SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC DOCKET NO. 96-0851
McNEILLY LOGGING,	
Respondent.	

APPEARANCES:

For the Complainant:
Dewey P. Sloan, Jr., Esq., U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:
Scott Thurston, , McNeilly Logging, Deary, Idaho

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

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

Respondent, McNeilly Logging (McNeilly), at all times relevant to this action maintained a place of business at the Dirty Ike Timber Sale, Clinton, Montana where it was engaged in logging. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 17, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of McNeilly's Dirty Ike work site. As a result of that inspection, McNeilly was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest McNeilly brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 19, 1997, a hearing was held in Missoula, Montana. At the hearing "serious" citation 1, item 2a was withdrawn (Tr. 9). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Alleged Violation of §1910.266(h)(1)(vi)

Serious citation 1, item 1 alleges:

29 CFR 1910.266(h)(1)(vi): The employer did not assure that each danger tree was felled, removed or avoided before work was commenced in the area:

> (a) McNeilly Logging, Dirty Ike Timber Sale: On or about 04/15/96 an employee performing sawing and bucking operation was working within the fall radius of a standing snag which fell over and seriously injured him.

The cited standard states:

> Each danger tree[1] shall be felled, removed or avoided. Each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. If the danger tree is not felled or removed, it shall be marked and no work shall be conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard for an employee.

Facts

On April 15, 1996, Michael Boehm was injured when a rotted tree fell and struck him (Tr. 19, 32). The tree that struck Boehm was a dead "snag" which had been resting on a green larch being felled by Boehm (Tr. 31-32). The snag remained standing through the felling, but as Boehm began cutting the larch to size, removing its top, the snag toppled and struck Boehm (Tr. 31-32).

CO Virgil Howell stated that both Boehm and a second employee, Harold Milne, told him that they had tested the standing snag for rot by kicking it, and recognized it as a hazard. They decided it would not fall, however, and opted not to remove it (Tr. 31-32, 40, 56-58, 129, 133). The accident occurred 46 feet from the base of the snag; the snag was approximately 50 feet tall (Tr. 33, 38-39, 42).

Mark McNeilly testified that there were a lot of dead standing trees on the Dirty Ike unit, and that it would have been impossible to log the area without employees working within two tree lengths of a snag (Tr. 146, 165). Employees were, therefore, allowed to work in the area of such danger trees (Tr. 165). McNeilly admitted that Boehm was not violating any of Respondent's safety rules in working withing two tree lengths of the snag which struck him (Tr. 165).

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[1] A danger tree is defined at §1910.266, Appendix C as: A standing tree that presents a hazard to employees due to conditions such as, but not limited to, deterioration or physical damage to the root system, trunk, stem or limbs, and the direction and lean of the tree.

McNeilly stated that the snag which injured Boehm could not have been safely removed prior to felling the larch, but that it should have been removed with a chain saw before Boehm began topping the larch (Tr. 150-51, 178).

<u>Discussion</u>

The record establishes that Michael Boehm did recognize the dead snag as a danger tree, despite his determination that the tree would not fall. The two conclusions are not mutually exclusive, as suggested by McNeilly; the *possibility* that a tree will fall makes it a hazard, i.e. a danger tree, even though the sawyer may determine that the *probability* of the tree falling is low. Boehm's failure to fell, remove or avoid the standing snag once it was determined to pose a hazard proves the cited violation.

McNeilly maintains that he was not party to the decision to leave the snag, which is the subject of this matter (Tr. 147). McNeilly testified that it is part of the sawyers' jobs to determine which trees are hazardous and decide which to leave standing (Tr. 148-50). McNeilly argues that its employees all know and understand OSHA regulations regarding danger trees (Tr. 143-44), and that there is nothing more McNeilly could do to prevent the kind of accident Boehm suffered. Mark McNeilly, however, admitted that it did not enforce OSHA rules prohibiting work within two tree lengths of a danger tree because he believed that adherence to the safe working distance requirement would have unreasonably interfered with his foresting of the unit. Boehm was following company policy when he continued to work within two tree lengths of a snag he had determined was hazardous.

The fact that McNeilly may not have known of the specific instance of violative conduct at the time it occurred does not mean that that conduct was unpreventable. *Ormet Corp*., 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991). The Commission has held that the reasonable employer must adequately supervise its employees and formulate and implement training programs and work rules designed to ensure that employees perform their work safely. *See; Mosser Construction Co.,* 15 BNA OSHC 1408, 1991-93 CCH OSHD ¶29,546 (No. 89-1027, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1991-93 CCH OSHD ¶29,344 (No. 86-1087, 1991). Because McNeilly neither enforced OSHA logging regulations, or made any effort to establish alternative safe methods of operation, it did not all it could do to prevent the cited violation.

The cited violation is proven and will be affirmed.

Alleged Violation of §1910.266(h)(2)(vii)

Serious citation 1, item 2b alleges:

29 CFR 1910.266(h)(2)(vii): The backcut of trees being felled was not above the level of the horizontal cut of the undercut:

> (a) McNeilly Logging, Dirty Ike Timber Sale: On or about 04/15/96, and at times prior thereto, the faller(s) were sawing the backcut at the same level as the horizontal cut of the undercut (match cut).

The cited standard states:

> The backcut shall be above the level of the horizontal facecut in order to provide an adequate platform to prevent kickback.. . .

CO Howell testified that during the inspection he noted a number of stumps which appeared to have been felled improperly (Tr. 120). At the hearing McNeilly stipulated that the backcuts on those stumps were below, level with, or less than one inch above the horizontal facecut (Tr. 77-78, 83-84; Exh. C-2). When interviewed, and at the hearing, Milne admitted that most of the time he matched his backcut with the undercut (Tr. 75, 93-94, 187-88). McNeilly admitted that his employees used matched cuts; McNeilly believed that matched cuts were acceptable under Montana law and so had no policy prohibiting it (Tr. 97, 110, 158-59, 163, 172-74).

CO Howell testified that Montana is a Federal standard state; any State standards are purely advisory (Tr. 91).

Howell stated that a tree being felled with an backcut which is too low can kick back prematurely, striking the cutter and causing crushing injuries, usually resulting in death (Tr. 22-28, 63-65, 110; Exh. C-1).

Discussion

The underlying facts in this matter are undisputed.

As a defense, McNeilly maintains that it believed that matched cuts were allowed in the state of Montana, based on state advisory standards. McNeilly did not introduce any state standards supporting his position, relying entirely on a single sentence in the preamble to the Federal Register in which the drafters of the logging standards discuss the industry practices taken into consideration prior to enactment of the current regulations. 60 Fed Reg. 47,027 (1995). That sentence states: “Only the State of Montana, which has advisory criteria, permits the backcut to be level with the face cut in Humboldt cutting.” That statement

is followed by: "After reviewing the record. . . OSHA reaffirms that the record supports the necessity of applying the backcut requirement specified in paragraph (h)(2)(vii).. . ."

First, the Federal Register clearly rejects Montana's advisory criteria. Secondly, as noted by the CO, any Montana safety standards are preempted by the Federal standards. McNeilly's interpretation of the requirements of the law is clearly unreasonable. Moreover, it is well settled that ignorance of the standards or of their reach does not excuse noncompliance. An employer has a duty to inquire into the requirements of the law. *Peterson Brothers Steel Erection Company*, 16 BNA OSHC 1196, 1991-93 CCH OSHD ¶30,052 (No. 90-2304, 1993), *aff'd.* 26 F.3d 573 (5th Cir. 1994).

The cited violation is proven.

Penalty

The gravity of both violations is high, in that severe bodily harm could, and in the case of citation 1, item 1, did result from failure to conform to OSHA regulations. Reductions were given for McNeilly's small size and previous good history (Tr. 61, 111-12). A penalty of $1,500.00 was proposed for citation 1, item 1. That penalty is deemed appropriate and will be assessed. A penalty of $1,500.00 was proposed for citation 1, items 2a and 2b combined. Because citation 2, item 2a was withdrawn, half the proposed penalty is deemed appropriate.

ORDER

1. Citation 1, item 1, alleging violation of §1910.266(h)(1)(vi) is AFFIRMED, and a penalty of $1,500.00 is ASSESSED.

2. Citation 1, item 2b, alleging violation of §1910.266(h)(2)(vii) is AFFIRMED, and a penalty of $750.00 is ASSESSED.

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Benjamin R. Loye
Judge, OSHRC

Dated: