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

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Notice of Decision

In Reference To:

Secretary of Labor v. Tony Watson, dba Countryside Tree Service

OSHRC Docket No. 16-2022

1. Enclosed is a copy of my decision. The entire record, including this decision, shall constitute the report of this Administrative Law Judge pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 661(j). The Judge's report, which includes this decision, will be filed with the Commission's Executive Secretary on **27 September 2019.** *See* Commission Rule 90(b), 29 C.F.R. § 2200.90(b).[1] The Executive Secretary will then issue a "Notice of Docketing of Administrative Law Judge's Decision" that notifies all parties of the date that the Executive Secretary dockets the Judge's report, and that will state the date by which a party must file a petition for discretionary review.

2. *Commission final order.* The decision shall become a final order of the Commission thirty (30) days from the date the Executive Secretary dockets the decision, unless a Commission member directs review of the Decision within that time. *See* Section 12(j) of the Act; Commission Rule 90(f), 29 C.F.R. § 2200.90(f).

3. *Party adversely affected or aggrieved by the decision.* A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review with the Executive Secretary at any time following the service of the Judge's decision on the parties but no later than 20 days after the date of docketing of the Judge's report. *See* Commission Rule 91(b), 29 C.F.R. § 2200.91(b). The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street NW, Suite 980
Washington, D.C. 20036-3457

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[1] OSHRC's new Rules of Procedure were effective June 10, 2019 and all references contained herein refer to these revised Rules. Rules of Procedure, 84 Fed. Reg. 14554 (April 10, 2019) (to be codified at 29 C.F.R. pt. 2200). (https://www.federalregister.gov/documents/2019/04/10/2019-06581/rules-of-procedure).

The full text of the rule governing the filing of a petition for discretionary review is Commission Rule 91, 29 C.F.R. § 2200.91.

4. *Correction of errors in the Judge's report.* Up to the time that either the Commission directs review of the decision or the decision becomes a final order of the Commission, a request to correct clerical errors arising through oversight or inadvertence in the decision or in other parts of the Judge's report shall be filed with the undersigned Judge, by motion, pursuant to Commission Rule 90(b)(4)(i), 29 C.F.R. § 2200.90(b)(4)(i). Motions shall conform to Commission Rule 40, 29 C.F.R. § 2200.40.

5. *Relief from default.* Requests for relief from default or for reinstatement of the proceeding may be filed with the undersigned Judge, by motion, until the date the Executive Secretary dockets the Judge's report. *See* Commission Rule 90(c), 29 C.F.R. § 2200.90(c). Motions shall conform to Commission Rule 40, 29 C.F.R. § 2200.40.

6. *Filing with Executive Secretary.* Except for motions filed to correct errors in the Judge's report discussed in paragraph 4 above, on or after the date the Executive Secretary dockets the Judge's report, all documents shall be filed with the Executive Secretary. *See* Commission Rule 90(d), 29 C.F.R. § 2200.90(d).

William S. Coleman
Administrative Law Judge

Dated: SEP 16 2019

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

SECRETARY OF LABOR,

Complainant,

v.

TONY WATSON, d/b/a Countryside Tree Service,

Respondent.

OSHRC DOCKET No. 16-2022

APPEARANCES:

For the Complainant:

Terrence Duncan, Esq.
Office of the Solicitor
U.S. Department of Labor
New York, New York

For the Respondent:

William Fanciullo, Esq.
Fanciullo Law Firm
Slingerlands, New York

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER

Countryside Tree Service is a sole proprietorship of the Respondent, Mr. Tony Watson, that is engaged in the tree service business in Schenectady, New York. On May 4, 2016, a five-person crew that Watson led was removing trees in a residential area when a new employee – his

first day on the job in the tree service industry – got ensnared in the Respondent's woodchipper[1] and was killed. Officials from the Albany area office of the Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation, after which on November 2, 2016, OSHA issued the Respondent a one-item willful citation and a four-item serious citation. OSHA proposed the then maximum permissible penalty for the willful citation of $124,709, and proposed penalties totaling $17,102 for the four serious citation items.

The willful citation alleged that on the day of the fatality the Respondent violated section 5(a)(1) of the Occupational Safety and Health Act of 1970. 29 U.S.C. §§ 651-678 (the Act). Section 5(a)(1) is commonly known as the "general duty clause" and requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The willful citation alleged that on the day of the fatality, the Respondent violated section 5(a)(1) at three separate worksites (each worksite being alleged as a separate instance of the alleged violation) in the following manner:

> On or about May 4, 2016, employees were exposed to rotating blades and moving parts while feeding tree limbs into the Bandit Hand Fed Wood Chipper (Model # 250, Serial # 19349) in that the employer failed to ensure that only employees trained in safe operation operated chippers and that only safe operating practices and techniques were used for feeding the chipper.

The four-item serious citation alleged violations of certain personal protective equipment (PPE) standards codified in subpart I of 29 C.F.R. pt. 1910. The serious citation items alleged that at three separate worksites on the day of the fatality there were failures (1) to wear leg protection while operating chainsaws, (2) to use protective eyewear during tree removal, tree

[1] This piece of equipment is referred to in the hearing record variously as a "woodchipper" or "wood chipper," "brush chipper," and simply "chipper." All similar references in this decision pertain to that single item of equipment.

trimming, and feeding a wood chipper, (3) to wear protective helmets during overhead crane operations and tree trimming from height, as well as for protection from struck-by hazards while loading a wood chipper, and (4) to train employees on certain PPE that employees were required to use.

The Respondent filed a timely notice of contest and thereby invoked the jurisdiction of the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Act. 29 U.S.C. § 659(c). The Commission docketed the matter on December 5, 2016, and the Secretary thereafter filed his formal complaint wherein the Secretary re-alleged the allegations set forth in the citations, to which the Respondent filed an answer denying the alleged violations and interposing certain defenses. The Commission's Chief Judge assigned the matter to the undersigned for hearing and decision. The hearing was conducted in Albany, New York, on October 25-27, 2017. Post-hearing briefing was completed on March 19, 2018.

The principal issues for decision are as follows:

- Did the Secretary prove by a preponderance of the evidence that Watson violated the PPE standards respecting leg protection, eye protection, protective helmets, and the training requirement for those items of PPE? (Citation 1, items 1 through 4)

  Decision: Yes. The Secretary proved all four alleged PPE violations.

- Did the Secretary prove by a preponderance of the evidence that inadequately trained workers were feeding the chipper, and that workers were feeding the chipper using unsafe practices, at any of the three worksites on May 4, 2016? (Citation 2)

  Decision: Yes. The Secretary proved all elements of the alleged general duty clause violation.

- Did the Secretary prove by a preponderance of the evidence that the violation of the general duty clause was willful within the meaning of section 17(a) of the OSH Act? (Citation 2)

  Decision: Yes.

- What are the appropriate penalties for the five established violations for the Commission to assess de novo under the criteria of section 17(j) of the Act?

Decision: Penalties totaling $66,986 are assessed.

FINDINGS OF FACT

The following facts were established by at least a preponderance of the evidence:

1. The Respondent, Tony Watson, owns and operates a sole proprietorship in the tree service industry based in Schenectady, New York, that he started around 1995. (T. 470). Watson does business as "Countryside Tree Service." Watson's sole proprietorship is in an industry that affects interstate commerce, and it employs employees.

2. On the day of the fatality, May 4, 2016, the Respondent provided tree care services at three different single-family residences in the following sequence: Church Road, DiBella Drive, and Placid Drive. Each of these three jobs required the use of a mobile crane, so Watson arranged with another company to provide a crane and operator for the three jobs. The crane operator that day had operated a crane on the Respondent's jobs about 30 to 35 times before. (T. 444).

3. For that day's work, Watson lined up a crew of five persons comprised of himself and four employees to work at all three worksites. Two of the employees were experienced workers in the tree service industry, and both had prior experience working for Watson. One of the experienced employees was Brendon Andres (Andres), who had worked for Watson intermittently for a total of about nine months over the preceding two years. The other experienced employee was Robert Burton (Burton), who had worked for Watson intermittently for a total of about nine months over the preceding four years. (T. 106, 501-503).

4. The other two employees had no prior experience in the tree service industry and were both newly employed by Watson. (T. 473). One of the new employees was John Ciaccio

(Ciaccio), who was a friend of Andres. (T. 116). The day of the fatality was Ciaccio's third day working for the Respondent and likewise his third day of work in the tree service industry. (Ex. C-25, p. 55). Watson knew that both Ciaccio and the decedent had no prior experience in the tree service industry, and he knew that they "definitely [did] not know how to run the chipper."[2] (T. 473).

5. The decedent was age 23 and he had no prior experience working in the tree service industry. The day he was killed was his first day working for the Respondent. (T. 137).

6. The decedent and Burton were friends. Before hiring the decedent, Watson had previously become acquainted with the decedent through Burton, and it was Burton who had asked Watson to hire the decedent. (T. 156; Ex. C-25, pp. 30-31). In part as a favor to both Burton and to the decedent, Watson hired the decedent to begin working on May 4, 2016.

7. Watson later told OSHA officials that he knew the decedent was "green" and "never had any experience in doing … tree work," and that "he really didn't know anything." (Ex. C-25, pp. 30 & 37). Watson also told OSHA officials that, being aware of the decedent's inexperience, the decedent had been Watson's "concern all day long" and that "I had my eye — any time there was something going on." (*Id.* at 85). Watson told investigating police in the immediate aftermath of the fatality that the decedent "wasn't hired or trained to operate any of the machinery including … [the] brush chipper." (Ex. C-16). Watson told OSHA officials that he "definitely didn't need [the decedent] … for any kind of brush removal" that day and that he "was basically having [the decedent] come in to basically rake" (Ex. C-25, pp. 57-58) and to be a "helper and a cleaner." (Ex. C-16).

[2] Watson's use of the verb "run" in the context here was to connote the feeding of material in the chipper, not operating the chipper's controls. (T. 475). In other contexts, the act of "operating" the chipper includes other operational activities in addition to the act of feeding material into a running chipper. (T. 573, 597, 601-02).

8. At about 7:45 a.m. on May 4, 2016, the four employees gathered outside Watson's residence on Church Road in Schenectady, from where Watson operates his business. (Ex. C-25, p. 32). The workers arrived in pairs—Burton with the decedent, and Andres with Ciaccio. (T. 115). While the four employees waited outside for Watson to emerge from his house, Andres took the initiative to orient the decedent to two aspects of the chipper—the "forward/reverse bar,"[3] which is situated over the infeed hopper, and the two "last chance cables," which dangle inside the infeed hopper near the infeed wheels.[4] (T. 115, 145-46, 155-56; Ex. C-25, pp. 31-32, 117-18). Andres did so unprompted and without any direction from Watson. In Andres' view, the "guidance" he provided the decedent "was not enough to know how to properly use the chipper," but was rather simply about "some safety features of the chipper in hopes that he wouldn't need to use them." (T. 137).

9. Upon emerging from his house, Watson gave the crew the street address for the first of the day's three jobs, which was on the corner of West Lydius Street and Church Road. (Church Road is the same street on which Watson resides and where the crew was gathered). (T. 115, 176; Ex. C-16). Watson did not provide any safety or work instructions to the decedent or to anyone else before departing his residence for the day's first job. (T. 176). The crew departed Watson's residence at about 8:00 a.m. (Ex. C-25, p. 33).

10. Watson was the supervisor of the work crew at all three worksites on May 4, as well as a working member of the crew. (T. 106-107, 485, 501). Watson did not expressly delegate any supervisory responsibilities to the two experienced employees, but Watson believed that

[3] The forward/reverse bar is identified by several other names in the manufacturer's manual: "feed control handle," "Forward-Off-Reverse Control Bar," and "Feedwheel Control Bar." (Ex. R-24, manual pages 19, 24 & 25).

[4] The infeed wheels are referred to as "feedrolls" in the manufacturer's manual. (Ex. C-24, manual page 27).

both implicitly understood that Watson relied on them to maintain proper work procedures with respect to the two inexperienced workers. (T. 485). The experienced employees, however, did not understand that Watson was relying upon them to supervise the two inexperienced employees. (T. 143).

11. Other than being shown the control bar and the last chance cables, neither Ciaccio or the decedent received any formalized training on the chipper at any time before arriving at the first work site on May 4, including reading any material or viewing any video regarding the safe operation of the chipper, reviewing the safety decals that the manufacturer had affixed to the chipper, or observing any demonstrations or instruction on operating the chipper. (Ex. C-25, p. 117).

12. Ciaccio and the decedent did not receive any formal or informal instruction or training on utilization of personal protective equipment, including protective eyewear or protective helmets, nor was either instructed on when the wear of protective eyewear or protective helmets was required. (T. 494-95).

Church Road Worksite

13. The crew arrived at the Church Road worksite around 8:15 a.m. and worked there until about 11:30 a.m., removing eleven white pine trees, each about 60 feet in height. (Ex. C-25, pp. 52, 62-63). About a week earlier, Watson and Burton had gone to the site to remove the lower limbs on all eleven trees (Ex. C-25, p. 35-36), and so the work that remained on May 4 with respect to each tree entailed (a) using the crane to remove the treetop (which had not been de-limbed, each about 20 feet in length), (b) cutting limbs of the downed treetop and running that brush through the chipper, (c) cutting down the bare tree trunk that remained after the treetop had been removed, and (d) cutting the downed bare trunk and the bare treetop into logs about six to

eight feet long to be collected and hauled away sometime later. (T. 116-117; Ex. C-25, pp. 59-61). This work was done one tree at a time. (Ex. C-25, p. 62).

14. Soon after arriving at the worksite, and while the mobile crane was setting up, Watson spoke with the decedent about the days' work, and he asked the decedent whether he had been shown the chipper. The decedent responded affirmatively, and Watson did not at that time further address the operation of the chipper with the decedent. Rather, Watson instructed the decedent about the mobile crane's operation, telling the decedent to "just stay out of the way and just watch" whenever the crane was "picking up a piece and … laying it down." (Ex. C-25, p. 37-38).

15. Andres, whose primary role for the day was to be the "tree climber," got up in each tree to lash its treetop to the crane using nylon straps called "chokers." (T. 118; Ex. C-25, pp. 39-42). After doing so, Andres severed the treetop from the trunk with a chainsaw; once severed the crane lifted the treetop and set it down on the ground. Watson did not require Andres to wear any leg protection such as chaps while operating the chainsaw while in the trees at Church Road, or wear any hardhat while in the tree, and Watson knew that Andres was not wearing any leg protection or hardhat. (T. 118-123, 144-45, 162, 177; Ex. C-5, p. 3).

16. Watson, Burton, and Andres used chainsaws while standing on the ground to cut the limbs off the downed treetops and to cut the main trunk into smaller logs. None of the workers operating chainsaws wore chaps or other leg protection at any time during the day. (T. 118-123, 144-45, 162, 177).

17. The tree service industry recognizes that workers operating chainsaws, whether while in a tree or while on the ground, should wear leg protection such as chaps to protect against lacerations from the chainsaw, even though some workers who operate chainsaws while

up in a tree prefer not to wear chaps because they are perceived to limit the worker's mobility while up in the tree. (T. 142; Ex. C-25, p. 108).

18. Watson, Burton, Ciaccio and the decedent were all involved dragging or carrying the brush that had been cut from the treetops to the chipper. (T. 122). From time to time, both Watson and Burton used a piece of equipment known as a "skid-steer"[5] to grapple limbs and feed the chipper mechanically by using the skid-steer's grappler, rather than feeding the chipper by hand. (T. 123-24, 143-44).

19. Brush from the treetops that was not fed into the chipper by the skid-steer mechanically was hand-fed. For the most part at Church Road, the decedent and Ciaccio carried or dragged branches to the chipper and put the cut end of the branch on the chipper's infeed tray[6] when the chipper's infeed wheels were not rotating, and then after the infeed wheels were activated Burton or Watson would feed the branches into the chipper by hand. (T. 124, 482-83; Ex. C-25, pp. 44 & 54-55).

20. About the time the crew was feeding the chipper with branches from the third or fourth tree, Watson and Burton showed Ciaccio and the decedent how to feed brush into the running woodchipper. This included instructing the decedent to feed the chipper while positioned to the side of the infeed tray and not from behind it, and that once the infeed wheels

[5] Throughout the hearing, the skid steer was generally referred to as the "dingo," which is the manufacturer's appellation for Watson's skid-steer. (E.g., T. 425, 583-84, 605).

[6] The chipper's infeed tray is 30 inches deep from its back edge to where it abuts the bed of the infeed hopper. The infeed hopper's opening and bed start where the infeed tray ends. (T. 514-15; *see* diagram at Ex. R-24, page 50 of equipment manual's pagination). The infeed wheels are recessed from the opening of the hopper, but the record does not reflect the depth of the hopper (i.e., the distance from the end of the infeed tray to the infeed wheels). However, diagrams in the manufacturer's manual suggest that this distance is about the same depth as the 30-inch depth of the infeed tray. (T. 525; Ex. R-25). A depth of 30 inches for the hopper is consistent with Watson's estimation that the distance from the end of the feed tray to the feed wheels is around five feet (i.e., 60 inches). (T. 487).

grabbed and started to pull on the branch, to walk away from the chipper. (Ex. C-25, pp. 44-47, 53-55). Watson then gave the decedent and Ciaccio express permission to actually feed limbs into the running woodchipper. (Ex. C-25, pp. 48, 53-55, 64, 124). Watson recognized that "it wasn't something that we needed to – but I mean, we were just trying to give them a little bit of experience." (Ex. C-25, p. 47). Allowing the two inexperienced workers to "run" the chipper was not Watson's "normal procedure on a new guy working with us." (T. 485).

21. Watson "didn't want [the decedent] getting comfortable with … thinking like … he's running the machine," so Watson told the decedent that "if that machine's running … don't put anything in there without at least me or [Burton] standing there."[7] (Ex. C-25, pp. 47-48, 53;

[7] Watson's concern about the decedent becoming overconfident with the chipper was consistent with safety information printed by the chipper's manufacturer in 2002, which was received in evidence at Exhibit C-22. While the record evidence was insufficient to establish that Watson had been provided a copy of any version of Exhibit C-22 by the dealer from which he purchased the chipper (*see* footnote 10 *infra*), the information in the document is nevertheless relevant to the matter of industry recognition of the hazard that the Secretary alleges in connection with the section 5(a)(1) citation item. *See K.E.R. Enters., Inc.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013). The admonitions in Exhibit C-22 included the following (Ex. C-22, pages 1, 2 & 11 of document's pagination):

> …. Employees need constant reminders not to become over confident and not to take a casual approach to the potential hazards they encounter on a daily basis. Improperly operating a brush chipper is very dangerous. The operator must be trained and warned that amputation and death can happen unless they follow all warning instructions. They must also always be in position and ready to operate feed controls if a dangerous situation should arise….
>
> Operators must be trained to be constantly thinking about being in a position and ready to use the forward-off-reverse feed control bar and other controls. They should be thinking and ready to stop or reverse the feed control bar the instant they feel any pulling toward infeed hopper or feed wheels.
>
> * * * *
>
> Training is essential! It is extremely important that everyone who operates a wood chipper to be trained. Operating instructions for the chipper are included in

T. 480). Watson testified that he thought Burton and Andres would enforce these instructions given to the decedent and Ciaccio that they not feed material into the woodchipper without an experienced worker being with them, but he never actually communicated this to either of Burton or Andres. (T. 143, 486). Watson told OSHA officials that he believed that neither Ciaccio nor the decedent should be permitted to feed brush into the chipper by himself "unattended." (Ex. C-25, p. 56). Although Watson acknowledges that he gave Ciaccio and the decedent express permission to feed the running chipper (albeit only when an experienced worker was nearby), Watson testified that he had not intended the decedent to be "running" the chipper that day, and that regardless whether the decedent had received safety instructions, Watson "didn't want [the decedent] even around that machine." (T. 499).

22. Neither Watson nor any of the employees wore protective helmets at any time at the Church Road site or at the other two worksites on May 4. (T. 121-22). Watson did not direct anyone to wear a hardhat because he had instructed the employees to stay clear of the loads that the crane was hoisting, and he believed no one would be exposed to being struck by any loads that the crane would be hoisting at any of the three job sites. (T. 114, 490-91; Ex. C-25, pp. 108-09; Ex. C-8, p. 3). Watson also believed there was no risk of employees being struck by falling

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Bandit manuals, decals and training video tapes with each chipper sold.

Safety training and enforcement of safety operating procedures is an important process. No device will prevent accidents when equipment is operated in an improper and dangerous manner. Operators need a frequent reminder as to the proper, safe operation of any piece of equipment, especially a chipper that is designed to quickly break down material much tougher than human flesh….

…. Lecture, preach, train, discuss and enforce safety procedures constantly!!

Chipper safety has to be a constant and continuing effort by all involved with operating and maintaining chippers.

limbs because all the cutting of limbs and branches would be done when the trees lay flat on the ground. (T. 490-91).

23. The tree care industry recognizes that debris can fall off trees that are hoisted overhead and that this debris presents a struck-by hazard even to workers who are not situated in the fall zone of a load. (T. 162-63; Ex. R-24, manual page 8; Ex. C-14, item 2).

24. Andres did not wear safety glasses at the Church Road site, but he was wearing a pair of personal sunglasses that were not impact resistant, although Andres believed these provided him a measure of eye protection. (T. 153, 163, 177, 179). Watson knew that Andres was wearing sunglasses, but he did not determine whether they were impact-resistant safety glasses.

25. Watson had impact-resistant safety glasses on site available for employee use (T. 179; Ex. C-7, p. 3), and he had a work rule requiring that everyone wear them. (T. 493). Watson did not enforce this rule on the day of the fatality at any of the three worksites with respect to his employees, although Watson himself did wear safety glasses at all three job sites. (Ex. 25, pp. 109-10). Watson knew that Burton, Ciaccio, and the decedent were not wearing safety glasses at any of the worksites that day. (T. 493).

26. The crew departed the Church Road worksite at about 11:30 a.m., went to lunch, and from lunch traveled to the second worksite on DiBella Drive.

DiBella Drive Worksite

27. The second worksite was in a residential area with a DiBella Drive address that was situated on the corner of DiBella Drive and Placid Drive. (T. 66; Ex. C-19, video 1).[8] The crew arrived there at 12:08 p.m. (Ex. C-19, video 1).

[8] Exhibit C-19 was comprised of two video clips that were recorded by a security camera mounted on the DiBella Drive residence that the Respondent was servicing. (T. 61-62, 66-67).

28. The job at DiBella Drive involved the removal of a single pine tree. Unlike the eleven white pines that the crew had removed at the Church Road worksite, the lower limbs of the pine tree at DiBella Drive had not been previously removed. (T. 149-50).

29. After the crane set up, Andres got up in tree, lashed the tree trunk to the crane, and then dismounted the tree. Watson then made a full cut of the tree at a point about four feet above ground level, whereupon the crane lifted the severed tree and set it down onto the street. DiBella Drive is a residential street with little traffic, and the crew had blocked off the street such that the crane, the downed tree, and the chipper were now arrayed on the street in that order in a blocked-off section of the street.

30. Video 2 of Exhibit C-19 captured the activities of the workers that occurred in between the crane and the chipper, where the tree lay flat in the street. The video depicts the following activities at the minute and second time marks in the video indicated as follows:

The date and time stamps superimposed on the video images are accurate. (T. 63). References in this Decision to the two video clips are to either "video 1" or "video 2." Video 1 depicts events that were first in time, and the date/time stamp shows the video commencing at 12:08:06 (i.e., six seconds after 12:08 p.m.) and ending at 12:22:37 p.m. Video 2 commences at time stamp 12:22:37 p.m. and ends at 12:37:00 p.m. The names of the electronic .mp4 files for the two video clips as such that the last four digits for video 1 are "0800" and the last four digits for video 2 are "2237."

During the hearing, references to any specific point in a particular video were generally to the time elapsed in that particular video segment reflected through the media player being utilized. (E.g., the time of "04:13" indicates a point at which four minutes and thirteen seconds have elapsed in the video.) References to the particular points or segments of these videos in this Decision is similarly to the time elapsed in the video segment.

The individuals in the two videos are most easily identified by their clothing as follows: Watson wore a blue hooded sweatshirt with white lettering on the back; Burton wore a blue sweatshirt with white lettering on the front; Andres wore a yellow jacket; Ciaccio wore a blue sweatshirt with no writing on it, but he removed the sweatshirt at the 05:42 mark of video 2, after which he was wearing a blue short-sleeved tee shirt with white lettering on the front; the decedent wore a maroon hooded sweatshirt. (T. 227).

a. From 00:00 to 00:17 — The crane sets the entire tree down in the street. Andres coils rope in the vicinity of the drop zone while facing away from the tree, and he peripherally notices a branch of the descending tree passing near his head, causing him to move out of the way with haste.

b. From 00:40 to 01:04 — With the tree on its side in the street, Watson uses a chainsaw to sever the treetop.

c. From 01:38 to 02:05 — The crane hoists the treetop from street. In the early part of this lift, Ciaccio and Watson are near or in the fall zone. Andres goes to assist them, but he waits for treetop to clear the area before doing so, probably to assure that he does not step into the fall zone. (*See also* Ex. C-25, p. 86).

d. From 02:10 to 02:43. — Burton cuts branches with a chainsaw and the decedent takes one of those branches and drags it about eight steps to the chipper, where he puts the cut end on the infeed tray. The chipper is not running at the time. The decedent then does the same thing with a second branch.

e. From 02:44 to 02:50 — The decedent walks from the chipper to where Burton is cutting limbs off the trunk. Limbs that extend higher than head-level drop to the ground while the decedent is in the vicinity of the dropping limbs.

f. From 03:02 to 03:17 — Burton puts down the chainsaw and walks to the chipper and starts it. With the bottom part of the tree trunk having now been fully de-limbed, Watson cuts the tree trunk at about its midpoint. The half below the cut is completely de-limbed, but the half above the cut still has limbs to be trimmed off.

g. From 03:18 to 03:24 — The decedent grabs a branch and then feeds it into the running chipper as Burton walks past him and observes the decedent feed the branch into the

chipper. This is the first branch that any worker feeds into the running chipper at the DiBella Drive worksite.

h. From 03:25 to 03:40 — As Watson continues to trim branches from the trunk with a chainsaw, Burton grabs a branch and feeds it into the woodchipper and then faces back toward the tree as the decedent passes by him carrying another branch that the decedent then feeds into the woodchipper.

i. From 03:30 to 04:05 — Burton backs up the truck that is hauling the woodchipper to close the space between the downed tree and the chipper. This re-positioning of the chipper enables the workers to take fewer steps to drag or carry branches to the chipper. (Also during this period, Andres rigs the de-limbed bottom segment of the tree trunk to the crane, and the crane hoists it from the street to a location off the street on the opposite side of the crane, outside the frame of the video.)

j. From 03:56 to 04:57 — Ciaccio trots up the where the decedent is feeding branches into the chipper and assists the decedent and Burton in feeding branches into the chipper. In some instances, Ciaccio hands branches over to the decedent for the decedent to feed into the woodchipper, and in other instances Ciaccio feeds branches in the chipper himself. All the while, Watson continues cutting branches off the trunk, sometimes facing in the direction of the decedent, Ciaccio and Burton, all of whom feed the chipper less than 25 feet away from Watson's position.

k. From 04:23 to 04:58 — The decedent and Ciaccio together wrangle a large branch as the decedent stands with his back to the infeed tray. The decedent then rotates his body toward the chipper, and he and Ciaccio together feed the branch into the chipper while Burton feeds a smaller branch into the chipper at the same time. At 04:44, Watson says

something to Burton, who is about 10 feet away, and from 04:52 to 04:58 Watson simply stands and faces directly at Burton, Ciaccio and the decedent as they feed the chipper about 20 feet away.

l. From 04:59 to 05:51 — Burton grabs a chainsaw and resumes cutting limbs off the tree along with Watson, as Ciaccio and the decedent continue to feed brush into the chipper no more than twenty feet away from them. Sometimes the decedent and Ciaccio feed branches at the same time, and sometimes they feed branches while positioned directly behind the infeed tray rather than from the side of the infeed tray. From 05:15 to 05:52, Watson and Burton both cut limbs from the trunk while Andres is positioned next to them rigging the trunk to the crane and while Ciaccio and the decedent gather brush and feed it into the running chipper. From 05:24 to 05:47 Watson is standing on one side of the trunk simply observing Burton and Andres working on the trunk, while about 15 to 20 feet to Watson's right, Ciaccio and the decedent gather and feed brush into the running chipper. From 05:19 to 05:40, the decedent struggles to wrangle a large branch while standing with his back to the chipper, eventually facing the chipper and feeding the branch into it. After the chipper starts to pull that branch in, the decedent lets go of the branch and he then steps over it while it is in motion as it is being pulled into the chipper.

m. From 05:52 to 06:48 — The crane lifts the remainder of the now fully de-limbed trunk off the street, with Ciaccio and the decedent working in or near the fall zone gathering brush and feeding it in the chipper. Burton makes direct contact with the trunk just as it is hoisted, pushing it with his hand and kicking it with his foot, as Watson can be seen on the left side of the video frame near the crane looking in the direction of the hoisted trunk and the four employees. Ciaccio and the decedent are directly in range of Watson's vision roughly 50 feet away, gathering brush and feeding the running chipper.

n. From 06:32 to 09:37 — Andres joins Ciaccio and the decedent in feeding brush into the woodchipper for over a three-minute period, feeding all the brush into the woodchipper that had been in the street. From 06:33 to 06:40, the decedent feeds two branches at the same time while positioned behind the feed tray rather than from the side, and by leaning over the feed tray so that his arms and torso are above the feed tray. (*Note*: Around the 07:10 mark, both Watson and Burton exit the video frame in the direction of the crane and reappear near the crane over a minute later at 08:17; at 08:40, the two men step out of the frame again in the direction of the crane. All during this period, Andres, Ciaccio and the decedent gather brush and feed it into the chipper.)

o. From 09:20 to 09:30 — The decedent throws a handful of brush onto the feeder tray of the chipper, and then uses his hands to shove the brush into the infeed hopper until the feed wheels grabbed the brush. In doing so, the decedent puts his hands and arms over the feed tray, but no part of his body penetrates the hopper's opening. Andres makes a similar move around 09:30.

p. From 03:18 to 09:45 — Over this approximate six and one-half minute period, the decedent fed branches and brush into the woodchipper about 20 separate times, and Ciaccio fed branches into the woodchipper about 16 times. In many instances when feeding the woodchipper, the decedent and Ciaccio fed the woodchipper while positioned behind the feed tray and not from the side of the feed tray. In many instances when feeding the woodchipper, neither Ciaccio nor the decedent was in a position to reach the chipper's control bar. In many instances feeding the chipper, branches would come in close proximity to the heads and eyes of workers manipulating the branches and of other workers near them. The video depicts the

workers from time to time placing their hands and arms over the infeed tray, but it does not depict the workers putting any part of their bodies into the infeed hopper.

31. The crew did not de-limb the treetop or cut the de-limbed trunk segments into smaller logs, but instead the crew left them flat on the ground (off the street) and proceeded to the next work site on Placid Drive. (Ex. C-25, pp. 87, 89). Watson intended to return to the DiBella Drive site at some later time to complete the removal of that material. (T. 126).

32. Watson believes that the manner and the extent to which Ciaccio and the decedent were feeding the chipper as is depicted in video 2 of Exhibit C-19 were improper. (T. 499, lines 7-9). Watson, in the exercise of reasonable diligence, should have known that Ciaccio and the decedent were utilizing unsafe practices in feeding the chipper at the Church Road worksite.

33. Watson and Burton operated chainsaws at the DiBella Drive site while standing on the ground. (Ex. C-19, video 2). Neither of them wore leg chaps while operating the chainsaws. Watson did not require that Burton wear chaps while operating the chainsaw at the DiBella Drive site, and Watson could see that Burton was not wearing leg chaps. (Ex. C-19, video 2). Watson had a pair of chaps on site in the truck that Burton could have used. (T. 494).

34. None of the five crew members wore protective helmets at any time at any of the three job sites. (T. 121-22; Ex C-25, p. 109). Watson did not require the employees to wear protective helmets. Watson instructed the employees to stay clear of the loads that the crane was hoisting, and he believed that none of the workers would be exposed to being struck by any loads that the crane would be hoisting at DiBella Drive (or at the other two job sites) by either intentionally or inadvertently positioning themselves in an area where they could be struck by something falling from the crane. (T. 114; Ex. C-8, p. 3).

35. None of the employees wore impact-resistant safety glasses at the DiBella Drive site. (Ex. C-25, p. 113). Watson had safety glasses available for employee use (Ex. C-25, pp. 111-12; T. 179, 195), but he did not require that any employees wear them. Andres wore a pair of personal sunglasses, but they were not impact-resistant safety glasses. (T. 179).

36. The crew and the crane departed the DiBella Drive location at 12:37 p.m. and traveled a short distance to the third jobsite on Placid Drive, which was down the street from the DiBella Drive worksite. (Ex. C-25, p. 87; Ex. C-19, video 2 at 14:20; Ex. C-16).

Placid Drive Worksite

37. The type of work to be done at the Placid Drive job was similar to the work that had been done at the Church Road worksite. (T. 149, 481, 561). There were five trees to remove at Placid Drive. (Ex. C-16; T. 496). One was an oak and the others were pines. (T. 496). About a week earlier, Watson and Andres had removed the lower limbs from three of the five trees (the oak and two of the pines), so that all that remained on those trees were mostly bare trunks topped by the untrimmed treetops. (T. 150, 496).

38. The crew and crane first removed the oak tree. (T. 496). After the crane set down the oak tree's treetop on the street, Watson de-limbed it with a chainsaw, and its brush was fed into the running chipper. The crew and crane then did the same thing with a red pine tree. (T. 129, 161, 496; Ex. C-25, p. 73, 75, 79, 83-84, 125). Watson, Burton, Ciaccio, and the decedent all fed brush from the oak tree and the pine tree in the running chipper. (T. 129, 161; Ex. C-25, page 125).

39. Andres then cut the treetop off a second pine tree, and the crane set it on the ground, where Watson de-limbed it with a chainsaw. (Ex. C-16). Watson was beginning to prepare to use the skid-steer to feed some of the brush from this treetop into the chipper, when he turned and saw the decedent's body in the chipper. (T. 130-31; Ex. C-25, p. 85; Ex. C-16). The bottom

half of the decedent's body lay within the enclosure of the infeed hopper amidst brush from a pine tree, with only his feet extending over the infeed tray, as is reflected in the photograph at Exhibit R-14. (Ex. C-25, pp. 85-86, 102, 498). Watson rushed to shut the woodchipper down and called "9-1-1" for emergency services. (Ex. C-25, p. 86; C-16). The decedent was declared dead at the scene. (Ex. C-15).

40. The fatality occurred around 1:15 p.m., which was about 38 minutes after the crew had departed the previous worksite. (Ex. C-19, video 2; Ex. C-15). Andres recalled that he last saw the decedent alive about a minute before, and that the decedent had been standing near the right side of the chipper, which was the curb side. Similarly, the crane operator recalled last seeing the decedent standing near the chipper. (T. 447). Watson recalled last seeing the decedent alive just 30 seconds or so earlier, standing near the chipper.[9] (Ex. C-25, pp. 85-86, 102, 498). No one witnessed what the decedent was doing between the time that he was last seen standing near the chipper and the time he was killed.

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[9] Neither Burton nor Ciaccio testified at the hearing. There is no evidence of precisely where Burton were situated or what he was doing at the moment the decedent was killed. In a formal interview conducted by an OSHA official fifteen days after the fatality, Ciaccio said:

> Well, basically what happened was I was probably about 30 feet away from the chipper. And I had my back turned to the chipper. And I went to go grab a branch. And next thing I know, I just hear [Watson] screaming. So I dropped the branch, turn around. And that's when I just see, you know, I look at the chipper and it's just the kid's feet hanging out.

(Ex. C-26, p. 17; T. 310).

The verbatim transcript of Ciaccio's interview was admitted in evidence as Exhibit C-26 pursuant to Fed. R. Evid. 803(8) as a public record. (T. 310). Ciaccio's statements reflected in the verbatim transcript may not be accepted for the truth of the matters asserted therein (Ciaccio was no longer employed by the Respondent at the time he was interviewed), and thus cannot provide support for any finding of fact, because the statements do not meet any exceptions to the rule prohibiting hearsay evidence. *See* Fed. R. Evid. 805, "Hearsay within hearsay." (*See* ruling on Respondent's objection to Exhibit C-26 at T. 305-311).

41. Andres and Watson used chainsaws at Placid Drive, and neither wore chaps while operating the chainsaws. Watson knew that Andres was not wearing chaps while using the chainsaw. (T. 118-123, 142, 144-45, 162, 177; Ex. C-25, p. 108).

42. None of the workers wore protective helmets at the Placid Drive worksite, and Watson knew this. (T. 114, 121-22, 490-91; Ex. C-25, pp. 108-09; Ex. C-8, p. 3).

43. None of the workers wore safety glasses at the Placid Drive worksite. Watson knew that Burton, Ciaccio and the decedent were not wearing safety glasses, and he did not determine whether the sunglasses that Andres wore were impact-resistant safety glasses. (T. 153, 163, 177, 179, 493; Ex. C-7, p. 3; Ex. C-25, pp. 109-10).

Safety and Training Programs

44. Watson believes the two main hazards at his worksites are the chipper and overhead hazards during crane lifts. (Ex. C-25, pp. 104-05.)

45. Watson did not require any of the four employees who were working on the day of the fatality to read the manufacturer's safety instructions for the chipper, and none of them had read those instructions. Similarly, Watson had not required any of those employees to view any safety videos regarding operation of the chipper. (T. 160-61). Another employee of Watson's who was not working on May 4 had viewed a safety video, though it is not apparent from his testimony whether he had viewed it before the fatality. (T. 466, 517).

46. Most of the workers that Watson hires are experienced in the tree service industry, and while Watson does not provide any formalized training to his employees, he regards himself as utilizing a "method" of working that addresses safety issues. (T. 195, 477; Ex. C-25, pp.107-08). With regard to feeding the chipper, Watson's safety method is to have workers carry brush to the chipper when the feed wheels are not turning, after which he uses the skid-steer to feed brush into the chipper mechanically. (T. 477). Watson recognizes that the manner in which the

Ciaccio and the decedent were feeding and operating the chipper as reflected in video 2 of Exhibit C-19 did not comport with this safety method. (T. 477, lines 14-23; T. 472, lines 5-22). The activity depicted in video 2 was not Watson's "normal procedure on a new guy working with" his business. (T. 485).

47. Watson recognizes that safety glasses are necessary PPE in the tree service industry. (Ex. C-25, p. 108). Watson keeps safety glasses in his truck that are available for his employees to use, and he uses safety glasses himself when using a chainsaw. (Ex. C-25, pp. 109 & 111; T. 493).

48. Watson believes that hardhats are necessary PPE in the tree service industry to be worn where workers are working under falling limbs and hoisted loads. Watson testified that he has "always had a hard hat rule in effect" that applies when he believes employees will be exposed to overhead hazards such as falling branches or will be in the fall zone of a hoisted load. (T. 490-91; Ex. C-25, pp. 108-09). Watson keeps hardhats at worksites in his truck for employee use. (T. 111-12, 456).

49. Watson believes that chaps are necessary personal protective equipment in the tree service industry where workers are "doing a lot of cutting." (Ex. C-25, p. 108; Ex. C-5, p. 3). Watson keeps chaps in his truck for employee use. (T. 494).

Chipper Safety

50. In March 2004, when Watson purchased the chipper new from a dealer, he signed the manufacturer's "Warranty Validation Form," though he believes that he did not read it before he signed it. (T. 529; Ex. C-14). The face of the form, however, reflects the dealer's affirmative representation that certain specified matters had been communicated to and acknowledged by Watson, including the following (Ex. C-14; T. 528-29):

1. ____ Customer has been instructed and understands operation and all safety aspects of operating the equipment.

2. ____ Customer has been instructed and understands that everyone within 100 feet of the machine must wear personal protective equipment (i.e. hard hat, safety glasses, etc.)

* * * *

4. ____ Customer has been advised and understands not to reach into the infeed hopper with hands or feet. The machine operators must **always** be located within easy reach of all feed control and shutdown devices.

5. ____ Customer understands that the wooden push paddle must be used to push small debris into the chipper and, that they are not to reach or kick debris into the infeed hopper area of the machine.

6. ____ Customer understands the purpose of and how to operate the last chance device, and if used the machine has been operated in an unsafe manner. Customer understands never attempt to override any safety devices or guards.

* * * *

12. ___ Customer has been instructed, understands, and agrees that all potential operators must: See the supplied videotape, be instructed in all the Danger, Warning and Operational decals, read the manual and follow the procedures.

The dealer had placed a check mark in the blank space to the left of each representation and signed the form along with Watson. (Ex. C-14).

51. Exhibit R-24 is the equipment manual that Watson was provided when he purchased the chipper from the manufacturer in March 2004. (T. 522-525). Watson understood the dangerousness and potential lethality of the chipper without being informed of those properties of the chipper by the manufacturer (*see*, *e.g.*, T. 498, lines 15-20), but the manual that he was provided when he purchased the woodchipper is nonetheless replete with warnings that address hazards posed by the chipper, including the following (Ex. R-24):[10]

[10] In the Secretary's case in chief, material prepared by the manufacturer regarding operation and maintenance of the chipper that indicates it was published in October 2002 were received in

a. Page 2 of the manual is the one-page "Introduction" section. Included in this introduction are the following warnings:

> **WARNING!**
> Improper use of the chipper can result in severe personal injury. Personnel using the chipper must be qualified, trained and familiar with the operating procedures as defined in this manual.
>
> **WARNING!**
> It is the responsibility of the owner or employer to insure that the operator is trained and practices safe operation while using and servicing the machine….

b. Pages 7 to 10 of the manual comprise the "Safety Procedures" section of the manual and include the following (the fonts used in the actual manual vary in size):

i. The following warning is on page 7, and is illustrated by a graphic that depicts a hand caught in between a chipper's feed wheels:

> **WARNING!**
> **DO NOT** attempt to operate this machine without proper training and becoming very familiar with the operator's manual. The hydraulic feed wheels are designed to pull wood into the chipper. They do not know the difference between a hand or wood….

ii. The following warnings are on page 8:

> **DANGER!**
> Don't ever take the machine for granted, always be cautious and careful when operating your equipment.
> Read and follow all the instructions in your manuals thoroughly. Your safety is dependent on your knowledge of how to operate and maintain this machine….

---

evidence at Exhibits C-21 and C-22. During the Respondent's case in chief, the manual that Watson actually received from the manufacturer when he purchased the chipper in March 2004, was received in evidence as Exhibit R-24. (T. 519, 521-22). That manual reflects that it had been published in 1999. While all three documents contain similar information, the evidence is insufficient to establish that Watson actually received versions of Exhibit C-21 or C-22 when he purchased the chipper in 2004.

> Before operating chipper, you must have all potential operators; read and understand manuals, and follow the recommendations.
>
> * * * *
>
> **WARNING!**
>
> When feeding material into the infeed hopper, always feed from the side of the infeed tray and then turn away from material and walk away as wood feeds in. Chippers should be fed from curbside (right side) whenever possible. Anytime operator is near infeed hopper, he must be within easy reach of feed control devices.
>
> * * * *
>
> **DANGER!**
>
> *** * * ***
>
> Wear all applicable safety equipment examples: hard hat, safety glasses, gloves, ear protection, etc.
>
> **WARNING!**
>
> Operators **must** at all times be located within easy reach of all feed control and shut-off devices when the unit is running.

iii. Page 10 contains the following:

> Regardless of how hard a manufacturer tries to produce a safe machine, accidents still happen. Normally accidents are caused by people making mistakes. They do not read the manual, they ignore warning decals or do not use lockouts provided for their safety. This normally happens after the person has become accustomed to the machinery. In the initial start up and operation of the machinery, they are cautious, they are very careful because they do not understand the machine.

c. Pages 16 to 20 of the manual depict the safety decals that the manufacturer affixed to the equipment (the fonts on the decals that are actually depicted in the manual vary in size):[11]

i. The safety decal depicted on page 19 of the manual states as follows:

[11] The photographs at Exhibits R-14 and C-9(1) reflect the presence of some of the manufacturer's safety decals on Watson's chipper, but there is no evidence that addresses whether all of the safety decals that are depicted in the manual remained both affixed and readable on the day of the fatality. For purposes of this decision, it is presumed that all of the manufacturer's safety decals were affixed to the chipper and were and readable.

DANGER!

BRUSH CHIPPERS ARE VERY DANGEROUS MACHINES TO OPERATE! READ & BELIEVE THIS WARNING DECAL!

The chipper feedrolls are **VERY DANGEROUS.** They are designed to pull large diameter trees of any length into the chipper. Pulling your hand, arm, foot or entire body through the machine is much easier than pulling a tree. **FOLLOW** the operating instructions in the operator's manual, and **ALWAYS** be in a position to activate the *Forward-Off-Reverse Control Bar*. Never take chances pushing wood too far into the infeed hopper of the chipper. **NEVER** use your feet to try to kick wood into the machine. There have been **MANY ACCIDENTS** involving the feed rolls, resulting in the amputation of hands, arms, feet legs and **DEATH**. **DO NOT** let this happen to you!

* * * *

DO NOT OPERATE THIS MACHINE UNLESS YOU HAVE READ THE OPERATOR'S MANUAL AND HAVE BEEN TRAINED FOR SAFE OPERATING PROCEDURES!

ii. Another of the decals depicted on page 20 of the manual pertains to the "Last Chance Stop" and states as follows:

DANGER!

LAST CHANCE STOP!

Brush Bandit Chippers have been involved with several serious hydraulic feed wheel injuries, these injuries have resulted in loss of hands/arms, feet/legs and/or DEATH.

Hand/arm and DEATH injuries are caused by negligently reaching far into the infeed hopper. This "Reaching In" is usually associated with trying to feed short limbs, twigs or leaves. Short or loose material must be tossed into the infeed hopper while longer material is feeding into the machine, or this material should be pushed in with a long, wooden pushing stick.

The "Last Chance Stop" is a means of stopping/reversing the feed rolls if the negligent operator does not follow the safety rules and finds him or herself in trouble.

DO NOT RELY ON THE "LAST CHANCE STOP" TO DISOBEY THE OPERATOR RULES!

YOU WILL FIND YOURSELF IN TROUBLE!

d. Page 27 of the manual relates to “Start-Up Procedures” and sets forth the following warnings that are illustrated by two graphics depicting hands and arms being caught up in the feed wheels:

DANGER!
STOP TO THINK!!
REACHING OR KICKING INTO THE INFEED HOPPER
WILL CAUSE SERIOUS INJURY OR DEATH!

DO NOT reach with your hand or kick with your foot inside the infeed hopper. The feedrolls are very powerful. Once your hand or foot is grabbed by the feedrolls, you can be pulled into the chipper. ***Do not think that you will be able to pull yourself out of the feedrolls. They will not let go!***

There is absolutely no reason to work inside of the infeed hopper. If the feedrolls become tangled or clogged, stop the machine and wait a minimum of three (3) minutes to clean them out.

WARNING! When feeding material into the infeed hopper, always feed from the side of the infeed tray and then turn away from material and walk away as wood feeds in. Chippers should be fed from curbside (right side) whenever possible. Anytime operator is near infeed hopper, HE MUST be within easy reach of feed control devices.

DANGER! DO NOT use any body part or steel devices inside the infeed hopper area. A "Wooden Pusher Tool" is supplied with this chipper to assist feeding material. It is owner's and operator's responsibility to use and keep a "Wooden Pusher Tool" with chipper, also to secure it when transporting chipper.

e. Also in the “Start-Up Procedures” section on page 29 of the manual is the following warning:

DANGER!

Do not let anyone operate or maintain this machine until they have thoroughly read this manual. You can purchase additional Bandit manuals for a nominal fee.

f. In the “Operating Procedures” section of the manual, the method of feeding wood into the chipper is reiterated at manual pages 31 and 32 as follows:

WARNING!

When feeding material into the infeed hopper, always feed from the side of the infeed tray and then tum away from material and walk away as wood feeds in. Chippers should be fed from curbside (right side) whenever possible.

* * * *

WARNING!

* * *

Always stand to the side of the infeed hopper when inserting material. This will allow you to turn away from the wood, and walk away, without passing through the material.

52. In 2012, the American National Standards Institute (ANSI) issued voluntary national consensus standard Z133–2012, titled "American National Standard for Arboricultural Operations—Safety Requirements." ANSI standard Z133–2012 is the seventh revision to the original standard that had been issued in 1972. (Ex. C-23, page 5 of 15). When an OSHA official asked Watson whether he was familiar with ANSI standard Z133–2012, Watson was uncertain, but he remarked that he received magazines about arboricultural operations.[12] (T. 327).

53. Section 8.6 of ANSI Z133–2012 pertains to work procedures for brush removal and chipping, and includes the following provisions:

> 8.6.4 Personal protective equipment shall be worn when in the work area of chipping operations in accordance with section 3.4, Personal Protective Equipment, of this standard.[13]

[12] The record does not establish that Watson had actual knowledge of the specific content of ANSI Z133 – 2012, but excerpts from the standard were nevertheless received in evidence over objection as Exhibit C-23. (T. 326-333). The standard is relevant to the matter of industry recognition of the hazardous activities/conditions alleged with respect to the section 5(a)(1) citation item, as well as industry recognition of the presence of hazards that warrant the use of certain PPE.

[13] Section 3.4 of ANSI Z133–2012 regarding personal protective equipment, which is referenced in subsection 8.6.4, was not included in the excerpt of the standard that was received in evidence at Exhibit C-23. Nor were four other subparagraphs of the standard that the Secretary cited to in the willful citation item that alleged inadequate training on, and improper

8.6.5 Only persons trained in safe chipper operation may operate chippers. Training shall include, but is not limited to, inspection, starting, stopping, feeding, and shutdown. Training shall be provided for each type of chipper being used.

8.6.7 Brush and logs shall be fed into chippers from the side of the feed table center line, butt or cut end first, and the operator shall immediately tum away from the feed table when the brush is taken into the rotor or feed rollers. Chippers should be fed from the curbside whenever practical.

8.6.11 Small branches shall be fed into chippers with longer branches or by being pushed with a long stick or tool designed for such use to prevent body parts from entering the infeed hopper.

8.6.12 Hands or other parts of the body shall not be placed into the infeed hopper. Leaning into or pushing material into infeed hoppers with feet is prohibited.

54. Watson understands that workers should not push small bits of brush into the hopper with their hands, and Watson himself usually uses a rake or similar implement to push small bits of brush into the hopper. (Ex C-25, p. 121).

Classifications of "Serious"

55. There was a substantial probability that death or serious physical harm could result by employees operating chainsaws without leg protection.

56. There was a substantial probability that serious physical harm could result by employees engaging in tree removal and chipping without wearing safety glasses.

57. There was a substantial probability that death or serious physical harm could result by employees engaging in tree removal and chipping without wearing protective helmets.

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feeding of, the chipper. (*See* Citation 2, item 1, which references ANSI Z133-210, sections 3.1.2, 5.1.2, 5.1.5, and 5.3.7). Those provisions not included in Exhibit C-23 are thus not of record in these proceedings.

58. There was a substantial probability that death or serious physical harm could result by employees operating a chipper before being provided adequate training and when feeding the chipper in an unsafe manner.

Unforeseeable Employee Misconduct

59. Watson had some work rules designed to prevent employees from using unsafe practices in feeding a chipper, and for requiring the employees to use certain PPE, but Watson did not adequately communicate those work rules to Ciaccio or the decedent. Watson was not reasonably diligent in taking steps to discover violations of those work rules, or in enforcing those rules when he identified violations, as is reflected by findings of fact in preceding paragraphs herein.

DISCUSSION

The Commission obtained jurisdiction of this matter under section 10(c) of the OSH Act upon Watson's timely filing of a notice of contest. 29 U.S.C. § 659(c). The Respondent has employees and is engaged in a business affecting interstate commerce, and thus meets the OSH Act's definition of "employer."[14] 29 U.S.C. § 652(5).

[14] The Respondent argues for dismissing the Secretary's complaint on the ground that the Secretary's litigation tactics and handling and presentation of exhibits "violated due process." (Resp't Br. 10-17, 45). The undersigned confirms all evidentiary rulings made during the hearing and denies the Respondent's reassertion in his closing brief of some of those objections. The Respondent has demonstrated neither a violation of due process nor any legal prejudice as a consequence of the claimed wrongful tactics and admission of evidence to which objection was made. In this regard, the undersigned notes that Exhibits C-2 through C-9 inclusive (OSHA's inspection report, inspection summary, safety narrative, and violation worksheets), the admission under Fed. R. Evid. 803(6) and 803(8) to which the Respondent objected in part on the asserted ground that the records are not trustworthy, have not been relied upon as the foundation for any findings of fact herein.

Citation 1, Items 1: 2, 3 and 4 – Personal Protective Equipment (PPE)

To establish a violation of a workplace safety or health standard promulgated pursuant to section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) employees were exposed or had access to the violative condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994); *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Serious Citation 1, Item 1 – Section 1910.132(a) – Leg Protection

Item 1 of serious citation 1 alleges that the Respondent violated 29 C.F.R. § 1910.132(a) in three separate instances on May 4, 2016, averring that for each instance "employees were exposed to laceration and amputation hazards while operating chainsaws during tree removal" when "[e]mployees did not wear leg protection while trimming branches."[15]

The cited standard, section 1910.132(a), is a general personal protective equipment standard (PPE) that provides as follows:

> **§ 1910.132 General requirements.**
>
> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body

[15] Each of the four citation items alleging violations of PPE standards, as well as willful citation 2, alleged three identically worded instances for each item—one instance for each of the three worksites on May 4, 2016. Each of the citation items misidentified the DiBella Drive worksite as "Salvia Lane." The Secretary moved to amend the complaint, which had incorporated by reference all of the citation items, to substitute "DiBella Drive" for "Salvia Lane" in each item, and that motion was granted at the hearing without objection. (T. 298-99).

through absorption, inhalation or physical contact.

"To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," the Secretary must demonstrate that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015), *aff'd in relevant part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016). "The Secretary must show more than the mere possibility of or a potential for injury." *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1783 (No. 90-0050, 1996) (consolidated). Rather, in order to establish that a potential hazard presents a "significant risk of harm," the Secretary must prove that the circumstances in the workplace are "likely to give rise to the alleged hazard" for which the PPE is needed. *See Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 63-67 (2d Cir. 1983).

Watson acknowledged that leg protection such as chaps was appropriate to protect against injury when trimming trees with a chainsaw while standing on the ground, but he suggested that chaps were unnecessary for a worker in a tree who is making overhead cuts and that they are a hindrance to the mobility of a worker who is in a tree. Andres, who is experienced in the tree service industry and is an experienced "tree climber," testified that chaps are "advised" for workers using chainsaws while cutting in trees, although he noted that many "climbers" do not wear them because they limit the mobility while in the tree. (Ex. C-19, video 2; T. 142, 493-94; Ex. C-25, p. 108). *Cf. Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878, 881 (4th Cir. 1982) ("The particular views of workmen are not necessarily, and often times are not, the best determination as to what is safe and what is unsafe. Convenience rather

than safety considerations often dictates a worker's perspective.").

Both Watson and Andres own and use chaps, but neither was using them at any of the three locations. Watson also had chaps on site in his truck, but he did not require that Burton wear them when Burton operated a chainsaw while standing on the ground at the Church Road and DiBella Drive sites. Watson's testimony establishes that he had actual knowledge that workers in the tree service industry operating chainsaws while standing on the ground should wear leg protection to protect against lacerations and amputations. Andres' testimony establishes that persons familiar with the tree service industry recognize that workers using chainsaws while in a tree should wear leg protection to protect against lacerations and amputations. Andres and Burton both operated chainsaws at the Church Road site and the DiBella Drive site, and Andres used a chainsaw while in a tree at the Placid Drive site. Both violated section 1910.132(a) by operating chainsaws without leg protection, and both were exposed to laceration and amputation hazards by doing so.[16] Employees were exposed to that

[16] The Respondent Watson is the proprietor of a sole proprietorship, so he and his proprietorship are the same entity in law and fact. If Watson were to have had no employees, he would not have been covered by the OSH Act, and OSHA could not have cited him for his personal failure to wear leg protection at any of the three worksites. *See Poughkeepsie Yacht Club, Inc.*, 7 BNA OSHC 1725, 1727 (No. 76-4026, 1979) (noting that "the Act's coverage extends even to those employers with only one employee.")

The Secretary has not asserted that Watson's personal failure to wear leg protection while using a chainsaw on May 4 violated section 1910.132(a), so the matter of whether OSHA can cite a sole proprietor who is covered by the Act for personally violating a standard was not put in issue. Even so, although no Commission precedent has been identified that addresses this issue, a Commission judge addressed the issue in *Clauson*, No. 76-2669, 1977 WL 6908 (O.S.H.R.C.A.L.J., Mar. 17, 1977), *aff'd on other grounds* 5 BNA OSHC 1760 (No. 76-2269, 1977) (the Commission had *sua sponte* directed review of the decision, but then declined "to pass upon, modify or change the Judge's decision in the absence of a compelling public interest" where no party had "expressed dissatisfaction with" it).

The Commission judge in *Clauson* concluded that a sole proprietor who is covered by the Act "while working in his business, must necessarily personally comply with applicable safety regulations." *Cf. McCullough v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (holding that if a sole

hazard at each of the three worksites on May 4, and Watson had actual knowledge that neither employee wore leg protection while operating chainsaws.

The Secretary has established by a preponderance of the evidence that the Respondent violated section 1910.132(a) in each of three instances alleged.[17]

The violation of section 1910.132(a) is properly classified as "serious." A violation is "serious" if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k); *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86–351, 1991). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31, (No. 97-0469, 2003) (consolidated) (citation omitted). The severe lacerations or amputations that would likely result if a running chainsaw impacted an unprotected leg constitutes serious physical harm and supports the serious classification of the violation. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522) (No. 90-2066, 1993) (likelihood of severe lacerations to hand support classification of serious).

Citation 1, Item 3 – Section 1910.133(a)(1) – Eye Protection

Item 3 of serious citation 1 alleges that Watson violated 29 C.F.R. § 1910.133(a)(1) in three separate instances on May 4, 2016, averring that for each instance "employees were

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proprietorship has employees or associates, it can be an "enterprise" with which its sole proprietor can be "associated" within the meaning of the RICO Act, the court reasoning that it should make no difference what kind of legal form the enterprise takes—e.g., corporation, partnership, sole proprietorship, etc.) (Posner, J.).

[17] Watson's argument that the Secretary lacked the authority to cite him for violations alleged to have occurred at the Church Street and DiBella Drive worksites because OSHA did not conduct a physical inspection of those two worksites is rejected as having no support in either the text of the Act or any of the Secretary's regulations promulgated pursuant to the Act. (Resp't Br. 46-47).

exposed to eye hazards during tree removal including wood dust, flying wood pieces, and being struck by branches during tree trimming and feeding a wood chipper."

The cited standard, section 1910.133(a)(1), is a general PPE standard respecting eye and face protection, and provides in pertinent part that "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles …."

Watson had safety glasses available for employees on May 4, and he had a work rule that everyone wears them, testifying that "everyone should have been wearing safety glasses." (T. (T. 179, 195; 493; Ex. C-7, p. 3). Watson was wearing safety glasses himself (Ex. 25, pp. 109-10), and he could see that among his four employees Andres was the only one wearing any eyewear during tree removal, trimming branches, and chipping. However, Watson did not check to determine whether the personal sunglasses that Andres was wearing were impact-resistant safety glasses (Andres reliably testified that they were not). (T. 153, 163, 177, 179). *See Stearns-Roger, Inc.*, 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979) (inferring that eyewear referred to as "street glasses" were not impact-resisting safety glasses that met the criteria of the construction industry eye-protection standard involved there).

The evidence establishes that employees who were engaged in tree removal and brush chipping activities were exposed to eye hazards from moving branches and propelled particles, so that the cited standard is applicable. *Wal-Mart Distribution Ctr.* The evidence also establishes (1) non-compliance with the standard at each of the three worksites, (2) employee exposure to injury to the eyes at each of the three worksites as a result of that non-compliance, and (3) that Watson had actual knowledge of the violative conduct. A preponderance of the evidence establishes that the Respondent violated section 1910.133(a)(1) in the manners alleged

in item 3 of citation 1.

The violation of section 1910.133(a)(1) is properly classified as serious. There is a substantial probability that an unprotected eye struck by a flying wood chip or some other object could result in temporary or permanent disability. *See Stearns-Roger, Inc.*, 7 BNA OSHC at 1921 (noting "that the eye is an especially delicate organ and that any foreign material in the eye presents the potential for injury"). Such an injury would amount to "serious physical harm" that warrants a classification of "serious." (T. 194, 420-21). *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061-62 (No. 79-4945, 1982) (finding that "given the delicateness of the eye, serious physical harm would be substantially probable if an employee were struck in the eye by a particle or chip of concrete" caused by a sledgehammer or an electric hammer) *aff'd*, 723 F.2d 410 (5th Cir. 1984).

Citation 1, Item 4 – Section 1910.135(a)(1) – Protective Helmet

Item 4 of serious citation 1 alleges that the Respondent violated 29 C.F.R. § 1910.135(a)(1) in three separate instances on May 4, 2016, averring that for each instance "employees were exposed [to] overhead hazards during tree removal involving a mobile crane and tree trimming from height" and "to struck by hazards from branches while loading a wood chipper."

The cited standard, section 1910.135(a)(1), is a general PPE standard respecting head protection, and provides that "[t]he employer shall ensure that each affected employee wears a protective helmet when working in areas where there is a potential for injury to the head from falling objects."

Watson has a rule requiring that employees wear hardhats when they are working in the vicinity of falling limbs and hoisted loads, but his hardhat rule apparently does not extend to employees who are feeding the chipper. (T. 490-91; Ex. C-25, pp. 108-09). Watson keeps

hardhats at worksites in his truck for employee use. (T. 111-12, 456).

In *Altor, Inc.*, 23 BNA OSHC 1458 (No. 99-0958, 2011), the Commission applied the head protection standard that is contained in the construction industry standards at 29 C.F.R. § 1926.100(a) (requiring employees in the construction industry to wear protective helmets when "working in areas where there is a possible danger of head injury from impact, or from falling or flying objects") *aff'd*, 498 F.App'x 145 (3d Cir. 2002) (unpublished). The Commission decided that the construction industry standard "requires a showing of 'access to an area of potential danger,' not actual exposure to overhead hazards." *Id.* at 1465, *quoting Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985). The Commission in *Altor* stated further that "[e]xposure can be shown even where 'the hazard of being struck... was remote and [where] hardhats may not have offered much protection.'" *Id.*, quoting *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1390 (No. 97-0755, 2003). The same logic should hold for the general industry head protection standard cited here, particularly since the standard here pertains to areas where there is the "potential for injury," which is substantially the same language of the "area of potential danger" test that the Commission adopted in *Altor*. Further, as the Commission noted in *Altor*, "even a 'comparatively brief exposure is sufficient to support a violation.'" *Id.*, quoting *Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331, 1339 (No. 00-1968, 2003) *aff'd*, 39 F.3d 56 (1st Cir. 2004).

Video 2 of Exhibit C-19, which depicted the removal of a single tree at the DiBella Drive worksite, showed all the employees having access to areas of potential danger from falling objects. It is reasonably inferable that the employees had similar access at the Church Road site, where the crew removed eleven trees, and the DiBella Street site, where the crew was working on the third tree at the time of the fatality.

With respect to the wear of hardhats solely for chipper operations, while the manufacturer's warranty validation form that Watson signed in March 2004 indicates that anyone within 100 feet of machine must wear hardhats (Ex. C-14), and the chipper's manual indicates that hardhats are among the "applicable safety equipment" that should be worn (Ex. R-24, manual page 8), these written materials from the manufacturer alone are insufficient (though barely) to establish either (a) that Watson had actual knowledge of a need for wearing a protective helmet simply while feeding the chipper, or (b) that a reasonable person familiar with circumstances surrounding the operation of the chipper, would recognize a hazard requiring the wear of a protective helmet simply while feeding the chipper. *See Wal-Mart Distrib. Ctr.*, 25 BNA OSHC at 1400-01. In this regard, it is notable that nothing in the *excerpt* of ANSI standard Z133–2012 that was offered and received in evidence at Exhibit C-23 states that protective helmets should be worn when workers are in an area of chipping operations.

The Secretary has thus not proven that the standard requires that employees wear protective helmets while simply operating the chipper at times when the crane was not operating and when no limbs were falling to the ground after being cut. However, the great weight of the remaining evidence establishes that the standard applied at each of the three worksites, that standard was violated and that employees were exposed to injury to the head from falling objects not associated with feeding of the chipper alone, and that Watson had actual knowledge of the violative conditions. The Secretary has proven that the Respondent violated section 1910.135(a)(1) in manners alleged in item 4 of citation 1.

The violation of section 1910.135(a)(1) is properly classified as serious. It is substantially probable that being struck in the head by a tree or branch falling while being hoisted by a mobile crane could result in death or permanent disability, which justifies a

classification of "serious."[18] (T. 422).

Item 2 – Section 1910.132(f)(1) – PPE Training

Item 2 of serious citation 1 alleges that the Respondent violated 29 C.F.R. § 1910.132(f)(1) in three separate instances on May 4, 2016, averring that for each instance "employees were exposed to various hazards during tree removal, including but not limited to laceration and struck by hazards," and that "[e]mployees were not trained on the necessary personal protective equipment for the task."

The cited standard, section 1910.132(f)(1), is a general PPE training standard, and provides as follows:

> (f) *Training*. (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:
> (i) When PPE is necessary;
> (ii) What PPE is necessary;
> (iii) How to properly don, doff, adjust, and wear PPE;
> (iv) The limitations of the PPE; and,
> (v) The proper care, maintenance, useful life and disposal of the PPE.

In the context of the PPE citation items alleged in citation 1, the standard required that Watson provide PPE training regarding protective legwear to operators of chainsaws (Andres and Burton), and to all employees regarding protective eyewear and protective helmets.[19]

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[18] Watson's general argument that holding him responsible for the violative conduct of his employees is inconsistent with the congressionally stated purpose of the Act is rejected. (Resp't Br. 47-49). *See Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1633, n.4 (No. 97-0250, 1999) (stating that "[r]esponsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees").

[19]By its terms, section 1910.132(f)(1) requires training for employees who are "required by this section to use PPE." Section 1910.132(f) thus requires that employees who are required to wear leg protection while operating chainsaws pursuant to section 1910.132(a) receive PPE training regarding protective legwear. Paragraph (g) of section 1910.132 states that the training

Even though Watson did not provide any formalized training to his employees, the evidence is insufficient to establish that Watson never provided instruction and guidance to his two experienced employees, Andres and Burton, that was sufficient to meet the PPE training requirements of the cited standard.[20] However, the great weight of the evidence is that Watson did not train either Ciaccio or the decedent regarding when they were required to wear protective eyewear and protective helmets, in violation of the cited standard. (*See* Findings of Fact ¶¶ 12, 22, 25, *supra*). Watson had actual knowledge that neither Ciaccio nor the decedent had been instructed when to wear eye protection and head protection. *See Lane Constr. Corp.*, 23 BNA OSHC 1097 (No. 09-0348, 2009) (ALJ) ("As the employer, Lane had actual knowledge of its training program"). Those new employees were exposed to risk of injury as a consequence of not receiving the training required by the cited standard. The Secretary has proven that the Respondent violated section 1910.132(f)(1) in manners alleged in item 3 of citation 1.

For the same reasons stated in connection with the proven violations of sections 1910.132(a), 1910.133(a)(1), and 1910.135(a)(1), the violation of the training standard at section 1910.132(f)(1) is properly classified as "serious."

Citation 2, Item 1: General Duty Clause

As described at the outset of this decision, the Secretary alleges that Watson willfully violated the general duty clause at each of the three separate worksites on May 4, 2016, by failing "to ensure that only employees trained in safe operation operated chippers and that only safe operating practices and techniques were used for feeding the chipper," thereby exposing

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requirements of paragraph (f) apply to employees who are required to use eye or face protection under section 1910.133 and protective helmets under section 1910.135.

[20] Evidence that an employee violated a PPE standard does not prove that the employee did not receive required training on the matter. *See Dravo Eng'rs & Constructors*, 11 BNA OSHC 2010, 2012 (No. 81-748, 1984) (observing that evidence of failure to enforce a safety rule does not prove a training violation).

employees to the hazard of "rotating blades and moving parts while feeding tree limbs" into the chipper.

The citation item alleged that the following unsafe practices in feeding the chipper occurred on May 4: operators leaned into and reached into the infeed hopper; operators stood on the left side of the infeed hopper; operators pushed "small pieces of wood and branches by hand;" and operators manipulated "large tree limbs in front of the infeed hopper with their back to it."[21]

The citation alleged that feasible and acceptable methods of abatement included following manufacturer guidance on training and operation set forth in material issued by the chipper's manufacturer and conforming to certain cited subparagraphs contained in ANSI standard Z133-2012, "American National Standard for Arboricultural Operations—Safety Requirements."

To establish a violation of the general duty clause, the Secretary must prove that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard.

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[21] Watson argues that the alleged general duty clause violation should be vacated because it does not specify "the source" of the alleged unsafe practices and thereby fails to provide him with fair notice of what conduct is required to comply with section 5(a)(1), in violation of due process. (Resp't Br. 39-45). *See Ruhlin Co.*, 21 BNA OSHC 1779, 1784-85 (No. 04-2049, 2006) (stating that "[a] citation issued under section 5(a)(1) will be vacated if the Commission determines that the employer lacks fair notice of what conduct is required"); *Gen. Elec. Co. v. E.P.A.*, 53 F.3d 1324, 1328–29 (D.C. Cir. 1995) (noting that the due process clause of the Fifth Amendment "prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires"). Watson fails to show how the citation item is deficient in providing him with notice of what conduct the Secretary alleges would be required to protect employees from the caught-by hazard, and so his lack of "fair notice" contention is rejected.

Peacock Eng'g, Inc., 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017). In addition, "the Secretary must also show the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition." *PSP Monotech Indus.*, 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008).

Recognized Hazard
Likely to Cause Death or Serious Physical Harm

The willful citation item defines the hazard to which employees were exposed as "being caught-in rotating/moving parts of a wood chipper."

A hazard is defined "in terms of the physical agents that could injure employees rather than the means of abatement." *Chevron Oil Co.*, 11 BNA OSHC 1329, 1331, n.6 (No. 10799, 1983). "The adequacy of the employer's work practices to reduce the risk of, or prevent the occurrence of, the hazard is a separate issue from the question of how the recognized hazard is defined." *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004).

The "physical agent" that defines the hazard here is the chipper, not the abatement methods that the citation proposes as being feasible and acceptable (*viz.*, that only employees trained in the safe operation of the chipper operate it, and that employees use only safe operating techniques in feeding the chipper).

The Secretary can establish that a hazard was recognized by "either the actual knowledge of the employer or the standard of knowledge in the employer's industry—an objective test." *Kokosing Constr.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996), *citing Cont'l Oil Co. v. OSHRC*, 630 F.2d 446, 448 (6th Cir. 1980).

"Manufacturers' instructions and voluntary industry standards that contain explicit safety warnings regarding compliance may be probative evidence in establishing a general duty clause violation." *K.E.R. Enters, Inc.*, 23 BNA OSHC 2241, 2242 (No. 08-1225, 2013).

Voluntary industry standards such as those published by ANSI "are admissible and probative evidence of industry recognition of hazards." *Cargill, Inc.*, 10 BNA OSHC 1398, 1402 (No. 78–5707, 1982). This is so even though a consensus standard has not been incorporated into an OSHA standard promulgated pursuant to the Act—such a consensus standard is nonetheless relevant to industry awareness of certain hazards associated with a given piece of equipment. *Id.*

The manufacturer's safety warnings and the provisions of ANSI standard Z133-2012 described in ¶¶ 51–53 of the Findings of Fact, *supra*, objectively establish that the rotating/moving parts of a woodchipper present a "caught-in" hazard.

Further, the caught-in hazard presented by the chipper is likely the type of hazard that is so "obvious and glaring" that it may be deemed recognized for purposes of the general duty clause apart from evidence of industry practice or expert testimony. *See Tri-State Roofing & Sheet Metal, Inc. v. OSHRC*, 685 F.2d 878, 880–81 (4th Cir. 1982).

In any event, with nearly thirty years' experience in the tree service industry and having owned and operated the chipper involved here since 2004, Watson had actual knowledge that the rotating/moving parts of the chipper presented a caught-in hazard.

It is manifest that death or serious physical harm can result from being caught in the rotating/moving parts of a chipper. In any event, the manufacturer's safety information described in the Findings of Fact at ¶ 51, is replete with warnings of the dire consequences of being caught in the chipper's infeed wheels.

Feasible and Effective Means
to Eliminate or Materially Reduce the Hazard

In order to establish the fourth enumerated element of a violation of the general duty clause (that a feasible and effective means existed to eliminate or materially reduce the hazard),

the Secretary "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated). The Secretary need only show that the identified abatement method would materially reduce the hazard, not that it would eliminate the hazard. *Arcadian Corp.*, 20 BNA OSHC at 2011. Where an employer has undertaken measures to address a hazard, the Secretary must establish that the employer's measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-1774 (No. 04-0316, 2006). The Secretary may establish that an employer's existing safety procedures were inadequate by demonstrating that there were "specific additional measures" required to abate the hazard. *Pelron Corp.*, 12 BNA OSHC 1833, 1836 (No. 82-388, 1986).

An "employer may use any method that renders its worksite free of the hazard and is not limited to those methods suggested by the Secretary," and thus "may defend by asserting that it was using a method of abatement other than the one suggested by the Secretary" and that "is as effective as the one suggested by the Secretary." *Brown & Root, Inc.*, 8 BNA OSHC 2140, 2144 (No. 76-1296, 1980).

The safety measures that were taken to abate the exposure of Ciaccio and the decedent to the chipper's caught-in hazard was to orient them the chipper's control bar and the last chance cables, to instruct them how to walk away from the chipper after the infeed wheels started pulling in a branch, and to feed the running chipper only when an experienced worker was with them. Watson also professed the intent to diligently monitor the decedent's activity because of his concern over the decedent's inexperience. The new employees were not directed to read the safety decals on the chipper and were not given any direct instruction on the content of those

safety decals. They were not provided any written or audio-visual safety material to review, and thus they had no exposure to such material. The Respondent had no reason to believe that either of the new employees had any exposure to any safety information regarding the chipper other than the oral information and instructions that they received during the brief time that each had been employed.

The great weight of the evidence shows that these safety measures were inadequate to materially reduce the caught-in hazard and that they were not as effective as the measures proposed by the Secretary in the citation. Watson instructed Ciaccio and the decedent how to feed brush into the running chipper at the first worksite on Church Road, and he allowed them to continue to feed brush in the chipper with the instruction that they do so only when an experienced worker was near them. (T. 480; Ex. C-25, pp. 47-48, 53). Watson offers no explanation about how permitting a new employee to feed the chipper only when there was an experienced worker nearby adequately protects that new employee from caught-in hazards, particularly in light of the swiftness in which a worker may be caught up in material being pulled into a running chipper. Allowing either of the new employees to feed the chipper with those oral instructions, given their scant knowledge and orientation to the chipper, was plainly contrary to the safety instructions provided by the manufacturer, and Watson seems actually to have recognized as much when he testified as follows (T. 499):

> But it wasn't that [the decedent] was going to be running — I didn't want him even around that machine, even if they [Andres and Burton] gave him safety instructions or not. When the chipper was running, I – I wouldn't even have wanted him -- I mean, I was – I can't even believe that video [Ex. C-19, video 2] that they [Andres and Burton] let him run that through like that.

In speaking with OSHA officials about two weeks after the fatality, Watson expressed a similar sentiment with respect to Ciaccio: "And even with [Ciaccio], I never would allow him

even to get near that chipper unattended himself. And he had … somewhat more experience" than the decedent. (Ex. C-25, p. 56). And Watson testified that allowing new workers to "run" the chipper was not his "normal procedure on a new guy working with us." (T. 485).

It is revealing that in speaking to the police in the immediate aftermath of the fatality, Watson falsely told them that "all day long [the decedent] was cleaning up branches and raking up debris" and that the decedent "was not supposed to be putting things in the chipper." (Ex. C-16). But in truth, Watson had permitted the decedent (and Ciaccio) to do much more than clean up and rake up and had expressly permitted both of them to feed the running chipper. Watson's false statement to the police reflects an awareness that the brief oral instructions and orientation given the decedent and Ciaccio on feeding the brush through the chipper was inadequate. It is reasonably inferable from Watson's false statement to the police that he actually recognized that neither of the new employees should have been permitted to feed the chipper on the day the decedent was killed, because neither of them had received an adequate orientation and instruction on the safe operation of the chipper or had demonstrated a full understanding of, and proficiency in, those safe operating practices.

The Secretary has established that the training and instruction that both the decedent and Ciaccio were provided on the chipper was inadequate to address the caught-in hazard posed by the chipper.

The Secretary has also established that supervision of employees feeding the chipper was inadequate for monitoring whether the new employees were using only safe operating practices in feeding the chipper. At the DiBella Drive worksite, the new employees (1) fed the chipper while positioned directly behind the infeed tray rather than from the side of the infeed tray (and in some instances with the employee's back to the infeed tray as other workers fed the chipper at

the same time), (2) failed to step away from the chipper after having fed brush into the chipper in the manner they had been instructed (and in one instance stepping over a branch as it was being pulled into the chipper), and (3) used hands rather than an instrument to push brush from the infeed tray into the infeed hopper (rather than using a wooden pole or similar instrument).[22] Watson acknowledged that the activity depicted in video 2 of Exhibit C-19 shows employees utilizing unsafe practices while feeding the chipper, and he testified that the only reason he did not correct those unsafe practices was because he did not see them as they were occurring.[23] (T. 559-61, 599-600). Watson also expressed chagrin that the experienced employees had not interceded at the DiBella Drive worksite to correct those unsafe practices, even though he had not instructed either of the experienced employees to do so. (T. 499).

The video evidence shows both Ciaccio and the decedent feeding the running chipper when experienced workers were nearby, which is precisely what Watson told them they could do. (T. 480). Although soon after the fatality Watson told OSHA officials he had been concerned about the decedent and that he had made a point of keeping an eye on him throughout

[22] Contrary to averments in the citation item, the video evidence does not depict any of the workers putting any part of their bodies inside the infeed hopper. Moreover, while the video does show workers sometimes feeding the chipper from the left side of the infeed tray, doing so did not create a hazard at the DiBella Drive location because the street was blocked off, so no traffic was passing by the employees who were feeding the chipper. The safe practice prescribed by the manufacturer's manual to avoid feeding from the left side of the infeed tray (the non-curb side) is intended to protect workers from passing vehicular traffic, not to protect employees from hazards presented by the chipper itself. (Ex. R-24).

[23] There is no direct evidence of any unsafe feeding practices occurring at either the Church Road or the Placid Drive worksites. Even though something went horribly wrong at the Placid Drive site, to conclude that the decedent got caught up in the chipper while engaging in unsafe feeding practices would to some extent require indulging in surmise, conjecture and speculation. Such an exercise is unnecessary in order to resolve the violation alleged. *See Quick Transp. of Ark., LLC*, 27 BNA OSHC 1947, 1949 (No. 14-0844, 2019) (stating that to establish a general duty clause violation does not require "[p]roof that a cited activity actually caused harm or necessarily could have caused harm under the precise physical conditions that happened to be present at the time of the violation, or at any other specific time").

the day (Ex. C-25, p. 85), the video evidence belies that assertion. Had Watson been as diligent in supervising and monitoring the activities of the decedent as he professed to OSHA officials that he had been (and that he apparently believed he ought to have been), he would have certainly observed the unsafe feeding practices both the decedent and Ciaccio were using at the DiBella Drive worksite. The Secretary has established that the monitoring and supervision of the employees feeding the chipper was inadequate for protecting the new employees against the caught-in hazard presented by the chipper.

The citation item identified provisions from the manufacturer's materials and from ANSI Z133-2012 respecting training of employees on safe operating practices, and utilization of such safe operating practices. The excerpt of the ANSI standard Z133-2012 received in evidence at Exhibit C-23 does not specify any practice or procedure respecting brush chipping that is not also stated in the manufacturer's manual that Watson received when he purchased the chipper. The great weight of the evidence establishes that restricting the feeding of the running chipper to employees who had been instructed on and understood the safe operating practices described in the manufacturer's written materials, and adequately monitoring and supervising those trained employees respecting their actual use of those safe operating practices, are measures that were capable of being put into effect and that would have been effective in materially reducing the caught-in hazard while feeding the chipper.

The Secretary has met his burden to show that a feasible and effective means existed to eliminate or materially reduce the caught-in hazard presented by the chipper.

Watson's Actual or Constructive Knowledge

Watson had actual knowledge that neither of his new employees had adequate training and experience on the safe operation of the chipper when he permitted both of them to feed branches in the running chipper. His testimony and early statements to the police and to OSHA

officials convey an implicit understanding that given the level of training and experience of those employees, that they should not have been feeding the chipper on May 4 even when under the close observation of an experienced worker. (T. 499, 531; Ex. C-16, Ex. C-25, pp. 29-32, 37, 53, 57-58, 84-85, 117-18).

Contrary to Watson's suggestion in his testimony that he did not know that Ciaccio and the decedent were feeding the chipper at the DiBella Drive worksite to the extent that video 2 of Exhibit C-19 depicted (T. 499), it is simply not reasonably possible that Watson failed to recognize that his new employees were feeding the chipper for over six minutes at the DiBella Drive location. At one point during the more than six minutes that the decedent fed brush into the chipper, the video shows Watson having stopped cutting to stand upright and to face directly at the decedent and Ciaccio as they feed the chipper no more than 20 feet away. (Ex. C-19, video 2 from 04:52 to 04:58). It was readily apparent to anyone who looked what Ciaccio and the decedent were doing, and the video shows that Watson actually did look.

But even if Watson truly did not see the extent and manner in which the new employees were feeding the chipper at the DiBella Drive worksite, it was because he was not providing an appropriate level of monitoring and supervision of the inexperienced employees as they were feeding the chipper.

"[A]n employer who lacks actual knowledge can nevertheless be charged with constructive knowledge of conditions that could be detected through an inspection or examination of the worksite." *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91–3467, 1995). To prove constructive knowledge, the Secretary must show that Watson's failure to discover an alleged violative condition was due to a lack of reasonable diligence. *See Ragnar Benson Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999).

"In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

"An employer is … chargeable with knowledge of conditions which are plainly visible to its supervisory personnel." *Texas A.C.A., Inc.*, 17 BNA OSHC at 1050, n.4; *see also Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993) (noting that constructive knowledge may be established where a violative condition is "readily apparent to anyone who looked"), *aff'd on other grounds*, 28 F.3d 1213 (6th Cir. 1994). Whether an employer should have discovered a violative condition that is plainly visible requires consideration of how long the violative condition existed. *Thos. Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2086 (No. 06-1542, 2012) (ruling that the absence of evidence of how long a violative condition existed precludes finding that the employer could have known of the condition with the exercise of reasonable diligence.)

Whether an employer has exercised reasonable diligence is a question of fact that "will vary with the facts of each case." *Martin v. OSHRC*, 947 F.2d 1483, 1484 (11th Cir. 1991); *see also Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129 (No. 92–0851, 1994) (finding that a preponderance of the evidence established the cited employer was reasonably diligent).

Watson is charged with constructive knowledge of the unsafe practices the decedent and Ciaccio frequently employed in feeding the chipper at the DiBella Drive worksite for over six minutes. As is substantially addressed in the preceding discussion on the section 5(a)(1) citation, Watson failed to exercise reasonable diligence in training the new employees, in adequately supervising the new employees, in reasonably anticipating hazards to which the new employees

may be exposed, and in taking reasonable measures to prevent the occurrence of their violative conduct.[24] *Thomas G. Gallagher, Inc. v. OSHRC*, 877 F.3d 1, 11 (1st Cir. 2017).

Willful Classification

"The hallmark of a willful violation is the employer's state of mind at the time of the violation." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). A violation is willful if the employer acted with an intentional, knowing, or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2222 (No. 09-0004, 2014) *aff'd*, 811 F.3d 922 (7th Cir. 2016). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). "[A] willful violation may be found where the employer knows of the legal duty to act, and knowing an employee is exposed to a hazard, nonetheless fails to correct or eliminate the hazardous exposure." *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685 (No. 00-1315, 2001); *see also Dukane Precast, Inc. v. Perez*, 785 F.3d 252, 256 (7th Cir. 2015) (concluding that proof of willfulness under section 17(a) of the Act "requires proof only that the defendant was aware of the risk, knew that it was serious, and knew that he could take effective measures to avoid it, but did not—in short, that he was reckless in the most commonly understood sense of the word") (Posner, J.).

"Willful violation of the general duty clause of the Act is legally cognizable." *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983). A willful violation of the

[24] This affirmative finding of constructive knowledge that the new employees were utilizing unsafe practices in feeding the chipper at DiBella Drive effectively disproves Watson's assertion that he should not be held responsible for that violative conduct on the ground of unpreventable employee misconduct. *See Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010). That affirmative defense need not be further addressed.

general duty clause may be established where an employer demonstrates " 'plain indifference' towards the safety requirements of the general duty clause." *Id.* at 1422-23. "An employer need not harbor … a 'specific intent' to violate" the general duty clause in order to violate it willfully. *Id.* at 1423.

As discussed earlier, Watson's false statement to the police in the immediate aftermath of the fatality, when he told the police that "all day long [the decedent] was cleaning up branches and raking up debris" and "was not supposed to be putting things in the chipper," when in truth the decedent had fed the chipper with Watson's express permission, evinces a consciousness of wrongdoing with regard to having given an inadequately trained employee with no prior experience the permission to operate lethal equipment. Corroborative of this conclusion is Watson's testimony that allowing new workers to "run" the chipper was not his "normal procedure on a new guy working with us." (T. 485). Further corroborative of this conclusion is Watson's further testimony, quoted previously, that he "didn't want [the decedent] even around that machine" when the chipper was running regardless whether the experienced employees had given the decedent safety instructions. (T. 499). But video 2 of Exhibit C-19 shows that in actuality, Watson observed the decedent and Ciaccio feeding the chipper at the DiBella Drive worksite when an experienced worker was nearby. This is what Watson had expressly permitted the new employees to do.

The whole of the evidence establishes that Watson's violation of the general duty clause was willful in that it establishes Watson recognized that he had a legal duty not to permit the decedent or Ciaccio to feed the running chipper and he knew that permitting them to do so would materially heighten their exposure to the chipper's caught-in hazard, but that he nonetheless

failed to materially reduce or eliminate the hazardous exposure. *Revoli Constr. Co.*, 19 BNA OSHC at 1685.

Watson argues that a willful classification is inappropriate because he "acted in good faith throughout." (Resp't Br. 62-63). *See Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1112 (No. 11-2559, 2016) (stating that the Commission has "long held that a violation is not willful if the employer shows that it exhibited a good faith, reasonable belief that its conduct conformed to law, or it made a good faith effort to comply with a standard or eliminate a hazard").

The evidence discussed above does not establish that Watson ever held the subjective belief that his conduct conformed to law or that he had made a good faith effort to materially reduce or eliminate the new employees' exposure to the caught-in hazard. But even if Watson did hold such a subjective belief, that belief would have been unreasonable, and would not support a finding of good faith that would preclude a classification of willfulness.

Penalty Assessment

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give due consideration to the gravity of the violation, the "size of the business of the employer," and to the employer's history of violations and good faith. 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

"[T]he Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a reasonable and appropriate penalty based on that evaluation." *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151 (No. 89-1508, 1995), *aff'd on other grounds*, 138 F.3d 686 (7th Cir. 1998).

The maximum penalty for a serious violation occurring on the day of the fatality here was $12,471. The maximum and minimum penalties for a willful violation were respectively $124,709 and $8,908.[25]

Watson testified regarding his financial condition, although he presented no documentation to corroborate his testimony. Nevertheless, his testimony that he does not have significant cash holdings, and that his only significant property holdings are his house (with a

[25] On July 1, 2016, the Secretary published an Interim Final Rule that increased allowable penalty amounts for violations that occurred after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015. Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). Interim Final Rule, Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43430, 43439 (July 1, 2016) (to be codified at 29 C.F.R. 1902, 1903). The Inflation Adjustment Act mandates that the penalty adjustments apply to any civil monetary penalty assessed after August 1, 2016, ''including those whose associated violation predated such increase.'' Pub. L. 114–74 at § 701. Before this increase, the maximum penalty for a willful violation had been $70,000.

The violations here occurred on May 4, 2016, and were assessed between August 1, 2016 and January 13, 2017, so the maximum penalties stated in the text apply. 29 C.F.R. § 1903.15(d) (2016); *see also*, Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017, 82 Fed. Reg. 5373, 5385-86 (Jan. 18, 2017) (to be codified at 29 C.F.R. 1903) (increasing maximum penalty amounts for penalties assessed after January 13, 2017).

The Respondent argues that applying the increased penalties that were published on July 1, 2016, to violations that occurred before the publication of the penalties "is a violation of due process/fair notice." (Resp't Br. 65). To sustain this argument would require ruling that the provision of the Inflation Adjustment Act of 2015 that expressly mandates application of the increased penalties in this manner is unconstitutional. This, the Commission has not the power to do. *See S.A. Healy Co.*, 17 BNA OSHC at 1147 (noting that "[a]rguably, the Commission would not be competent to decide … whether the Act would be unconstitutional"); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (noting the principle that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

substantial mortgage) and vehicles and equipment related to his business, was credible. (T. 532-543).

The Commission has recognized that an employer's finances can be relevant to assessing "the size of the business of an employer" under section 17(j). *See e.g., Colonial Craft Reprod.*, 1 BNA OSHC 1063, 1064 (No. 881, 1972) (size includes financial condition); *Jasper Constr., Inc.*, 1 BNA OSHC 1269, 1270 (No. 119, 1973) (size is determined by looking at both "gross dollar volume and the number of persons employed").

OSHA proposed the penalties for the serious PPE violations by employing its internal methodology for calculating penalty amounts to take into account the statutory factors prescribed by section 17(j) of the Act. (T. 415-29). The assessments for severity and probability with respect to the "gravity" factor for each of the PPE violations as described by the OSHA Area Director were consistent with the evidence presented at the hearing, and the undersigned adopts those assessments as reflected in the Area Director's testimony. (T. 415-29). The undersigned also adopts the Area Director's adjustments to the resulting gravity-based penalties for the serious citation items to take into account the employer's size, history and good faith. In making these adjustments, the Secretary reduced the calculated gravity-based penalties for each of the serious violations by 60% to account for the employer's size, in accordance with objective standards set forth in OSHA's methodology.[26] (T. 423). This reduction for size in OSHA's methodology operates to address appropriately the size of Watson's business (including the business's financial condition) with respect to the four serious citation items. Adopting the

[26] OSHA's methodology for assessing proposed penalties apparently does not directly take into account the financial condition of an employer (*see* Sec'y Br. 42), perhaps on the logic that OSHA's methodology of adjusting penalties downward for smaller employers addresses to some extent the financial wherewithal of some smaller employers to satisfy the gravity-based penalty. The undersigned notes, however, that the sizes of any given employer's workforce and the bank accounts are not necessarily directly correlated.

proposed penalties for the serious citation items, the following penalties will be assessed for the serious citation 1 items as follows: (1) for item 1, $3563 for the violation of § 1910.132(a); (2) for item 2, $4988 for the violation of § 1910.132(f)(1); (3) for item 3, $3563 for the violation of § 1910.133(a)(1); and (4) for item 4, $4988 for the violation of § 1910.135(a)(1). Thus, penalties totaling $17,102 for serious citation 1 shall be assessed.

OSHA's assessment of the severity and probability factors for the serious willful violation resulted in a determination that the violation was "high" gravity, which under OSHA's methodology resulted in a gravity-based penalty in the maximum amount allowable for a willful violation of $124,709. (T. 423-28). OSHA's methodology provides for an employer of the Respondent's size to receive an 80% reduction to that gravity-based penalty on account of the employer's size. (T. 437). An 80% reduction to the maximum penalty would have resulted in a proposed penalty of $24,942 for the serious willful violation. OSHA's penalty methodology allows area directors the discretion to depart from the methodology in certain circumstances, including violations that involve fatalities. (T. 372-74, 427-28). The Area Director here exercised that discretion in determining not to provide for any reduction for size because a fatality was involved and because of "all the factors related to the investigation." (T. 428).

The undersigned adopts the Secretary's assessment that the serious willful violation is of high gravity and merits the gravity-based penalty as calculated using the Secretary's penalty methodology. The undersigned further adopts the Secretary's determination not to adjust this gravity-based penalty downward in addressing the section 17(j) factors pertaining to the employer's history of violations and good faith.

The undersigned determines that not reducing the maximum penalty allowable under the law for the employer of very modest financial means here, even for a willful violation involving

a fatality, does not adequately account for the "size of the business" of an employer under section 17(j) of the Act, and here would result in a penalty that is unduly burdensome and excessive for the employer. *See S.A. Healy Co.*, 17 BNA OSHC at 1151.

The Secretary argues for not reducing the proposed maximum penalty in part because of the deterrent effect of a maximum penalty. (Sec'y Br. 38-40). The undersigned finds that after due consideration is given to the size of the business of the employer here, that the interests of specific deterrence will be sufficiently served without assessing the maximum available penalty. A reduction of 60% to the gravity-based penalty for the serious willful violation, which is the same percentage reduction that the Secretary proposed to be applied to the gravity-based penalties for the serious PPE violations, is appropriate in view of the small size of the employer's business (and correspondingly meager financial wherewithal) and to account for "all the factors of the investigation" as referenced by the area director, which includes the tragic fact that the matter involved a fatality.

A 60% reduction in the proposed maximum penalty results in an assessed penalty of $49,884 for the willful violation of section 5(a)(1) of the Act.

ORDER

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a)(1). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, item 1, instances "a", "b", and "c", for a serious violation of 29 C.F.R. § 1910.132(a) is AFFIRMED, and a penalty of $3563 is assessed.

2. Citation 1, item 2, instances “a”, “b”, and “c”, for a serious violation of 29 C.F.R. § 1910.132(f)(1) is AFFIRMED, and a penalty of $4988 is assessed.

3. Citation 1, item 3, instances “a”, “b”, and “c”, for a serious violation of 29 C.F.R. § 1910.133(a)(1) is AFFIRMED, and a penalty of $3563 is assessed.

4. Citation 1, item 4, instances “a”, “b”, and “c”, for a serious violation of 29 C.F.R. § 1910.135(a)(1) is AFFIRMED, and a penalty of $4988 is assessed.

5. Citation 2, item 1, instances “a”, “b”, and “c”, for a willful violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), is AFFIRMED, and a penalty of $49,884 is assessed.

_____
WILLIAM S. COLEMAN
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order/Notice was mailed to the parties listed below electronically using the Commission's E-Filing System and via email on September 16 2019.

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