



Testimony of

Peter Gerstenberger

Senior Advisor for Safety Compliance and Standards

for the Tree Care Industry Association

before the

House Education and the Workforce Committee

Subcommittee on Workforce Protections

June 16, 2011

Chairman Walberg, Ranking Member Woolsey and Members of the Subcommittee, on behalf of the Tree Care Industry Association (TCIA) and our approximately 2,000 member companies across the U.S., we thank you for the opportunity to testify today about our experiences with state plans and federal OSHA.

My name is Peter Gerstenberger and I am the Senior Advisor for Safety, Compliance and Standards for the Tree Care Industry Association. I am responsible for the development of TCIA's safety and compliance training programs and the association's primary contact with company owners and their employees on safety/compliance matters. I also act as TCIA's liaison with OSHA and similar state entities and regularly work with these agencies in an effort to improve safety throughout our industry. I have had the privilege of serving TCIA in one capacity or another for more than 25 years. Throughout my tenure, I have participated actively as a member of the ANSI Z133 Committee, which develops the only consensus safety standard for tree care operations.¹ The Z133 committee was first formed in 1969, pre-dating OSHA.

TCIA's 2000 active members are companies engaged in arboriculture (tree care), tree trimming and removal, utility vegetation management, landscape maintenance and related activities. Tree care is a high-hazard industry. Using estimates of our industry's size from reliable sources as well as our own market research, we calculate that our industry's fatality rate places us among the top 10, and likely among the top five most hazardous occupations in the country.²

¹ The American National Standard's Institute (ANSI) Z133.1-2006, Safety Requirements for Arboricultural Operations. Z133 was first published in 1972. It was revised in 1979, 1982, 1988, 1994, 2000 and 2006. A revised standard is expected for 2011.

² A recent report published by the Centers for Disease Control & Prevention (CDC) indicates that there are 190 fatal occupational fatalities among a group of workers that the Bureau of Labor Statistics (BLS) terms "grounds maintenance workers." See *Fatal Injuries Among Grounds Maintenance Workers — United States, 2003–2008. Morbidity and Mortality Weekly Report, May 6, 2011. Vol. 60, No. 17*. Within this statistic, it is eminently clear that tree care activities and tree care workers were responsible for the majority of those fatal accidents. As benchmarks, consider the all-industry fatality rate put forth by BLS of 4.0 (per 100,000) and the GMW rate of 13.3. To calculate a comparable statistic for tree care, we need the number that has eluded everyone, namely the total number employed in tree care in the U.S. Industry sources suggest that this number is somewhere between 150,000 and 300,000. Using the 63-fatalities-per-year-among-tree-trimmers figure from the CDC report and not counting the workers from allied trades who died doing tree work, we estimate a fatality rate of between 21 and 42 per 100,000. For comparison's sake, according to the BLS CFOI, the 2009 fatality rate for construction laborers was 18.8 with 229 total fatalities, and for farming, fishing and forestry occupations it was 25.8 with 239 fatalities.

As a result, worker safety has been one of the central tenets of TCIA since its inception more than 70 years ago. We were the original Secretariat of the ANSI Z133 in 1969 and remain very active in that standard-making process. We also have consistently focused on assisting our members improve safety through education and training. As part of this effort, we direct the only credentialing program for safety professionals within our industry, produce a wealth of bilingual safety training programs, and offer employers a model illness and injury prevention program.

Our efforts have not been limited to our membership and the ANSI committee, however. We also regularly engage regulators to effect safer working conditions for our members' employees as well as the multitude of small employers outside our membership. In this regard, we have been fortunate to collaborate with federal OSHA as well as several State Plan OSHAs in the past, and the result has been a tangible safety benefit to the industry in each instance.

In recent years, our collaborations with state plans have been particularly fruitful. We have worked directly with State Plan OSHAs in California, Virginia, Maryland and Michigan to adopt more effective rules and guidance for tree care operations.

Since 1993, Virginia experienced 59 non-logging, tree care-related fatalities, which comprised seven percent of all occupational fatalities within the state, with 47 of those, or nine percent of all occupational fatalities, occurring since 2000. For an industry of the relatively small size of the tree care industry, this is a very high number of fatal accidents.

TCIA (then National Arborist Association) approached the Virginia Department of Labor & Industry (DOLI) about the possibility of adopting a comprehensive regulation addressing tree trimming in 2001. We requested a regulation based on ANSI Z133.1-2000. Developed through a consensus process by an accredited standards committee representing employers and employees, organized labor, equipment manufacturers, academia, and other stakeholders, the Z133 Standard captures the collective wisdom and experience of the entire profession, translating that body of knowledge into standards of safe practice.

Discussions with the DOLI resulted in a commitment from the industry to make changes to the ANSI standard, which culminated in the adoption of the revised ANSI Z133.1-2006³.

Virginia OSHA (VOSH) initiated this rulemaking in 2007 with the assistance of a regulatory work group composed of private and public sector representatives. TCIA organized a small coalition of affected members to sit down with VOSH, other agencies and other affected parties to craft the standard language that very recently took effect in the Commonwealth.

The purpose of the new regulation is to provide comprehensive protection to private and public sector employees and employers exposed to tree trimming hazards. The final regulation is based closely on ANSI Z133, with certain provisions such as the one for first aid/CPR training that are more stringent than either Z133 or OSHA general industry standards.

VOSH estimates that on average over the last 10 years there were four fatal tree trimming accidents per year that could be prevented going forward if there is full compliance to the final regulation.

California has had tree care-specific rules on its general industry safety orders (GISO) as well as its high voltage safety orders for quite some time. We are not aware of the full history of their promulgation other than the fact that they were based upon the extant consensus standards at the time.

We began our collaboration with California OSHA (Cal/OSHA) in 2004. At that time there was a recognized and growing hazard associated with climbing into and removing trees killed or weakened by forest fires and pine beetle infestations in the State. Cal/OSHA reached out to the industry experts and even attended our conferences and trade shows to learn more. We participated in the development of an emergency regulation to allow tree workers to be hoisted by crane into the tree canopy when other methods were less safe or infeasible. Cal/OSHA immediately saw the logic of adopting this as permanent regulation, consistent with what had been recognized as an accepted safe work practice in Z133 since 1979. In 2005, that goal was realized.

³ TCIA also had substantive conversations with federal OSHA concerning Z133. Please see page 7 of this document.

Currently, an advisory committee of our members, Cal/OSHA staff, and representatives from unions, utilities, municipalities, companies and other stakeholders are assisting Cal/OSHA with the revision of several outdated sections of its GISO pertaining to tree care operations. Once again, Z133 language is serving as the template. With these standards, Cal/OSHA's compliance field force will be better educated to look for the hazards likely to cause serious harm, and the smallest practitioner in the remotest corner of the State will have ready access to updated minimum standards for safety.

In 2008, TCIA entered a formal alliance with the Michigan Occupational Safety and Health Administration (MIOSHA) and five other Green Industry organizations in Michigan to help protect the safety and health of Michigan's green industry workers. The MIOSHA program is part of the Michigan Department of Labor & Economic Growth (DLEG).

MIOSHA launched a Tree Trimming Industry initiative in October 2006, due to a series of fatalities involving tree trimmers in Michigan. MIOSHA sent letters and a fact sheet to 1,000 employers in the tree trimming and removal industry to raise awareness of the industry hazards and to offer training materials. MIOSHA also increased compliance efforts in the industry to encourage employers to protect their workers.

This ground-breaking alliance was an outgrowth of that initiative. By forming this collaborative relationship, all partners pledged to work together to foster the highest standards, good work ethics and safe work practices for all professional sectors of the green industry.

The goals of this alliance included, but were not limited to: Reducing accidents; providing training and education specific to the green industry and encouraging member participation; developing fact sheets, PowerPoint presentations, best practices case studies, and a website resource list to help employers and employees increase their knowledge of safety and health issues and to forge innovative solutions; and coordinating participation in forums, round table discussions, conferences, and reciprocal website links to assist employers with compliance and the development of safety and health systems.

Just over three years after the alliance was signed, all those goals and more have been realized.

As the economy continues to impact our industry, nowhere is the effect being felt more than in Michigan. In 2010, Michigan experienced seven occupational fatalities related to tree care. These fatalities included electrocutions, falls and struck-bys; and arguably all could have been prevented with more training. Therefore it was particularly gratifying for the Michigan Green Industry Association (MGIA, one of the Green Industry Alliance Partners) to be able to announce that it had been approved for a \$20,000 grant from MIOSHA. The grant helped relieve some of the financial burden of training for numerous small employers while providing high-quality, tree care-specific safety training to 200 tree workers.

In 2011 with MIOSHA's assistance, MGIA will again be able to help address unmet training needs with both electrical hazard awareness and CPR/first aid training programs.

Very recently, Maryland OSHA initiated a rulemaking with the ultimate goal of promulgating a comprehensive vertical standard for tree trimming similar to Virginia's. TCIA attended a hearing in November 2010 and participated in a work group in December 2010 with other stakeholders to refine the first draft of a proposed standard that MOSH had created internally.

We submit that the situation in States like Virginia, California, Michigan and Maryland is a microcosm of the situation nationally as far as our industry is concerned. As a result, we feel that similar collaboration with other state plans and federal OSHA can improve safety in our industry.

Our efforts to engage federal OSHA have in many instances resulted in positive outcomes. For example, during a 12-year period, our association's leadership worked directly with federal OSHA toward the promulgation of 29 CFR §1910.269, Electric Power Generation, Transmission and Distribution. Certain parts of this "vertical standard" regulate the utility line clearance tree trimming industry, a specialized industry within our profession, employing tens of thousands in the U.S. The result, in our estimation, was an effective, workable standard that was and is responsive to the hazards of line clearance tree trimmers.

We have also sought and received assistance from federal OSHA to train thousands of workers. In 2004-05, TCIA received a \$197,000 Harwood grant to provide a series of full-day

regional, bilingual electrical hazards awareness workshops targeting small-employer businesses. Our program included a train-the-trainer component to leverage the resources from the grant. The grant enabled us to provide this vital training to 2,327 tree care workers. Once again in 2007-08, TCIA received \$160,000 from OSHA to conduct electrical hazards awareness training through regional workshops. Another 1,513 tree care workers were trained.

From 2002 through 2007 as we fulfilled our Harwood grant obligations, we continued to collaborate with a variety of arborist organizations to deliver electrical hazards training. In total, we estimate that more than 10,000 arborists received electrical hazards training using TCIA training materials in a five-year time span.

In recent years, there has been an amazing transformation in the industry that we firmly believe is directly attributable to this training, and for which OSHA deserves some of the credit. In the 19 years prior to the electrical hazards workshops, the percentage of all fatal accidents attributable to electrical hazards, as measured by OSHA, was 39 percent. By 2006, that statistic had dropped to 18 percent, and a year later (the last year of our grant) it had dropped even further to 16 percent.

While our most recent applications for Harwood grants have not been selected, we hope to receive future grants so we might build upon our past success.

On February 11, 2003, TCIA entered an Alliance with federal OSHA. The Alliance was created to help solidify a relationship between both organizations which will result in enhanced dialog, information exchange, and the development of training materials. Both parties to the Alliance agreed that the ANSI Z133 Standard should be recognized as the leading authority for safe practices in the tree care industry, and that all training programs created should be consistent with this document. However, because the Z133 is a consensus standard, both parties agreed to review the Z133 document in order to ensure consistency with existing legal standards before developing such training programs based on its content. Therefore, in June of 2003, representatives of OSHA and the TCIA reviewed the content of the 2000 revision of Z133.

Our shared goal was to identify areas of the Z133 document that either appeared to be inconsistent with existing legal standards, or appeared to need clarification for better

understanding. TCIA did not make any promises or commitments to OSHA that Z133 would be revised per the recommendations; nevertheless we did carry the recommendations to the Z133 committee and almost all were adopted in the next revision. Again this exercise was undertaken for the sole purpose of identifying the principles on which future training programs could be modeled. Our industry's consensus safety standard became stronger as a result.

Unfortunately, not all interactions with federal OSHA have resulted in positive outcomes. In the same period that OSHA was working on 1910.269, it was also separately working on a standard for the logging industry, 1910.266, that became a final rule in 1994-95. It wasn't until after the rule was promulgated that OSHA determined through letters of interpretation that the tree care industry should be regulated by it. By applying the standard to our industry after it was promulgated, we were denied any opportunity to have input into the standard. This has resulted in various inconsistencies and inefficiencies, including some of the final Logging Standards' requirements directly contradicting what had just become law in 1910.269. What ensued was a running legal and verbal battle between OSHA and our industry over 10-plus years concerning the applicability of the Logging Standard that culminated in the current OSHA Directive, CPL 02-01-045, Citation Guidance Related to Tree Care and Tree Removal Operations.

We cannot define what "effective" should mean for this committee; however, we can certainly point to the aforementioned as an example of ineffective. While the current federal directive provides some guidance on safety measures for our industry, it nonetheless is the product of an attempt by OSHA to cobble together various standards from general industry, as well as other industries, and apply them to tree care. In this manner, it is incomplete and inferior to standards such as those in Virginia and California, which address the unique hazards facing our industry and provide proactive guidance to employer, employees and enforcement officers.

Over the years, TCIA has repeatedly engaged OSHA in an effort to address these deficiencies and obtain a specific standard for our industry, including a formal petition for rulemaking we filed in 2006. Support for an arboriculture standard also has come from various other stakeholders. Indeed, Members of Congress from both Chambers and both parties have intervened several times on this issue in support of a separate "arborist standard" based upon ANSI Z133, beginning when Cass Ballenger, the former Chair of this Subcommittee, suggested

OSHA move forward with a separate standard more than 10 years ago. Those calls have been repeated by several Members of this Subcommittee over the years, including several current members, who have urged OSHA to move forward with a negotiated rulemaking.

It appeared that we would get what we had been asking for when in September 2008 (Federal Register Vol. 73, No. 182. Thursday, September 18, 2008. Pages 54118-54123) OSHA issued an advance notice of proposed rulemaking (ANPR) for tree care operations. They seemed to agree with our justification for a standard when they said, “After analyzing the BLS and IMIS fatality and injury data, OSHA has decided to pursue rulemaking to address hazards in tree care operations. As the first step in the rulemaking process, OSHA is publishing this ANPR to gather data, information, and comment on hazards in tree care operations and effective measures to control hazards and prevent injuries and fatalities. In addition, OSHA is requesting comment on provisions a standard should include to effectively address those hazards. OSHA also will carefully consider the ANSI Z133.1 standard, as well as State occupational safety and health standards addressing tree care operations, in developing a standard.”

It certainly appeared to us from the comments OSHA received on the ANPRM that there was broad base support for a standard from industry, individual arborists and other stakeholders.

Despite the vast majority of commenters supporting a standard and for reasons we do not understand, OSHA has apparently decided not to pursue a rulemaking at this time and did not include this rulemaking on its last two regulatory agendas. OSHA’s justification for not moving forward on a vertical standard for our industry has been that existing standards already provide adequate protections to workers in tree care, and that the Agency had higher priorities. We do not agree.

Allow us to compare our industry’s recent citation history with that of the logging industry. In fiscal 2009-10, 66 percent of the logging industry’s citations were issued under its vertical standard and less than one percent were issued under OSHA’s catch-all of the general duty clause.

By contrast in our industry, 10 percent of our citations were general duty clause. We heard it expressed by a high-ranking OSHA official once that general duty citations were considerably

more difficult to research and write, and were more frequently contested by the employer. Your committee may wish to ask OSHA about the relative “efficiency” of general duty citations. Certainly efficiency is one measure of effectiveness.

We cannot comment upon the effectiveness of State Plan’s enforcement activities relative to federal OSHA’s. We simply have no knowledge in that area. However, effectiveness as measured by certain State Plan’s responsiveness to our efforts to improve safety in our industry is very good.

We have been and we remain more than willing to participate in further dialogue and meetings with OSHA and other stakeholders concerning this important measure. Thank you for the opportunity to be heard in today’s hearing, and I am happy to address any questions.