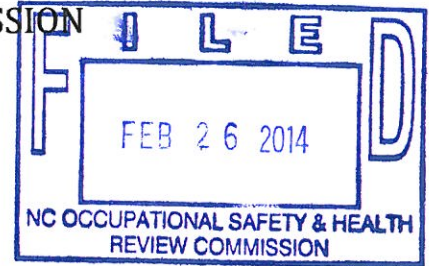


BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2012-5287
OSHA INSPECTION NO. 315957951
CSHO ID: Y8949

vs.

RUSSELL ENTERPRISES, LLC.
and its successors

AMENDED ORDER

Respondent.

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on October 8, 2013, at the Lee House, 422 North Blount Street in Raleigh, North Carolina.

The Complainant presented the affidavit of Nicole Brown, District Supervisor of the Bureau of Safety Compliance, division of Occupational Safety and Health, North Carolina Department of Labor, as well as an unredacted copy of the case file. The Respondent received proper notice of the hearing; however, Respondent did not show up for the hearing.

After reviewing the record file, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for, compliance with, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the “Act”).
2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about February 14, 2012, contesting a citation issued on February 1, 2012, to Respondent, Russell Enterprises, LLC (“Respondent” or “Russell”).
3. Respondent, a disaster-recovery logging company, is a North Carolina corporation, duly organized, and existing under the laws of the State of North Carolina, which does business in the State of North Carolina, subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent maintains a place of business in Smithfield, North Carolina, and employs 7 workers.
4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).
5. On January 18, 2012, Compliance Safety and Health Officer Thorpe (“CSHO Thorpe”), conducted a comprehensive inspection at Respondent’s worksite at 4131 Lower Moncure Road, Sanford, North Carolina (“site”).
6. Respondent was contracted to trim trees along the ½ mile section right-of-way on Lower Moncure Rd., Sanford, NC, using one aerial lift truck and a VERMEER 1800 Turbo brush chipper.

7. CSHO Thorpe properly entered the site and presented credentials to Mr. John Langdon, Respondent's foreman, and received consent to the inspection by Mr. Langdon. Mr. Langdon accompanied CSHO Thorpe on the walk-around portion of the inspection.
8. CSHO Thorpe initiated a walk around of the site and interviewed Respondents' employees.
9. CSHO Thorpe conducted a closing conference with Mr. Langdon and at the completion of the inspection at the site, CSHO Thorpe recommended that citations be issued.
10. As a result of the recommendations of the compliance officer, on February 1, 2012, the Complainant issued the following Citations:

Citation 1 Item 1: Serious

Citation 1, Item 1, alleges a serious violation of NCGS § 95-129 (1) of the Occupational Safety Health Act of North Carolina: "The employer did not furnish each of his employees conditions of employment and a place of employment free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a caught-in hazard

- a) 4131 Lower Moncure Rd. - where the employer placed a bungee cord on the feed control bar of the VERMEER 1800 Turbo brush chipper to keep the feed rolls continuously operating in the forward direction.

The proposed penalty for this violation was \$2,800.

11. The linkage bar on the feed was bent, and the friction stop positions were worn to the point of allowing the control arm to pass through the forward, neutral, and reverse positions with no pressure.

12. The employer placed bungee cord on the feed control bar.
13. Mr. Langdon explained that the bungee cord was in place to keep the feed rolls in the forward direction.
14. With the bungee cord installed, the feed control bar could be moved into, but would not remain in, the neutral or reverse positions.
15. With the engine operating, the feed control bar would not remain in a set position.
16. If the bungee cord was removed, the lever would easily migrate into the neutral or reverse positions without any effort on the part of the operator.
17. In an emergency situation, a victim may not be able to maintain continuous pressure on the feed bar until he is out of the hazard zone.
18. Hazards exist for employees to be exposed to caught-in rotating feed rolls which created the possibility of an accident; the substantial probable result of such an accident is amputation or death.
19. Mr. Adam Womble, Mr. Cesar Martinez and Mr. Jaino Martinez, laborers, were feeding the chipper as recommended by the operator's manual when CSHO arrived and each confirmed the bungee cord usage.
20. Respondent should have known of the hazardous condition wherein Mr. Langdon was on site working in the bucket of the aerial lift while the chipper operations continued.
21. CSHO Thorpe found the severity to be high, the probability greater, and assessed a Gravity based penalty of \$7,000. He applied a 60% credit for size and proposed an adjusted penalty in the amount of \$2,800. The proposed penalties

were computed in accordance with the provisions of the Field Operations Manual.

Citation 1 Item 2: Serious

Citation 1, Item 2, alleges a serious violation of 29 CFR 1910.132(e): Defective or damaged personal protective equipment was used.

- a) 4131 Lower Moncure Rd. - where the six foot personal fall arrest lanyard the foreman was wearing exhibited a tied knot, as well as a cut which traversed the width of the outer portion of the lanyard, exposing the inner core fibers. The foreman was elevated to approximately 20 feet above the ground in a truck mounted aerial lift while trimming trees along the right-of-way.

The proposed penalty for this violation was \$1,500.

22. CSHO Thorpe determined through professional observation and employer/employee interviews that employees had access to only one safety lanyard at the job site and that was in use with the foreman's personal fall protection system in the bucket of the aerial lift.
23. The employees exhibited a heavy rope that they stated was used for directional control when removing branches or tree felling in a controlled area.
24. In an open environment such as right-of-way clearance operations, the branches were allowed to fall directly to the ground as were the smaller trees along the way.
25. The foreman stated that the rope had not been used on this project at all.
26. The six foot lanyard the foreman was wearing exhibited a tied knot, as well as a cut which traversed the width of the

outer portion of the lanyard, exposing the inner core fibers.

27. Mr. Langdon told CSHO Thorpe the knot was used to shorten the lanyard to keep it out of the way in the bucket, and the cut was probably from contact with a chainsaw a few weeks ago.
28. The weakened section of the lanyard created a hazardous condition.
29. The hazardous condition created the possibility of an accident if the weakened section failed resulting in the employee falling 20 feet to packed earth; the substantial probable result is death.
30. One employee was exposed to the hazardous condition.
31. Foreman Langdon was wearing the defective lanyard, and his knowledge is imputed to the Respondent.
32. Respondent could have abated the hazardous condition by replacing the damaged lanyard.
33. CSHO Thorpe found the severity to be high, the probability low, and assessed a Gravity based penalty of \$5,000. He applied a 60% credit for size and proposed an adjusted penalty in the amount of \$2,000. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 1 Item 3: Serious

Citation 1, Item 3, alleges a serious violation of 29 CFR 1910.151(b): There was neither an infirmary, clinic, or hospital used for the treatment of all injured employees in

near proximity to the workplace nor a person or persons adequately trained to render first aid:

a) 4131 Lower Moncure Rd. - where the employer did not provide at least one employee at the work site who had been trained and certified in first aid where the job site was approximately 16 miles from the nearest hospital and approximately 7 miles from the nearest rescue squad facility.

The proposed penalty for this violation was \$2,800.

34. Respondent's tree trimming contract with NC DOT was open-ended and had been in effect for approximately 2 months for this specific contract.
35. The portion of the right-of-way tree trimming operation consisted of a ½ mile stretch of Lower Moncure Rd.
36. The closest full medical facility to the site was approximately 16.29 miles away, and the nearest fire and rescue facility was approximately 3.86 miles away.
37. A hazard exists for a severely injured employee to have a delay in medical or first aid treatment; the substantial probable result is death.
38. Foreman Langdon was aware no one at the jobsite was trained in first aid, and his knowledge is imputed to the Respondent.
39. Five employees were exposed to this hazardous condition.
40. CSHO Thorpe found the severity to be high, the probability greater, and assessed a Gravity based penalty of \$7,000. He applied a 60% credit for size and proposed an adjusted penalty in the amount of \$2,800. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 1 Item 4a: Serious

Citation 1, Item 4a, alleges a serious violation of 29 CFR 1910.212(a)(1): One or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by points of operation, ingoing nip points, rotating parts, and flying chips and sparks.

- a) 4131 Lower Moncure Rd. - where approximately 10 percent of the rubber shroud at the opening in front of the feed rollers was damaged and/or missing on the VERMEER 1800 Turbo brush chipper which could allow material to be ejected violently.

The proposed penalty for this violation was \$2,000.

- 41. Approximately 10 percent of the rubber shroud at the opening in front of the feed rollers was damaged and/or missing on the VERMEER 1800 Turbo brush chipper.
- 42. This created a hazardous condition wherein material could be ejected violently.
- 43. The hazardous condition created the possibility of an accident if the employees were struck by ejected debris; the substantial probable result is severe puncture wounds or broken bones.
- 44. Three employees were exposed to this hazard.
- 45. Foreman Langdon was on site and assisted in startup of the chipper and informed CSHO Thorpe that the shroud had been damaged for an unknown period of time, but longer than a month. This knowledge is imputed to the Respondent.

46. CSHO Thorpe found the severity to be high, the probability low, and assessed a Gravity based penalty of \$5,000. He applied a 60% credit for size and proposed an adjusted penalty in the amount of \$2,000. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 2 Item 1a: Non-serious

Citation 2, Item 1a, alleges a non-serious violation of 29 CFR 1910.1200(e)(1): The employer did not develop, implement and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g) and (h) will be met:

- a) 4131 Lower Moncure Rd. - where the employer did not develop or implement a written program informing employees of the hazards presented by exposure to, among other things, gasoline, hydraulic fluid, and lubricating oil.
47. The written program must :
- a. Describe how the criteria specified in the standard will be met for labels and other forms of warning for material safety data sheets and for employee information and training: Employee training shall include the following:
- i. Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance, or odor of hazardous chemicals when being released, etc.);
 - ii. The physical and health hazards of the chemicals in the work area;
 - iii. The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to

protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and

- iv. The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.
 - b. Include a list of the hazardous chemicals known to the present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and
 - c. Identify the methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels) and the hazards associated with chemicals contained in unlabeled pipes in their work areas.
 - d. Describe methods used to inform any contractor with employees in the workplace of hazards that may be exposed to and appropriate protective measures.
48. Respondent did not develop or implement a written program informing employees of the hazards presented by exposure to, among other things, gasoline, hydraulic fluid, and lubricating oil.
49. Seven employees were exposed to the hazard.
50. Respondent could have abated the hazard by completing the HAZCOM documentation provided in the Arborist Safety Checklist.
51. Respondent knew or should have known of the hazardous condition as Foreman Langdon was on the site daily and with reasonable diligence could have known that the condition existed.

52. CSHO Thorpe found the severity to be non-serious, the probability low, and assessed a Gravity based penalty of \$00. He applied a 60% credit for size and a 10% for good faith. The proposed adjusted penalty was \$00. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

Citation 2 Item 1a: Non-serious

Citation 2, Item 1a, alleges a non-serious violation of 29 CFR 1910.1200(e)(1): The employer did not develop, implement and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g) and (h) will be met:

- a) 4131 Lower Moncure Rd. - where the employer did not have a material safety data sheet (MSDS) available for any of the hazardous chemicals on site, including, but not limited to, gasoline, hydraulic fluid, and lubricating oil.
 - b) Respondent maintain a material safety data sheet (MSDS) available for any of the hazardous chemicals on site, including, but not limited to, gasoline, hydraulic fluid, and lubricating oil.
53. A hazard existed for employees to be delayed in accessing information about hazardous material which could result in minor dermal/respiratory irritation.
54. Seven employees were exposed to the hazard.
55. Respondent could have abated the hazard by maintaining a copy of appropriate MSDSs on site.
56. Respondent knew or should have known of the hazardous condition as Foreman Langdon was on the site daily and with reasonable diligence could have known that the condition existed.

57. CSHO Thorpe found the severity to non-serious, the probability low, and assessed a Gravity based penalty of \$00. He applied a 60% credit for size and a 10% for good faith. The proposed adjusted penalty was \$00. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.


Conclusions of Law

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant proved by a preponderance of the evidence that the Citation 1, Item 1, was a serious violation of NCGS 95-129 (1) and the penalty of \$2,800 is affirmed.
4. Complainant proved by a preponderance of the evidence that the Citation 1, Item 2, was a serious violation of 29 CFR §1910.132(e), and the penalty of \$2,000 is affirmed.
5. Complainant proved by a preponderance of the evidence that the Citation 1, Item 3, was a serious violation of 29 CFR §1910.151(b), and the penalty of \$2,800 is affirmed.
6. Complainant proved by a preponderance of the evidence that the Citation 1, Item 4, was a serious violation of 29 CFR 1910.212(a)(1), and the penalty of \$2,000 is affirmed.

7. Complainant proved by a preponderance of the evidence that the Citation 2, Item 1a, was a non-serious violation of 29 CFR 1910.1200(e)(1).
8. Complainant proved by a preponderance of the evidence that the Citation 2, Item 1b, was a non-serious violation of 29 CFR 1910.1200(g)(1).

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED, ADJUDGED, AND DECREED** that all of the citations and penalties are hereby affirmed; and Respondent shall pay the penalties as set forth in the Findings of Fact and Conclusions of Law above.

This the 26 day of February 2014.


Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing AMENDED ORDER, upon:

DENNIS RUSSELL
PRESIDENT
RUSSELL ENTERPRISES LLC
350 WESTERMAN PLACE
SMITHFIELD NC 27577

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

JASON ROSSER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 27th DAY OF February 2014.

OSCAR A. KELLER, JR.
CHAIRMAN


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Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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