

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

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SECRETARY OF LABOR, :  
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 Complainant, :  
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 v. :  
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 JOHN CARTER d/b/a :  
 J.B.'S TREE SERVICE, :  
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 :  
 Respondent. :  

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OSHRC DOCKET NO. 96-1551

APPEARANCES:

Susan B. Jacobs, Esquire  
New York, New York  
For the Complainant.

John S. Wallenstein, Esquire  
Hempstead, New York  
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) investigated a work site accident in West Islip, New York, where an individual engaged in a tree removal operation was fatally injured on April 4, 1996; as a result of the investigation, Respondent John Carter d/b/a J.B.’s Tree Service was issued a serious citation alleging a general duty clause violation and an “other” citation alleging a violation of 29 C.F.R. 1904.8(a). Respondent contested the citations, the case was designated an E-Z Trial case pursuant to the Commission’s E-Z Trial Rule 203(a), and a hearing was held on March 5, 1997. Both parties have submitted post-hearing briefs.

Background

The work at the site involved cutting the branches from a 110-foot oak tree, after which the trunk was also to be cut down. The site was a private residence, and the homeowner had engaged Off the Top Tree Service, owned by Daniel Massaro, to perform the job. The individuals working at the site included Massaro, John Carter, Efraim and Jose Reyes, Jose Cortez and two other persons. Carter's job was to climb up the tree, tie off, and, beginning with the lowest branches and working upwards, cut off the branches with a chain saw; Carter's job also included tying a rope to the branches before severing them and warning the workers below, and Massaro, who was working on the ground, used the rope to guide each branch as it fell. Efraim and Jose Reyes picked up the fallen branches and carried them to the front of the residence, where Jose Cortez and another worker fed them through a wood chipper. The job began about 8:00 a.m., and around 9:00 a.m., after a number of branches had been removed, Efraim Reyes was struck by a large limb and knocked down. Shortly thereafter his brother, Jose Reyes, was hit on the head by another falling limb and knocked to the ground, where he lay unconscious. The homeowner called an ambulance, which arrived minutes later, and Reyes was taken to a hospital, where he died three days later from the injury.

#### The Positions of the Parties

The Secretary contends, based on OSHA's investigation of the accident, that John Carter was the employer of Jose Cortez and Efraim and Jose Reyes, and that Carter was therefore responsible for the alleged violations. Respondent contends that Massaro was the employer at the site, and that Carter, the Reyes brothers and Jose Cortez were all employed by Massaro that day. Respondent also contends that the accident was the result of unpreventable employee misconduct.

#### The Testimony

Jose Cortez testified through an interpreter. His testimony was that he had worked for John Carter for three months before the accident, that he was paid in cash, at first \$65.00 a day and then \$75.00 a day, and that Carter's wife, who Cortez identified at the hearing, was the one who paid him; Cortez also identified John Carter at the hearing as the person he had worked for and the one who had instructed him on the jobs they did. Cortez said Carter and his driver always picked him up in the parking lot of a deli and that both were present every day he worked for Carter. Cortez did not know the name of the driver, who sometimes helped on jobs and at times told him what to do; he also did not know what J.B.'s Tree Service was but noted that C-1 was a business card he got from the

dashboard of Carter's truck the first day he worked for him and that there were always cards there which were used to give to customers. The day before the accident, Carter told Cortez he needed two more workers for the following day; Cortez spoke with his neighbors that evening, the Reyes brothers, who he had known for years, and they agreed to go. The three drove to the deli the next day, where they met with Carter and his driver, after which they all went to a yard, the Reyes brothers riding with Carter in his truck and Cortez riding with the driver in another truck; they got the equipment they needed and drove to the site, and the job started after the equipment was set up.<sup>1</sup> Cortez did not witness the accident, but after it happened he went to see Jose Reyes. He said Carter stayed up in the tree and did nothing to help Reyes, that he quit working for Carter after the accident, and that he was never paid for his work that day. He also said he had never heard of Off the Top Tree Service and that he did not know who Joseph Baker and Daniel Massaro were. (Tr. 6-31).

Efraim Reyes also testified through an interpreter. He testified that when he and his brother met Carter he said he would pay \$60.00 a day, that in his mind Carter was the boss who was giving them work, and that on the way to the yard he took one of the business cards on the dash, which were the same as C-1, after Carter said he could; they loaded the equipment for the job at the yard, where besides Carter's two trucks there was another truck driven by a person Reyes later learned was Daniel Massaro, and at the site Carter told him and his brother what to do but gave them no safety instructions or safety equipment. There were four people working under the tree when Carter began cutting the branches, Reyes and his brother, another person who was cutting up the big branches, and Massaro, who was lowering the limbs with a rope, and while Carter at first told them to move away before he cut a branch he then started cutting without saying anything. Reyes said the branch that hit him pinned him against a fence they had taken down, that Massaro asked Carter why he hadn't said anything, and that his brother had started towards him when he was hit in the head; Reyes then went to help his brother, as did Massaro, who again asked Carter why he hadn't said anything.<sup>2</sup> Reyes also said Carter did nothing to help his brother and that when the police arrived and asked who the

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<sup>1</sup>Cortez rode to the site with Carter's driver; the Reyes brothers rode with Carter. (Tr. 18).

<sup>2</sup>Reyes said the limb that struck his brother was not tied off and that when the police arrived the rope was still tied to the branch that had knocked him against the fence. (Tr. 46).

boss was Carter told Massaro to give them one of his business cards, which Massaro did; Reyes then told the police Carter was his boss and gave them the business card he had. Reyes noted he did not know who Joseph Baker was and that he did not know who Massaro was until he gave the police his card; he further noted he and his brother were never paid for that day and that he had been unable to work since then as his spine and neck had been injured from his fall. (Tr. 32-57).

Richard Mendelson, the OSHA safety specialist who investigated the accident, testified the police notified OSHA of the accident on April 23, 1996, that he began his investigation on April 29, 1996, and that he spoke with the police, Cortez and Reyes and also checked out the information on C-1, a business card showing the name J.B.'s Tree Service. Mendelson learned the license number on C-1 belonged to Joseph Baker under the name of J.B.'s Inexpensive Lawn and Tree Service, and Baker told him that while he and Carter had done some jobs together they were no longer doing so at the time of the accident, that J.B.'s Tree Service was a non-entity, and that his business had nothing to do with the April 4 job; he also learned the phone number on C-1 went to Carter's residence where an answering machine answered Al's Tree Service, an unlicensed company operating out of Carter's address. In addition, while the homeowner hired Massaro's company, Off the Top Tree Service, and although Carter and Massaro declined to talk to Mendelson, Massaro told the OSHA area director that Carter was a contractor at the site; further, Mendelson learned Cortez had worked for Carter for three months, that Carter told Cortez he needed additional laborers for April 4, that Carter told the Reyes brothers how much they would be paid and they believed he was their employer, and that Carter and his driver had taken the three to the site and Carter had directed them in the job.<sup>3</sup> Based on this information, Mendelson concluded Carter was the employer of Cortez and the Reyes brothers, and the citation was issued to John Carter d/b/a J.B.'s Tree Service as that was the name appearing on the business cards Carter was using. Mendelson also concluded that Carter was in violation of 29 C.F.R. 1904.8(a) because he never reported the accident to OSHA and that he was in violation of the general duty clause because he did not follow C-3, the ANSI standard containing the safety

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<sup>3</sup>Mendelson said that there were no payroll records for Cortez or the Reyes brothers but that careless record keeping did not negate an employment relationship; he also said that Massaro had had one employee at the site, a Daniel Cooper, but that he had been unable to find him. (Tr. 78-79; 83-85; 92; 95-96).

requirements for tree care operations; pursuant to his investigation, Carter did not warn the workers below before cutting the branches that hit the Reyes brothers and he also failed to tie off the branch that struck Jose Reyes, which, from what the police told him, was several feet long and 8 to 10 inches around. (Tr. 58-97).

John Carter testified that he and Joseph Baker were working for a tree service company when they were laid off in December 1995, after which they did some jobs together using Baker's truck, license and equipment; they considered going into business and Baker had some business cards made but they instead parted company and Baker sold him his truck and equipment. Carter said the phone number on C-1 went to his home as Baker's wife did not want to be bothered by calls and that the answering machine answered Al's Tree Service because after he and Baker split up he applied for his own license; he also said that although he and Cortez worked together in the spring of 1996 they were both employed by Baker and that Cortez stayed on with Baker, and he denied that the woman he lived with, who Cortez had identified as his wife, had ever paid Cortez.<sup>4</sup> Carter stated that Massaro did not call him about the job until late evening on April 3, that he had not spoken to Cortez about it that day, and that when he went to the deli on April 4 Cortez and the Reyes brothers were there looking for work; they had gone to Baker's yard, Baker had not had any work, and they had proceeded to the deli where Carter went every morning. Carter told them he did not need them and called Massaro, who said to bring all three as two of his workers had not shown up and that he would pay \$60.00, and Carter drove the Reyes brothers to the site because they did not have enough gas in their car; he denied giving them or Cortez a business card and said they had probably found them somewhere in the truck, noting that Baker had left all kinds of things inside the truck and that he himself had not had time to clean it out. (Tr. 98-103; 115-23).

Carter further testified that Massaro had hired him to be the climber for the April 4 job, and that while he ran the job and gave some directions Massaro was responsible for giving safety instructions and for directing the workers on the ground. He said he tied off every branch before cutting it, that he warned the workers below before cutting each branch, and that Efraim Reyes was

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<sup>4</sup>Carter suggested that the person Cortez had testified was his driver was Baker, although he also said he and Baker were no longer working together at the time of the accident, and he indicated that Baker was to have sent him a W-2 form but that he had not received it. (Tr. 115-18).

hit because he ran under the tree to catch the branch while it was still airborne instead of waiting until it was on the ground; he disagreed Reyes was pinned against the fence, noting he got up and resumed working and was unhurt. He also said the fatal accident did not occur until 20 minutes later when he was cutting a nub, that he had not tied off the nub with the rope because it was too small but had given a warning before cutting it by yelling and revving the chain saw, and that the accident was caused by Jose Reyes running under the tree just as he severed the nub; he saw Reyes and yelled to him, but Reyes did not react and was hit by the nub, which, according to the police, was 6.5 to 7.5 inches long and weighed about 7.5 pounds. Carter stayed up in the tree smoking a cigarette after the accident because he could not believe it had happened and it seemed unreal, but he climbed down and talked to the police after they arrived; he told Massaro to give the police his card after they asked whose job it was, and he disputed Reyes' testimony that he was present then and that the branch that had struck him was still attached to the rope when the police got there. (Tr. 101-16; 121-32).

Whether Respondent was the Employer of Cortez and the Reyes Brothers

In determining whether an employment relationship exists, the Commission utilizes the "economic realities test," which consists of the following factors:

1. Whom do the workers consider their employer?
2. Who pays the workers' wages?
3. Who has the responsibility to control the workers?
4. Does the alleged employer have the power to control the workers?
5. Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6. Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7. How are the workers' wages established?

*Loomis Cabinet Co.*, 15 BNA 1635, 1637 (No. 88-2012, 1992). The test emphasizes the substance over the form of the relationship, and although the primary reliance is on who controls the work environment such that abatement of hazards can be obtained, who the workers believe to be their employer is also strong evidence of an employment relationship. *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158-59 (Nos. 87-214, 87-217 and 87-450-59, 1989).

It is clear from the record that much of Carter's testimony was contrary to that of the other witnesses and that before applying the evidence in this case to the above factors a credibility determination must be made. I observed the respective demeanors of Cortez, Reyes and Mendelson

as they testified and found their testimony to be sincere, credible and convincing. I also observed Carter as he testified, and it was apparent from his demeanor and statements that he was not being candid about his work relationships or the circumstances of the accident and that his testimony was largely an attempt to exculpate himself in this matter; in this regard, I note Carter's testimony that the Reyes brothers were at fault for being struck, despite his own admission that they had no prior experience in tree work and that he gave them no training. (Tr. 107; 110-12; 123-31). In short, the trustworthiness of Carter's statements was suspect, and his testimony is not credited insofar as it conflicts with that of the other witnesses. I find as fact, therefore, that Carter and Baker were not working together at the time of the accident but that Carter was still using the business cards Baker had had made, that Carter had employed Cortez and paid him for the three months preceding the accident, and that Carter told Cortez on April 3 he needed two more workers for the next day. I also find that Carter told the Reyes brothers on April 4 he would pay them \$60.00, that Carter and his driver took Cortez and the Reyes brothers to the job and that Carter directed the three workers at the site, and that although the homeowner had hired Massaro for the job there was no employment relationship between Massaro and the three workers. Finally, I find that Cortez and the Reyes brothers believed Carter was their employer and that, based on his job as climber and his relationship with the three workers, Carter controlled the work environment such that abatement of hazards could be obtained. Applying these findings to the above factors, I conclude that Carter was the employer of Cortez and the Reyes brothers at the site.

#### Serious Citation 1

This citation alleges that Respondent violated section 5(a)(1) of the Act, the general duty clause, in that employees were working below tree limbs which were being cut without safeguards to prevent their being struck by the falling limbs; the citation also states that a feasible and useful method of abating the hazard is to follow ANSI Z133.1, the ANSI standard for tree care operations, which provides for using guidelines to lower limbs, giving warnings before limbs are dropped, and preventing employees from working under limbs which are being cut.

Section 5(a)(1) provides that "[e]ach employer shall 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." To demonstrate a 5(a)(1)

violation, the Secretary must show that a workplace condition or activity presented a hazard, that the employer or industry recognized the hazard, that the hazard was likely to cause serious physical harm, and that a feasible means existed to eliminate or materially reduce the hazard. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). Based on the testimony of Reyes and Mendelson, which is credited over that of Carter for the reasons given *supra*, the work as it was being performed at the time of the accident presented a hazard. Specifically, Carter did not tie off the branch that struck Jose Reyes, he did not give warnings before allowing the branches that struck Efraim and Jose Reyes to fall, and he did not ensure the area below the tree was clear before cutting the branches. C-3, the 1994 revision of ANSI Z133.1, sets out these requirements at sections 9.4.3, 9.5.3 and 9.5.5, and Carter acknowledged his familiarity with the safe work practices of the industry. (Tr. 115). Moreover, it is apparent that the cited hazard was likely to and in fact did cause serious physical harm, and C-3 establishes the feasibility of the abatement methods set out in the citation.

In view of the foregoing, the Secretary has established the alleged violation. However, as noted at the beginning of this decision, Respondent contends the accident was the result of unpreventable employee misconduct. To prove this affirmative defense, an employer must show it had work rules designed to prevent the violation, that it had adequately communicated the rules, and that it had taken steps to detect violations and had effectively enforced the rules upon discovering violations. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). The record demonstrates none of these elements, and Carter himself admitted the Reyes brothers had no previous experience in tree work and that he gave them no training. (Tr. 123-31). Respondent's defense is rejected, and the citation is affirmed as a serious violation.

Turning to the assessment of an appropriate penalty, Mendelson testified that the proposed penalty of \$5,000.00 was based on the high gravity and obvious nature of the hazard, the fact that two employees were hit by falling branches, and Carter's heightened knowledge of the hazard after the first employee was struck; he further testified that no penalty reductions were given due to the circumstances in this case and in order to have the maximum deterrent effect. (Tr. 73-74). Upon consideration of this testimony and the record as a whole, it is my conclusion that the proposed penalty is appropriate and it is accordingly assessed.

"Other" Citation 2



This citation alleges Respondent did not report the fatality to OSHA within eight hours of its occurrence, as required by 29 C.F.R. 1904.8(a). Mendelson testified the fatality occurred on April 7, 1996, that Carter never reported the accident, and that OSHA did not learn of it until the police reported it on April 23, 1996. Mendelson also testified that a penalty of \$1,500.00 was proposed for this citation due to Carter's failure to report the accident at any time and because the late notice impeded OSHA's investigation. (Tr. 74-75). Carter testified it was not his responsibility to report the accident as he was an employee and not a company owner. (Tr. 114). However, the record in this case establishes that Carter was the employer of Jose Reyes. This citation is therefore affirmed, and the proposed penalty is assessed based on Mendelson's testimony and the record as a whole.

#### Conclusions of Law

1. On April 4, 1996, Respondent was engaged in a business affecting commerce and had employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of section 5(a)(1) of the Act and in "other" violation of 29 C.F.R. 1904.8(a).

#### Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of citation 1 is AFFIRMED, and a penalty of \$5,000.00 is assessed.
2. Item 1 of citation 2 is AFFIRMED, and a penalty of \$1,500.00 is assessed.

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Irving Sommer  
Chief Judge

Date: