No. 12-1234

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

THE DAVEY TREE EXPERT COMPANY,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

On December 8, 2011, a Davey Tree Expert Company (Davey Tree) employee was killed during a tree felling operation. The Secretary of Labor's logging standard, 29 C.F.R. § 1910.266, addresses the hazards associated with felling trees, and the Secretary cited Davey Tree for failing to comply with 29 C.F.R. § 1910.266(d)(2)(ii) and § 1910.266(d)(6)(i) of the logging standard. The ALJ vacated the citation, erroneously concluding that the standard did not apply to Davey Tree's tree felling operation. As a result of the ALJ's erroneous ruling, tree care employees performing extremely hazardous felling activities will be improperly denied the protection of the logging standard. The ALJ's decision should therefore be reversed.

STATEMENT OF ISSUES[1]

1. Whether the ALJ correctly determined that the logging standard applies to felling operations that are not followed by the movement of the felled trees to a point of delivery where the word "and" in the phrase "operations associated with felling and moving trees" is used disjunctively so that the standard encompasses both "operations associated with felling" and "operations associated . . with moving trees . . . from the stump to the point of delivery."

[1] The Commission's briefing notice requested the parties to brief the issue of "whether the judge erred in concluding that [the cited provisions of the logging standard] did not apply to the cited condition," and directed the parties to also "address the standard's definition of 'logging operations' in its entirety, including the phrase 'to the point of delivery.' 29 C.F.R. § 1910.266(c)." The parties briefed this issue, including the same direction to discuss the entire definition of logging operations, in *Davey Tree Expert Co.*, OSHRC No. 11-2556 (ALJ Decision docketed July 2, 2013), *review granted on* July 31, 2013. This earlier case will be referred to as *Davey Tree I.*

2. Whether the ALJ erred in concluding that Davey Tree's felling operations were not of sufficient scope to constitute a logging operation where the standard does not contain a minimum number of trees that must be felled to be covered by the standard and Davey Tree felled twenty trees.

STATEMENT OF FACTS

A. Regulatory Background

In 1994, the Occupational Safety and Health Administration (OSHA) promulgated 29 C.F.R. § 1910.266(d)(2)(ii) and § 1910.266(d)(6)(i) as part of a revised logging standard codified at 29 C.F.R. § 1910.266.[2] 59 Fed. Reg. 51672 (1994). The logging standard applies to "all types of logging, regardless of the end use of the wood," and "to all logging operations." § 1910.266(b)(1), (2). The logging standard provides a non-exhaustive list of "types of logging" it covers and defines "Logging operations" 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 and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites."[3] § 1910.266(c).

[2] Section 1910.266(d)(2)(ii) prescribes requirements for first aid kits that must be at worksites "where trees are being cut." Section 1910.266(d)(6)(i) requires employees to "be spaced and [their] duties . . . organized so the actions of one employee will not create a hazard for any other employee."

[3] The types of logging listed "include, but are not limited to, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products." § 1910.266(b)(1). "Fell" means "[t]o cut down trees." § 1910.266(c).

In 1995 OSHA issued a compliance directive stating that the logging standard "applies during line clearing tree trimming operations, where any of the activities within the scope of this standard such as felling etc., are conducted." CPL 02-01-019, *Logging Operations, Inspection Procedures and Interpretive Guidance* ¶ J.8 (March 17, 1995). In August 2008, OSHA supplemented this directive by issuing another directive to "clarif[y] when § 1910.266 applies to operations in near proximity to overhead power lines."[4] CPL 02-01-045 at p. iii, ¶ VII, *Citation Guidance Related to Tree Care and Tree Removal*

[4] In the period between the issuance of the 1995 directive and Directive 45, OSHA issued several letters of interpretation and another, short-lived directive. A March 1996 letter stated that the logging standard did not apply when a power company cut down trees to make way for installation of power poles and burned the cut trees. *Memorandum From John B. Miles, Jr., Director, to R. Davis Layne* (March 12, 1996). A March 1998 letter stated that the logging standard applied to cutting down trees during line clearance work. *Letter From John B. Miles, Jr., Director, to Amelia Reinert* (March 4, 1998). A June 1998 letter withdrew the March 1998 letter. *Letter from Emzell Blanton, Jr., Deputy Assistant Secretary, to Amelia Reinert* (June 22, 1998). A July 1998 letter clarified that in light of the withdrawal of the March 1998 letter, OSHA would not issue logging citations to arborists "who are not engaged in logging operations" until discussions with arborists resolved compliance issues that they raised in response to the March 1998 letter. *Memorandum from John B. Miles, Jr., Director, to Regional Administrators and State Designees* (July 1, 1998). In March 2001, OSHA struck from the March 1996 letter the statement that the logging standard did not apply to a power company that cut down trees to make way for the installation of power poles and then burned the trees. *Letter From John B. Miles, Jr., Director, to R. Davis Layne* (March 12, 1996) (deletion noted on copy of letter maintained on OSHA's website). Finally, in June 2008, OSHA issued a directive providing that tree removal projects of arborists were covered by the logging standard if they involved the felling of any tree at the stump. *CPL-02-01-044, Citation Guidance Related to Tree Trimming and Tree Removal Operations* (June 25, 2008). OSHA cancelled the June directive when it issued Directive 45 in August 2008. Davey Tree introduced all of the documents issued between the 1995 directive and Directive 45 into evidence in *Davey Tree I*, and attached four of them as exhibits to its post-hearing brief in this case. Davey Tree's Post-Hearing Brief Exhibits (Ex.) B, C, D, E; Respondent's Exhibits H, I, J, K, and L. All of the documents are publicly available on OSHA's website except for the June 1998 letter that withdrew the March 1998 letter to Ms. Reinert. The June 1998 letter, however, is quoted in *Davey Tree I* and described in the July 1998 letter from Mr. Miles to Regional Administrators. *Davey Tree I*, Slip Op. 57-58; Davey Tree's Post-Hearing Brief Ex. D. It is therefore appropriate for the Commission to consider these documents in this case.

Operations (Aug. 21, 2008), *reprinted in* Complainant's Exhibit (Ex. C) -14 (Directive 45).

This latter directive, known as Directive 45, notes that "the removal of a tree, or even several trees, from a residential lot," does not constitute logging. Directive 45 ¶ IX. On the other hand, Directive 45 states that the logging standard applies to an employer in the tree care industry if the employer's operations go "beyond those typical of tree care operations," and the employer engages "in a tree removal project that is sufficiently large and complex to constitute a logging operation." Directive 45 ¶ IX. Directive 45 also provides criteria to assist compliance officers in determining whether a particular tree removal project is covered by the logging standard. Directive 45 ¶ IX.

The listed criteria in Directive 45 are: (1) the scale and complexity of the tree removal project; (2) the number of trees removed; (3) the type of equipment or machines used to perform the tree removal; (4) the location of the tree removal project; (5) the size of the land/lot where the tree removal project is performed; and (6) the use of mechanical equipment to remove trees. Directive 45 at ¶ IX. A., B., C., D., E., G.[5] Directive 45 also instructs OSHA Area Directors to obtain approval from OSHA's National Office to issue a logging citation to an employer "engaged in small-scale tree removal, or one whose primary business is performing tree care operations." Directive 45 at ¶ IX. H.

Directive 45 states that no one factor is determinative; instead the focus is on the "nature of the activity performed." Directive 45 at ¶ IX. Directive 45 also notes,

[5] Paragraph F lists factors that "<u>should not</u>" affect the compliance officer's determination about whether the logging standard applies. Directive 45 ¶ IX. F. (underlining in original).

however, that the scale and complexity of the project are "key" factors. Directive 45 at ¶ IX. A.

B. Davey Tree's Line Clearance Work for Alabama Power

Davey Tree provides a range of tree and landscape services, including line clearance work for utilities, across the United States and in Canada. Decision and Order (Dec.) 2. Davey Tree entered into a three-year line-clearance contract with Alabama Power Company, effective January 1, 2011. Dec. 2. Davey Tree contracted to remove trees that endangered power lines because they were within fifteen feet of a line, or because even though they were farther than fifteen feet from the line, their condition or lean posed a risk that they could fall onto the line. Dec. 2-3.

Davey Tree kept track of most of the trees that it cut down for regular maintenance work because it was paid a per-tree fee for this work in addition to a mileage charge.[6] Dec. 3; Tr. 347-51, 594-96. Davey Tree did not, however, keep track of how many trees it removed during work referred to as "hot spotting." Tr. 347-49, 393-94, 594-96, 709. For hot spotting work, Alabama Power identified the trees to be cut down in a designated area, and Alabama Power and Davey Tree negotiated an hourly charge for the hot spotting work. Dec. 3; Tr. 348, 356-57, 393-94. If during the hot spotting work Davey Tree identified additional trees that posed a threat to the power line, it cut down those trees as well. Dec. 3.

[6] The per-tree figure was based on the diameter-breast-height (DBH) of the tree, but was paid only for trees having a DBH of twenty inches or less. Dec. 3; Tr. 348-50, 586-87. For the period January 1, 2011, to December 8, 2011, Davey Tree's records show it received the per-tree payment for cutting down 350 trees. Dec. 13 n.3. Davey Tree was paid an hourly fee for removal of trees having a DBH of greater than twenty inches, and Davey Tree claimed that it could not determine how many of these sized trees it had cut down. Dec. 13 n.3; Tr. 586-87, 593-96, 709.

In December 2011, Davey Tree performed hot spotting work in Prattville, Alabama. Dec. 3. The designated area near a power line was slightly less than forty miles long, and the portion of the worksite that OSHA inspected was a rural area with wooded areas on both sides of a country road. Dec. 3; Tr. 28-29, 32, 122, 166-67, 311, 830-31; Exs. C-1, -7A, -9C, -10C. Davey Tree cut down approximately eighty trees over a two- to three-week period at the Prattville site; approximately sixty trees were cut down in pieces from the top using a bucket truck, and twenty were cut down from the stump.[7] Dec. 3, 11. Davey Tree either left the trees it cut down where they fell, if they fell in an unmaintained right-of-way, or transported them by truck to a dump. Tr. 188-89, 248-49, 397-98.

C. The December 8, 2011 Fatality

On December 8, 2011, seven employees from multiple crews and general foreman Randall Keith Abbott were assigned to cut down five trees as part of the Prattville hot spotting. Dec. 3; Tr. 36, 42-43, 190-91; Ex. C-2 at 1. After they cut down the first of these trees at the stump, Mr. Abbott left to supervise work being performed elsewhere and left foreman Yemil Flores in charge of the six other employees. Dec. 4; Tr. 190-91.

Mr. Flores and crew member Vincent Brown decided to cut down the next two trees jointly. Dec. 4; Tr. 62; Ex. C-3. To do so, the employees placed one rope around one tree (referred to as tree # 3), looped the rope around the second tree (referred to as tree # 2), and then secured the rope to another tree known as the anchor tree by a device

[7] Davey Tree performed hot spotting work at least one other time in 2011. Ex. C-4 at 2. During this other hot spotting work, three crews cut down trees over a two-week period. Ex. C-4 at 2. One of the crews cut down between twenty and thirty trees over this two-week period. Ex. C-4 at 2. The trees cut down during hot spotting work are in addition to the 350-plus trees Davey Tree cut down during regular maintenance work. *See supra* p. 5 n.6

known as a come-along. Dec. 4. When operated, the come-along pulls the rope to guide the felled trees' descent towards the anchor tree. Dec. 3, 4. Four employees manned the come-along, and crew member Kevin Pleitz operated the chain saw. Dec. 4; Exs. C-2 at 4, C-4 at 3-4. While operating the come-along, the four employees were closer to tree # 2 than its eighty-foot height, an unsafe practice in "any industry where trees are being felled."[8] Tr. 40-41, 126, 781.

Mr. Pleitz made a horizontal cut halfway through tree # 2 and then proceeded to make a notch cut and back cut in tree # 3. Dec. 4; Ex. C-4 at 3-4. With the last of these cuts, and with Mr. Flores, Mr. Brown, and two other employees operating the come-along, tree # 3 fell into tree # 2; tree # 2 then fell and struck Mr. Brown, killing him. Dec. 4; Exs. C-3 at 2-3, C-4 at 4.

D. The OSHA Citation and Ensuing Litigation Over the Scope of the Logging Standard

OSHA compliance officer Stephen Day inspected the Prattville worksite following the fatality. Dec. 4. Based on his inspection, OSHA issued a citation alleging two violations of the logging standard: (1) 29 C.F.R. § 1910.266(d)(2)(ii), which prescribes requirements for first aid kits that must be at worksites "where trees are being cut;" and (2) § 1910.266(d)(6)(i), which requires employees to "be spaced and the[ir] duties . . . [to] be organized so the actions of one employee will not create a hazard for

[8] It is likely, but not certain, that the employees were also within the tree length of tree # 3, which was a little over ninety feet tall and approximately fifteen feet from tree # 2. Tr. 41, 85, 126, 314; Ex. C-6. But in any event, as to tree # 3 the employees violated Davey Tree's requirement to stay at least as far away as one and one-half times the length of the tree. Tr. 217-19, 365-66, 455, 511. The logging industry considers the area within two tree lengths to be the drop zone that employees must avoid during a felling operation. Tr. 288-89; *see also* 29 C.F.R. § 1910.266(d)(6)(ii) (work areas must be "at least two tree lengths of the trees being felled"); *id.* § 1910.266(h)(1)(iii), (iv), (v) (similar requirements to stay at least two tree lengths of trees being felled).

any other employee." Dec. 5.

Davey Tree contested the citation and argued that the logging standard did not apply because the logging standard's definition of "logging operations" required both the felling and the moving of trees for there to be a logging operation.[9] Dec. 6. Davey Tree also argued that its felling of trees did not constitute logging under Directive 45. Davey Tree's Post-Hearing Brief 32-39. Directive 45 instructs OSHA compliance officers to consider various factors in determining whether to recommend issuance of a citation under the logging standard for a small-scale tree removal project or to an employer that primarily performs tree care operations.[10] Directive 45.

In response, the Secretary asserted that he reasonably construed the logging standard as applying to the felling of trees at the stump, even if no movement of the felled trees followed the felling operations. Secretary of Labor's Post-Hearing Brief 14-30. The Secretary also explained that Directive 45 confirmed the reasonableness of the Secretary's interpretation as applied to the Prattville work, and also defeated Davey Tree's assertion that it lacked fair notice of the Secretary's interpretation. Secretary's Post-Hearing Brief 33-34, 36-37, 50-54. Davey Tree also had notice of the Secretary's

[9] The logging standard defines "[l]ogging operations" 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 and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites." § 1910.266(c).

[10] The factors in Directive 45 are: (1) the scale and complexity of the tree removal project; (2) the number of trees removed; (3) the type of equipment or machines used to perform the tree removal; (4) the location of the tree removal project; (5) the size of the land/lot where the tree removal project is performed; and (6) the use of mechanical equipment to remove trees. Directive 45 ¶ IX. A., B., C., D., E, G.. Directive 45 also instructs OSHA Area Directors to obtain approval from OSHA's National Office to issue a logging citation to an employer "engaged in small-scale tree removal, or one whose primary business is performing tree care operations." Directive 45 ¶ IX. H.

interpretation because it and its subsidiary had been cited under the logging standard for similar felling operations during line-clearance work at other sites. Tr. 530-33, 800-02; Secretary's Post-Hearing Brief 53. Thus, Davey Tree's felling of trees from the stump was covered by the standard, and Davey Tree had fair notice that the standard applied to the Prattville work. Secretary's Post-Hearing Brief 14-30, 33-37, 49-54.

E. The ALJ's Decision

The ALJ vacated the citation on the ground that the logging standard did not apply to Davey Tree's felling operations at the Prattville worksite. Dec. 2, 17, 18. Although he recognized that another ALJ's decision was not binding precedent, the ALJ determined that ALJ Phillips's decision in *Davey Tree I* was "persuasive" on the applicability of the logging standard. Dec. 6; *supra* p. 1 n.1 (providing full citation and noting that *Davey Tree I* involves the same issues as this case and is before the Commission on review).

Applying ALJ Phillips's decision, the ALJ determined that the Secretary had reasonably construed the standard as applying to felling operations even if they were not followed by movement of the felled trees. Dec. 8. The ALJ determined, however, that it was not reasonable to construe the standard as applying "whenever" an arborist in the line clearing industry removed trees from the stump or to the facts of this case. Dec. 9-17. The ALJ then weighed the factors set forth in Directive 45 and concluded that "neither Davey Tree nor a reasonable person in the line-clearing industry would conclude that" the logging standard applied to the Prattville worksite. Dec. 9-17. Because the Secretary failed to establish that the standard applied, the ALJ vacated the citation. Dec. 2, 17, 18.

SUMMARY OF ARGUMENT

The ALJ properly found that the logging standard applies to the felling of trees even if the trees are not subsequently moved to a point of delivery. The word "and" in the phrase "felling and moving" trees in the definition of logging operations is reasonably construed as having a disjunctive meaning. This interpretation sensibly conforms to the language and purpose of the standard. The disjunctive reading furthers the Secretary's intent to cover all types of logging and all operations associated with logging. The Secretary's interpretation also furthers the standard's purpose of protecting those who fell trees and who work near felling operations, as felling operations are the most hazardous aspect of logging operations.

The ALJ erred, however, in determining that the Prattville work was not a logging operation covered by the logging standard. The plain language of the definition of logging operations encompasses the felling of twenty trees, as nothing in the standard limits its scope by reference to a minimum number of trees or otherwise exempts small scale logging operations. Even assuming that there were some ambiguity in the language, the Secretary's interpretation is reasonable because it sensibly conforms to the language and purpose of the standard. Moreover, application of the factors highlighted in Directive 45 underscores the reasonableness of the Secretary's interpretation. The scale and complexity of the Prattville work, along with the location and size of the land tract where the tree felling took place, demonstrate that Davey Tree was engaged in a logging operation, and none of Directive 45's other, non-"key" factors changes this result.

ARGUMENT

The logging standard, 29 C.F.R. § 1910.266, applies to "all types of logging," and "to all logging operations as defined by" the standard. § 1910.266(b)(1), (2). The logging standard defines "Logging operations" as: "[o]perations associated with felling and moving trees and logs from the stump to the point of delivery." § 1910.266(c). The ALJ correctly ruled that the standard applies to felling operations even if the trees are not subsequently moved "to the point of delivery" because the word "and" in this phrase is used disjunctively and can mean "or." Dec. 7-8.

The ALJ erred, however, in ruling that it was not reasonable to construe the standard as applying to the Prattville work. Dec. 9-17. Under the clear terms of the standard, Davey Tree's felling of twenty trees constituted a logging operation. And, to the extent the standard could be viewed as ambiguous with regard to a tree felling operation of this scope, the ALJ erred in rejecting the Secretary's reasonable determination that the Prattville work was a logging operation. Finally, Directive 45 corroborates the reasonableness of the Secretary's interpretation that an operation involving the felling of twenty trees is a logging operation, and the ALJ erred in applying Directive 45's guidance.

A. The ALJ Correctly Found that the Logging Standard Applies to Felling Operations that Are Not Followed by Any Movement of Trees From the Stump to a Point of Delivery.

The logging standard defines "Logging operations" 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 and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and

transporting machines, equipment and personnel to, from and between logging sites." § 1910.266(c). Davey Tree argued to the ALJ that trees must be both felled and moved to fit within this definition. The ALJ properly rejected this claim.

The Secretary has long construed "logging operations" to cover two types of activities: "operations associated with felling," and "operations associated with moving trees and logs from the stump to the point of delivery." *Supra* p. 3 (noting such interpretation); Dec. 8 (noting Secretary's advancement of this interpretation in *Pettey Oil Field Servs., Inc.*, 2006 WL 2050961 (No. 05-1039, 2006) (ALJ)). Under the Secretary's interpretation of the standard, therefore, *either* felling *or* moving trees and logs constitutes a "logging operation." Under this reading, the phrase "from the stump to the point of delivery" directly relates only to "moving trees and logs," and not to "felling."

While Davey Tree's position that both felling and moving of trees is required might be a permissible reading of the standard's language, the possibility of two permissible interpretations merely establishes that the language is ambiguous. Dec. 8 (agreeing with reasoning of *Davey Tree I*); *Davey Tree I*, Slip Op. 50. And if the regulatory language is ambiguous, the Secretary's reasonable interpretation of the language is controlling. *Martin v. OSHRC (CF&I Steel Corp.*), 499 U.S. 144, 150-57 (1991). The ALJ correctly determined that the Secretary's interpretation is reasonable. Dec. 8; *Davey Tree I*, Slip Op. 48-55.

An interpretation is reasonable if it sensibly conforms to the purpose and language of the standard. *CF&I*, 499 U.S. at 150-51. Courts have long recognized that "the word 'and' is not a word with a single meaning, for chameleon[-]like, it takes its color from its surroundings." *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958).

Thus, "and" can have either a conjunctive or disjunctive meaning depending on the context in which it is used in the standard. *See Reese Bros., Inc. v. United States*, 447 F.3d 229, 235 (3d Cir. 2006); *see also Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995) ("In interpreting a disputed term in a standard, we look to the provisions of the whole law, and to its object and policy."), *aff'd*, 17 BNA OSHC 1628 (5th Cir. 1996) (unpublished); Dec. 8 (noting that Commission precedent recognizes that "and" can mean "or").

As both the ALJ ruled here and ALJ Phillips explained in *Davey Tree I*, the context here shows that "and" in the phrase "felling and moving trees" is used in the disjunctive sense to mean "or." Dec. 8; *Davey Tree I*, Slip Op. 51-53. The Secretary made clear from the outset of the rulemaking that he intended the logging standard to cover "all types of logging, regardless of the end use of the wood." § 1910.266(b)(1); *Davey Tree I*, Slip Op. 51-52. This intent corroborates the Secretary's interpretation because some types of logging do not involve the movement and subsequent use of felled trees. Dec. 8; *Davey Tree I*, Slip Op. 51-52.

Similarly, the definition of logging operations does not cover just felling and moving trees; it covers "operations associated with" these activities, and it provides a lengthy but explicitly non-exhaustive list of covered activities. § 1910.266(c). The definition thus reveals the Secretary's intent to cover *any* activity associated with logging. *See Huffington v. T.C. Group, LLC*, 637 F.3d 18, 22 (1st Cir. 2011) (noting that term "associated with" has broad meaning); *infra* p. 14 (noting that associated operations are enumerated in the disjunctive).

Moreover, in the definition of "logging operations," "and" is used five additional times, and in each instance, the word is used in a disjunctive sense. For example, logging operations is defined as operations associated with "moving trees *and* logs from the stump to the point of delivery," and the standard clearly applies if only trees or only logs are moved. Dec. 8; *Davey Tree* I, Slip Op. 52. Similarly, the definition includes operations such as "marking danger trees *and* trees/logs to be cut to length," and the standard obviously applies to marking activities that involve only danger trees or only other types of trees/logs. Dec. 8; *Davey Tree I*, Slip Op. 52-53. Moreover, the activities covered by the definition include "transporting, machines, equipment *and* personnel to, from *and* between logging sites." § 1910.266(c) (emphasis added). As the ALJ correctly held, "[o]bviously, the transport of machines and personnel to a logging site would fall within the definition, even if equipment were not also moved there and even if it were move[d] 'to' but not 'between,' a logging site." Dec. 8; *Davey Tree I*, Slip Op. 53. Given the definition's numerous disjunctive uses of "and," it is reasonable to construe the first "and" as also having a disjunctive meaning. Dec. 8; *Davey Tree I*, Slip Op. 53 ("identical words and phrases within the same statute should normally be given the same meaning") (quoting *Hall v. United States*, 132 S.Ct. 1882, 1891 (2012)).

In addition, as the ALJ recognized, construing "and" to have only a conjunctive meaning would exclude from the standard's coverage the movement of trees when such operations are unaccompanied by felling activities—even though "the movement of trees sometimes takes place as long as a month after they are felled by workers who were not involved in the felling process." Dec. 8; *Davey Tree I*, Slip Op. 52. By the same logic, Davey Tree's interpretation would deny protection to logging employees who fell trees

but are not "associated" with those that move the felled trees. This interpretation would frustrate the standard's protective purpose. Dec. 8; *Davey Tree I*, Slip Op. 51-52.

For the same reasons, the word "felling" in the phrase "felling and moving trees" is independent of the phrase "from the stump to the point of delivery"; the latter phrase directly relates only to "moving trees and logs." This is because one cannot "fell" a tree "from the stump to the point of delivery." Moreover, "felling" is one of the enumerated activities following the phrase "felling and moving trees and logs from the stump to the point of delivery." Thus, "[o]perations associated with felling and moving trees and logs from the stump to the point of delivery, such as . . . felling" reinforces the point that felling, without more, constitutes a logging operation, while the movement of trees from the stump to the point of delivery may or may not be accompanied by felling (and, e.g., limbing, debarking, etc.). § 1910.266(c).

The Secretary included post-felling activities in the definition of logging operations because logging is often performed to produce forest products, and moving the felled trees to a point of delivery is part of the production of forest products. But not all logging operations involve producing forest products. § 1910.266(b)(1) (standard prescribes safety requirements for "*all* types of logging . . . includ[ing], *but . . . not limited to"* logging of "forest products") (emphasis added). For example, logging is also performed for other non-production purposes such as promoting growth of nearby trees, clearing a pipeline right-of-way, and improving fish habitat. Dec. 8; *Davey Tree I*, Slip Op. 51-52.

In each of these cases, the felled trees are not subsequently moved, but they are nonetheless logging operations. Dec. 8; *Davey Tree I*, Slip Op. 51-52; *see also* 59 Fed.

Reg. at 51699 (felling trees to clear land for construction activities a logging operation). Thus, the phrase "from the stump to the point of delivery" does not limit the standard's coverage of "felling" activities. *Asplundh Tree Expert Co. v. Dep't of Labor*, No. 01420, Slip Op. 10 (Md. Ct. Spec. App. Aug. 2, 2002) (unpublished) ("the plain language of § 1910.266 indicate[s] that its safety requirements apply to all situations in which trees are being cut down"); *In re Ed's Tree Serv., Inc.*, MOSH No. C1192-027-02, Slip Op. 6 n.5 (Comm'r Lawson Apr. 29, 2005) ("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").[11]

The Secretary's interpretation of the definition of logging operations also sensibly conforms to the standard's purpose. Felling is the most hazardous aspect of logging operations, the hazards associated with felling exist whether or not the felled trees are subsequently moved, and no other standard addresses these felling hazards. *E.g.*, 59 Fed. Reg. at 51697 ("The record clearly shows that felling activities are the most hazardous activities of the logging operation."); *Nelson Tree Servs., Inc. v. OSHRC*, 60 F.3d 1207 (6th Cir. 1995) (affirming citation under general duty clause, 29 U.S.C. § 654(a)(1), for tree felling operation).[12]

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[11] Copies of the decisions in *Asplundh Tree Expert Co.* and *Ed's Tree Serv.* are reproduced in this brief's Addendum.

[12] The conduct cited in *Nelson Tree Services* occurred in 1993, prior to the promulgation of the logging standard. In the Commission proceedings, the Secretary relied, in part, on the recognized nature of the hazard in the logging industry to prove that the cited felling operation violated the general duty clause even though the employer was felling trees for public utility line clearance purposes. *Nelson Tree Servs. Inc.*, 16 BNA OSHC 1887, 1888 (No. 93-1665, 1994) (ALJ) ("An OSHA area director testified that in the logging

In sum, the Secretary reasonably construed the definition of logging operations as covering felling operations even if there is no movement of the felled trees to a delivery point, and the ALJ properly deferred to that interpretation. *CF&I*, 499 U.S. at 150-57.

B. The Secretary Reasonably Interpreted the Logging Standard as Encompassing Davey Tree's Felling Operations for the Prattville Work.

The logging standard applies to operations associated with felling trees. 29 C.F.R. § 1910.266(b)(2), (c). Nothing in the standard limits its scope by reference to the number of trees felled or otherwise exempts small scale logging operations. § 1910.266. Thus, the felling of twenty trees from the stump during Davey Tree's Prattville work constituted a logging operation under the plain language of the standard.

The ALJ nevertheless rejected this straightforward reading of the provision, and appears to have wholly adopted ALJ Phillips's determinations that the standard was ambiguous and did not apply to these types of tree care operations. *See* Dec. 9 (referring to pages 57 through 70 of ALJ Phillps's decision in *Davey Tree I*). The ALJ erred.

No ambiguity exists if the language is plain "with regard to the particular dispute in the case," *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009) (8th Cir. 2009), and the ALJ did not point to any language in the standard that was ambiguous with regard to a felling operation involving twenty trees. With regard to the felling of twenty trees at the stump, there is simply no ambiguity. The text of the standard compels the conclusion that the phrase "operations associated with felling" trees covers Davey Tree's felling of twenty trees from the stump. § 1910.266(c).

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industry, a tree being felled is considered hazardous from the time it is first notched."), *aff'd*, 60 F.3d 1207 (6th Cir. 1995).

Even if there were some ambiguity regarding the scope of the operation to which the logging standard applies, the ALJ was required to defer to the Secretary's reasonable resolution of that ambiguity. *CF&I*, 499 U.S. at 150-57. An interpretation is reasonable if it sensibly conforms to the language and purpose of the standard. *Id.* at 150-51. The Secretary's interpretation easily meets that test.

To perform the Prattville work, over a two- to three-week period Davey Tree cut down approximately eighty trees, including about twenty trees that were cut down at the stump. Dec. 3, 11. Nothing in the standard provides a threshold number of trees that must be felled to trigger coverage of the standard or suggests that the felling of twenty trees is not covered by the standard. *E.g.*, § 1910.266(b), (c), (d), (h). Indeed, Davey Tree's own expert, Paul Cyr, testified that someone who felled trees for his or her own firewood—an operation implicitly involving less than twenty trees—would be engaged in logging. Tr. 737-38, 811-12 (stating also, at Tr. 738, "[w]hen you're felling trees, you're logging"). Moreover, there is no denying that the felling operations exposed Davey Tree's employees to one of the main hazards the logging standard addresses—the hazard of death or serious injury from being struck by a felled tree. *E.g.*, 59 Fed. Reg. at 51697 ("The record clearly shows that felling activities are the most hazardous activities of the logging operation."); *id.* at 51707 ("One of the major causes of injury in the logging industry is being hit by a tree.").

The ALJ did not defer to the Secretary's interpretation of the scope of the logging standard because he "agree[d] with Judge Phillips's conclusion that 'the Secretary is not entitled to deference insofar as [he] interprets the logging standards to be applicable to arborists in the line clearing industry whenever they are involved in removing trees from

the stump.'" Dec. 9 (quoting *Davey Tree I*, Slip Op. 70). This conclusion, however, is beside the point.

The issue before the ALJ was the reasonableness of applying the logging standard to the facts of this case, which involved Davey Tree's felling of twenty trees from the stump. *See Donovan v. A. Amorello & Sons, Inc.*, 761 F.2d 61, 63-66 (1st Cir. 1985) (whether particular set of facts satisfy general term of standard is an interpretive task to which Secretary is owed deference); *see also Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991) (purported vagueness of standard judged in light of its application to the facts of the case). That the standard does not necessarily apply "whenever" an employer in the line-clearing industry removes trees from the stump does not render the standard ambiguous with regard to felling twenty trees from the stump; much less does it undermine the reasonableness of the Secretary's interpretation that the standard applied to Davey Tree's felling operations for the Prattville work. As explained above, *supra* pp. 17-18, the text and purpose of the standard compels, or at least permits, the Secretary's interpretation that the standard covers Davey Tree's felling of twenty trees from the stump. The ALJ therefore erred in rejecting that interpretation.

C. The ALJ Relied on Faulty Reasoning in Finding that the Logging Standard Did Not Apply to the Prattville Work.

Notwithstanding the plain language of the standard, or at a minimum the reasonableness of the Secretary's interpretation, the ALJ refused to apply the Secretary's interpretation of the phrase "operations associated with felling" trees because: (1) the Secretary had issued inconsistent interpretations in the past, Dec. 9 (incorporating *Davey Tree I*, Slip Op. 57-60); (2) Directive 45 did not provide adequate notice that the logging standard would apply to "typical" line clearance projects, Dec. 9 (incorporating *Davey*

Tree I, Slip Op. 60-63); and (3) the regulatory history of the logging standard and differences between the logging and line clearance industries showed that the Secretary had not adequately considered the "pertinent policy considerations." Dec. 9 (incorporating *Davey Tree I*, Slip Op. 63-70). None of these renders the plain meaning of the standard ambiguous or justifies the ALJ's refusal to defer to the Secretary's resolution of any ambiguity in the phrase "operations associated with felling."

1. *The Existence of Prior Inconsistent Interpretations Does Not Justify the ALJ's Refusal to Defer to the Secretary's Reasonable Interpretation of the Logging Standard Presented in the Davey Tree Citation.*

The ALJ determined that the existence of prior inconsistent interpretations of the logging standard undermined the Secretary's claim of deference. Dec. 9 (incorporating *Davey Tree I*, Slip Op. 57-60). But only a 1996 interpretive letter expresses an interpretation even arguably different than the one embodied in the citation, and that interpretation was withdrawn in 2001.[13] *Davey Tree I*, Slip Op. 57-58 (quoting letter and noting its withdrawal).

The Supreme Court has repeatedly ruled that a reasonable interpretation is still entitled to deference even if it is at odds with an earlier interpretation, so long as the latter interpretation does not involve unfair surprise. *Long Island Care at Home, Ltd v. Coke*, 551 U.S. 158, 170-71 (2007); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009). Moreover, in 2011, Davey Tree could not have relied on the 1996 letter, and the Secretary's current interpretation could not have caused unfair

[13] This interpretive letter refers to a power company cutting down and burning an unspecified number of trees to make way for the installation of power poles. *Davey Tree I*, Slip Op. 57. The interpretive letter does not refer to tree care employers or to felling trees at the stump. *Id.*

surprise to Davey Tree given the letter's revocation and the existence of Directive 45. *See supra* pp. 17-18 (explaining that no ambiguity exists with regard to standard's scope as applied to facts of this case and in any event the Secretary's interpretation sensibly conforms to wording and purpose of standard); *infra* p. 32 (explaining that in light of prior citations Davey Tree had received, Davey Tree knew or should have known of the Secretary's interpretation). The ALJ thus erred in relying on any perceived inconsistency of any prior interpretations to reject the Secretary's interpretation that felling twenty trees at the stump was covered by the logging standard.

2. *Directive 45 Supports the Reasonableness of the Secretary's Interpretation.*

The expansive language and clear purpose of the logging standard provide adequate notice that the standard applies to felling operations involving numerous trees cut from the stump. Directive 45 bolsters this view, and the ALJ's determination to the contrary was in error.

Directive 45 was issued more than three years before Davey Tree began the Prattville work. Directive 45; Dec. 3. In relevant part, Directive 45 states that the logging standard applies to tree removal operations performed by tree care companies such as Davey Tree "when an employer's operations go beyond those typical of tree care operations, and [the employer] engages in a tree removal project that is sufficiently large and complex." Directive 45 ¶ IX.

For guidance on what constitutes a "sufficiently large" tree removal operation, Directive 45 distinguishes between cutting down "one or a few trees" on a lot and cutting down a "substantial number of trees on a large tract of land." Directive 45 ¶ IX. A.1. For complexity, the Directive distinguishes primarily between operations that "may take only

a few hours to a few days" to complete and those that "typically take days to months" to perform. Directive 45 ¶ IX. A.2. Directive 45 therefore supports the reasonableness of the Secretary's interpretation of the logging standard because it provided additional notice that the logging standard applied to the felling of twenty trees at the stump over a two- to three-week period.

The ALJ indicated that prior inconsistences in the Secretary's interpretation of the logging standard prior to issuance of Directive 45 lessened the notice provided by Directive 45. Dec. 9 (incorporating *Davey Tree I*, Slip Op. 60-61). But the ALJ, like ALJ Phillips, did not explain what aspects of Directive 45 were less clear in light of the interpretive history that preceded its issuance. Dec. 9; *Davey Tree I*, Slip Op. 60-61. And, as previously noted, *supra* pp. 20-21, agencies are free to change their interpretation and still receive deference.

The ALJ also pointed to Directive 45's statement that the logging standard applied "when an employer's operations go beyond those typical of tree care operations, and [the employer] engages in a tree removal project that is sufficiently large and complex to constitute a logging operation." Dec. 9 (incorporating *Davey Tree I*, Slip Op. 61). Thus, the ALJ reasoned, Davey Tree did not have notice that the logging standard applied to felling twenty trees because the evidence establishes that the Prattville work was a "typical line clearance operation." Dec. 9, 12.

Directive 45, however, evinces *no* intent to exclude typical *line clearance* operations; the language on which the ALJ relied instead refers to typical *tree care* operations, that is, "the trimming, pruning, repairing, and maintaining of trees."

Directive ¶¶ VII., IX. Felling twenty trees at the stump goes well beyond typical "trimming, pruning, repairing, [or] maintaining of trees."[14]

The ALJ further relied on the fact that at the hearing compliance officer Day acknowledged that Directive 45 does not define terms "such as 'substantial' number of trees, 'large' tract of land and 'rural' or 'remote' areas," and that therefore OSHA's compliance officers must exercise judgment in applying Directive 45's factors. Dec. 10 (citing Tr. 153-57). But compliance officer Day correctly testified that Directive 45 distinguishes between the removal of a "few" trees within short period of time and removal of more than a few trees over several weeks, and that the Prattville work covered a large rural area. Tr. 119-23. Compliance officer Day's acknowledgement that judgment had to be exercised in applying Directive 45's factors does not undermine the reasonableness of the Secretary's interpretation. *See supra* pp. 17-18 (explaining that no ambiguity exists with regard to standard's scope as applied to facts of this case and in any event the Secretary's interpretation sensibly conforms to wording and purpose of standard); *infra* pp. 27-32 (explaining that proper interpretation of Directive 45 supports Secretary's position).

Additionally, the ALJ erred to the extent he relied on Directive 45's instruction to OSHA's Area Directors to obtain approval from OSHA's National Office before issuing

[14] In fact, Directive 45 clarified that OSHA's prior 1995 Directive had intended to convey that the logging standard applied to line clearance tree trimming operations "where felling etc. are conducted" near power lines. *See* Directive 45 at p. iii, ¶ VII (supplementing paragraph J.8 of 1995 Directive to clarify when logging standard applied to such operations); CPL 02-01-019 (CPL 2-1.19, *Logging Operations, Inspection Procedures and Interpretive Guidance* ¶ J.8 (March 17, 1995) ("This standard applies during line clearing tree trimming operations, where any of the activities within the scope of this standard such as felling etc., are conducted.").

a citation under the logging standard to "employers engaged in small-scale tree removal, or whose primary business is performing tree care operations." *See* Dec. 9 (incorporating *Davey Tree I*, Slip Op. 61-62). This focus improperly ignores the context surrounding the issuance of Directive 45. OSHA was well aware that the tree care industry opposed OSHA's view that the logging standard applied to some of that industry's tree removal activities. *See* Davey Tree Post-Hearing Brief Ex. D (copy of letter, discussed in *Davey Tree I*, Slip Op. 57-58, noting OSHA's intent to discuss with arborists their concerns over applicability of logging standard). OSHA's related concern with ensuring consistency in the issuance of citations under the logging standard to employers in the tree care industry in no way detracts from the reasonableness of the Secretary's interpretation that the standard applies to the felling of twenty trees from the stump in a rural area.

3. *In Promulgating the Logging Standard, the Secretary Considered the Pertinent Policy Considerations.*

The ALJ further erred in rejecting the Secretary's interpretation on the ground that the Secretary did not consider the line clearing industry when promulgating the logging standard. The ALJ faulted the Secretary on this score because: (1) the regulatory history of the logging standard (including the consideration of economic costs) did not mention the line clearance industry; (2) loggers usually work independently while line clearers work as a team; (3) line clearers fell danger trees while, in the ALJ's view, the logging standard reflects OSHA's preference that loggers leave danger trees standing or use mechanical felling techniques to fell them; (4) loggers rarely work near power lines but line clearers always do; and (5) it was unclear whether the "special circumstances" that led OSHA to allocate the cost of protective boots to loggers (rather than to their employers) were present in the line clearance industry. Dec. 9 (incorporating *Davey Tree*

I, Slip Op. 63-70). None of these establish that the Secretary failed to consider pertinent policy considerations.[15]

The proposed rulemaking for the logging standard used (and the standard uses) expansive language to capture "all types of logging" and felling operations because the most pertinent policy consideration is that the felling of trees is equally hazardous regardless of the purpose for which the tree is felled. 54 Fed. Reg. 18798, 18799-00, 18807-08, 18812 (May 2, 1989) (notice of proposed rulemaking); 59 Fed. Reg. at 51672, 51680, 51681, 51697, 51707, 51724 (preamble to final standard); *see Nelson Tree Servs.*, 60 F.3d at 1210 (tree felling hazardous regardless of purpose for which tree is felled). In addition, during the rulemaking OSHA recognized that employers outside of the logging industry would be governed by the standard's provisions. 59 Fed. Reg. at 51674.

Since the standard's costs and benefits are based on the activities performed, rather than the standard industrial classification of the employer, OSHA had no obligation to analyze costs separately for industries that perform those activities only sporadically. *See UAW v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994) (because the lock out tag out standard applied based on risk of performing service and maintenance on certain types of machines, OSHA did not have to perform industry-by-industry analysis of risks). Thus, the absence of specific mention of the line clearance industry does not

[15] The cases cited in *Davey Tree I* as support for the contrary conclusion, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), and *United States Postal Serv.*, 21 BNA OSHC 1767 (No. 04-0316, 2006), are inapposite. The relevant portion of *Christopher* notes that deference is not appropriate when there are reasons to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter, 132 S. Ct. at 2166; there are no such reasons here. Similarly, the relevant portion of *United States Postal Service* relied on the post-citation issuance of a letter that contradicted (in the Commission's view) the interpretation embodied in the citation, 21 BNA OSHC at 1773 n.8; no such circumstance exists here.

indicate that applying the standard to that industry raises any new policy issues when an employer in that industry engages in felling operations involving numerous trees.

The other factors on which the ALJ relied provide even less support for his conclusion. The logging standard contains provisions for employees working interdependently and for working near power lines. *E.g.*, § 1910.266(d)(6), (7), (8), (h)(1)(iv), (v). Therefore, the differences in the working arrangements in the two industries (logging and line clearance) and the frequency with which their employees work near power lines do not implicate any pertinent policy consideration the Secretary had to consider in promulgating the standard.

Similarly, the standard allows employers to use any safe felling method for danger trees. § 1910.266(h)(vi). As such, the frequency with which line clearers use non-mechanical felling methods likewise does not implicate any pertinent policy consideration the Secretary had to consider separately. And the Secretary had no obligation to explain why he was or was not allocating the costs for protective boots for line clearance work that constitutes logging in the same manner as he did for logging work generally.[16] *See UAW*, 37 F.3d at 670.

[16] Indeed, it does not necessarily follow from the Secretary's interpretation that Davey Tree's line clearers would have to bear the cost of protective boots for performing logging operations. There is no reason to believe on this record that the line clearers need different personal protective footwear when they perform felling operations that fall under the logging standard than when they perform felling operations that do not. *See* §§ 1910.136 (general standard for protective footwear), 1910.266(d)(1)(v) (logging standard provision for protective footwear). And to the extent the ALJ thought the Secretary had to explain in this case the interplay between the logging standard and the personal protective equipment standard, the ALJ erred. *See Bigelow v. Dep't of Defense*, 217 F.3d 875, 878 (D.C. Cir. 2000) (agency has no affirmative obligation to explain the interpretation it advances in an adjudication).

D. The ALJ Also Erred in His Application of the Directive 45 Factors to Davey Tree's Prattville Work.

As explained above, the language and purpose of the logging standard provide adequate notice that it applies to the felling of twenty trees from the stump. *See supra* pp. 17-18. The ALJ, however, ignored the text of the standard and looked solely to Directive 45 to determine the reasonableness of the Secretary's interpretation. Dec. 9-17. This was error. *See, e.g.*, *Public Utilities Maintenance, Inc.*, 23 BNA OSHC 1433 (2d Cir. 2011) (unpublished) (affirming Secretary's reasonable interpretation despite conflicting interpretation in a directive); *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1910 n.3 (No. 94-1460, 1997) (Compliance and Enforcement Directives (CPLs) are not binding on the Secretary). Moreover, the ALJ's application of Directive 45 was flawed.

Directive 45 directs compliance officers to evaluate six factors in deciding whether to recommend issuance of a citation under the logging standard: (1) the scale and complexity of the tree removal project; (2) the number of trees removed; (3) the type of equipment or machines used to perform the tree removal project; (4) the location of the tree removal project; (5) the size of the land/lot where the tree removal project is performed; and (6) the use of mechanical equipment to perform the tree removal project. Directive 45 ¶ IX. A., B., C., D., E., G. As expressly stated in Directive 45, no one factor is determinative; instead the focus is on the "nature of the activity performed." Directive 45 ¶ IX. Thus, applying the guidance of Directive 45, the Secretary properly determined that Davey Tree's Prattville work constituted a logging operation.

Directive 45 notes that the first factor—the scale and complexity of the tree removal project—is the "key" factor. Directive 45 ¶ IX. A. With regard to scale, Directive 45 distinguishes between projects involving one or several trees from larger

scale tree removal projects. Directive 45 ¶ IX. A.1, B. With regard to complexity, Directive 45 refers to the time and equipment needed to perform the job, and distinguishes (with regard to the time aspect) between projects that take a few hours to a few days and projects that take days to months. Directive 45 ¶ IX. A.2. Additional guidance regarding complexity refers to the presence of unique hazards, projects involving several work crews in several areas, the use of directional felling methods, and the use of heavy machinery. Directive 45 ¶¶ IX. A.3, B.2.

The record establishes that the scale and complexity of Davey Tree's Prattville work support the Secretary's determination that the work was a logging operation because the work: (1) involved more than a few trees; (2) took weeks to perform; (3) involved directional felling methods; (4) involved multiple crews at multiple locations; and (5) involved unique hazards because Davey Tree felled dead trees. Tr. 119-23; Directive 45 ¶ IX. A., B. The ALJ nevertheless determined that the scale and complexity of the work did not support the Secretary's determination that Davey Tree was engaged in a logging operation because Davey Tree felled "only 20" trees from the stump and, according to Davey Tree's expert Mr. Cyr, the project's scale was small and the work was not complex because it did not involve rough terrain or environmental obstacles. Dec. 10-12.

The ALJ's application of the scale and complexity factor is erroneous. Mr. Cyr's testimony that the project's scale was small, and that the ALJ apparently thought twenty trees was a small number of trees, cannot override the fact Directive 45 makes clear that felling more than a few trees supports a determination that the scale of the operation is sufficient to constitute a logging operation. Directive 45 ¶ IX. A.1, B. Similarly, Mr.

Cyr's opinion about the complexity of the project does not override the fact that the Prattville work involved numerous aspects that Directive 45 notes are indicative of sufficient complexity to constitute a logging operation: the Prattville project took weeks to perform, involved directional felling methods, involved multiple crews at multiple locations, and involved unique hazards because Davey Tree felled dead trees. Directive 45 ¶ IX. A.2, A.3, B.2; Tr. 119-23.

The record also establishes that three of the remaining five factors also support the Secretary's determination that Davey Tree was engaged in a logging operation. The number of trees factor is "an example of the concept of project scale." Directive 45 ¶ B; *see* Dec. 13 (noting that number of trees "was addressed under Factor A"). Thus, because Davey Tree felled more than a few trees, this factor weighs in favor of finding that Davey Tree engaged in a logging operation.

The ALJ nevertheless determined that this factor did not weigh in the Secretary's favor because Davey Tree was not "harvesting large numbers of trees for useable wood," and did not use heavy machinery. Dec. 13 (quoting Directive 45 ¶ IX. B.1.a, and citing Directive 45 ¶ IX. B.2). But the fact that logging operations "typically" involve "harvesting large numbers of trees for useable wood" says nothing about the atypical situation in which trees are not moved after the felling operation (and therefore are not harvested). Directive 45 ¶ IX. B.1.a. And the fact that felling multiple trees "may . . . necessitate the use of heavy machinery" likewise does not undermine the guidance Directive 45 provides that a project involving several work areas and work crews and the use of directional felling methods to cut down multiple trees is indicative of a logging

operation, even if heavy machinery is not used.[17] Directive 45 ¶ IX. B.2; *see also infra* pp. 31-32 (explaining that ALJ misapplied factors directed to type of equipment used).

The location of the Prattville work also indicates that Davey Tree was performing a logging operation. For this factor, Directive 45 notes that logging operations "[t]ypically . . . take place in rural or remote areas, on undeveloped land, or on land that is to be developed." Directive 45 ¶ IX. D. Workers in these areas, Directive 45 further notes, may face increased difficulty in obtaining medical care in the case of an accident. *Id.* Thus, "[i]f a number of trees are being removed in a remote or rural location, it is likely that the" the logging standard applies. *Id.*

Compliance officer Day testified that the Prattville work site was a rural area, and photographic evidence confirms the wooded, undeveloped nature of the area in which the fatal accident occurred. Tr. 28-29, 32, 113, 120, 122, 166-67, 830-31; *see also* Tr. 197 (Mr. Abbott, Davey Tree's general foreman, testifying that the worksite was woody with a lot of brush and a flat plantation); Exs. C-1, -7A, -9C, -10C (photographs). The ALJ nonetheless concluded that this factor supported Davey Tree's contention that it was not engaged in a logging operation because the location did not affect "the availability of medical services, paved roads, or cell phone service." Dec. 15.

Again, the ALJ erroneously applied Directive 45. Neither common sense nor Directive 45 suggests that houses, paved roads, and medical services cannot exist in or

[17] The provision on which the ALJ relied to determine that the non-use of heavy machinery weighed against the Secretary, paragraph IX. B.2, states:

> Projects that involve the removal of multiple trees would be expected to present greater complexity, for example, if the trees are very large or tall. Such projects may involve several work areas and work crews, and require the use of particular felling methods to ensure the trees fall in the intended direction, and necessitate the use of heavy machinery.

near rural and undeveloped areas. That a paved road bisected the rural, undeveloped area of the Prattville work and provided relatively prompt access to medical services does not undermine the evidence establishing the area as rural.

The size of the area where Davey Tree felled trees also supported the Secretary's determination that the Prattville work was a logging operation. Directive 45 notes under this factor that "logging operations are performed on large tracts of land where there is space to cut trees down at the stump." Directive 45 ¶ IX. E. As the ALJ found, the "project spanned 39.81 miles," and Davey Tree cut down many trees down at the stump. Dec. 3, 16.

The ALJ apparently thought this factor was neutral, because in applying this factor he noted only that the size of the land was "consistent with both line-clearing work and a logging operation." Dec. 16. But it is irrelevant that the size of the land is consistent with uses other than logging, such as line-clearing work; the size of the Prattville worksite supports the Secretary's conclusion that Davey Tree was engaged in logging operation because it was a "large tract of land" with "space to cut trees down at the stump." Directive 45 ¶ 45 IX. E.

The ALJ also erred in placing significant weight on the factors describing the type of equipment used to perform the tree removal project. These factors refer to machinery used for mechanical felling operations and other logging operations related to the movement of felled trees and logs. Directive 45 ¶¶ IX. C, G. Although the use of mechanical felling equipment is a clear indicator of a logging operation, the non-use of such equipment does not support the contrary conclusion because using a chain saw to cut down trees is a logger's usual method of felling trees. *E.g.*, 59 Fed. Reg. at 51672

(felling "usually [done] by chain saws"). Similarly, because the logging standard applies even when felled trees are not moved, the absence of the remaining equipment described in Directive 45 does not support the conclusion that a particular felling operation is not a logging operation.

The ALJ's misplaced focus on Directive 45 also caused him to overlook the record evidence showing that a reasonable person familiar with the logging industry would have recognized that the logging standard applied to the Prattville work. Mr. Cyr, Davey Tree's expert, testified that a person cutting down trees for his or her own firewood was engaged in logging. Tr. 737-38, 811-12. Thus, although the ALJ properly rejected Mr. Cyr's view that some use of the wood was necessary to satisfy the definition of "logging operations," the ALJ erred in not finding that Mr. Cyr's testimony shows that felling more than a few trees from the stump is a felling operation of sufficient scope to trigger application of the logging standard. *E.g.*, Tr. 738 ("When you're felling trees, you're logging").

Indeed, and perhaps even more important, Davey Tree had *actual* knowledge that the Secretary interpreted the logging standard as applying to line-clearance operations involving the felling of more than a few trees because the Prattville work occurred after Davey Tree and its subsidiary had been cited under the logging standard for similar felling operations during line clearance work. Tr. 530-33, 800-02. At a minimum, the evidence shows that the question was close enough that Davey Tree had a duty to inquire before proceeding on the assumption that the logging standard did not apply. *See Corbesco, Inc. v. Dole*, 926 F.2d 422, 428 (5th Cir. 1991) (applying cases, including *Fluor Constructors, Inc. v. OSHRC*, 861 F.2d 936, 942 (6th Cir. 1988), holding that

employer with doubts about the application of an ambiguous standard has duty to seek clarification from OSHA); *Caterpillar Inc.*, 15 BNA OSHC 2153, 2162 (No. 87-0922, 1993) ("If Caterpillar, as it claims, felt that it needed to fill the gaps in a vague regulation, it could have asked OSHA what criteria it should apply").

In sum, the ALJ erred in determining that Directive 45 did not apprise a reasonable person familiar with the tree clearing industry that the logging standard applied to the Prattville work, and erred in his application of the Directive 45 framework to the facts of this case.

CONCLUSION

For the foregoing reasons, the ALJ erred in vacating the citation. The Commission should therefore reverse the decision and remand the matter for a determination on the cited violations of 29 C.F.R. § 1910.266(d)(2)(ii) and § 1910.266(d)(6)(i).

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CERTIFICATE OF SERVICE

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