

STATE OF ALASKA

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DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
KETCHIKAN PULP CO., INC.,)
)
Contestant.)

Docket No. 90-826
Inspection No. Hu-9505-344-90

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the State of Alaska, Department of Labor ("Department") on May 15, 1990, at a logging site near Shrimp Bay in southeastern Alaska. As a result of the inspection, the Department issued three citations to Ketchikan Pulp Co., Inc. ("KPC") for alleged violations of Alaska occupational safety and health codes. KPC timely contested all of the Department's citations and penalties.

A hearing was held before the Board in Ketchikan on February 14, 1991. The Department was represented by Assistant Attorney General Lisa M. Fitzpatrick. KPC was represented by Michael F. Barron. At the hearing KPC indicated that it wished to



withdraw its contest to Citation 1 and all items in Citation 3 except for item 5. With respect to Citation 3, item 5, KPC sought to amend its pleadings to contest the Department's jurisdiction to cite that particular violation. The Department responded that the jurisdiction issue had not been timely raised in earlier pleadings and could not be raised for the first time at the hearing. The Board reserved its ruling on the jurisdictional issue.

The principal item in contest at the hearing was Citation 2 which alleged that KPC violated Logging Code 07.115(c) by failing to remove snags and other hazardous trees within falling distance of a logging road used by KPC employees. The violation was classified as "serious" and a monetary penalty of \$800 was assessed.

Both parties presented witness testimony and documentary evidence. Upon consideration of the evidence and arguments presented by the parties, the Board hereby makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. During 1989 and 1990 KPC conducted logging operations on Revillagegido Island near Shrimp Bay, approximately 40 miles north of Ketchikan.

2. The land on which KPC conducted logging operations at Shrimp Bay is owned by the U.S. Government and managed by the U.S. Forest Service. KPC has a long-term contract with the Forest

Service to cut and remove timber and began logging in the Shrimp Bay area in August 1989.

3. A logging road approximately 7 miles long connects the timber transfer facility at Shrimp Bay to the logging areas inland (Exhibit A). The road is approximately 10 years old and is under the supervision and control of the Forest Service. The principal users of the road are KPC employees involved in logging operations.

4. In May 1990 KPC was cutting timber in an area approximately 3-4 miles from Shrimp Bay (circled in green on Exhibit A). The logs were cut, loaded onto a truck and transported to the transfer facility at Shrimp Bay.

5. On May 15, 1990, Department compliance officer Cliff Husted flew to Shrimp Bay to conduct an inspection of KPC's logging operations. Prior to joining the Department as a safety compliance officer, Husted worked for over 7 years as an insurance inspector for the Alaska Timber Exchange.

6. While driving out the main logging road to the cutting area, Husted noticed several trees within falling distance of the road that he believed were hazardous and, if they fell, could potentially injure employees traveling on the road. He photographed trees he felt were hazardous in an area approximately 1 to 1-1/2 miles from Shrimp Bay and 2-3 miles from the cutting area (Exhibits B and C).

7. Husted believed the trees were dangerous because they were dead or decayed; they had dead or broken limbs; they had

damage to their trunk or root systems; and some were leaning toward the road. In addition, there was considerable vibration along the road from logging trucks and other heavy equipment and he believed hazardous trees could fall suddenly and quickly on employees who might be on the road. He also noted some erosion at the sides of the road near the trees due to logging operations.

8. After Husted completed his inspection, he notified the Forest Service sale administrator, Alan Grundy, of his findings regarding the hazardous trees. Grundy went to the logging site on the following day and after discussing the situation with Fred Bennett, KPC's logging foreman at Shrimp Bay, authorized KPC to remove the trees identified by Husted. The marked trees were then cut down by KPC.

9. In April 1990, approximately one month before Husted's inspection, Department of Labor officials met with timber industry representatives at Thorne Bay and discussed the subject of dangerous trees in logging operations. At least two KPC safety supervisors, Bob Evert and Dick Hansen, attended the meeting. Department officials stated that the Department's policy regarding hazardous trees was to cite any employer whose employees were exposed to dangerous trees regardless of ownership of the trees or the land.

10. According to Dennis Smythe, the Department's chief of safety compliance, KPC was cited for the hazardous trees within falling distance of the road because its employees traveled on the road to and from the cutting areas and were thus exposed to the

hazard created by the dangerous trees. In addition, as the principal user of the road under its contract with the Forest Service, KPC was in a position to request permission from the Forest Service to cut down dangerous trees but neglected to do so. The Department considers the logging road in question to be part of the "workplace" where employees must be protected and employers must comply with applicable occupational safety codes.

11. Bob Evert, KPC's safety supervisor, accompanied Husted for part of his inspection. He agreed that certain trees near the cutting area might be hazardous and should be cut down. However, Evert and other KPC officials objected to the citation for hazardous trees along the road that were not near the actual cutting areas where employees were working. Evert acknowledged being present at the Thorne Bay meeting where the Department's policy regarding dangerous trees was discussed but maintained that the primary concern at the meeting was dangerous trees in cutting areas rather than along logging roads.

12. Fred Bennett, a logger for 39 years, was KPC's logging foreman at Shrimp Bay. He disagreed that the trees identified by Husted along the road were hazardous, contending that the roots were not dug out, all the stumps were solid, and there was little or no visible rot. He said that damage to the bark of the trees was not decay but was caused by rocks from nearby blasting operations. He also testified there was little or no wind in the area to knock over leaning or weak trees. Bennett did not think that any of the trees identified by Husted were unsafe and

that such a decision was essentially a judgment call. In Bennett's view, it is more dangerous to fell a dead or dying tree than to let it stand and fall of its own accord during the winter snow. Bennett said he had examined the entire length of the logging road between August 1989 and the date of the inspection and had removed any trees that might have been dangerous to employees.

13. According to Forest Service officials Stephen Ambrose and Alan Grundy, the Forest Service has primary responsibility for the logging road at Shrimp Bay. However, this did not preclude a logging contractor from requesting permission to cut down dangerous trees. The Forest Service's policy is to authorize the removal of hazardous trees once they have been identified. KPC made no request to remove or cut down hazardous trees at Shrimp Bay prior to Husted's inspection.

14. In a letter to the Department dated January 30, 1991, Grundy stated:

... Any tree in the sale area, whether designated for harvest or not, that has the potential to cause injury or damage to people or equipment is considered a danger tree. Advanced decay, excessive lean, and exposed root systems are factors which contribute to identifying danger trees.

Although the Longterm Sale Contract (#A10fs-1042) does not include a provision concerning the issue of danger trees, it is the policy of the Forest Service to incorporate the Alaska Department of Labor's Occupational Safety and Health Standards concerning logging into the administration of Federal timber sales. Any tree identified by the operator as a danger tree to the sale administrator would be reviewed and approval for removal would occur on a case-by-case basis.

Exhibit 1.

15. Grundy had no opinion as to what killed the dead or dying trees in question but stated that soil disruption from logging operations may have exposed their roots. He looked at the stumps of the felled snags and noted a significant amount of decomposition in their root systems.

16. The Department classified Citation 2 as "serious" due to the likelihood of serious injury or death in the event an employee were to be struck by a falling tree. Under the Department's citation guidelines, the probability of an accident occurring is not taken into account in determining whether the violation is "serious." The Department looks principally to the seriousness of an injury resulting from a potential accident.

17. Because the violation was found to be "serious," the Department's initial unadjusted penalty was \$1,000. Under the Department's penalty calculation guidelines, the penalty was reduced by 10 percent for KPC's good faith in promptly abating the hazard and by an additional 10 percent because KPC had no history of similar violations within the prior three years. KPC was not given any penalty credit for company size since it is a large employer with approximately 500 employees. Applying the 20 percent penalty credit, the Department's final penalty assessment for Citation 2 was \$800.

CONCLUSIONS OF LAW

A. Scope of Logging Code

Alaska Logging Code 07.115(c) provides: "Each employer shall ensure safe removal of hazardous trees and snags within falling distance of buildings, roads, landings, donkeys, and rigging prior to commencing operations."

We must first consider whether the above provision applies to trees outside the actual cutting area but within falling distance of the main logging road from the cutting area to Shrimp Bay. KPC argues that any hazardous trees outside its immediate cutting area are the exclusive responsibility of the Forest Service and that the logging road is not part of KPC's "workplace" subject to OSHA enforcement. The Department responds that the Logging Code applies to all logging operations, including travel by employees along roads to and from the actual cutting areas. The Department also maintains that even though KPC did not own or control the road, it had a responsibility to its employees under the OSH Act to notify the Forest Service of any hazardous trees and request permission to remove them.

We cannot agree with KPC's narrow interpretation of the scope of the Logging Code. LC 07.105(a) sets forth the basic scope of the Logging Code and broadly covers all logging operations "associated with the preparation and movement of logs from timber site to point of delivery." This would include the transportation of logs by employees along any logging roads. Moreover, LC 07.115(c) specifically requires removal of hazardous trees or snags

within falling distance of "roads" without limitation or exception. The federal Occupational Safety and Health Review Commission (OSHRC) and the courts generally have construed OSHA standards as broadly as possible to best accomplish the OSH Act's purpose of assuring worker safety and health. When there is more than one interpretation of a code provision, the one best calculated to achieve accident prevention is preferred. See Rothstein, Occupational Safety and Health Law § 126, at 175 (3d ed. 1990).

Similarly, the "workplace" is not a stationary concept but has been broadly construed to offer maximum safety and health protection. See Rothstein, supra, § 116 at 160. For example, in Clarkson Construction Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976), the employer's truck was backing up along the shoulder of a public highway when it struck and killed a worker. The court emphatically rejected the employer's defense that the accident occurred outside the limits of its workplace:

To draw narrow boundaries which would have the effect of restricting the area of protection would effectively defeat the clear purpose of the statute. The important aspect is that the truck was being used to further the project.

531 F.2d at 458.

Based on the foregoing principles, we believe the logging roads used by KPC employees are just as much a part of KPC's "workplace" as the actual cutting area itself. To conclude otherwise would be to allow KPC to abdicate part of its safety responsibilities to employees whenever they are not within the

actual cutting area and would contravene the broad scope of the OSH Act as determined by the courts and federal regulatory authorities.

The evidence further indicates that the Forest Service considers the Department of Labor's OSHA standards concerning logging to be incorporated into its timber sales agreements. Any trees identified by a logging contractor as dangerous would be reviewed and approved for removal on a case-by-case basis. Thus, KPC had the ability to abate the hazard by requesting permission from the Forest Service to cut down dangerous trees.

We also find it significant that only a month before the Department's inspection, KPC officials and other timber company representatives were specifically notified by the Department of its enforcement policy regarding dangerous trees. The Department stated that employers would be cited for any dangerous trees to which their employees were exposed regardless where the trees were located. We believe the Thorne Bay meeting gave KPC fair warning of the Department's enforcement policy.

B. Were the Cited Trees "Hazardous"?

Having determined that LC 07.115(c) applies to hazardous trees within falling distance of logging roads, we must next determine whether the trees cited by the Department were "hazardous" within the meaning of the Code.

The Code does not define a "hazardous" tree but defines a "danger tree" as "a standing tree live or dead, including snags, with evidence of deterioration, or physical damage, to the root

system or stem. The degree and direction of lean is also an important factor when determining if a tree is dangerous." LC 07.110(a)(126). A "snag" is "a dead standing tree or portion thereof which remains standing." LC 07.110(a)(99). For the purposes of this decision, we consider a "danger tree" to be "hazardous" within the meaning of LC 07.115(c).

The photographs taken by compliance officer Husted show several apparently dead trees within falling distance of the road, including two that were leaning toward the road. Exhibit B depicts a leaning dead tree with visible signs of damage to its trunk. In addition, Husted (who had significant experience in the timber industry) testified that he saw a significant amount of decay and decomposition of the root system of the trees in question. This was corroborated by Forest Service official Grundy. Taking these factors into account and notwithstanding the contrary testimony of KPC logging foreman Fred Bennett, we conclude there is substantial and credible evidence that the trees in question were "danger trees" under LC 07.110(a)(126) and thus were "hazardous" within the meaning of LC 07.115(c).

C. Classification As "Serious" and Penalty Assessment

Under AS 18.60.093(b), a violation is considered to be "serious" if the violation creates in the place of employment a substantial probability of death or serious physical harm. This definition is substantially similar to that in § 17(k) of the federal OSH Act, 29 U.S.C. § 666(k). Decisions of the OSHRC and

the courts have constantly held that it is not necessary to prove that there is a substantial probability that an accident will occur. It is only necessary to prove that an accident is possible and that death or serious physical harm could result. Rothstein, supra, § 313 at 333 (citing cases). The likelihood of an accident occurring, however, is taken into account in the determination of an appropriate penalty. Id., § 333 at 357-59.

Applying the foregoing principles, we conclude that the Department properly classified Citation 2 as "serious." There is little doubt that if a hazardous tree were to fall on an employee, serious physical injury or death would result. We also believe, however, that the chances of a tree falling on an employee are remote. None of the witnesses at the hearing could recall an instance where a hazardous tree or snag away from the cutting area had struck an employee. Because of the relatively slight probability that an accident would occur, combined with KPC's good faith in cutting down the hazardous trees and no history of prior violations, we conclude the penalty should be reduced from \$800 to \$200.

D. Citation 3, Item 5

At the hearing, KPC for the first time challenged Citation 3, item 5, on jurisdictional grounds. Citation 3, item 5, alleges that KPC violated Logging Code 07.160(f)(7) by failing to provide a fire extinguisher on the boom boat at Shrimp Bay. Other than raising the jurisdictional question, KPC offered no

evidence or legal authority to support its position on this issue. The Department objected that the jurisdiction issue was not timely raised by KPC.

The Department is presumed to have jurisdiction unless the employer demonstrates that jurisdiction does not exist or has been preempted by some other regulatory agency. We have previously held that the burden of proof on a jurisdictional preemption claim is on the employer. Cook Inlet Aquaculture Association, Docket No. 89-781, Decision and Order at 10, n.2 (October 3, 1990); see also Rothstein, supra, § 24 at 29-30. Because KPC provided no evidence or legal authority to support its jurisdictional objection, we are unable to effectively address the issue and therefore dismiss KPC's objection.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board hereby orders as follows:

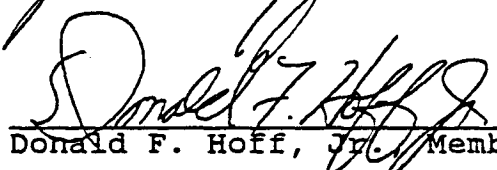
1. Citation 2 is affirmed as a "serious" violation but the proposed penalty is reduced to \$200.
2. Citation 3, item 5, is affirmed as an "other" violation with no monetary penalty.

DATED this 2nd day of May, 1991.

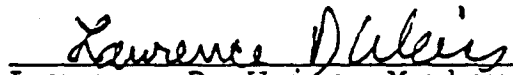
ALASKA OCCUPATIONAL SAFETY
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J.C. Wingfield, Chairman



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Lawrence D. Weiss, Member

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NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. Ketchikan Pulp Company, Docket No. 90-826, filed in the office of the OSH Review Board at Juneau, Alaska, this 2nd day of May, 1991.



Mary Jean Smith
OSH Review Board

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