IN THE MATTER OF	*	**BEFORE THE**
	*	**COMMISSIONER OF LABOR**
ED'S TREE SERVICE, INC.	*	**AND INDUSTRY**
	*	**MOSH CASE NO. C1192-027-02**
	*	**OAH CASE NO. DLR-MOSH-41-03-10518**
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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following an accident inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued three citations to Ed's Tree Service, Inc. (hereinafter "Employer"), alleging various violations. A hearing was held on October 20, 2003, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, William Somerville, sitting as the Hearing Examiner (hereinafter "HE"), issued a Proposed Decision recommending that both citations and penalties be affirmed. The Employer filed a timely request for review and the Commissioner exercised his authority pursuant to Labor and Employment Article, § 5-214(e), and ordered review. On April 13, 2004, the Commissioner of Labor and Industry[1] held the review hearing and

[1] Commissioner Keith Goddard ordered review and presided over the review hearing in this case. At the present time, Robert L. Lawson is the Commissioner of Labor and Industry. Commissioner Lawson has carefully reviewed the record in this case and issues this decision.

heard argument from the parties. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth below, the HE's recommendations are AFFIRMED.

FINDINGS OF FACT

The facts in this case are not in dispute. The Employer is a small business (FF 3)[2] that performs tree trimming, pruning, and removal in mostly residential settings. (FF 11). Pursuant to an investigation triggered by an accident in which an employee fell from a tree he was attempting to cut apart, MOSH issued citations to the Employer. (FF 4). The Employer was charged with 1) failing to ensure that employees received first aid and CPR training, in violation of 29 CFR § 1910.266 (OSHA – Logging Operations); 2) failing to abide by several Bloodborne Pathogens Standards in violation of 29 CFR § 1910.1030 (OSHA – Bloodborne Pathogens); and 3) failing to prepare a written "certificate of training" in violation of 29 CFR § 1910.266 (OSHA – Logging Operations). (FF 5).

The Employer stipulated that no employee was designated to perform first aid or CPR. (FF 6). The Employer further stipulated that it did not comply with OSHA's Logging Standards or OSHA's Bloodborne Pathogens safety standards. (FF 7). On the contrary, the Employer contended that it believed, at all relevant times, that the American National Standards Institute, Inc. (hereinafter "ANSI") Z133.1 standard applied to work that involved pruning, trimming, repairing, maintaining, and removing trees. (FF 8). Based upon a settled agency policy of applying the OSHA Logging Industry Standards to

[2] Herein, the HE's Findings of Fact are referred to as "FF", the transcript of the October 20, 2003 hearing as "Tr", the Hearing Examiner's decision as "HE Decision", and the transcript of the April 13, 2004 review hearing before the Commissioner as "RevTr".

activities such as "cutting trees with saws, which are included in 'logging operations' as defined in the OSHA logging operations safety standard," the HE concluded that those standards, and therefore also the OSHA Bloodborne Pathogens safety standards, apply to the tree care industry. (HE Decision, pg. 12-13; *see also Asplundh Tree Expert Company Inc.*, Final Decision and Order, Hearing Determination No. 00-4). The HE further concluded that MOSH correctly applied those standards to the Employer's tree trimming, pruning, and removing project. On review, the Employer asserts that the standards do not apply to it because a) the Employer is not in the logging industry, b) the Employer had no knowledge of these standards, and c) compliance would be infeasible for Employer.

DISCUSSION

Section 1910.266 has been specifically interpreted by the Commissioner and by the Court of Special Appeals of Maryland to apply to the felling of trees by companies other than logging companies. *See Asplundh v. Dept. of Labor*, 145 Md. App. 712, (Md. App. Aug. 02, 2002)(No. 1420 Sept. Term 2001); *Asplundh Tree Expert Company, Inc.* Final Decision and Order, Hearing Determination No. 00-4 (herein *Asplundh*, Final Decision). The specific issue in this case, as in *Asplundh*, is the application of the Logging Standards to a tree-trimming company.

In applying the Logging Standards to the felling of trees by a tree trimming company, the Court of Special Appeals recognized that, under the rules of statutory interpretation, "the plain language of 29 CFR § 1910.266 indicates that its safety

requirements apply to all situations in which trees are being cut down." *Asplundh*, p. 10.[3] Specifically, the Court noted that the scope and application section provides that the standards apply to "all logging operations as defined by this section," that the term "logging operations" is defined as "[o]perations associated with felling and moving trees and logs from the stump to the point of delivery…" and that the term "fell" is defined as "[t]o cut down trees." 29 CFR § 1910.266(b)(2) and (c). The Court held that these definitions along with the legislative history behind the Logging Standards demonstrate that their purpose "is to prevent occupational hazards unique to the activities governed by their respective standard." *Asplundh*, p. 11. Therefore, the Court found that the standards must be interpreted to cover "all tree removal for any purpose whatsoever" regardless of the type of company performing the tree removal. *Asplundh*, pp. 11, 14. In other words, the Court concentrated on the type of operation being performed rather than the type of company performing it.

CONCLUSIONS OF LAW

It is within the foregoing framework that this case must be decided. Like the employer in *Asplundh*, the Employer in this case is not directly involved in what is traditionally considered the logging industry. Because it is uncontested that the Employer was not in compliance with the standards cited, 29 CFR § § 1910.266 and 1910.1030, the only issue on appeal is whether the HE erred by upholding MOSH's application of these standards to the Employer. (Tr. 28-29, 124-25). The Commissioner

[3] "The cardinal rule of statutory interpretation is the assertion of legislative intent." *Langston v. Langston*, 366 Md. 490, 507 (2001). "In interpreting and determining legislative intent, we must look to the plain language of the enactment, while keeping in mind its overall purpose and aim." *Waters v. Pleasant Manor Nursing Home*, 361 Md. 82, 103-4 (2000). *Cited in Asplundh*, pg. 9.

finds, for the reasons set out below, that MOSH correctly applied these standards to the Employer.

Application of the Logging Standards to the Employer:

The Commissioner finds that the plain language of the standards at issue and the Court of Special Appeals' decision in *Asplundh* mandate that the standards were correctly applied to the Employer. The Employer argued that the standards are not applicable because they were not intended to be applied outside the logging industry. (Rev.Tr. 5). In response to the application of the standards to Asplundh, a tree-trimming company, the Employer pointed out that it is smaller than Asplundh, engages in less tree felling, and is exclusively residential rather than partially commercial. (RevTr. 29, 49-51, 133). While these facts may be true, the use of the comparisons misses the point.

The hazards associated with felling trees are the same regardless of the end use of the wood or the frequency with which an employer fells trees. *See Asplundh,* Final Decision, p. 3. This fact was also recognized by OSHA when it revised the Logging Standards in 1995 "with the clear purpose of expanding coverage beyond pulpwood logging," *Id.*, at 3, and by the Court of Special Appeals when it held that the standard was amended to cover "all tree removal for any purpose whatsoever." *Aplundh*, p. 14.[4] The plain language of the standard at issue demonstrates that its expanded coverage was intended to provide protection for *all* employees engaged in "logging operations", not just those who are employed by logging companies. The standard's scope and

[4] OSHA specifically noted that the hazards that arise from the felling of trees are a function of the massive weight of the tree and the equipment that must be used, which are consistent regardless the "type of timber being logged, where it is logged, or the end use of the wood." 59 FR at 51673 (Oct. 12, 1994), *cited in Asplundh*, Final Decision, p. 3.

application section provides:

> This standard establishes the safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood. These types of logging include, but are not limited to, pulpwood and timber harvesting. . .

29 CFR 1910.266(b)(1). As the Commissioner has previously concluded and the appellate court has affirmed, this language is quite broad. The phrase "including but not limited to" indicates an intention to apply the standard to operations other than those specifically listed.

The standard's expanded scope is further reinforced by the provision that it applies to "*all* logging operations as defined by this section." 29 CFR § 1910.266(b)(2) (emphasis added). "Logging operations" are defined as "[o]perations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees ....felling...and transporting machines..."[5] "Fell" is specifically defined as "to cut down". 29 CFR § 1910.266(1)(c). Thus, a plain reading of the standard makes it clear that its application hinges upon whether the work at issue constitutes "logging operations" and whether those "logging operations" include "felling trees" and not the size of the employer and whether it performs residential or commercial work. Regardless of the size of the company or the frequency with which or purpose for which a company fells trees, the standard applies to an employer if it "fells trees." There is no applicable threshold in the standard for the percentage of work that includes tree

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[5]The Employer argues that the standard *requires* a "point of delivery" for the wood product. (Tr. 28; HE Decision, pg. 14). However, on the contrary, a close reading of the definition reveals that the inclusion of the phrase "and moving trees and logs from the stump to the point of delivery" signifies that the term "logging operations" includes not just felling trees but operations associated with transporting personnel, equipment, and the logs as well.

felling. The Employer has admitted to felling trees. (Tr. 50, 115). Thus, based upon the plain language of the standard, the Commissioner finds that the safety standards in 29 CFR § § 1910.266 were correctly applied.[6]

Infeasibility defense

The Employer asserts an infeasibility defense. In support of this defense, it argues that it should be subject to the ANSI Standards rather than the Logging Standards (Tr. 117), and that the requirement of 1910.266 to provide first aid training would effectively put it out of business. (Tr. 126). This defense is rejected for two reasons. First and foremost, the Employer's argument is hollow since the first aid training requirements set forth in the Logging Standard are essentially the same as the requirements set forth in the current version of ANSI.[7] Section 4.3.4 of ANSI Z133.1-1994 requires that employees "be instructed in cardiopulmonary resuscitation (CPR) and first aid." This requirement is less specific but no less burdensome on an employer than the requirement in the Logging Standards that employers assure that their employees

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[6] Employer references letters from OSHA dated July 1, 1998 and January 20, 2004 as evidence that 29 CFR § 1910.266 should not apply to it because it is an arborist in SIC 0783. (Rev.Tr. 9-10). Without addressing whether the documents were properly admitted as evidence before the HE, the Commissioner finds the letters unpersuasive because they state only that section 1910.266 does not apply to employers in SIC 0783 *who are not engaged in logging operations*. As discussed, the Commissioner finds that the Employer, while felling trees, was engaged in logging operations as defined in Section 1910.266.

[7] The 1987 version of ANSI, which are nationally recognized standards for safety, was offered for consideration by the Employer before the HE. However, as with all standards, ANSI is updated intermittently with the most recent edition issued in 1994. The Commissioner is taking judicial notice of both the 1987 and the 1994 editions of ANSI. Judicial notice is appropriate where a fact is "capable of immediate and certain verification by resort to sources whose accuracy is beyond dispute." *Faya v. Almaraz*, 620 A.2d 327, 331 (1993). The 1987 edition of these standards has been superseded by the 1994 edition, which was the edition that was in effect in the spring of 2002, when the citations were issued.

receive basic first aid and CPR training. 29 CFR § 1910.266(i)(7)(i). While the Commissioner is cognizant of the challenges of providing first aid training to a workforce with very high turnover (Tr. 126), the application of the Logging Standards instead of the ANSI Standards to this Employer would impose no additional cost or use of resources due to the fact that both the ANSI Standards, which the Employer herself testified should be the controlling standard (Tr. 117), and the Logging Standards contain the same requirements.

In addition, the Commissioner finds that, even if the Logging Standard carried an additional burden, the Employer has failed to demonstrate infeasibility. To mount such an affirmative defense, an employer must do more than simply testify that compliance with these standards would be a financial hardship. *See e.g., Hughes Brothers*, 6 O.S.H.C. Case (BNA) 1830 (1978). Rather, an Employer must demonstrate that compliance is functionally or physically impossible. *See e.g., M.J. Lee Construction Co.*, 7 O.S.H.C. Case (BNA) 1140 (1979).[8] Employer has made no such showing and has failed to meet the burden of proving an infeasibility defense.

Lack of Knowledge of the Standards

Finally, the Employer has argued before the HE and the Commissioner that, despite efforts to keep up on the applicable law, it was not aware of the applicability of these standards to its operations, and therefore should not be cited. However, as pointed

[8]On the contrary, the Commissioner notes that providing the required first aid training to those employees who are involved in felling trees becomes even more feasible in light of the Employer's testimony that only certain employees are allowed to cut down trees because new employees must receive sufficient training before they are allowed to fell a tree. (Tr. 115-16). The Employer could establish a dedicated crew for felling trees, and would then be required to provide first aid and CPR training only to those employees.

out by the HE below, the Commissioner's policy on the application of Logging Standards was published as a Final Decision and Order in *Asplundh* case on September 14, 2000, well before the citations at issue here were issued. This, along with the plain language of the standards, provided notice to the Employer of the standards' applicability.

Application of Bloodborne Pathogens safety standards

Application of Bloodborne Pathogens safety standards necessarily follows the application of the Logging Standards' requirement of first aid training. The Logging Standards' first aid training requirement raises the expectation that a trained employee could and should assist an injured employee. Considering the fact that employees are using equipment such as chain saws to fell trees and are working at heights, it can be reasonably anticipated that an employee would suffer an injury which would expose him to Bloodborne Pathogens, thereby implicating the application of 29 CFR § 1910.1030. (HE decision, p. 8; Rev.Tr. 16). Thus, the Commissioner upholds the HE's finding that the Bloodborne Pathogens safety standards were correctly applied to the Employer. Therefore, Citation 2 is upheld.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 29 day of APRIL, 2005, hereby **ORDERS**:

1. Citation 1, Item 1 for a "serious" violation of 29 CFR § 1910.266(i)(7)(i) and its accompanying proposed penalty of $875, is **AFFIRMED**.

2. Citation 2, Item 1 for a "serious" violation of 29 CFR § 1910.1030(c)(1)(i) and its accompanying proposed penalty of $875, is **AFFIRMED**.

3. Citation 2, Item 1b for a "serious" violation of 29 CFR § 1910.1030(d)(1) is **AFFIRMED**.

4. Citation 2, Item 1c for a "serious" violation of 29 CFR § 1910.1030(d)(3)(i) is **AFFIRMED**.

5. Citation 2, Item 1d for a "serious" violation of 29 CFR § 1910.1030(f)(1)(ii)(A) is **AFFIRMED**.

6. Citation 3, Item 1 for an "other" violation of 29 CFR § 1910.266(i)(10)(i) is **AFFIRMED**.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.

Robert L. Lawson
Commissioner of Labor and Industry