



September 10, 2021

Arthur Buchanan, *Director*
Office of General Industry and Agricultural Enforcement
U.S. Dept. of Labor, OSHA
200 Constitution Avenue, NW, Room N-3610
Washington, DC 20210

CHAIR OF THE BOARD

Tim Gamma
Gamma Tree Experts
Saint Louis, Missouri

RE: June 24, 2021 Enforcement Memo entitled “Inspection Guidance for Tree Care and Tree Removal Operations”

VICE CHAIR

David Fleischner
Asplundh Tree Expert, LLC
Willow Grove, Pennsylvania

Dear Director Buchanan,

SENIOR DIRECTOR

Tom Prosser
Rainbow Treecare
Minnetonka, Minnesota

On June 24, 2021, the Occupational Safety and Health Administration’s (“OSHA”) Department of Enforcement Programs (“DEP”) issued a memorandum to all Regional Administrators and State Plan Designees stating that DEP had cancelled its August 21, 2008, Instruction CPL 02-01-045, *Citation Guidance Related to Tree Care and Tree Removal Operations* (“Tree Care Directive”). As part of the same memorandum, DEP also issued an enforcement memo titled, *Inspection Guidance for Tree Care and Tree Removal Operations* (“memo”).

DIRECTORS

Noel Boyer, CTSP
All About Trees, LLC
Springfield, Missouri

On behalf of our affected members, the Tree Care Industry Association (“TCIA”) requests that OSHA revise and re-issue the memo. TCIA’s feedback is intended to help promote fair, effective, informed, and responsible enforcement, and we seek revisions to the memo to help ensure DEP is promoting the safest workplace practices possible for arborists in the United States. While DEP’s memo improves upon the Tree Care Directive, in too many instances it ignores the practical and effective solutions the tree care industry has housed in its consensus safety standards and creates other problems for employers attempting to be both compliant and safe.

Josh Morin, CTSP
We Love Trees
Niwot, Colorado

Jason Showers
Morbarck, LLC
Winn, Michigan

While enforcement guidance serves an important purpose by cobbling together and interpreting various standards that may apply to arboriculture work, TCIA continues to believe OSHA can best promote safety in our industry by promulgating a standard via notice and comment rulemaking specifically addressing the hazards unique to tree care work.¹

Tad Jacobs, CTSP, QCL
Treemasters
San Rafael, California

August Hoppe
Hoppe Tree Service LLC
Milwaukee, Wisconsin

History of Cooperation Between OSHA and TCIA

TCIA is the national trade association representing approximately twenty-five hundred tree care establishments throughout the United States. TCIA was one of the initial industry associations to enter a formal Alliance with OSHA in 2003, and it renewed that Alliance in 2006. Under the Alliance members of the trade association and OSHA met at OSHA’s national office regularly and shared safety information, jointly developed safety and training

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Kent, Ohio

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PRESIDENT & CEO

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¹ [As acknowledged by OSHA](#), the agency possesses only a patchwork of outdated and poorly fitting standards to address the profound hazards tree care workers face.

materials and E-tools for the tree care industry, conducted joint industry seminars, and worked toward the common goal of improving worker safety within the tree care industry.

The relationship developed further in 2008, when the Assistant Secretary of OSHA invited TCIA members to discuss the content of CPL 02-01-044, which predated the above referenced CPL 02-01-045. As a result of those discussions, CPL 02-01-44 dated June 25, 2008, and the Memorandum to Regional Administrators titled *OSHA's Enforcement Policy Regarding Arborists* were both cancelled, and CPL 02-01-45, the *Citation Guidance Related to Tree Care and Tree Removal Operations* dated August 21, 2008, was then issued. This document served to clarify several safety and enforcement issues for industry members and enforcement officials at the same time and stood for over twelve years as an example of what can be achieved when industry and government work together.

In 2006, TCIA formally petitioned OSHA to create a vertical standard for tree care. The record of accomplishments mentioned above as well as the cooperation on CPL 02-01-45 added impetus to OSHA and TCIA working toward the joint goal of creating such a standard. While this topic made it to the Federal Register on more than one occasion, it gained significant traction in 2016 with TCIA being invited to participate in a stakeholders' meeting with OSHA officials, and then with TCIA members participating in the SBREFA Panel. At this time, TCIA had already participated in the complete promulgation of numerous state standards for tree care, and OSHA welcomed the participation and expertise in the process.

It is with this history of extensive cooperation and achievement, spanning almost two decades, that we reach out to request changes to the memo. Members of the tree care industry throughout the United States, representing thousands of employees, have contacted TCIA with questions related to the directive and are asking for clarification and guidance from the association. Our comments and request for changes are built upon these questions and other input from our members as well as our years of expertise in promoting safety in the industry.

Below, TCIA identifies our various concerns and recommendations in the order they appear in the memo.

Protection from Falls and Falling Objects (29 CFR § 1910 Subparts D and I, 29 CFR § 1910.67)

In this section of the memo, DEP instructs compliance safety and health officers (CSHOs), during their inspection of work sites, to assess whether employers are complying with the *Walking-Working Surfaces* standard, 29 CFR §1910 Subpart D. This standard creates a requirement to barricade and prevent entry to what our industry refers to as “drop zones.” While falls and struck-bys constitute significant risks to tree care employees and are dealt with extensively in our standards and training programs, barricaded drop zones in most tree care settings are infeasible, because in order to prevent the buildup of debris and limbs on the ground creating a trip hazard as well as to ensure the orderly flow of work, arborists on the ground must be allowed to enter the drop zone after announcing themselves to the arborist aloft and then drag or carry out debris. Neither of these would be possible if the area was barricaded.

As such, the ANSI Z133 Standard makes alternative provisions for prevention of struck-by injuries in drop zones by requiring a “command and response” protocol. Under such protocols, workers wishing to enter a drop zone must be acknowledged by the worker aloft and cutting and dropping of limbs must be temporarily halted to allow the ground worker safe access. The crew is required not to barricade but to mentally delineate the drop zone and discuss drop zone management in their pre-job briefing.

We understand through communication with tree care employers that OSHA CSHOs have attempted in several instances to cite 1920.28(c)(3) against tree care employers. We would therefore like DEP to revise the memo and acknowledge that strict adherence to measures such as 1910.28(c)(3) may prove to be infeasible and that the Z133 Standard provides feasible alternative protections.

This same section (29 CFR 1910 Subpart D, *Walking-Working Surfaces*) incorporates by reference 1910.140, a standard that has historically been problematic for arborists and is one of the catalysts for both OSHA and the industry wanting to construct a standard for tree care.

Arborists' climbing systems are designed for worker suspension and work positioning and, when used correctly, do not expose the worker to any fall. Arborist climbing harnesses utilize a ventral anchor point when the arborist is maneuvering or descending or anchor points on the waist for work positioning. The climbing systems used by arborists are designed for better lateral movement, support, and work positioning for the arborists' working environment as compared to other forms of work positioning and fall protection equipment used in other industries. Our industry safety experts have looked at the specifications for fall protection systems outlined in 1910.140 and determined them not to be safe and/or feasible for the prolonged work and type of work that climbing arborists do.

Both issues were discussed with and recognized by DEP in 2008. References to 29 CFR 1910 Subpart D were intentionally left out of the previous guidance document and reference list for the exact reasons we have reiterated above. For over twelve years, the use of the climbing systems or the types of harnesses or body belts used in the tree care industry have not been an issue. Compliance with the industry safety standard has been the measure of safety, and there is no data showing that worker safety has been jeopardized in any manner.

For these reasons, TCIA recommends that DEP reference the extensive guidance found in the Z133 Standard concerning arborists' tree climbing equipment and procedures as opposed to 1910.140, which is inappropriate for our industry.

Provision and Use of Personal Protective Equipment (PPE) in Connection with Other Hazards (29 CFR Part 1910, Subpart I and other PPE requirements)

In this section of the memo, DEP provides the single example of the use of cut-resistant leg protection while operating a chain saw. Both the ANSI Z133 Standard and OSHA's own logging standard make an exception for the use of cut-resistant leg protection when climbing if the employer demonstrates a greater hazard is posed by using such leg protection while climbing. Unlike the greater hazard affirmative defense, this is an exception to a portion of an OSHA regulation that directly applies to using a chain saw while climbing. In most instances, climbing arborists prefer not to climb with cut-resistant leg protection due to its restrictive qualities and heat retention. These hazards have long been held, across both the tree care and logging industries, to outweigh the hazards associated with chain-saw use while aloft. We ask OSHA to revise the memo and acknowledge this exception.

Materials Handling and Storage (29 CFR § 1910 Subpart N)

TCIA's largest concern with DEP's memo is the continued assertion that "...[1910.180(h)(3)(v)] applies even though the standard for Arboricultural Operations—Safety Requirements, ANSI Z133-2017, §5.7.11, allows the hoisting of personnel into position with a crane. An employer's reliance on the ANSI Z133 Standard is not a defense to a violation of § 1910.180(h)(3)(v). An employer may, however, assert that compliance with the OSHA standard is either impossible/infeasible or presents a greater hazard to the employee. The employer, though, bears the burden of proving these affirmative defenses."

Hoisting a worker via crane is as safe as, if not safer than, alternative means of tree access

Specifically, TCIA does not agree with 1910.180's prohibition of hoisting an individual on the crane load or hook, also known as "riding the hook" (29 CFR § 1910.180(h)(3)(v)). The memo's language remains

unchanged from the 2008 Tree Care Directive it replaces, despite an abundance of data showing the dangers of some alternative practices as well as a glaring *absence* of data implicating the practice of hoisting as dangerous even though hundreds if not thousands of crane operations use this practice daily.

For instance, the following hazards must be considered to understand the employer's justification for hoisting a climber by using the crane's load line as a reliable, predictable, quantifiable, and engineered anchor point:

- The tree or part of the tree failing with the climber in it.
- The climber inadvertently cutting his/her own lifeline.
- The climber inadvertently failing to re-attach his/her lifeline as they reposition during an ascent.
- An aerial lift and/or its operator being struck by dislodged dead branches or cut pieces because the lift unit must be positioned directly under the tree to reach its highest branches.
- The climber's spikes (i.e., gaffs, hooks) slipping as they ascend or maneuver in a tree canopy.
- The fatigue factor associated with a manual ascent of a large tree.

Within this section of the current guidance document regarding the use of cranes, DEP leaves out some important information that has transpired since 2008 that enforcement officials should know. Despite the fact that the language in OSHA's general industry crane standard has not changed over the last twelve years, OSHA's construction crane standard was revised several years ago. Given the fact that the ANSI Z133 Standard, and some separate State OSHA plans, recognize that arborists may need to be attached to a crane under certain circumstances, the revised construction standard intentionally exempted tree care operations so this practice would not be expressly precluded on construction sites (the construction standard can apply to tree care being performed on construction sites).

States recognize hoisting climbers as a safe practice

To date, four State OSHA Plans have adopted rules that allow for hoisting climbers following the lead of the ANSI Z133 Standard.

The Maryland State Plan, *09.12.28 Tree Care and Removal*, promulgated in 2012, says, "The following procedures shall be followed by a person being lifted in a crane: (i) The person being lifted shall use a second point of attachment to the crane hoist line or lifting line; (ii) The person being lifted shall secure the climbing line to the tree and disconnect from the crane as soon as possible; (iii) The arborist climbing line shall be secured to the crane in such a way that it does not interfere with the function of any damage prevention or warning device on the crane; (iv) No part of the crane shall compromise the climbing line or any component of the climbing system; and (v) Lifting or lowering speed may not exceed 100 feet per minute."

The Virginia State Plan, *16VAC25-73 for Tree Trimming Operations*, which took effect in 2011, says, "The use of a crane to hoist a qualified arborist into position is prohibited, except when the use of conventional means of reaching the work area, such as, but not limited to, an aerial lift, would be more hazardous or is not physically possible because of worksite conditions. If the above exception applies, a qualified arborist may be hoisted into position utilizing a crane if the crane manufacturer's specifications and limitations do not prohibit such use, and any fall protection requirements of the crane manufacturer are complied with, and the arborist is tied in with an arborist climbing line and arborist saddle and secured to a designated anchor point on the boom line or crane."

In the California State Plan, *General Industry Safety Orders §3427* was first introduced as an emergency standard in 2004 in response to the profound hazard faced by tree workers who needed a safe means to access tens of thousands of beetle- and fire-killed pine trees. In 2012, §3427 was adopted as a permanent regulation. This standard also emulates Z133 guidance when it says, "Only

when a tree cannot be safely accessed by climbing or the use of aerial devices, a qualified tree worker may be hoisted into position by using an approved tree worker's saddle secured to a crane's hook that shall be closed with a positive locking device. The tree worker's saddle shall also be secured to an independent line attached above the crane hook..."

Washington OSHA's *WAC 296-24-23533 Crane and derrick suspended personnel (work) platforms* makes allowance for the use of a "boatswains chair" with the worker's lanyard secured to the lift line above the headache ball or to the crane hook itself.

Prior to these State OSHA Plans being implemented, each was reviewed by OSHA and found to be as effective as, or more effective than, the federal standard. Under the guidance of DEP's CPL 02-01-45 issued in 2008, tree care industry members have undergone numerous OSHA inspections regarding this practice and held demonstrations exclusively for government officials and regulators at trade shows and at tree care work sites. Additionally, OSHA enforcement officials have requested information from TCIA members on the practice. Now, after over twelve years, OSHA's new memorandum appears to instruct its enforcement officials to cite this practice and place the burden of providing an affirmative defense on the employer after the citation.

DEP misinterprets Z133's provisions on cranes

DEP's interpretation that employers cannot rely on compliance with the ANSI Z133 Standard for protection against citation under 1910.180(h)(3)(v) is short-sighted. A careful read of the following two statements in the ANSI Z133 Standard shows that the standard requires the employer to assert the impossible/infeasible or greater hazard argument proactively, before the employee has been exposed to a possible hazard. The standard only *conditionally* allows hoisting when the employer has determined it is the safest or only feasible way to access the tree or perform the work:

5.7.11 A qualified arborist may be hoisted into position utilizing a crane if he/she is tied in with an arborist climbing line and arborist saddle and secure to an anchor point on or above the crane hook or to the crane boom. The following procedures shall be followed when a qualified arborist is to be hosted by a crane:

5.7.11.1 Only a qualified arborist shall authorize the use of a crane for hoisting a qualified arborist into position when he/she has determined that it is the safest and/or only feasible method to perform the work or to gain access to a tree.

While DEP should ultimately recognize hoisting as a safe practice for our industry in a vertical standard, in the interim DEP should revise the memo and advise CSHOs to refrain from issuing 1910.180(h)(3)(v) citations in instances where the employer has demonstrated full compliance with ANSI Z133 – 2017 section 5.7, because it does require the employer to exercise due diligence in considering alternatives.

DEP's "solution" is not proactive

Importantly, while DEP's memo tells its enforcement officials that an employer may assert the impossibility/infeasibility defense or the greater hazard defense, both are affirmative defenses only asserted after a citation is issued, not preclusions to a citation.

According to OSHA's Field Operations Manual², an employer can only assert the greater hazard defense if application for a variance is inappropriate. This should be reviewed in context with the following facts; 1)

² OSHA Field Operations Manual, CPL 02-00-164, effective date 4/14/2020.

there are literally thousands of hazardous tree removals conducted by tree care industry members on a *weekly* basis in the United States where it is safer for arborists to be attached to a crane, 2) it can take over a year for OSHA to process one variance request, 3) in the time it takes to even prepare the application for a variance, a dangerous tree removal can become a deadly tree to the public and to the workers who must remove it, and 4) since its inception, OSHA has issued less than thirty variances to its regulations in total (all industries, all regulations). Given the sheer number of companies and trees involved, our members alone could send over a million variance applications per year to OSHA for processing.

Hand and Portable Power Tools and Other Hand-Held Equipment (29 CFR § 1910 Subpart P, 29 CFR § 1910.269(r), and the General Duty Clause)

Another portion of the memo we found concerning was the specific reference directing enforcement officials to 29 CFR 1910.243(a)(4) “Cracked saws. All cracked saws shall be removed from service”. In nearly twenty years of close interaction with OSHA, this issue has never been raised. More importantly, in our entire history with chain saws, we have no documented evidence showing that a “cracked saw” has led to any employee injury.

We question the rationale of DEP instructing its enforcement personnel to use a section of the code, written at the onset of the OSHA regulation for the purpose of identifying safety issues to routers, belt sanders, grinders, saber saws, jig saws, reciprocating saws, scroll saws, and other woodworking/metalworking type equipment, as a method of measuring safety and issuing citations to tree care employers. It should be noted that nowhere in this section, not even the definitions, is “chain saw” or “chainsaw” mentioned. The OSHA regulation also repeated this language in 2001 with its *Wood Working Machinery Requirements* in 1910.213(s)(7) and still chose not to identify chain saws.

One reason neither of these sections specifically mentioned chain saws might be that unlike all other saws directly mentioned, a chain saw cuts with a chain rotating around a guiding bar. While we agree that a cracked chain or a cracked bar on a chain saw requires removal from service and replacement or repair, unlike all the other types of saws referenced in 1910.243 and 1910.213, chain saws used in tree care typically have large amounts of plastic and rubber components to allow for prolonged carrying and use, and the entire unit is often referred to as a “saw.” Non-safety related plastic housing items can crack over time, and different manufacturers have different instructions regarding the replacement cycles of their respective parts. We feel that for an enforcement memorandum to specifically identify this obscure section of the regulation (clearly not intended for every portion of a chain saw if it was intended for chain saws at all) and direct enforcement officials to use it to cite tree care employers is tantamount to a game of “gotcha” and serves no true safety purpose.

Traffic Safety (the General Duty Clause)

The final area that we feel requires clarification is the guidance for enforcement officials to refer to its web page on Highway Work Zones and Signs, Signals, and Barricades to determine if a citation under the general duty clause for a traffic control violation should be issued. This method of guiding an OSHA enforcement official through the process of determining whether a citation should be issued to a tree care company is fundamentally flawed and unfair.

While we agree that work zone safety is an important issue and that tree care industry employers must provide training and controls to protect workers from traffic and guide traffic and pedestrians through work zones, the referenced web page and the accompanying materials were designed around compliance for the construction industry. OSHA itself has struggled with the lack of guidance for general industry in this area for years, and in fact, DEP has previously issued a letter of interpretation attempting to clarify general industry work zone issues on highways. Even the *Manual of Uniform Traffic Control Devices*, which is the primary controlling

authority, recognizes that road speed, traffic count, and length of time in a work area must be accounted for in determining the level of work zone protections implemented.

Our concern is when enforcement officials are directed to utilize materials such as this, which were not intended for the industry that the enforcement official is inspecting, then it becomes the equivalent of regulation without the affected parties having the opportunity to know and understand what is expected of them. We believe this to conflict with the correct process for promulgating a regulation for our industry. At the very least, we believe DEP should state exactly what it feels a tree care industry member should be doing to provide work zone safety when working on a roadside, so our members can comply or openly object through the correct process. Either way, industry members and enforcement officials will know what is expected.

Our line clearance member companies have concerns with the footnote on page 9 of the printed memo, appearing as endnote 5 in the online version and reproduced below:

The Electric Power Generation, Transmission, and Distribution Standard contains some requirements on traffic control (see 29 CFR §§ 1910.269(e)(7), 1910.269(w)(6)). These requirements do not apply to the majority of line clearance tree trimming covered under the standard (see 29 CFR § 1910.269(a)(1)(i)(E)). CSHOs should nevertheless consider whether these requirements apply and issue citations, if appropriate.

The memo directs CSHOs to apply these sections to line clearance tree trimmers performing line clearance tree trimming if the requirement seems to fit the situation, despite the fact that 29 CFR §1910.269(a)(1)(i)(E)(2) stipulates that only paragraphs (a)(2), (a)(3), (b), (c), (g), (k), (p), and (r) of 1910.269 apply to line-clearance tree trimming performed by line-clearance tree trimmers who are not qualified employees (as those terms are defined in the standard). 1910.269(e)(7) speaks to attendants around confined spaces and as such wouldn't find much application in the world of line clearance. Such is not the case with (w)(6). If a CSHO attempts to apply (w)(6) to a line clearance employer, it isn't too much of a stretch to see barricades ((w)(6)(iii)) stipulated for roadside work.

Therefore, OSHA should not suggest in this enforcement memo that these sections of 1910.269 may be applied to our members' line clearance operations even though the standard itself explicitly states these sections do not apply. DEP should delete the last sentence of the footnote/endnote: "*CSHOs should nevertheless consider whether these requirements apply and issue citations, if appropriate.*"

Conclusion

Thank you for this opportunity to provide feedback. We would like to discuss our recommendations and possible timetables for revising the memo in the near future.

Respectfully,



Peter Gerstenberger, Senior Vice President
Tree Care Industry Association