service a machine where its unexpected energization could result in injury to them. Items 1, 2, 3a, and 3b are vacated.

Item 4: Alleged Serious Violation of § 1910.147(f)(1)(ii)

The Secretary also alleges that TTS committed a serious violation of § 1910.147(f)(1)(ii), which provides:

> In situations in which lockout or tagout devices must be temporarily removed from the energy isolating device and the machine or equipment energized to test or position the machine, equipment or component thereof, the following sequence of actions shall be followed:
> . . .
> (ii) Remove employees from the machine or equipment area in accordance with paragraph (e)(2) of this section[.]

Section 1910.147(e)(2) provides:

> The work area shall be checked to ensure that all employees have been safely positioned or removed.

Unlike the sections of § 1910.147 cited in the previous items, § 1910.147(f)(1)(ii) deals with situations where the machine or equipment is energized in order to test the equipment. The TTS crew had energized the trimmer in order to test the replacement blades and belt.

The Secretary has established a *prima facie* case for item 4. Ney violated the terms of the standard when he positioned himself within the zone of danger created by the rotating blades. His

death is evidence of his exposure to the hazard, and, as foreman, his knowledge of his positioning is imputed to TTS.

TTS asserted the affirmative defense of employee misconduct in its answer. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997).

The evidence adduced by TTS tended to show that it was uncharacteristic of Ney to position himself near the blades (Tr. 147), that Ney could have observed the testing of the blades from a safer vantage point (Tr. 163, 174), and that staying away from rotating blades is common sense (Tr. 80). TTS failed, however, to establish the first element of its defense, that it had an actual work rule designed to prevent an employee from positioning himself within the zone of danger of the trimmer's blades. McMahan testified regarding the work rules for changing the blades and belt (Tr. 141):

> Q. What kind of work rules, if any, did you have for doing this kind of work, like changing a saw blade? Did you have any rules about it?
>
> McMahan: No, because it wasn't nothing in operation when we was changing them. The machine was shut down completely.

When Ney squatted down within three feet of the rotating blades attached to an articulated boom, he was not violating any work rule established by TTS. With no work rule established to communicate to its employees, the affirmative defense of TTS must fail. The Secretary has established that TTS committed a violation of § 1910.147(f)(1)(ii).

Penalty Determination

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.

TTS employs approximately 1,800 employees. At the time of the inspection, the company had a history of previous violations within the last three years (Tr. 58). No evidence of bad faith was adduced. The gravity of the violation is high, as Ney's tragic death attests. Based upon these factors, it is determined that a penalty of $5,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, alleging a violation of § 1910.147(c)(1), is vacated and no penalty is assessed;
2. Item 2 of the citation, alleging a violation of § 1910.147(c)(4)(i), is vacated and no penalty is assessed;
3. Item 3a of the citation, alleging a violation of § 1910.147(c)(7)(i)(A), is vacated and no penalty is assessed;
4. Item 3b of the citation, alleging a violation of § 1910.147(c)(7)(i)(B), is vacated and no penalty is assessed; and
5. Item 4 of the citation, alleging a violation of § 1910.147(f)(1)(ii), is affirmed and a penalty of $5,000.00 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: August 4, 2005