United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. THE DAVEY TREE SURGERY COMPANY, Respondent.	OSHRC Docket No. 12-0096

DECISION AND ORDER

I. BACKGROUND

On June 27, 2011, an employee of the Davey Tree Surgery Company ("Davey Tree") was killed while cutting trees in a utility easement right-of-way that belonged to the Idaho Power Company. This utility easement was located on federal government property in the Boise National Forest. On December 27, 2011, the Secretary cited Respondent for failing to comply with several sections of the logging operations standard found at 29 C.F.R § 1910.266 and the reporting requirements found at 29 C.F.R. § 1904.39. The Secretary characterized the logging violations as serious, the reporting violations as other-than-serious, and proposed a penalty of $31,175.00.

II. DISCUSSION OF RECENT CASE LAW

On February 26, 2016, the Occupational Safety and Health Review Commission issued decisions in two companion cases that are relevant to the instant case, as they provide binding

precedent. Both cases are entitled *The Davey Tree Expert Company* and are listed as Docket Nos. 12-1324 and 11-2556. The Commission's holdings in these two companion cases will be discussed *infra.* Additionally, for purposes of brevity, the Parties' respective arguments and legal positions shall be summarized.

III. THE SECRETARY'S ARGUMENTS

The Secretary's theory of the case is that Respondent was engaged in logging operations on June 27, 2011. The Secretary believes it has established that Davey Tree Surgery Company's "large-scale tree removal project" for Idaho Power is covered by OSHA's logging operations standard. The Secretary asserts that its interpretation of the logging standard is entitled to deference.

OSHA received notification of Mr. Butterfield's fatal workplace accident on June 28, 2011 via a phone message that was left on the Boise Area Office answering machine around 8:00 p.m. on June 27, 2011. (Tr. 52). Area Director (AD) Kearns assigned Cecil Tipton, an experienced Compliance Safety and Health Officer (CSHO), to lead OSHA's investigation. (Tr. 393).

AD Tipton[1] contacted Davey Tree's representative on June 28 and arranged to inspect the accident scene where Mr. Butterfield was fatally injured. (Tr. 58). AD Tipton met Davey Tree area manager James Hartzell and safety manager Pat McDermott in Boise and drove to Respondent's staging area in Idaho City. (Tr. 58). From the staging area in Idaho City, they travelled to the worksite in the same manner as Respondent's employees. (Tr. 59, Govt. Ex. 2 at 182). It took about an hour to get to the worksite from Boise. (Tr. 394–95).

1. Mr. Tipton has since been promoted and is now the Area Director in Portland, Oregon.

When AD Tipton got to the worksite, he spoke to the Boise County Sheriff's deputy and took video and measurements of the accident site, the hazard tree[2] that struck Mr. Butterfield, and the distance from other trees on the worksite. (Tr. 61–62; Govt. Ex. 2 at 128). The hazard tree was 103-feet tall, and Mr. Butterfield was only about 70 feet away from this tree when he was struck. (Tr. 64; Govt. Ex. 4 at 12). This same tree was approximately 100 feet from the power line. (Tr. 63). OSHA also met with Davey Tree management, returned another time to the worksite to take more detailed photographs and measurements, and conducted employee interviews. (Tr. 65). A couple weeks after the fatal accident, OSHA observed a different Davey Tree crew felling trees also using a rope come-along system. (Tr. 66).

OSHA alleged that Davey Tree violated several provisions of the logging operations standard. (Govt. Ex. 1). OSHA determined that the logging operations standard applied to Davey Tree's worksite because the employees were conducting manual felling, and the logging operations standard addresses manual felling. (Tr. 69). Additionally, OSHA consulted a compliance directive related to the application of the logging operations standard for tree care operations. (Tr. 69). AD Tipton testified that he considered the application of 1910.269, OSHA's Electrical Power Generation, Transmission, and Distribution standard, but determined that it did not apply. (Tr. 70). AD Tipton determined that 1910.269 did not apply because the work crew was not working within ten feet of the power lines and they were exposed to struck-by hazards, not electrical hazards. (Tr. 70). AD Tipton did not consider the work that Mr. Butterfield and Mr. Slaven were performing to be arboriculture because they were not trimming trees, they were not using herbicides, and they were not piecing out trees—they were felling trees whole, from the stump. (Tr. 70, 74).

2. Herein, the tree that fatally struck Mr. Butterfield will be designated "the hazard tree."

Citation1, Item 1. OSHA's investigation revealed that Davey Tree's first aid kit was missing the following required items listed in 1910.266, Appendix A: roller bandages, triangle bandages, scissors, a blanket, tweezers, tape, elastic wrap, splints, and directions for requesting emergency assistance. (Tr. 78; Govt. Exs. 1 and 2 at 25; Resp. Ex. KK, LL, MM). OSHA determined that Davey Tree did not have a written plan for what to do in case of an emergency. (Tr. 61; 695–96). AD Tipton explained that because there was no communication method at the worksite, Davey Tree was "relying on traveling down a path and getting in the car and traveling down a dirt road and then hoping that somebody is going to be at home in one of these houses so you can make a phone call if there is an emergency." (Tr. 61–62). There was no plan, written or otherwise, about what the crew would do in an emergency. In other circumstances, Mr. Slaven had employed the "nearest phone" policy. Prior to commencing previous jobs, he had contacted a nearby resident and made arrangements to use the homeowner's telephone in the case of an emergency. (Tr. 695–96; Resp. Ex. FFF at 109–111). But Davey Tree did not make prior arrangements with a nearby resident before starting the work on the instant job in Boise National Forest, and there was no cell phone coverage in the area. *Id.*

Citation 1, Item 2. OSHA also determined that Davey Tree violated 1910.266(d)(6)(i), which requires employees to be spaced properly so that one employee does not present a danger to any other. (Tr. 79–80; Govt. Ex 1, Citation 1, Item 2). Mr. Butterfield and Mr. Slaven were both working within the drop zone of the hazard tree. (Tr. 536–37). Because a tree being felled can strike another tree, workers other than the sawyer need to be two-tree lengths away from the tree being felled. (Tr. 537–38).

Citation 1, Item 3. OSHA determined that Davey Tree violated 1910.266(h)(2)(ii), which requires a hazard evaluation to be conducted before the felling of a tree. (Tr. 81; Govt. Ex. 1,

Citation 2, Item 3). OSHA determined that Mr. Slaven failed to do an appropriate hazard evaluation by not evaluating the lean of the hazard tree and the other trees in the area. (Tr. 81, 539–40; Govt. Ex. 2 at 69). OSHA found that Davey Tree could have felled the hazard tree more uphill instead of to the side of the hill, could have used ropes properly, could have used the rope come-along system, and could have used wedges. (Tr. 81).

Citation 1, Item 4a and 4b. OSHA determined that Davey Tree violated the training requirements at 1910.266(i)(3)(ii) and (iii). (Tr. 82; Govt. Ex. 1, Citation 1, Items 4a and b). OSHA reviewed Davey Tree's safety manual and conducted employee interviews to understand the information and training Davey Tree provided to its employees. (Tr. 66–67; Govt. Ex. 11). OSHA determined that Davey Tree did not train its employees on how to use the rope come-along system; instead, employees learned how to use it through trial-and-error. (Tr. 82). Davey Tree has no written instructions related to using the rope come-along system. (Tr. 273). And, based on review of the manual and employee interviews, OSHA determined that Davey Tree did not provide any training on how to determine the height of a tree that was going to be felled. (Tr. 67–68, 82–83, 93–95). AD Tipton conducted several interviews with employees, who told him that that they guessed and relied on experience to determine tree height. (Tr. 68).

AD Tipton testified that Davey Tree employees could have measured the height of the hazard tree with a laser range finder, a clinometer, or a rope. (Tr. 83–84). Based on his employee interviews, AD Tipton testified that employees were not trained on the "stick trick" before Mr. Butterfield was fatally struck by the tree. (Tr. 84–85). AD Tipton testified that the first he heard about the "stick trick" was from James Hartzell showing him what it was with a different crew. (Tr. 85–87). The stick trick involves holding up a stick and trying to figure out if you are in the

fall shadow of a tree. (Tr. 87). Davey Tree does not have any written instructions related to using the stick trick. (Tr. 86, 266).

Citation 2, Item 1a and 1b. OSHA alleges that Davey Tree failed to comply with the reporting requirements at 1904.39(a) and (b)(1). (Tr. 87–88; Govt. Ex. 1). OSHA was notified about the fatal accident the following workday from a voicemail left by Mr. Pat McDermott. (Tr. 620). There was no record of calls made by Davey Tree to the 1-800 number as required by the regulations, although other callers were able to access the 1-800 number and were routed to the Boise Area office in a timely manner. (Govt. Exs. 6–8). Mr. McDermott testified that he attempted to call the 1-800 number and could not get through, but his phone records show only calls to the local area office. (Tr. 621; Govt. Ex. 21).

In support of its citations, OSHA consulted with a logging expert, Jeff Funke, to provide his analysis of the performance standards at issue. (Govt. Ex. 13). Mr. Funke is the Area Director for OSHA's Omaha Area Office in Nebraska. (Tr. 510). AD Funke has been involved in the logging industry since 1990. He got his start as an employee of his family's business, Funke Brothers Logging. (Tr. 511–13). Throughout AD Funke's career at OSHA, he developed specialized experience in logging. Funke conducted the majority of the logging inspections when he was a compliance officer in Montana and Idaho and provided training to compliance officers in OSHA about the logging industry. (Tr. 514–17). As AD Funke advanced in OSHA, he continued to hone his experience in logging through the supervision of compliance officers and by providing training to the industry. (Tr. 518–19). In the course of his career at OSHA, AD Funke has personally inspected at least a hundred cases involving felling operations where trees were removed from the stump. (Tr. 521). From his work at Funke Brothers Logging and throughout his career at OSHA, AD Funke has gained expertise in felling techniques in this

specialized area and he testified that there are widely accepted safe directional felling methods in the industry, including accepted distances for workers. (Tr. 522–24). AD Funke has been qualified and has testified as an expert in two matters before the Commission. (Tr. 525–26).

Based on the foregoing, the Secretary argues as follows:

1. Davey Tree's argument that the logging standard applies only if trees are felled, moved, and turned into a forest product is in direct conflict with the plain language of the standard, with this Court's order in *Pettey Oil Field Servs., Inc.*, 2006 WL 2050961 at *1, 4–5 (No. 05-1039, 2006), and with OSHA guidance and interpretation.
2. The logging operations standard provides the regulated community adequate notice that tree removal operations are covered by the standard, even if the removal operation was performed outside the commercial tree-harvesting industry.
3. By its plain language, the logging operations standard covers Davey Tree's manual felling operations.

IV. THE SECRETARY'S CONCLUSION

The Secretary urged the Court to reject Davey Tree's affirmative defenses, uphold the OSHA citations, and promote the necessary safeguards to prevent future fatal accidents.

V. RESPONDENT'S ARGUMENTS

Respondent's basic theory of the case is that The Secretary "inappropriately attempted to apply the ***logging standard*** to a wholly separate and distinct industry, to wit, ***the utility line-clearance industry.***" *See Davey Tree's Response to the Secretary of Labor's Post-Hearing Brief* at 3 (emphasis added). Respondent asserts that the logging standard simply does not apply to line-clearance operations. *Id.* Respondent asserts the following general, salient points:

1. Davey Tree is in the arboricultural industry.

2. A subset of arboricultural operations is line-clearance.
3. Line-clearance arborists are regulated by 29 C.F.R § 1910.269; the Electric Power Generation, Transmission and Distribution standard.
3. The American National Standards Institute (ANSI) standard Z133.1 contains arboricultural safety requirements for removing trees in the vicinity of electrical power lines.
4. Arborists are not loggers. *See* 59 Fed. Reg. 51672 (Oct. 12, 1994).
5. Respondent was performing line-clearance operations on June 27, 2011.

Respondent articulates the following, specific arguments as to why the logging standard, in particular, is inappropriate:

1. The logging standard's language is clear and unambiguous: "*These types of logging include, but are not limited to, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products.*" *See* 29 C.F.R § 1910.266(b)(2). The Secretary's interpretations have been inconsistent.
2. Respondent lacked adequate notice of the Secretary's interpretation.
3. The Secretary's interpretation lacks evidence of pertinent policy considerations.
4. The August 2008 Directive in invalid for lack of notice and comment rulemaking.
5. No reasonable person could conclude that Respondent was engaged in logging operations.
6. The scale and complexity of the project demonstrates that Respondent was engaged in typical line-clearance operations on June 27, 2011.
7. Respondent did not harvest trees for usable wood.
8. Respondent did not use any heavy machinery.

9. The location of the tree removal project was not atypical for line-clearance work.

10. Respondent was not performing tree removals on large tracts of land.

11. The Secretary's interpretation is not entitled to deference.

VI. ANALYSIS

This Court has carefully reviewed the hearing transcript, the case file and the parties' post-hearing submissions. Additionally, this Court has carefully read the Commission's decisions in *The Davey Tree Expert Company* cases, Docket Nos. 11-2556 and 12-1324. The threshold issue before the Court is whether the logging standard applied to the work that was being performed by Davey Tree at the cited worksite on June 27, 2011. This Court finds that the totality of the evidence establishes that Respondent was not engaged in logging trees for harvest as forest products, and that the logging standard does not apply. Rather, the Court finds that Respondent was engaged in line clearance operations for Idaho Power.

Following the precedent articulated by the Commission in *The Davey Tree Expert Company* line of cases, this Court cannot conclude that Respondent's work on the date cited in this Complaint was covered by the logging standard. The facts of this case are nearly identical to the recently decided *Davey Tree* line of cases, wherein the Commission determined that the logging operations standard did not apply. Accordingly, the Court finds that the logging standard's requirements do not apply to the conditions found here in Citation 1. Having decided that the logging standard does not apply, the following analyses provide additional bases for vacating certain Citations.

In Citation 1, Item 1, Respondent was cited for a serious violation, pursuant to 29 C.F.R. 1910.266(d)(2)(ii): *Each first aid kit did not contain the items listed in Appendix A at all times.* However, AD Tipton testified that if the logging standard should be found not to apply, then

Respondent's first aid kit would have been in compliance with 29 C.F.R. 1910.269. (Tr. 178–79). Accordingly, the Secretary has not met his burden of persuading the Court that this Citation item should be affirmed.

In Citation 1, Item 2, Respondent was cited for a serious violation, pursuant to 29 C.F.R. 1910.266(d)(6)(i): *Employees were not spaced and the duties of each employee were not organized so that the actions of one employee will not create a hazard for any other employee.*

However, since the Court has determined that the logging standard does not apply, the Secretary has not met his burden of persuading the Court that this Citation item should be affirmed.

In Citation 1, Item 3, Respondent was cited for a serious violation, pursuant to 29 C.F.R. 1910.266(h)(2)(ii): *Conditions such as, but not limited to, snow and ice accumulation, the wind, the lean of the tree, dead limbs and the location of other trees, were not evaluated by the feller and precautions were not taken so a hazard in not created for an employee before each tree is felled.* Mr. Harry Slaven, a Davey Tree employee, testified as a witness for the Respondent. (Tr. 672–710). Mr. Slaven was the feller of the tree that killed Mr. Butterfield. During direct examination, Mr. Slaven related that he had fourteen years of experience with Respondent and was a certified line clearance crew leader. (Tr. 672–73). He also stated that he was a member of the International Society of Arborists. He identified his copy of the Davey Tree Company Operations Manual. (Tr. 674). The witness advised that the Operations Manual has always been kept in his truck. (*Id.*).

Mr. Slaven continued with an extensive account of the hazard evaluation process prior to the felling of this particular tree. He related that the day before the fatality, his crew, consisting of himself, Rob Butterfield and Darrell Sheepskin, conducted a walk-through of the area. They

found steep terrain, burned trees and other standing trees that were dead. He related that for each tree to be felled, his crew took soundings to determine whether the tree was hollow or partially rotted. In addition, the crew noted the lean of the tree and its estimated weight. (Tr. 682–84).

Mr. Slaven explained that they took the time to do soundings on the trees to be felled because such a tree "has the potential to be a very hazardous tree and it sends up a red flag, and it requires more attention and care to bring this tree down." (Tr. 686). Accordingly, the Secretary has not met his burden of proving that the standard applies or that its terms were violated.

In Citation 1, Item 4a, Respondent was cited for a serious violation, pursuant to 29 C.F.R. 1910.266(i)(3)(ii): *Training did not consist of safe use operation and maintenance of tools, machines and vehicles the employee uses or operates, including emphasis on understanding and following the manufacturer's operating and maintenance instructions, warnings and precautions.* This item refers to the alleged failure to train employees on the use of a rope come-along system.

Mr. Patrick McDermott testified for Respondent. He related that he had been with Davey Tree Company for many years (1970–1975 and 1982–present), and that he was now a senior safety coordinator. (Tr. 604). His duties included safety policy, safety enforcement and safety training. (Tr. 605). Mr. McDermott discussed those safety classes he conducted for Davey Tree at four different locations in Idaho. (Tr. 606). Some of these training presentations included "Notching and Felling", "Communications", "Ropes and Knots", "Policy on Ropes in Trees", and "Hazard Trees". The substance of these five classes appears to dovetail perfectly with the duties of line clearance crews. (Tr. 619).

Mr. Slaven's testimony was rich with discussions of his training in the uses of a rope come-along. Beginning in 2001, Mr. Slaven received come-along training from Brett Dixon.

(Tr. 675). He subsequently became familiar with using a come-along to fell trees while working with other individuals. Tr. (677–78).

The testimony from Mr. McDermott and Mr. Slaven made it clear that Respondent provided the disputed training and that such training is provided in multiple locations throughout Idaho. Accordingly, the Secretary has not met his burden of persuading the Court that this citation item should be affirmed.

In Citation 1, Item 4b, Respondent was cited for a serious violation, pursuant to 29 C.F.R. 1910.266(i)(3)(iii): *Training did not consist of recognition of safety and health hazards associated with the employee's specific work tasks, including the use of measures and work practices to prevent or control those hazards.* This Item refers to the alleged failure to train employees on how to determine the height of a tree or the tree length from the stump.

During the testimony of Mr. McDermott, he testified about the stick trick. (Tr. 616–17). He testified, "It is a method we use to determine the height of a tree." (Tr. 616). He recalled performing this training in 2009. (Tr. 617). Mr. Slaven's testimony included his training on the use of the stick trick in March 2009. (Tr. 678–82). When asked on direct examination if, on the day of the accident, he knew how to use the stick trick, Mr. Slaven replied, "Yes I did." (Tr. 682).

The testimony from Mr. McDermott and Mr. Slaven makes it is clear that the latter was adequately trained in an accepted method of estimating tree height. Further, on the day of the accident, Mr. Slaven knew how to use the stick trick method. Accordingly, the Secretary has not met his burden of persuading the Court that this Citation item should be affirmed.

In Citation 2, Item 1a, Respondent was cited for an other-than-serious violation, pursuant to 29 C.F.R. 1904.39(a): *Within eight (8) hours after the death of any employee from a work-*

related incident or the in-patient hospitalization of three or more employees as a result of a work-related incident, the employer did not orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident. The employer did not use the OSHA toll-free central telephone number, 1-800-321-OSHA (1-800-321-6742). This item refers to the alleged failure of Respondent to timely report the fatality to OSHA.

In fact, however, the Secretary acknowledges that Respondent telephonically notified the OSHA Area Office in Boise; to wit: "A voice message was left on the local office telephone." Citation 2, Item 1a. Also, Area Director Cecil Tipton testified as follows: "A telephone message was left on our answering machine at our office at approximately 8:00 that night, on the 27th." (Tr. 52, 88–89).

Accordingly, the Secretary has not met his burden of persuading the Court that this citation item should be affirmed.

In Citation 2, Item 1b, Respondent was cited for an Other-than-Serious violation, pursuant to 29 C.F.R. 1904.39(b)(1): *On or about June 27, 2011 and at times prior thereto, the employer did not report a fatal accident to the 800 number after no one was available at the area office.* This Item refers to the alleged failure of Respondent to timely report the fatality to the OSHA toll-free central number.

Respondent argues that Patrick McDermott, Davey Tree's senior safety coordinator, twice received a busy signal on the central telephone number. (Tr. 620–21). Mr. Hartzel was present when Mr. McDermott attempted to call the central number and was not able to get through. (Tr. 371–74). But, Mr. McDermott's phone records showed only calls to the local area office. (Tr. 621; Govt. Ex. 21). The Secretary has also shown that Davey Tree employees did not

make prior arrangements with a nearby resident for emergency telephone services before starting the work on the instant job in Boise National Forest, and there was no cell phone coverage in the area. (Tr. 695–96; Ex. FFF at 109–111).

On balance, however, the Court finds that the Secretary has carried his burden of proof regarding Citation 2, Item 1b, by establishing sufficient evidence of a violation, which Respondent was unable to rebut. Accordingly, Citation 2, Item 1b shall be AFFIRMED.

VII. ORDER

This Court concurs with and is bound by the analyses conducted and the decisions reached by the Commission in *The Davey Tree Expert Company* line of cases; Docket Nos. 12-1324 and 11-2556. This Court finds that the logging standard does not apply to the instant case. Instead, the Court finds that Respondent was engaged in line clearance operations on June 27, 2011 at the cited worksite.

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is hereby VACATED, with no penalty assessed.
2. Citation 1, Item 2 is hereby VACATED, with no penalty assessed.
3. Citation 1, Item 3 is hereby VACATED, with no penalty assessed.
4. Citation 1, Items 4a and 4b are hereby VACATED, with no penalty assessed.
5. Citation 2, Item 1a is hereby VACATED, with no penalty assessed.
6. Citation 2, Item 1b is AFFIRMED, and a $300.00 penalty is ASSESSED.

SO ORDERED

JOHN H. SCHUMACHER
OSHRC Judge

Dated: May 27, 2016