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.	:	OSHRC DOCKET NO. 03-2190
	:	
NELSON TREE SERVICE, INC.,	:	
	:	
Respondent.	:	

Appearances:

Vivien V. Ranada, Esquire U.S. Department of Labor New York, New York For the Complainant.	Gary W. Auman, Esquire Dunlevy, Mahan and Furry Dayton, Ohio For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection into the circumstances surrounding an accident involving an employee of Respondent, Nelson Tree Service, Inc. ("Nelson"); the accident occurred on August 20, 2003, at a work site located in Milford, New Jersey, and the OSHA inspection took place in early September 2003. As a result of the inspection, OSHA issued to Nelson a four-item serious citation. Specifically, the citation alleges (1) a violation of section 5(a)(1) of the Act, for failing to have appropriate inspections and tests performed on the bucket truck that was involved in the accident; (2) a violation of 29 C.F.R. 1910.67(c)(2)(v), for the employee's failure to wear a body belt with a lanyard attached to the truck's boom or basket; (3) a violation of 29 C.F.R. 1910.133(a)(1), for the employee's failure

to wear appropriate eye protection; and (4) a violation of 29 C.F.R. 1910.269(c), for failing to ensure that the employee in charge conducted a job briefing before the start of work on August 20, 2003. Nelson contested the citation and the proposed penalties, and a hearing was held in this matter on November 4, 2004, in Plymouth Meeting, Pennsylvania.

The Accident

On August 20, 2003, Nelson crews were assigned to trim tree branches from around utility lines along a rural road in Milford, New Jersey. One crew, headed up by Christopher Huge, arrived about 7:30 a.m. and set up, after which Mr. Huge went up in the bucket of his truck and began working. Another crew, headed up by Joseph Longyhore, arrived around 8 a.m. and set up. Mr. Longyhore then went up in the bucket of his truck, and, when he was about even with Mr. Huge, who was about 50 feet away, he asked Mr. Huge a question about the work to be done. Mr. Huge answered the question and then went back to his work; however, seconds later, Mr. Huge heard a loud bang, and he saw that the boom of Mr. Longyhore's truck had collapsed and that Mr. Longyhore, who had been ejected from the bucket, was injured and unconscious. Emergency help was summoned, and Mr. Longyhore survived, but he sustained a severe scalp laceration and several bone fractures. The cause of the accident was determined to be the failure of the crank arm assembly on the truck's boom. (Tr. 11-12, 15-18, 26, 32, 54, 101-03, 107-08, 122, 125-26, 129-30, 146-47).

Citation 1 - Item 1 - Alleged Violation of Section 5(a)(1) of the Act

This item alleges a violation of section 5(a)1) of the Act, as follows:

> 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 the hazard of falling:
>
> (a) 181 Miller Park Road, Milford, New Jersey - 1996 GMC TECO SATURN S-5 Boom Truck: NJ Registration #X-9434N/Vin#1GDL7H1J4TJ513647: On or about 8/20/2003, an employee was exposed to a falling hazard up to approx. thirty (30) feet, while working in a vehicle-mounted elevating and rotating work platform.
>
> One feasible and acceptable method to correct this hazard is to:

1.) Perform and record inspections and test on the vehicle-mounted elevating and rotating work platform at **regular intervals** in accordance with the American National Standards Institute ANSI A92.2-1990.[1]
2.) Follow the **inspection requirements** for structural members in the TECO SATURN S-5 "OPERATIONS MANUAL."

REFERENCE: American National Standards Institute ANSI A92.2-1990.

To prove a violation of section 5(a)(1), the general duty clause, the Secretary must establish that (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Well Solutions, Inc.*, 17 BNA OSHC 1211, 1213 (No. 91-340, 1995). The Secretary contends that the cited bucket truck was not inspected and tested as required by ANSI 92.2-1990. Nelson, on the other hand, contends that the cited truck was inspected as required.

John Frowd, the OSHA Compliance Officer ("CO") who conducted the inspection, testified that when he requested the inspection records for the truck, Nelson gave him C-1, showing that a company named Quest had inspected a Nelson truck on February 12, 2003.[2] The CO further testified that although C-1 was the type of comprehensive inspection report he was looking for, especially since it included the boom and its various components, the vehicle identification number ("VIN") appearing on C-1 was not the same as the one he obtained during his inspection.[3] The CO said that

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[1]As issued, the citation and complaint referenced "ANSI A92.2-1969." On October 28, 2004, the Secretary moved to replace the reference to ANSI A92.2-1969 with ANSI A92.2-1990, based on her having learned that ANSI and the A92 Committee had promulgated ANSI A92.2-1990, for Vehicle-Mounted Elevating and Rotating Aerial Devices, which applies to "both new and existing units delivered by sale, lease, rental or any form of beneficial use on or after [July 2, 1991]." The Secretary attached a copy of the 1990 standard to her motion, and the 1990 standard is also C-2 in the record. After considering Respondent's objections to the motion, and after hearing further arguments from the parties, the motion was granted on November 2, 2004.

[2]The Quest report is captioned "Bucket Truck Periodic Inspection." The CO testified he had reviewed ANSI 92.2-1990, that the relevant portion was section 8.2.2, and that that section required periodic inspections and tests to be done from 1 to 12-month intervals. (Tr. 38-41; C-2).

[3]The record shows that the Nelson crew leaders who operated the trucks did daily, weekly and monthly inspections of their trucks; the record also shows that these inspections included the boom. However, the evidence establishes these inspections would not have detected a structural

he himself had not inspected the truck but that he had spoken to the police officer who investigated the accident; the police officer had obtained the truck's license plate number and VIN, and the VIN the police officer had given him was not the one shown on C-1.[4] The CO also said that he was given no proof of a similar inspection of the subject truck (Tr. 7-8, 11, 14, 26-30, 46-48).

The Secretary asserts that, based on the foregoing, she has established that the cited truck was not inspected as required by ANSI 92.2-1990. I do not agree, for the reasons that follow.

First, since the CO did not ever inspect the truck himself, he had to rely upon what the police officer told him.[5] The CO testified that the police officer told him that he had gotten the plate number from the plate itself and had then called in the plate number to get the VIN; the CO also testified that when he asked him about it, the police officer told him that he had not physically climbed into the cab to get the VIN. According to the CO, getting the VIN by calling in the license plate number was "common practice." (Tr. 46-48). Thus, the Secretary has presented no conclusive proof that the VIN the police officer obtained was the actual VIN for the cited bucket truck.

Second, James Craner, Nelson's current safety director, testified that R-X was Quest's annual inspection for Nelson Truck No. 835-6813.[6] He explained that the reason the original truck number (No. 724-1863) was crossed out on R-X and the new number (No. 835-6813) was written in by hand was because Asplundh Tree Service ("Asplundh") had purchased Nelson and had required Nelson to renumber all of its trucks with the system Asplundh used.[7] He further explained that D-1, photos

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problem such as the one here. (Tr. 27, 75-77, 88-89, 98-99, 115, 140-44, 147; R-A, R-B).

[4]The VIN appearing in the citation is 1GDL7H1J4TJ513647; the VIN shown on C-1, on the other hand, is 1GDL7H1J9TJ513059.

[5]As indicated *supra*, the accident took place on August 20, 2003, and it was reported to OSHA the same day; however, no one from OSHA went to the site on August 20, and CO Frowd did not begin his inspection until September 9, 2003. Further, while the CO testified that he had made an effort to inspect the truck, he never actually inspected it. (Tr. 11, 44-46, 53-54).

[6]Mr. Craner has been Nelson's safety director since early 2004; he was a safety specialist with Nelson at the time of the accident, and he worked his way up to his present position after 20 years in the tree-trimming business. (Tr. 150, 169-70).

[7]Mr. Craner did not recall the purchase date. (Tr. 164-65).

the investigating police officer took at the scene on the day of the accident, showed a truck bearing the number 835-6813.[8] Finally, Mr. Craner explained that he had gone to the company's garage in Ashland, Ohio, where Truck No. 835-6813 was located, on November 1, 2004, to check the truck's VIN; he had found the VIN to be the same one shown on R-X, that is, 1GDL7H1J9TJ513059. Mr. Craner said it was possible that the wrong license plate had been put on Truck No. 835-6813; he also said that that was not a safety violation. (Tr. 150, 160-70).

At the hearing, the Secretary's counsel objected to the admission of R-X for the purpose of showing the truck number, particularly since the original number had been crossed out and the new number written in by hand. (Tr. 160-64). However, it is clear that C-1 and R-X are the same document; the only difference is that C-1 is a copy with larger print, such that the last two digits of the hand-written truck number are cut off, and that R-X is a copy with smaller print, such that the last two digits appear on the document.[9] Furthermore, the Secretary's counsel herself agreed, while she was objecting to the admission of R-X, that the truck in D-1 showed the same truck number, that is, No. 835-6813. (Tr. 163). R-X was accordingly admitted into the record. (Tr. 164).

Also at the hearing, the Secretary's counsel attempted to have admitted into evidence a copy of a certification from the New Jersey Motor Vehicle Commission pertaining to a Nelson truck that bore the same license plate number and VIN as those set out in the citation. The certification was not admitted because the Secretary's counsel had sought its admission as an exhibit during a phone conference held with the parties on November 1, 2004, three days before the hearing, which was a violation of my pre-hearing order.[10] (Tr. 56-61). However, even if the certification had been admitted, I would nonetheless find that the Secretary had not met her burden of proof in this matter.

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[8]D-1 was not admitted into evidence; however, the CO testified that he obtained D-1 from the investigating police officer, and both parties used D-1 during their examination of witnesses. (Tr. 12-15, 45, 162-63).

[9]Kevin Forgue, Nelson's safety director at the time of the accident, testified to this effect. Mr. Forgue was the safety director for ten years before leaving in March 2004. (Tr. 65, 77-80).

[10]The certification was also excluded because counsel, during the phone conference, indicated she already had the document, when in fact she did not. (Tr. 57-61).

According to the testimony of Mr. Craner, he personally checked the VIN on the cited truck and found it to be the same VIN as the one appearing on C-1 and R-X. (Tr. 162-63). Although the Secretary disputes his testimony, I observed Mr. Craner's demeanor, including his body language and facial expressions, as he testified. I found him to be a sincere, credible and convincing witness, and I therefore credit his testimony. Having credited his testimony, and since he was the only individual who testified who actually checked the VIN on the cited truck, I find that the VIN on the truck was the same as the one set out on C-1 and R-X. (Tr. 46, 92, 145-46, 168-69). Moreover, as Nelson asserts, and as Mr. Craner indicated, a plausible explanation for the truck having a VIN different from the one shown on the citation is that the wrong license plate was put on the truck. (Tr. 166). In this regard, John Kellar, a Nelson supervisor in northern New Jersey, testified that new trucks were dispatched from Nelson's main garage in Ashland, Ohio.[11] He also testified that while he had received trucks from Michigan, New York and other states, once a truck was assigned to him in New Jersey, one of his general foremen would obtain New Jersey plates for it. Mr. Kellar agreed with Mr. Craner that it was possible the wrong license plate was put on the cited truck. (Tr. 133-34, 144-45).

As the Secretary points out, Mr. Kellar conceded that he had no direct knowledge that the wrong license plate was put on the truck, and he also conceded he was unaware of any such incident at Nelson before. (Tr. 145). In addition, Mr. Craner admitted that, while he believed that the truck with the VIN as shown on the citation was also a Nelson truck, he had not attempted to locate that truck and ascertain its VIN. (Tr. 169). Regardless, as noted above, the Secretary presented no conclusive evidence that the VIN the police officer obtained was the actual VIN for the cited truck. Further, Mr. Craner, who I found credible, testified he personally checked the VIN on the truck and found it to be the same VIN that was on C-1 and R-X. Based on the evidence of record, Nelson did not violate the general duty clause, as set out in the citation. This item is therefore vacated.

Citation 1 - Item 2 - Alleged Violation of 29 C.F.R. 1910.67(c)(2)(v)

This item alleges a violation of 29 C.F.R. 1910.67(c)(2)(v), which states that:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

[11]As a supervisor, Mr. Kellar oversees eight foremen, who themselves oversee several different crews. Mr. Kellar has worked for Nelson for about 12 years. (Tr. 133-34).

The citation alleges a violation of the standard as follows:

> a) 181 Miller Park Road, Milford, New Jersey. While the employee was working in a bucket of a TECO SATURN S-5 vehicle mounted elevating and rotating work platform, the CRANK ARM failed causing the boom to fall thirty (30) feet downward, ejecting the employee to the asphalt ground below. Employee was not wearing a body belt or attached to the boom or basket with a lanyard, while the boom was elevated thirty (30) feet. Condition existed on or about 8/20/03.

It is clear from the circumstances of the accident, in that he was ejected from the bucket and onto the roadway, that Mr. Longyhore was not wearing a body belt and tied off as required when the boom collapsed. (Tr. 18). Further, Nelson essentially concedes that Mr. Longyhore was not wearing a body belt and tied off at the time of the accident. *See* R. Brief, p. 12. The Secretary has thus shown three of the four elements necessary to establish the alleged violation, that is, that the cited standard applies, that the standard's terms were violated, and that employees had access to the cited condition. *See, e.g., Kerns Bros. Tree Serv. ("Kerns")*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

In regard to the fourth element, that the employer had actual or constructive knowledge of the violation, the Third Circuit, where this case arose, has stated as follows:[12]

> In cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions....We do hold, however, that the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge [of a serious violation] is raised only by proof of a supervisor's misconduct.

Pennsylvania Power & Light Co. v. OSHRC ("PP&L"), 737 F.2d 350, 357-58 (3d Cir. 1984). In *Kerns*, a case similar to this one and to *PP&L*, in that the person who committed the safety violation was a crew leader, the Commission held that the first step was to decide if the crew leader was a supervisor for purposes of the Act; if so, the next step was to decide if knowledge had been proven under *PP&L*, utilizing three factors: (1) whether supervisors were adequately trained in safety matters, (2) whether reasonable steps were taken to discover safety violations committed by supervisors, and (3) whether the company had a consistently-enforced safety policy. *Kerns*, 18 BNA OSHC at 2068-69.

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[12]"Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case – even though it may differ from the Commission's precedent." *Kerns*, 18 BNA OSHC at 2067 (citation omitted).

In *Kerns*, the Commission noted that an employee who has been delegated authority over other employees, even if only temporarily, is considered a supervisor for purposes of imputing knowledge to an employer. The Commission also noted that it is not the formal title of the employee that is controlling but the substance of the employee's duties, and it cited to various cases in which employees had been held to be supervisors because they were responsible to higher supervision for the progress and execution of the work. *Kerns*, 18 BNA OSHC at 2069 (citations omitted). The Commission found the crew leader in *Kerns* to be a supervisor, as he was "responsible for seeing that the work was done safely and properly, based on the written work order." *Id*. at 2068-69.

With respect to Mr. Longyhore's position, the record shows that he was a Class B trimmer.[13] (Tr. 15-18, 21-22, 67, 125, 147). The record also shows employees went through various classifications before reaching the Class A trimmer position, which was the highest trimmer classification under the general foreman position. (Tr. 66-67, 88-92, 99-100, 118-19, 125, 147-48, 170-71). Christopher Huge, who also had a truck and crew at the site on August 20, 2003, testified that Mr. Longyhore was at the top of the trimmer trainee classifications and that he was running his own truck at the site and was qualified to do so.[14] (Tr. 109, 125). Further, Kevin Forgue, Nelson's safety director at the time of the accident, testified that a B trimmer could run a crew and that on August 20, 2003, Mr. Longyhore was in charge of the truck and the other individual on his crew. (Tr. 65-68, 97-98). Finally, John Kellar, a Nelson supervisor who at the time of the accident oversaw the general foremen in the area where the accident occurred, testified that Mr. Longyhore and Mr. Huge were both in charge of their respective crews at the site on August 20, 2003. (Tr. 133-36). Mr. Huge, Mr. Forgue and Mr. Kellar all testified that crew leaders were responsible for giving their crews daily job briefings, which covered the work to be done and any safety hazards involved, and for holding weekly tailgate safety meetings;

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[13]Mr. Forgue described Mr. Longyhore as a "B trimmer" or "trimmer trainee," while the CO and Mr. Kellar testified that Mr. Longyhore was a "B trimmer." (Tr. 15-18, 21-22, 67, 147). Based on the testimony of these witnesses, and that of Mr. Huge that Mr. Longyhore was at the top of the trimmer trainee classifications (Tr. 125), I find Mr. Longyhore was a Class B trimmer and that trimmers below the Class A position could also be referred to as "trimmer trainees."

[14]Mr. Huge, a Class A trimmer at the time of the accident, is currently a general foreman for Nelson with responsibility for about eight crews; a crew typically has three members but can have as few as two and as many as four or more. (Tr. 88, 97-98, 101-02).

James Craner, Nelson's present safety director, also testified that it was the responsibility of the crew leader to hold the daily job briefing. (Tr. 68, 98, 102-05, 109, 117, 135-38, 168).

Based on the foregoing, I find that Mr. Longyhore was a crew leader at the site and that his responsibilities as crew leader, considering the criteria set out in *Kerns*, were such that he was a supervisor under the Act. I also find, for the reasons that follow, that the Secretary has not established employer knowledge, in view of the three factors set out *supra* in *Kerns*.

The first factor is whether supervisors were adequately trained in safety matters. The record shows that new hires received an employee handbook, that Nelson's crew leaders provided workers with on-the-job training, and that an employee moved up through the ranks by taking a test addressing the work activities and safe work practices in the next-rated position; an employee became eligible to take the test for the next-rated position after an appropriate period of time in the lower-rated position, and the general foreman, after reviewing the test and going over with the employee any incorrect answers, and after evaluating the employee's job performance, would determine whether it was time for the employee to move up to the next level. The record further shows that Nelson's crew leaders were responsible for holding daily briefings at the job sites that included information about the work to be done and the safety hazards that were involved; if conditions changed during the day, such that new or different hazards were present, crew leaders were to hold another briefing. Crew leaders were also responsible for holding weekly tailgate safety meetings with their crews; the safety director sent out the meeting materials from Nelson's Dayton office the week before the meeting was to take place, and the general foremen overseeing the crews gave the crew leaders the materials so that they could hold the meetings the following Monday morning. The meetings covered topics such as aerial lift safety and inspections, job briefings and back injury prevention. The tailgate meeting held on May 5, 2003, set out the company rule that when aloft, operators were required to be secured with a body belt and lanyard or a full-body harness. The record establishes that Mr. Longyhore and Mr. Huge both held this meeting and that they and their crew members signed off on the sheets containing the aerial lift meeting information.[15] (Tr. 66-70, 89-92, 98-100, 109-13, 117-20, 135-37,151-52, 168).

[15]R-C and R-J are the sheets documenting that Mr. Longyhore and Mr. Huge both held the May 5, 2003 meeting. The reverse sides of these exhibits, captioned "Job Briefing Check Off Sheet," show the initials of Mr. Longyhore and Mr. Huge for each day that work was done at the

The second factor is whether reasonable steps were taken to discover safety violations committed by supervisors. Mr. Huge testified that, as a general foreman, he makes daily visits to the sites where his crews are working and checks for safety violations while there; this includes checking to see if the bucket truck operator is using a body belt, and, because he cannot tell when the operator is aloft if a body belt is in use, he has the operator lower his bucket so that he can see if a belt is being utilized.[16] Mr. Huge further testified that Scott Blocker, who was the general foreman over him and over Mr. Longyhore in August of 2003, also made daily visits to his crews' sites, also checked for safety violations, and also had operators lower their buckets so he could check for body belt use. (Tr. 114-17, 120-23, 127-28). Mr. Kellar testified that, as a supervisor who oversees seven to eight foremen, he is responsible for making sure the foremen are properly managing their crews and taking care of the safety aspects of their crews' work. He said that part of his job involves visiting his foremen's sites and that if he sees a safety violation at a job he will notify the foreman and have him write it up; he also said that he has written up foremen for violations at sites. (Tr. 133-35, 140). Mr. Craner testified that as safety director, he is responsible for developing safety programs, for getting them out into the field, and for making sure they are implemented and followed. He further testified that he is also responsible for maintaining safety-related records, such as documentation of tailgate safety meetings, job briefings and disciplinary actions. Mr. Craner noted that he and three safety specialists perform safety audits of the crews and that any Nelson manager who is out in the field is to ensure that the crews are working safely. He also noted the importance of job briefings, and he identified R-Y as a document that he uses to train crews to ensure they do adequate job briefings.[17] (Tr. 150-58, 165-68)

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site that week and, consequently, that a job briefing was done. The general foremen collected the safety meeting sheets from the crew leaders at the end of each week and sent them to the safety director to document that safety meetings and job briefings were held as required. Other exhibits documenting meetings and briefings Mr. Longyhore and Mr. Huge held in the few months before the accident are R-D-I and R-K-N. (Tr. 69-75, 104-07, 111-13, 119-20, 137-39, 151-57).

[16]Mr. Huge said the belt cannot be seen as it is below the bucket's top. (Tr. 116-17, 123).

[17]Mr. Kellar stated that the general foremen are responsible for checking the tailgate safety meeting and job briefing sheets to make sure they are signed off on properly; if not, the general foreman is to get with the person assigned to the truck and find out why. (Tr. 138-39).

The third factor is whether the company had a consistently-enforced safety policy. Mr. Craner and Mr. Forgue, Nelson's current and previous safety directors, respectively, both testified about Nelson's discipline policy. Taken together, their testimony was that Nelson had a four-step progressive discipline policy to enforce its safety requirements that was in effect in August of 2003.[18] The steps consisted of a verbal warning for a first violation, a written warning for a second, suspension for a third violation and termination for a fourth. The manager using the policy had the discretion to bypass steps and could, for example, terminate an employee for a serious safety infraction even if no prior warning had been given. Both Mr. Craner and Mr. Forgue identified R-S as a report from Nelson's computer database detailing the discipline that was issued for safety violations taking place from January 1, 2000 through August 31, 2003, in the region where the accident occurred. (Tr. 80-88, 157-60). Mr. Forgue noted that R-S showed an incident where an employee had been suspended for not wearing a body belt and hard hat.[19] He also noted that Mr. Longyhore's failure to use fall protection did not appear in R-S because Nelson did not issue discipline until the injured employee returned to work; his belief was that Mr. Longyhore had not ever returned to work after the accident. (Tr. 93-97).

In addition to the above, Mr. Kellar, the supervisor who was over Mr. Blocker and the crews headed up by Mr. Huge and Mr. Longyhore, testified that Mr. Longyhore, to his knowledge, had never been disciplined for not using protective equipment. (Tr. 146). Furthermore, Mr. Huge testified that he had worked with Mr. Longyhore on other jobs, that he had never seen him working without his protective equipment, and that he had never seen or heard Mr. Blocker discipline Mr. Longyhore for not using his protective equipment; he also testified that although he saw that Mr. Longyhore was wearing his safety glasses just before the accident, he could not tell if Mr. Longyhore was using his body belt and lanyard due to the height of the bucket's top. Mr. Huge noted that Mr. Blocker had driven by the site that morning, around 7:50 a.m., and had not stopped but that this was not unusual; he indicated that Mr. Blocker had probably been going to one of his other sites and that, based on his customary practice, he

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[18]The program is still in effect, and its provisions are summarized in Nelson's employee handbook. (Tr. 159; R-O).

[19]R-S shows another incident in which an employee was suspended for not wearing a safety lanyard. (R-S, p. 9). R-S also shows other incidents of discipline for failure to wear other protective equipment, such as hard hats, eye wear, vests and chaps. (R-S, pp. 1, 3-8, 10, 12).

would have returned to the subject site at least twice that day to check on the work and safety matters. (Tr. 102-03, 107-10, 113-17, 122-23, 127).

To rebut the foregoing, the Secretary points to the testimony of CO Frowd that Mr. Longyhore had told him, during his telephone interview with him on September 9, 2003, that Mr. Blocker had given him two verbal warnings in the past for not wearing a body belt; Mr. Longyhore had also told him that the reason that Mr. Blocker did not write him up was because he (Mr. Longyhore) was a hard-working employee and Mr. Blocker had decided to overlook the incidents. (Tr. 16, 174-75). However, CO Frowd admitted that Mr. Blocker had told him that Mr. Longyhore had been a model employee who had been compliant in his use of protective equipment, including safety belts and lanyards, and that he had not given Mr. Longyhore any verbal reprimands; the CO also admitted that Mr. Blocker had told him that, following the accident, he had received a one-week suspension from work for his failure to enforce safety rules. (Tr. 176).

Upon considering the CO's testimony about what Mr. Longyhore told him, I note first that it is contrary to what Mr. Blocker stated. I note also that Mr. Longyhore informed the CO during their interview that he had not been wearing safety glasses at the time of the accident, which is contrary to the testimony of Mr. Huge, set out above.[20] I observed the demeanor of Mr. Huge, including his body language and his facial expressions, while he was on the witness stand. I found him to be a sincere and believable witness, and I therefore credit his testimony in general and his specific testimony that he saw that Mr. Longyhore was wearing his safety glasses just before the accident. Besides these factors, I note that although Mr. Longyhore was set out as a witness on the Secretary's witness list, he did not appear at the hearing. (Tr. 174). Because I was unable to observe Mr. Longyhore's demeanor, and because his statements to the CO are contrary to other reliable evidence in the record, I do not credit what he told the CO during their telephone interview and conclude that his statements may well have been an attempt to exculpate himself in the matter of the accident.

[20]Mr. Longyhore apparently informed the CO that he had not been wearing any protective equipment, except for a safety helmet, at the time of the accident. (Tr. 18-19, 25-26).

For all of the reasons set out *supra*, and pursuant to the three factors noted above in *Kerns*, I conclude that the Secretary has not met her burden of proving employer knowledge with respect to this citation item.[21] This item is accordingly vacated.

Citation 1 - Item 3 - Alleged Violation of 29 C.F.R. 1910.133(a)(1)

This item alleges a violation of 29 C.F.R. 1910.133(a)(a), which provides that:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

The citation alleges a violation of the above standard as follows:

> a) 181 Miller Park Road, Milford, New Jersey. An employee working in the elevated bucket of a vehicle-mounted elevating and rotating work platform, while engaged in tree trimming operations, was not wearing eye protection. This condition existed on or about 8/20/03.

The CO testified that during their phone conversation on September 9, 2003, he learned that Mr. Longyhore had not been wearing eye protection at the time of the accident. (Tr. 16-19, 25, 50-51). However, Mr. Huge testified that when he saw him just before the accident, Mr. Longyhore was wearing safety glasses; Mr. Huge also testified that he was about 50 feet away from Mr. Longyhore at that time. Mr. Huge stated that the safety glasses were not on Mr. Longyhore when he went to help him after the accident, and he indicated his belief that the glasses had come off when the accident occurred; in this regard, he noted that Mr. Longyhore also had been wearing a safety helmet and that it had fallen off and landed in some nearby bushes. (Tr. 108, 122, 129-30).

As set out on page 12 of this decision, in the discussion relating to Item 2, I found Mr. Huge to be a sincere and believable witness, and I credited his testimony about having seen Mr. Longyhore wearing safety glasses just before the accident. In that discussion, I noted the CO's testimony that Mr. Longyhore told him that he was not wearing eye protection at that time. However, I did not credit what

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[21]I also find that the evidence of record establishes Nelson's contention that the accident was due to unpreventable employee misconduct; to prove this affirmative defense, pursuant to Commission precedent, the employer must show that (1) it had established work rules designed to prevent the violation, (2) it had adequately communicated the rules to its employees, (3) it had taken steps to discover violations, and (4) it had effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979).

Mr. Longyhore told the CO, based on the testimony of Mr. Huge and on certain statements of Foreman Blocker to the CO that contradicted what Mr. Longyhore had said. (Tr. 174-76). I also did not credit Mr. Longyhore's statements because, although he was listed as one of the Secretary's witnesses, he did not appear at the hearing, and, consequently, I was unable to observe his demeanor. (Tr. 174). Finally, in addition to his testimony set out above, Mr. Huge testified that he had worked at other sites with Mr. Longyhore and had never seen him working without safety glasses. He explained that Mr. Longyhore was blind in one eye and that his other eye was a "lazy eye." He further explained that Mr. Longyhore had always said that he had only one good eye and that he was going to keep that one. (Tr. 108-10).

For all of the foregoing reasons, I conclude Mr. Longyhore was wearing safety glasses at the time of the accident. The Secretary has not proved the alleged violation, and this item is vacated.

Citation 1 - Item 4 - Alleged Violation of 29 C.F.R. 1910.269(c)

This item alleges a violation of 29 C.F.R. 1910.269(c), which provides that:

> The employer shall ensure that the employee in charge conducts a job briefing with the employees involved before they start each job. The briefing shall cover at least the following: hazards associated with the job, work procedures involved, and personal protective equipment requirements.

The citation alleges a violation of the standard as follows:

> a) 181 Miller Park Road, Milford, New Jersey. Employees on this site, were not provided a "JOB BRIEFING" prior to the start of work by the "employee in charge." This condition existed on or about 8/20/03.

CO Frowd testified that he learned from his telephone interviews with Nelson employees that no job briefing had been provided Mr. Longyhore at the site.[22] According to the CO, Mr. Longyhore told him that the foreman, Mr. Blocker, was the person in charge of the site and that he did not perform a job briefing; in addition, Mr. Blocker told the CO that in his absence, the next-highest-ranking individual, the A trimmer, would have been in charge and would have done the job briefing. (Tr. 19-25, 175-76).

Based on the above, the Secretary contends she has proved the alleged violation. However, for the reasons set out in the discussions relating to Items 2 and 3, *supra*, I have not credited the statements

[22]The three employees the CO interviewed were Mr. Longyhore, on September 9, 2003, and Mr. Blocker and Mr. Huge, on September 12, 2003. (Tr. 16, 50-52).

Mr. Longyhore made to the CO that are contrary to other reliable evidence of record.[23] Moreover, the discussion pertaining to Item 2 shows that Mr. Longyhore, a B trimmer, was a crew leader at the site, that he was qualified to act in that capacity, and that, as a crew leader, he was responsible for holding the daily job briefings and the tailgate safety meetings at the site; that discussion also shows that Mr. Longyhore had been a crew leader at various sites prior to the accident and that he had signed off in that capacity on the tailgate safety meeting and daily job briefing sheets.[24] (Tr. 15-18, 21-22, 67-74, 97-98, 102-07, 109-13, 119-20, 125, 135-39, 147, 151-57, 168; R-C-I, R-J-N). Finally, I have noted the CO's testimony about what Mr. Blocker told him, but I conclude that the CO misunderstood what Mr. Blocker said or that Mr. Blocker misunderstood what the CO was asking.[25] In light of the evidence of record, I find the Secretary has failed to prove a violation of the cited standard. This item is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

[23]Besides the statements that Mr. Longyhore made noted in Items 2 and 3, he also told the CO that Mr. Blocker stopped at the site at 8:00 a.m. that morning and talked to him briefly before going on to other sites. (Tr. 17, 22). Mr. Huge, on the other hand, testified that Mr. Blocker drove by the site without stopping at about 7:50 a.m., which, according to Mr. Huge, was before Mr. Longyhore had arrived at the job site. (Tr. 102-03, 107, 122).

[24]This evidence is based on the testimony of Mr. Craner, Mr. Forgue, Mr. Huge and Mr. Kellar. Mr. Craner and Mr. Huge have been found credible witnesses, as set out on pages 6 and 12, respectively, of this decision. I further find that Mr. Forgue and Mr. Kellar were also credible witnesses, based on my observation of their respective demeanors as they testified.

[25]In this regard, Mr. Huge specifically testified that it was Mr. Longyhore's responsibility to do the job briefing because he was operating the truck and that when he had worked with him at other sites Mr. Longyhore had done his own job briefings; Mr. Huge also testified that he did not recall telling the CO that he and Mr. Blocker were the qualified individuals to conduct job briefings at the site. (Tr. 103, 109-10, 124-26).

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Item 1 of Serious Citation 1, alleging a violation of section 5(a)(1) of the Act, is VACATED.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.67(c)(2)(v), is VACATED.

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.133(a)(1), is VACATED.

4. Item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.269(c), is VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: February 7, 2005
Washington, D.C.