



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR  
Complainant,  
  
v.  
  
DAVEY TREE EXPERT CO.  
Respondent.

OSHR DOCKET  
NO. 93-1849

**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 October 5, 1994. The decision of the Judge will become a final order of the Commission on November 4, 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 October 26, 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  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
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200 Constitution Avenue, N.W.  
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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: October 5, 1994

DOCKET NO. 93-1849

NOTICE IS GIVEN TO THE FOLLOWING:

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Administrative Law Judge  
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OSHRC  
DOCKET NO. 93-1849

**Appearances:**

James Glickman, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
For Complainant

Keith A. Ashmus, Esq.  
Thomas Piatak, Esq.  
Thompson, Hine and Flory  
Cleveland, OH  
For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

**DECISION AND ORDER**

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C., *et seq.*, ("the Act"), to review a citation issued by the Secretary pursuant to Sec. 9(a) of the Act and a proposed assessment of penalty issued thereon for an alleged violation of section 5(a)(1) of the Act.

Respondent, Davey Tree Expert Company ("Davey Tree"), was issued one citation on June 17, 1993, stemming from an investigation conducted by the Occupational Safety and Health Administration ("OSHA") of an accident which occurred on Scotland Road in Winchester, New Hampshire on April 14, 1993. In that accident, a Davey Tree employee was fatally electrocuted when he contacted a primary wire while performing tree trimming services under a contract with Public Service of New Hampshire ("PSNH"). (Tr.26-29; Exhibit C-4). David Caswell, an OSHA compliance officer, began the accident investigation on the same day and concluded his investigation on April 15, 1993. The original citation--a Willful violation of Sec. 5(a)(1) of the Act with a proposed penalty of \$35,000.00 was later amended by the Complainant to a Serious violation and the proposed penalty was reduced to \$5,000.00 (Tr. 7, 154-55).

Davey Tree filed a timely Notice of Contest and a hearing was held in Boston, Massachusetts from May 16, 1993 to May 17, 1993, presided over by Judge Barbara L. Hassenfeld-Rutberg.

## DISCUSSION

### **I. Serious Citation 1, Item 1**

The Secretary alleges that Davey Tree violated Section 5(a)(1) of the Act (General Duty Clause) because its employee did not maintain an adequate clearance from the energized (primary) line. In order to establish a violation of the General Duty Clause, the Secretary must show that the employer failed to provide to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees. The cases mandate that the Secretary must prove: (1) the existence of a hazard to employees; (2) recognition of the hazard by the industry or employer; (3) hazard causes or is likely to cause death or serious physical harm; and (4) the existence of feasible abatement steps to eliminate or materially reduce the hazard. *See National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1265, 1267 (D.C.Cir. 1973); *Wheeling-Pittsburgh Steel Corp. v. OSHRC*, 16 BNA OSHC 1218, 1221, 1993 CCH OSHD para. 30,050 (No. 89-3389, 1993).

Davey Tree is an international company that performs tree trimming services around power lines for utility companies. Although based in Ohio, the company conducts extensive business east of the Mississippi River and in New England. Thomas Collins, the deceased employee, had been employed by the Respondent for about 18 months, and at the time of the accident, was the acting (working) foreman on a two-man tree trimming crew performing tree trimming. On the tenth setup of the morning of April 14, 1993, Collins had been trimming trees in a Ford High Ranger aerial lift bucket while the chipper (ground person who collects and clips brush), Gordon Goodell, had been on the ground clearing the debris. (Tr. 28, 30-31). From the injuries sustained--a red mark on the right side of his face and a wound on his right hip--it was concluded that Collins contacted the primary wire (containing 2.4 Kilovolts (KV)) with the right side of his face and the neutral wire with his right hip and was electrocuted.<sup>1</sup>(Tr. 36-37, 229, 344, 347-48). Goodell had been working with his back to Collins and approximately 50 to 70 feet behind the truck when he heard a loud bang and then saw a blue flash. (Tr. 30-31). The deceased was found in his bucket which was in front of and off to the right of the truck between the telephone and neutral wires. (Tr. 33-34).

Since there was no eye witness to the tree trimming method used by Collins that caused the accident, each party presented a different version of how it believed the accident occurred. According

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<sup>1</sup> There were three different wires on the poles where Mr. Collins and Mr. Goodell were trimming. The lowest one was a telephone wire and was located 17 feet from the ground. The next wire was the neutral wire and was located 47 inches above the telephone wire. The highest wire was the energized line, also called the primary wire, and was located 15 inches above the neutral wire. (Tr. 168-72, 175-83). The height of the bucket on the aerial lift truck was 42 inches. (Tr. 125, 384-85).

to the Secretary's expert witness, Mr. Arthur Lewis, Mr. Collins was coming back through the neutral and telephone wires after finishing trimming the trees at that setup; he had been crouched down in the bucket to come through the wires and misjudging his location, stood up too early, thus contacting the primary wire. (Tr. 231-33). The Secretary attempted to substantiate this version of the accident with testimony from Gordon Goodell, the Davey Tree employee working with Collins the day of the accident, who stated that the decedent had been known to pass through the neutral and telephone wires to perform tree trimming and had done so on earlier setups that day. (Tr. 38). In addition, the Secretary established that Davey Tree employees were allowed to go through the telephone and neutral wires as long as they maintained a minimum clearance from the primary wire. (Tr. 43-54, 448-49). Finally, Mr. David Nicholas, a former Davey Tree employee, testified that he had performed tree trimming by crouching down in the bucket and going between the neutral and the telephone wires. (Tr. 105-06).

Mr. Lewis asserted that crouching down in a bucket and going between the neutral and the telephone wires were unsafe practices and should be prohibited. (Tr. 233-34, 235-36, 252-57, 266). However, he admitted that no such prohibition has ever existed nor was adopted in the recently revised standards of the American National Standards Institute ("ANSI") covering tree care operations. (Tr. 268; ANSI Standard Z133, Exhibit C-12). There was testimony from Mr. Edward Johnson, Respondent's Vice-President for safety, Mr. Walter Michelson, Respondent's Supervisor for the PSNH account, and Mr. Gerald Duke, Respondent's expert witness, that neither the ANSI standards nor any of Davey Tree's competitors prohibited either crouching down in the bucket or going between the neutral and telephone wires as long as there was a minimum clearance of 2 feet from a line energized at greater than 2.1 Kilovolts (KV). (Tr. 270, 312, 453, 456-59; Exhibit C-12). It is to be noted that OSHA's new standard concerning working in proximity to overhead power lines, 29 CFR 1910.269, does not prohibit crouching in the bucket or passing between the neutral and the telephone wires. (Tr. 268). ANSI has published tables giving the minimum clearances from primary lines when working around the wires and these tables are the guidelines that Davey Tree posts in its trucks for its employees to use to determine if it is safe to go between the neutral and telephone wires on a particular setup. (Tr. 111-12, 442). Although Davey Tree employees do not actually measure distance from and between the wires at each setup, Respondent has set as a guideline to stay an arm's length away from the primary wires and the employees' experience usually tells them what is safe and what is not. (Tr. 56-58, 68). Regarding the operation of aerial lift truck buckets, the current ANSI standards do not impose a minimum height for the operator of the bucket so there is no requirement as to how far above the top of the bucket the head of the operator must be. (Tr. 268-70; 457-58; Exhibit C-12). Thus, a tall person crouched down may be the equivalent height of a shorter person standing

up. (Tr. 268-69)<sup>2</sup>

Mr. Lewis' opinion about the crouching prohibition, therefore, is clearly not reflective of the industry standard. Yet, if we assume that his version of the accident is correct and Mr. Collins did, in fact, crouch down in the bucket measuring 42 inches high to pass between the neutral and the telephone wires measuring 45 inches and then stood up too early, there would have been a violation of the industry, i.e. ANSI standards of coming too close to the primary wire which was 15 inches above the neutral wire (not 2 feet as required by ANSI). However, the Secretary is still unable to meet its burden of proof to sustain an affirmation of a violation of section 5(a)(1) of the Act because the Respondent has successfully proven its defense of unpreventable employee misconduct or pure accident caused by a well-trained employee.

The Secretary dismisses as without merit the alternative theories of the accident presented by the Respondent, i.e., that Collins either went through the neutral and the telephone wires and violated his employer's instructions for clearance between those wires and the need to maintain a 2 foot clearance from the primary wire; or he did not go between the wires at all but simply lost track of where he was, contacting the wires purely by accident while watching the boom across the street. These are the two versions of the accident raised by Davey Tree in its defense of unpreventable employee misconduct and/or well-trained employee mistake. (Tr. 19-20). Since there is no eyewitness as to how the accident actually occurred, this judge finds that the theories presented by both parties are all plausible explanations and that no particular theory can be said to be the correct one to the exclusion of the others.

To establish the defense of unpreventable employee misconduct, an employer must: (1) have established work rules designed to prevent the violation; (2) adequately communicated these rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations have been discovered. *Jensen Construction Co. v. OSHRC*, 7 OSHC 1477, 1979 OSHD para. 23,664 (1979). Davey Tree has passed this test. First, Davey Tree has created and maintained an extensive safety and training manual designed to protect their employees while working around energized (primary) lines such as those at the accident site. (Tr. 307; Exhibit R-1). In addition, each truck contains a copy of the Respondent's safety and training manual which includes the entire ANSI Z133 standard as well as a notice posted in the truck with the ANSI tables of guidelines for clearances needed from the primary wire. (Tr. 89, 112, 308). Thus, the company has clearly tried to prevent the

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<sup>2</sup>On cross-examination, Mr. Lewis conceded that a 6 foot man crouching down in the bucket would have the equivalent range of vision as a 5 foot 3 inch man standing straight up in the bucket. Implied in this line of questioning is that since ANSI standards do not impose a minimum height requirement, there should therefore be no prohibition on crouching down in the bucket. (Tr. 268-69).

type of accident that occurred--electrocution of an employee--by enabling the employees to quickly verify the necessary minimum clearances at a new job site. (Tr. 89, 111-12, 308, 442). Second, safety issues and rules are communicated primarily through the weekly "tailgate" system. (Tr. 308). Mr. Mark Nicklos, Respondent's Account Manager for New England travels throughout the area monthly, and Mr. Walter Michelson, the Supervisor of the PSNH account, visits the different worksites on a weekly basis and discusses certain safety issues at the back of the truck, hence the name "tailgate talk." (Tr. 366-73, 424-39; Exhibits R-2 through R-15). Sign-in sheets were required and kept in order to document those who attended and what subjects were discussed. (Tr. 366-73, 424-39; Exhibits R-2 through R-15). Topics of these talks, while primarily centering on tree trimming and electrical hazards, also included general safety concerns such as wearing seatbelts while driving the trucks as well as their personal vehicles, safety at home over holidays and rescue techniques (Goodell attempted to revive Collins by using cardiopulmonary resuscitation that he learned from the Respondent's safety training program). (See, e.g., Exhibits R-3, R-4, R-12 and R-13). This tailgate system also has enabled Davey Tree employees to learn about safety in the context of real-life problems, even to the extent that employees often demonstrate procedures that are discussed. (Tr. 428-29; Exhibit R-11). Mr. Goodell testified that he felt he was adequately trained by Davey Tree so as to be capable of making the necessary judgments to work safely around electrical lines. (Tr. 92). Third, Davey Tree has created a reporting program by which employees are charged with the responsibility of maintaining a safe environment by reporting any safety violations they are aware of, even if a superior officer is involved. (Tr. 84, 311, 322, 339). In addition, supervisors travel to the worksites, usually on a daily basis, to insure that there are no problems, that the employees are working in a safe manner, and work crews are encouraged to refer safety issues to them. Fourth, Davey Tree issues either an oral or a written reprimand when safety violations are discovered. (Tr. 95-96, 108). The general policy is that four violations in one year would result in termination.<sup>3</sup> Employee testimony confirmed that reprimands had been issued for infractions ranging from going between the primary and neutral wires to being late for tailgate talks, and that employees were aware that termination could result from safety infractions. (Tr. 87-88, 95-96, 108, 401-12). The Respondent's safety program is considered a model by the tree trimming industry. (Tr. 466).

Thus, it appears that Davey Tree has more than adequately met the four-part *Jensen* test for unpreventable employee misconduct. Mr. Collins had been a Davey Tree employee for about 18 months and Respondent has documented that he had attended all of the weekly tailgate talks where

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<sup>3</sup> This rule is neither automatic or absolute. Mr. Nicklos testified that outside factors such as the severity of the offenses and the level of knowledge of an employee were considered in the decision to terminate an employee; he also stated that he did not know of an employee who had four violations in one year and that some employees were fired for less than four violations. (Tr. 401-12, 416).

safety around energized lines (among other concerns) was frequently discussed. (Exhibits R-2 through R-15). He was characterized by other employees as a "tremendously hard worker", and he had never been known to come within the minimum clearance from a primary wire. (Tr. 412, 365, 441). In fact, Mr. Collins was considered capable of added responsibility and was given the position of acting (working) foreman for the two-man crew on which he was working in the weeks prior to his accident. From his training by the Respondent, Mr. Collins was well aware of the necessity of maintaining a sufficient clearance (i.e. the ANSI recommended clearance) from the energized lines.

The other possible explanation of the accident presented by Davey Tree is that this was just a pure accident--a case of Collins making a mistake and losing track of his position relative to the wires, especially the primary wire. Respondent's expert witness, Mr. Gerald Duke, theorized that Collins was probably coming back over the wires after trimming while simultaneously rotating himself using the controls on the outside of the bucket. (Tr. 463). During this time, it was hypothesized that he was looking over his shoulder to watch the location of the boom on the other side of the street rather than looking in the direction of his travel in the bucket. (Tr. 463-64). In Duke's opinion, the bucket must have hit the neutral wire and Collins turned towards the wires, and thus contacted the primary wire on his right side. (Tr. 464-66). This version of the accident was also espoused by Mr. Nicklos, Davey Tree's Account Manager for New England, who had conducted his own investigation of the accident in order to use it as an example for other Davey Tree employees to prevent accidents in the future. (Tr. 357-59). Only theories could be used because the other employee at the site, Mr. Goodell, testified that he had not seen Collins go through the wires at that setup so he did not actually know how the trees were trimmed or the route the decedent had traveled in the bucket. (Tr. 70-75). There was considerable testimony from other Davey Tree employees and Mr. Duke that it was not necessary to go between the wires to perform the trimming at that setup. (Tr. 70-75, 440, 443-44, 463). Lastly, there was testimony that no other Davey Tree employees had ever been seen coming within the required 2 foot clearance of the primary wire mandated by the ANSI standards. (Tr. 43-54, 365, 441). If the Respondent's version of the accident that the employee did not go through the wires but rather made a mistake in judgment coming back towards the wires is true, then Mr. Lewis' prohibition against crouching down in the bucket to go between the wires would not have prevented the accident. In addition, Mr. Lewis' other suggestion to have a regional person solely in charge of safety would also have not prevented the accident.<sup>4</sup>

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<sup>4</sup> Davey Tree's expert maintained that the only circumstance where a regional safety person might have prevented the accident was if he/she coincidentally drove up just before Mr. Collins had hit the primary wire and honked his/her horn or screamed. (Tr. 510).

The overall safety record of Davey Tree also lends weight to the conclusion that this was either a case of unpreventable employee misconduct or a well-trained employee's mistake. Davey Tree's safety record concerning electrocutions is exemplary; they have one-third less electrical fatalities than the industry in general--Davey Tree's average per year fatality record was 2.32 versus 8.6 for the industry. (Tr. 477-78, 482-83; Exhibit R-17). From 1986-1993, Respondent's employees worked more than 26,700,000 hours performing utility line clearance without an electrocution or serious injury while using an aerial lift bucket truck. (Tr. 319-20). This low fatality record appears to be a result of its effective safety program.

Thus, even if the Secretary's theory of the accident were true and Collins violated industry standards by coming too close to the primary wire by passing between the neutral and the telephone wires, the Respondent has met its burden of defense of unpreventable employee misconduct or pure accident caused by a well-trained employee. Davey has established that it has a good safety program that was well communicated to the employees and enforced whenever violations were discovered. Further, the Secretary has not presented feasible abatement steps that Davey Tree could have pursued that would have eliminated or materially reduced the hazard or prevented the accident. The Secretary has not proven that Davey Tree committed a violation of section 5(a)(1) of the Act, the General Duty Clause; therefore, the citation must be VACATED.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

All findings of fact relevant and necessary to a determination of the contested issue have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

#### **ORDER**

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



**BARBARA L. HASSENFELD-RUTBERG**

Judge, OSHRC

Date: September 20, 1994  
Boston, Massachusetts