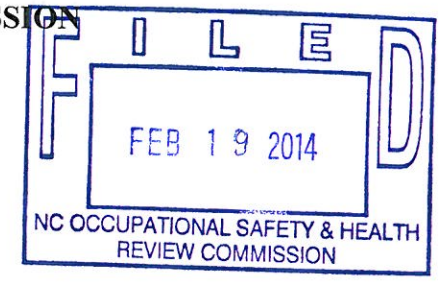
BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	
COMPLAINANT,	)	
v.	)	DOCKET NO. OSHANC: 2012-5309
	)	INSPECTION NO.: 315961938
NEW RIVER TREE COMPANY INC. *and its successors*	)	CSHO ID: D5581
RESPONDENT.	)	

ORDER

THIS CAUSE came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina, on October 23, 2013, at the Law Offices of Groome Tuttle Pike & Blair, RLLP, 210 Ridge Street NW, Lenoir, North Carolina.

APPEARANCES

For Complainant:

Larissa Williamson
Melissa H. Taylor
Assistant Attorneys General
North Carolina Department of Justice
Labor Section
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Ms. Regina Cullen
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For Respondent:

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An evidentiary hearing was convened on October 23, 2013. Complainant and Respondent were represented by counsel during that hearing. Agricultural Safety and Health Officer Alan Fortner testified for the Commissioner. Respondent presented the testimony of New River Tree Company Inc. owner Mark Johnston.

Based upon the evidence presented by Complainant and Respondent at the hearing, the briefing of the parties subsequent to the hearing, and review of the transcript, the undersigned makes the following Findings of Fact and Conclusions of Law, engages in discussion, and enters an Order accordingly.

FINDINGS OF FACT

1. The 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 the Act (N.C.G.S. § 95-133).

2. On March 16, 2012, Complainant issued to Respondent the following citations:

Citation No. 1 (serious): North Carolina General Statute 95-129(1) of the Occupational Safety and Health Act of North Carolina: the employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to fall hazards:

a) A bay at the loading dock located a 1750 Dick Phillips Road, near Idlewild, NC, 28694 where the employer provided a trailer for employees to use to load and unload Christmas trees. On tree worker died from a fall while unloading Christmas trees on or about November 21, 2011. Employees loaded and unloaded field trailer while standing on top of Christmas trees ten feet above the ground.

Citation No. 2 (nonserious): CFR 1904.39(a) Reporting fatalities and multiple hospitalization incidents to OSHA. Within eight hours after the death of any employee from a work-related incident or the in-patient hospitalization of three or more employees as a result of a work related incident, you must orally report the fatality/multiple hospitalization by telephone or in person to the Area Office of the Occupational Safety and Health Administration.

a) On 11/21/2011, employer failed to notify North Carolina Department of Labor Occupational Safety and Health within the required eight hour timeframe after an employee died after falling off a trailer from a height of approximately 10 feet. Employee died on 11/21/2011 on or about 4:53 p.m. and OSHA was not notified until 11/22/2011 at approximately 7:30 a.m.

3. This case was initiated by a timely Notice of Contest which followed the above-referenced citations issued to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act) (N.C.G.S. § 95-126 *et seq.*).

4. Respondent is subject to the provisions of the Act (N.C.G.S. § 95-128) and is an employer within the meaning of N.C.G.S. § 95-127.

5. Respondent New River Tree Company Inc. is in the business of growing and harvesting Christmas trees. The harvesting process consists of several steps, including loading and unloading the trees from field trailers.

6. The field trailers utilized by Respondent are approximately sixteen feet long and eight feet wide. Vertical posts ("standards") approximately ten feet high and spaced roughly four feet apart line both sides of the trailers. The beds of the trailers sit slightly less than two feet from the ground. The vertical posts do provide some fall protection to workers standing on top of the trailer while unloading trees.

7. The field trailers, attached to a tractors or trucks, are loaded on the mountain after employees cut, bale and drag the trees to the side of the road. The trees are loaded so that they rest horizontally to a height of approximately eight feet from the bed of the trailer. Once loaded, the field trailers are driven to a staging area where they are unloaded to await loading onto trucks for distribution to retail locations.

8. On November 21, 2011, at approximately 4:45 p.m., a field trailer arrived at Respondent's Idlewild staging area. Respondent employee Jose Eligio Muniz-Arriaga and another employee climbed to the top of the trailer to unload the trees.

9. Mr. Muniz-Arriaga had worked with Respondent for eighteen harvest seasons and was the employee responsible for training other employees the proper loading and unloading procedures.

10. The medical examiner's report indicates that, while unloading the field trailer, Mr. Muniz-Arriaga fell backwards over the side of the trailer, striking the ground head first.

11. The medical examiner did not conduct testing to determine whether Mr. Muniz-Arriaga suffered a heart attack, stroke or other medical condition that could have contributed to the accident.

12. Mr. Muniz-Arriaga was pronounced dead at the scene.

13. On November 21, 2011, Mark Johnston, owner of New River, contacted the North Carolina Growers Association concerning reporting the fatality. Mr. Johnston's contact informed him that he would make the necessary calls. As such, Mr. Johnston did not contact the North Carolina Department of Labor.

14. The North Carolina Growers Association contacted the Department of Labor at approximately 7:30 the next morning.

15. Mr. Johnston has worked for forty (40) years in the Christmas tree growing industry.

16. Prior to Mr. Muniz-Arriaga's accident, Mr. Johnston's farming operation had never experienced a serious fall from a field trailer.

17. Mr. Johnston was not aware of any North Carolina Christmas tree grower utilizing measures such as guardrails, personal fall arrest systems, harnesses, or netting as contemplated under the general industry standards, 29 C.F.R. Part 1910, (hereinafter "fall protection") for workers loading and unloading field trailers.

18. On or about November 22, 2013, North Carolina Agricultural Safety and Health Officer Alan Fortner and his supervisor Regina Cullen conducted an inspection of Respondent's Idlewild worksite in light of the fatality. Mr. Fortner and Ms. Cullen observed employees unloading trees from a field trailer, took photographs, and conducted interviews.

19. Neither Mr. Fortner nor Ms. Cullen asked Mr. Johnston to halt operations or discussed any abatement measures while they were investigating the accident.

20. Complainant did not present any evidence that other North Carolina Christmas tree growers have been cited for failure to utilize fall protection.

21. Complainant did not present any evidence that other North Carolina Christmas tree growers utilize fall protection measures.

22. Complainant did not present any evidence that North Carolina Christmas tree growers have received any training regarding the provision of fall protection to workers loading and unloading field trailers.

23. Complainant did not present any evidence of prior serious falls at any North Carolina Christmas tree farm under similar circumstances.

24. Respondent's Christmas tree growing and harvesting operation is subject to the agriculture standards, 29 C.F.R. Part 1928 ("agriculture standards"), which do not require fall protection.

25. The March 16, 2012, citation was the Commissioner's first notice to Respondent that the Commissioner intended to subject Respondent to fall protection requirements by way of the General Duty Clause.

26. To establish a violation of the general duty clause, Complainant must prove that: (1) the employer failed to render its workplace free of a hazard; (2) the hazard was recognized; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means by which the employer could have eliminated or materially reduced the hazard." *Brooks v. Dover Elevator Co.*, 94 N.C. App. 139, 144, 379 S.E.2d 707, 710 (1989) (citations omitted).

27. To establish a "recognized" hazard, Complainant must demonstrate that a reasonable person familiar with the circumstances would recognize that the loading and unloading of field trailers constituted a hazard requiring the use of fall protection measures. *See Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464-465, 372 S.E.2d 342, 345 (1988) (adopting Review Board's "reasonable person" standard when analyzing general duty clause). This element is not met by simply arguing the hazard is "obvious." *See S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1283 (5th Cir. 1981) (recognizing that "[i]n the absence of an industry custom or standard requiring the use of safety belts, or a history of fall accidents, an employer in the roofing . . . industry could reasonably conclude that employees' constant awareness of the danger of falling provides adequate protection against falls from flat, open surfaces").

28. "Although industry custom and practice and the lack of any history of fall injuries in the industry, are not controlling factors, they cannot be ignored, and standing unrefuted, without more, are sufficient to support a finding that a reasonably prudent employer would not

recognize that a hazard existed to employees doing the work." *A.J. Mcnulty Co., Inc.*, 12 BNA OSHC 1203, 1204, Dkt. No. 83-456 (Jan 25, 1985) (vacating citation under construction industry standard, Section 1926.28 regarding personal protective equipment).

29. To establish a feasible means of abatement, Complainant must "demonstrate both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enterprises, Inc.*, 2000 WL 34012177, 19 BNA OSHC at 1190, 2000 CCH OSHD at p.48, 981 (O.S.H.R.C. Oct. 27, 2000). Feasibility encompasses both technical feasibility and economic feasibility. *See Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor*, 674 F.2d 1177, 1189-90 (7th Cir. 1982).

30. "Under the general duty clause, if a proposed abatement method creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility; it is not the employer's burden to establish an affirmative defense of greater hazard." *Kokosing Constr. Co., Inc.*, 17 O.S.H. Cas. (BNA) ¶ 1869 (O.S.H.R.C. Dec. 20, 1996) (citing *Royal Logging Co.*, 7 BNA OSHC 1744, 1751, 1979 CCH OSHD ¶ 23,914, pp. 28,997–98 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir.1981)).

31. At the hearing, Complainant offered as an exhibit a photo-shopped picture illustrating a proposed "guardrail" system for Respondent's field trailers. (*See* Complainant Exh. 4a and 4b).

32. The proposed guardrail system has never been constructed or tested.

33. The proposed guardrail system would raise the standards to eleven (11) feet. It is unclear whether Respondent's field trailers would be able to safely navigate the mountainous

roadways with low hanging branches that they must traverse to harvest trees if the standards were to be raised to eleven feet.

34. The proposed top guardrail illustrated in Complainant's Exhibit 4b is located roughly 24 inches from the top of the trees when the field trailer is fully loaded. This height differential does not comport with the general industry standards requirement for guardrails on elevated platforms: 29 C.F.R. Part 1910.23(c)(1) of the general industry standards states that the guardrails for open-sided raised platforms must meet the requirements of section 1910.23(e)(3). The requirements of section (e)(3) dictate that the top rail must be 42 inches from the floor and must withstand at least the minimum requirement of 200 pounds top rail pressure. *See* 29 C.F.R. Part 1910.23(e)(3)(v)(a) and (b).

35. Even if the proposed guardrails were in place as depicted in Complainant's Exhibit 4b, an employee loading or unloading a field trailer could fall over the proposed guardrail.

36. Complainant did not raise the proposed abatement measure of vertically stacking the trees in the field trailer in its Complaint, but did raise the issue of vertical stacking during the hearing.

37. Complainant did not present any evidence that vertical stacking of Christmas trees is generally accepted by Christmas tree farmers or a feasible method for bringing trees from the field to a staging area.

38. Eighty five percent of the Christmas trees harvested by North Carolina Christmas tree farmers are horizontally stacked on field trailers like the procedure followed by Respondent for over forty years. It is not feasible for these farmers to utilize vertical stacking.

39. North Carolina Christmas tree farmers who utilize vertical stacking have a significantly lower volume of production.

40. Respondent established that it could not continue to operate financially if it is required to convert its operations to utilize a vertical tree stacking method as opposed to the current horizontal stacking method.

DISCUSSION OF RESPONDENT'S ARGUMENT THAT IT LACKED FAIR NOTICE OF AN OBLIGATION TO PROVIDE FALL PROTECTION

"Due process requires that parties received fair notice before being deprived of property." *General Electric Co. v. U.S. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). "The due process clause thus 'prevents deference from validating the application of a regulation that failed to give fair warning of the conduct it prohibits or requires.'" *Id.* (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). *See also*, *Cardinal Indus., Inc.*, 14 O.S.H. Cas. (BNA) ¶ 1008 (O.S.H.R.C. Apr. 20, 1989) ("As a general principle, an employer cannot be found in violation of the Act for failing to comply with a requirement of which it lacked fair notice.") (citing *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335–1339 (6th Cir.1978)). Where an agency provides no pre-enforcement warning and instead announces its interpretation for the first time by issuing a citation, "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties." *Martin v. OSHRC*, 499 U.S. 144, 158 (1991).

Where, as here, the agriculture standards do not require specific fall protection, and Complainant points to no instance where North Carolina has utilized the General Duty Clause to cite a Christmas tree grower for failure to utilize fall protection, Respondent lacked fair notice

that it would be cited under the theory alleged by Complainant. Further, as Respondent argued, federal guidance with respect to the general industry standards and construction standards with respect to rolling stock and mobile equipment, while not binding, is persuasive with respect to notice. It is telling that federal OSHA guidance declines to impose fall protection requirements under the general industry standards or the construction standards where rolling stock and motorized equipment is involved. *See e.g.* Memorandum for Regional Administrators, U.S. Department of Labor, Occupational Safety & Health Administration (Oct. 18, 1996) (stating that the Agency will not cite falls from rolling stock under the general industry fall protection standards); Interpretation Letter to Mr. Timothy J. Batz, U.S. Department of Labor, Occupational Safety & Health Administration (March 10, 2004) (Director Russell B. Swanson of the Directorate of Construction advising that no duty to provide fall protection under the general duty clause exists where employees are exposed to fall hazards climbing onto a tractor trailer rig to load and unload materials); 75 Fed. Reg. 28862 (May 24, 2010) (stating a separate proposed rule will issue, if needed, to encompass fall protection on motorized mobile equipment); and *Erickson Air-Crane*, 2012 O.S.H. Dec. (CCH) ¶ 33199, 2012 WL 762001 (O.S.H.R.C. Mar. 2, 2012) (declining to find fall protection required under the general industry walking and working surfaces standards, PPE standards, or the general duty clause for workers on top of motorized equipment).

While not binding, the logic excluding mobile equipment covered by the general industry and construction from fall protection standards because of infeasibility is persuasive. This argument bears on the issue of notice. Where fall protection is not required under the general industry standards or the construction standards in seemingly similar circumstances, one would be hard-pressed to require an employer subject to agriculture standards– which have no specific

fall protection requirement – to discern that they are required to utilize fall protection measures when loading and unloading their trailers.

CONCLUSIONS OF LAW

1. The foregoing findings of fact paragraphs 1 through 40 and the discussion section above are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. The undersigned has jurisdiction over the case and the parties are properly before this Court.

3. Complainant failed to demonstrate that Respondent received fair notice that it was subject to citation under the General Duty Clause for failure to utilize fall protection.

4. Complainant failed to meet its burden of proving Respondent violated N.C.G.S. 95-129(1).

5. Complainant failed to meet its burden of proving a recognized hazard where the testimony and evidence show that neither industry custom nor standards recognize a hazard and where the record is void of evidence of a history of fall accidents under similar circumstances.

6. Complainant failed to meet its burden of proving a feasible means of abatement where the guardrail proposal illustrated by Complainant's Exhibit 4b is untested and does not comport with general industry standards.

7. Complainant failed to meet its burden of proving a feasible means of abatement where vertical stacking would preclude Respondent from continuing to operate.

8. Respondent violated 29 C.F.R. 1904.39(a) by failing to report the fatality of Mr. Muniz-Arriaga within the required eight (8) hour timeframe.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Citation Number One charging a serious violation under N.C.G.S. 95-129(1) is hereby dismissed with prejudice.
2. Citation Number Two charging a nonserious violation of CFR 1904.39(a) is affirmed without penalty.

This the 30th day of January, 2014.

Carroll D. Tuttle
Administrative Law Judge Presiding

CERTIFICATE OF SERVICE

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

THOMAS A FARR
OGLETREE DEAKINS
4208 SIX FORKS ROAD
SUITE 1100
RALEIGH NC 27609

LARISSA WILLIAMSON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602-0629

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

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 19th DAY OF February 2014.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney
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