BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

DUGLAS ANTUNEZ-BENITEZ,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1515634
	)	
ASPLUNDH TREE EXPERTS,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE (FORFEITURE)

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before a Hearing Officer of the Industrial Accident Board in New Castle County, Delaware on February 11, 2022 and March 7, 2022.

PRESENT:

KIMBERLY A. WILSON
Workers' Compensation Hearing Officer

APPEARANCES:

Matthew R. Fogg, Attorney for the Employee

Kristopher T. Starr, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Duglas Antunez-Benitez ("Claimant") was injured when he fell from a tree to the ground below while working for Asplundh Tree Experts (also "Employer" or "Asplundh") on September 8, 2021. Claimant's wage at the time of the accident was $1,441.04 per week, with a corresponding compensation rate of $797.96 per week.

Claimant filed a Petition to Determine Compensation Due (also "DCD") on September 20, 2021 seeking an acknowledgement of his injuries as compensable, payment of his related medical expenses and ongoing total disability from the date of the work accident. The parties agree that Claimant sustained a displaced fracture of the pelvis and a comminuted fracture of the sacrum in this incident requiring a surgery as well as other medical treatment. Employer concedes that this is a compensable accident but alleges that Claimant has forfeited his right to workers' compensation benefits under 19 *Del. C.* § 2353(b) due to a willful failure to use a reasonable safety appliance provided for the employee and/or a deliberate and reckless indifference to danger. Claimant denies the applicability of such.

By stipulation of the parties, a hearing on Claimant's petition was held before a Workers' Compensation Hearing Officer on February 11, 2022 and March 7, 2022. This is the decision on the merits of Claimant's petition.

SUMMARY OF THE EVIDENCE

Wes Killebrew testified first on behalf of Claimant. He lives in a house near where Claimant's accident occurred and he witnessed the accident. On September 8, 2021, he observed tree trimmers arriving somewhere between 2:00 or 3:00 p.m. He recalled that he found it odd that they were trimming the trees so late in the day. Mr. Killebrew was observing the tree trimming activities because he was concerned that falling limbs might ruin his fence. He went outside to

offer the workers some water. As he was standing there, he saw two men up in the trees and one or two men on the ground picking up limbs. Claimant and the other workers were talking and communicating a lot. Claimant was working a tree to Mr. Killebrew's left side. Claimant went up to trim the tree and there was a lot of communication in Spanish taking place. Claimant topped the tree and when he did that, either his belt came off or the belt malfunctioned and he fell about 24 to 28 feet down to the ground. He landed in ivy but there were logs and unseen things under the ivy as well.

Mr. Killebrew was standing at the back of his property by his fence and gate, and was not even six feet from the tree that Claimant was trimming. He saw that Claimant had a belt on, and that he was wrapped up on something using the belt. He was connected to the tree. When the tree was topped and went to fall, the tree whipped and either his belt broke or it flipped off and then he fell. Mr. Killebrew was only about ten feet from where Claimant landed on the ground. There was a lot of activity after that and Mr. Killebrew was not sure of what to do. There were a lot of workers whistling and running. Claimant was lying on the ground. The workers started to move him until one yelled not to touch him. Claimant stayed there for about five to ten minutes. Mr. Killebrew went inside to get Claimant some water. He told the workers that they could use his back yard to get an ambulance to Claimant, but he was not sure if they understood him. Mr. Killebrew did not call for an ambulance, as it seemed that the workers had a process they were following. He saw a truck drive across the field. Claimant was picked up and he did not look good. He was placed in the truck.

On cross examination, Mr. Killebrew agreed that he is not an arborist or tree climber. He is not certified in rigging but had done rigging at heights in a past construction job. In that capacity,

he needed to wear full safety gear. He is not a regular tree climber. Mr. Killebrew had seen a safety line over the piece of tree Claimant was working on.

Devis Molina testified next.[1] He has now worked for Asplundh for about six months. Mr. Molina worked for Asplundh for less than two months at the time of Claimant's accident. He works as a helper to the foreman. This position watches everything and cleans and picks up branches. Mr. Molina had never worked as a climber for Asplundh up until the date of this incident. He had almost always worked as a spotter before the accident. The spotter makes sure that the foreman does things right. The spotter also tells the climber if what is going to be cut will fall on the line or damage anything when the branches fall and to make sure that all of the equipment is complete. This includes the safety lines used by the climber. Mr. Molina had worked with Claimant before the day of his accident and he knew Claimant to be a good worker.

On September 8, 2021, the workers left at 6:30 a.m. and arrived at the River Road site at 7:30 a.m. They left for a new site on River Road around noon. Mr. Molina was performing spotter duties in the morning and afternoon, whereas Claimant had been in the bucket trimming in the morning and then was a climber in the afternoon.[2] The bucket is attached to an arm on a truck and the bucket goes up and down with the worker in it to reach the line. Mr. Molina was not aware that he was going to be a spotter for a climber in the afternoon, though he was aware that he was going to be a spotter for someone in the bucket in the morning. There are job briefings that occur every day before a job is started. Everyone on the crew reviews the job briefing forms, including the general foreman ("GF"). The job briefing forms are signed. If jobs are switched during the day, there is another job briefing.[3]

[1] Mr. Molina testified with the assistance of a Spanish language interpreter, Natalina Catalini.
[2] Mr. Molina explained that the bucket is attached to a truck and the trimmer can stand in it to trim. However, when a climber, trees are actually physically climbed for trimming.
[3] The job briefing form from September 8, 2021 was marked into evidence as Claimant's Exhibit #1.

On the September 8, 2021 job briefing form (also "job briefing form"), the first page indicates that Claimant would cut with the mini bucket with "Will" as the spotter, and "Chip" cleaning and cutting brush. It also indicates that Claimant would be a climber in the afternoon and that Mr. Molina would be a spotter in the afternoon. Mr. Molina did not work with Claimant in the morning. He did not know that he would be a spotter for Claimant in the afternoon when he started working that day. His understanding was that he would be a spotter for someone working in the bucket for the entire day.

When there are job briefings, potential hazards and necessary protective equipment to be worn are discussed. On page two of the job briefing form, the block to the left of number three talks about hazards of the job; to the right, there is a list to be checked off. The eighth item down from the left is "fall from height" and it is not checked off on the form. There were discussions of a hazard of falling from heights that morning. Item number five talks about required personal protective equipment (also "PPE"). There is also a checklist in that regard and the sixth item down is "fall protection." That also is not checked off.

Mr. Molina first knew that he was going to be a spotter for a climber when the GF Jorge Vasquez told him that there was a change in plans and that he was going to be doing another job. There was no job briefing before jobs were switched on September 8th and Mr. Molina became a spotter for Claimant who was working as a climber in the afternoon. Mr. Molina had signed the job briefing form the day after the accident, on September 9th. Mr. Vasquez asked Mr. Molina to sign the form the next day. Mr. Molina testified that he should have signed a new job briefing form before the change of jobs on the day of the accident. He was questioned about whether Mr. Vasquez told him why he wanted him to sign the form the day after the accident.[4] Mr. Molina

[4] Employer's counsel objected to this question on the basis of hearsay; the Hearing Officer overruled the objection.

testified that Mr. Vasquez said that he needed to sign the job briefing form so there would not be any problems for Mr. Molina after the accident because he should have signed the form before the accident happened. Mr. Molina does not recall reviewing the form before the accident happened.

Mr. Molina confirmed he had provided two written statements after Claimant's accident. He was asked to read the first statement into the record. Mr. Molina's first written statement (also "first statement") indicates that Claimant had been working with a foreman from the beginning of the day until noon. They had been trimming to clear electric lines. The supervisor arrived around noon and told them that they had another job to do because the electricity people were going to turn the power off. Other coworkers arrived. The supervisor told Mr. Molina to go and work with Claimant and two other coworkers. They had not had lunch. Mr. Molina went to where Claimant was and they got the equipment ready to work the fence for climbing. They trimmed some trees. The next tree was not very big but needed to be topped. It was a little bit thin. Claimant topped it, and the tree moved a lot and the safety line came out and Claimant fell. The workers all ran to him and blew their whistles because they did not have cell phones. The supervisor then arrived. A neighbor asked if he should call the ambulance and the supervisor said no that we were fine. The supervisor then said that he was going to take Claimant in his pickup truck. He brought it over and they all lifted Claimant up. Claimant was hurting a lot and he was unconscious because he did not know what he was saying. The supervisor took Claimant away in his pickup truck. This was the end of Mr. Molina's first written statement.[5]

Mr. Molina agreed that he had indicated in his statement that the workers had not yet had lunch. They normally have lunch at noon. It is unusual for them to work through lunch. They had not had any breaks yet at that point either; lunch is normally their first break. The accident had

[5] Mr. Molina's first written statement was marked into evidence as Claimant's Exhibit #2. It was translated into English into the record by Ms. Catalini.

occurred after 1:00 p.m. Mr. Vasquez wanted the workers to start doing the other job because the electricity was off. He did not tell them when it would be coming back on. When questioned about whether Mr. Molina felt rushed, he answered "not exactly." He was hungry and tired at the time.

Claimant was topping a tree at the time of the accident. Mr. Molina explained that this is when the top of the tree is cut off. Claimant had his safety harness on while topping this tree. When a climber is climbing a tree, they should use three ropes to tie off, but the minimum necessary is two. Claimant was attached to at least two ropes at the beginning; at some point, he was not attached to at least two ropes though. Mr. Molina was asked to explain why this was the case. He speculated that maybe because the workers were in a hurry and were hungry and just wanted to get the job done and did not pay attention to what was happening because they were in a hurry. The first time Mr. Molina realized that Claimant was not connected to at least two ropes was when Claimant fell down; had he realized earlier, he would have told Claimant.

The afternoon this accident occurred was the first time that Mr. Molina ever worked with Claimant as a climber. Further, Mr. Molina had never worked as a spotter for any climber before this. He did not receive any training on the responsibilities for a spotter working with a climber. He did understand that one of his responsibilities as a spotter was to make sure that the climber was using all of the necessary equipment properly.

Mr. Molina's second written statement (also "second statement") was similar to the first statement, but he had elaborated on what happened with the tree that Claimant fell from. He wrote in the second statement that once Claimant topped the tree, the tree shook and the safety belt overlooped from the top of the tree. In the second statement, Mr. Molina explained that the tree was swaying because it was not a very thick trunk.[6] After Claimant fell, the conclusion that Mr.

[6] Mr. Molina's second written statement was marked into evidence as Claimant's Exhibit #3. It was translated into English by Ms. Catalini.

Molina had reached was that the safety line had gotten loose. Mr. Molina had never assisted a climber or seen something like that before.

A climber has a belt used to attach the climber to a tree. There are generally at least two points to be tied off. Two are tied together on one branch and then the other is on another branch in case something happens, there is always one left. There are times where there is a rope attached to another tree in order to protect a climber from falling. Mr. Molina agreed that he first time he realized that Claimant was not hooked to a rope to another tree was when he fell. He supposes that it was one of his responsibilities as a spotter to make sure that Claimant was hooked to a rope to another tree. There were two more people present—Yony Benitez (also "Yony") and Francisco Pacos (also "Francisco"). Yony was a climber and Francisco was a spotter for Yony and they were about two trees away from where Claimant fell. Mr. Vasquez was in the area too, but not close enough to see what happened.

Mr. Molina could not recall getting training that indicated that if any employee saw something they felt was unsafe to call an all stop to the work. He agrees that it appears he had signed the company policy relating to this with specific language that states, "I will also call an all stop when I see something wrong or when I am unsure."[7] All stops had been talked about as a group but Mr. Molina had not recalled receiving training on this. No one had tried to stop Claimant's work before he fell.

Mr. Molina was questioned if he could recall anything else about Claimant's fall. He testified that they had been working with time pressure and it was not a normal day with a break or time to get ready to do the job briefing in order to continue working.

[7] The "Company Policy Awareness" form signed by Claimant and Mr. Molina on August 24, 2021 was marked into evidence as Claimant's Exhibit #4.

After Claimant's fall, the whistles were blown. Mr. Vasquez arrived within a few minutes. Claimant was awake but he seemed like he could not breathe. He was asked questions but seemed to not know how to answer. They are supposed to call 9-1-1 with accidents but they did not have a phone. Mr. Vasquez had a phone. Mr. Molina had told Mr. Vasquez to call 9-1-1 when he arrived, but he had not called. Claimant was moaning and would not let them move him because he was hurt. The workers helped to lift and load Claimant into Mr. Vasquez's truck. Only Mr. Vasquez and Claimant traveled in the truck.

Mr. Molina later met Claimant and Mr. Vasquez in the Christiana Care (also "ER") parking lot. Yony, Francisco and other coworkers were there. Claimant was already being treated in the hospital when Mr. Molina arrived. Claimant had a green company shirt on with Asplundh written on the back when he fell. Mr. Molina did not help with or observe Claimant take his Asplundh shirt off at the ER.[8]

On cross examination, Mr. Molina agreed that a picture from the Asplundh website appears to be a job briefing where the work plan is discussed.[9] It is a familiar scene to Mr. Molina. Safety training occurs in groups. That is not depicted in this picture; the picture shows what happens in the morning before the workers leave the yard. Group training sessions are always performed in the yard.

Mr. Molina's position at Asplundh was as a grounds person. It is an entry level position. Mr. Molina is not a certified tree climber. He is not certified to apply a safety saddle or the proper rigging of ropes for tree climbing. The saddle that the climber uses attaches to the waist and under

[8] Employer objected to this question on the basis of hearsay because Mr. Molina's answer contained a reference to his understanding that Claimant had taken the Asplundh shirt off before he entered the ER and, at the hearing, the Hearing Officer overruled the objection. However, in arriving at a decision in this case, the Hearing Officer only considered the language as written in this sentence because Mr. Molina testified that he arrived after Claimant had already entered the ER and was apparently not a witness to the events surrounding the removal of Claimant's Asplundh shirt.

[9] This picture was ultimately marked as part of Employer's Exhibit #5 (page 2).

the legs to form a seat; attached to the front part of that belt is a metal carabiner. The climber will usually attach the main climbing line (also "main safety line" or "main line") to that hook; if that main line is tied off and secured to something else it will suspend the climber. Two safety lines or lanyards are also attached to that same apparatus. The main line, a thick rope, is supposed to be secured to a tree at all times. The two safety lanyards, however, can be moved during climbing; as the climber ascends the tree, he or she loops the lanyards to secure position on the tree. The main safety/climbing line is always secured to the tree and the point of the main safety line is to keep the climber secured to the tree 100% of the time. It prevents the climber from falling out of the tree, while the safety lanyards are only used to keep the climber at a certain position in the tree to do the trim work. If the safety lanyards become dislodged, the main safety line and the climber are still secured to the tree. The main safety line is supposed to be secured in a Y at the base or biggest part of the tree; if there is no natural notch in the tree, the main line is secured to an adjacent tree. The main line is supposed to be secured to a tree before the work begins. The main safety line was not attached to the tree Claimant was working on when he fell.

Mr. Molina was questioned about Asplundh's lifesaving rule/policy called "100% tied in." He admitted that his signature is on a form dated August 6, 2021 called "New Employee Safety Orientation (LCQS)" acknowledging this policy.[10] He had received safety education as a new employee to include lifesaving rules and safety while climbing trees. This form also acknowledges that Mr. Molina was trained on the work of a spotter. He agreed that perhaps the number one safety directive at Asplundh is that a climber needs to be 100% tied into a tree before climbing it. If a worker is not 100% tied into a tree when climbing, the worker is considered to be free climbing a

[10] This form was marked into evidence as Employer's Exhibit #1.

tree; if Asplundh becomes aware that a worker is free climbing a tree, the worker will be terminated.

The job briefing form is filled out by the crew foreman. Claimant was a crew foreman. He was directing the operation of his and Mr. Molina's two-person crew at the time of the accident. The job briefing form does appear to have Claimant's signature on it. Mr. Molina was not sure if Claimant prepared the form; though, according to the form, Claimant was in charge of the operation involving the tree he fell from. Also, according to the form, rigging and roping work would be involved in the afternoon. "Job hazard assessments" was also checked off, though "fall from height" was not checked. There is a box that states "Foreperson Acknowledgment: I have assessed the crew and it is able to perform the task(s) at hand safely. If no, do NOT proceed with the task." The box for "yes" is checked off. The form then states: "IF THE JOB CANNOT BE PERFORMED SAFELY, STOP THE JOB AND ASK FOR ASSISTANCE!" Mr. Vasquez asked Mr. Molina to sign this form the day after the accident.

Mr. Molina did not see the main safety line attached to the tree that Claimant was working on. Mr. Molina did not realize that Claimant was not 100% tied in to the tree until he fell. He would have stopped the operation if he realized that Claimant was not 100% tied into the tree. Every employee is responsible for safety on site. A foreperson would have more advanced safety training than a grounds person. Mr. Molina agreed that in the afternoon they were rushing on the job, did not pay attention and were in a hurry.

On redirect examination, Mr. Molina became aware that Claimant was not secured by the main safety line because when he fell the main line was not tied up. The main line was attached to Claimant's harness though. It was the other end of the main safety line that was not attached to the tree Claimant was climbing or to an adjacent tree. Mr. Molina noticed that the other end of the

main safety line was lying on the ground near to the tree Claimant had been climbing and the other end was hooked to Claimant's harness. It was not tied to the tree that Claimant was climbing, but Mr. Molina did not notice this until after the accident.

The first time that Mr. Molina saw the job briefing form was the day he signed it, the day after the accident. He was not aware that he would be working with Claimant as a climber until just before he worked with Claimant that afternoon. There was no separate job briefing before he started the job with Claimant.

On recross examination, when Mr. Molina saw the other end of the main safety line that was not attached to Claimant it was not attached or tied off in any way. This violates Asplundh's "100% tied in" lifesaving policy. It is the most important element of keeping a climber in a tree and not falling and being injured. If Claimant had been tied off 100% in terms of the main safety line per this policy, when the overtopping end came off, Claimant would have been suspended in the air by his safety harness.

The Hearing Officer questioned Mr. Molina. The main safety line secures the climber to the tree. There are also two safety lanyards that loop around the tree and keep the climber at a certain level of the tree. Claimant was topping the tree or cutting the top off away from power lines at the time of his accident; when the tree was topped, one of the two safety lanyards looped over the cut portion of the tree, also known as "overlooping."

There is one or two minutes of preparation once one tree is finished and the next tree is climbed. During those one to two minutes, Claimant had observed possible hazards but they all were in a hurry to finish. Claimant did not pay attention and had underestimated the tree. The tree Claimant fell out of had a smaller trunk, so it would have been justified to tie off to another tree.

It would not have been possible to tie off the main safety line to the same tree; it was too small of a tree.

On further recross examination, the climber makes the decision on where to tie off the tree. There was no natural wedge to tie off onto the tree they were working on when Claimant fell. Claimant was not free climbing the tree. He was climbing up with the safety lanyard. Mr. Molina admitted that Claimant's main climbing line was not secured to anything other than Claimant. It is a direct violation of the lifesaving rule of Asplundh. The "100% tied in" policy is the primary rule preventing someone from being killed or seriously hurt when falling from a tree.

Eric Johnson, M.D., an orthopedic surgeon, testified by deposition on behalf of Claimant.[11] His initial contact with Claimant was at Christiana Care after the September 8, 2021 accident. Claimant had been at work when he fell from a tree and sustained a fracture to the sacrum, a fracture to two ribs and multiple fractures to his pelvis. He required a blood transfusion due to significant internal bleeding.

Dr. Johnson operated on Claimant for his pelvis fractures the day after the accident, on September 9, 2021.

Claimant has been totally disabled since the surgery. He has a four to six month injury, which sometimes could last six months to a year, depending on how much fixation needs to be done.

Dr. Johnson reviewed the last medical note from December 15, 2021. Claimant was marking progress. He still demonstrated some weakness and difficulty mobilizing. He was to continue with physical therapy for strengthening. He remains totally disabled from any and all employment. Dr. Johnson confirmed that Dr. Hanley had indicated in November 2021 that it would

[11] Dr. Johnson's deposition was marked into evidence as Claimant's Exhibit #5.

be three to six months before Claimant could be considered for work activities. Claimant will require more physical therapy to include work hardening in the future.

All of Claimant's treatment regarding these injuries have been reasonable, necessary and causally related to the September 2021 accident.

On cross examination, Dr. Johnson had not provided direct trauma or ER care to Claimant. He was called in to treat Claimant's pelvic fractures. Claimant told him he had been a tree trimmer and was up in a tree and fell. The initial triage records indicate that Claimant had fallen off of a ten to twenty foot ladder onto grass and Dr. Johnson is not sure the reason for this inconsistency. The mechanism of Claimant's injury in falling from a height is capable of producing these injuries. Dr. Johnson agreed that if Claimant had not fallen, he would not have been injured in this way.

Yony Benitez testified next.[12] He has been employed with Asplundh as a foreman for three years. The responsibilities of a foreman include making sure that himself and the other workers are safely working. Mr. Benitez knows Claimant and has worked with him many times. He never observed Claimant doing anything he believed to be unsafe.

Mr. Benitez recalls Claimant's accident. It was around 1:00 p.m. Mr. Benitez was asked to provide a written statement surrounding Claimant's accident. The statement indicates that the day of the accident was going about normally with Mr. Benitez working with two coworkers trimming in a bucket on a main road. Around noon, the supervisor Mr. Vasquez told Mr. Benitez to go to another address with Francisco. He said that they needed to finish a job to take advantage that they had already turned the electricity off. They arrived at the new location. They did not have lunch because Mr. Vasquez wanted the job done. Mr. Benitez gathered his tree climbing equipment and

[12] Mr. Benitez also testified with the assistance of a Spanish-language interpreter, Ms. Catalini. It was confirmed during questioning that Mr. Benitez is not related to Claimant, though they share the same last name. Any reference to "Yony" or "Mr. Benitez" references this witness as opposed to Claimant himself.

went into the woods to start trimming. They had already finished trimming a couple of trees. Claimant was trimming the next tree but the tree needed to be topped. He topped it but, when he did that, the tree moved in a swing and the safety line got loose and he fell from the tree. They blew the whistle to ask for help because there were no phones to call the ambulance. The supervisor Mr. Vasquez arrived. The workers started to help Claimant, whom Mr. Benitez believed to be unconscious. The owner of the property asked if they wanted him to call an ambulance. The supervisor said no, and that they were fine. The supervisor then said he was going to take Claimant to the hospital in his pickup truck. They moved Claimant to the truck and he was complaining of pain. This was the end of Mr. Benitez's statement.[13]

Mr. Benitez confirmed that the electricity was cut off when the accident happened. The trees needed to be cut because they were burning. Mr. Vasquez wanted to finish this job before the electricity was turned back on. Normally, they would turn the electricity back on at 2:00 or 2:30 p.m. because it cannot be off for too long. There was no lunch break. The workers had to be at the yard at 6:15 a.m. with the trucks arriving at the worksite at 8:30 a.m. There were no breaks in the morning before the lunch break; if someone has food from home, they could eat during the job briefing but otherwise no break.

The job briefing is held in the work area where the hazards are being observed. Mr. Benitez had a job briefing in the morning but not in the afternoon when he went to work with Claimant. If the job changes, there is supposed to be another job briefing before the new job is started. There was no new job briefing because by the time everyone arrived it was about 12:30 p.m. and everyone was already working. Mr. Benitez's boss told him to just grab his equipment and go to where Claimant was working. Mr. Benitez arrived to help and support him. He did not sign any

[13] Mr. Benitez's statement was marked into evidence as Claimant's Exhibit #6.

job briefing because many were already working and everything was fast. There was a lot of work to be done and it was only Claimant's and Mr. Benitez and two others. Mr. Benitez did not feel rushed per se but he was there and told that he needed to end this job before the electricity came back on and it felt in his mind that it needed to get done before then. He did feel like he needed to hurry up with the job.

The lunch break was normally between noon and 1:00 p.m. Sometimes they worked through lunch but, even when they did, they would take twenty minutes to eat something and then continue. On this day there was no time to eat anything. Mr. Benitez was hungry at the time that Claimant fell. Mr. Benitez and someone else had been joking around about being hungry. Mr. Benitez was also tired at the time.[14]

Mr. Benitez witnessed Claimant's accident. He had come down a tree when he was finished trimming it and Claimant was in front of him. He was waiting for Claimant to finish so that he could move onto the next tree because one cannot walk around while someone else is trimming. Claimant's safety line appeared to be tied but everything had happened very quickly. Claimant finished topping the tree but next thing Mr. Benitez knew, Claimant was falling down. Mr. Benitez could not say if Claimant was doing anything wrong in falling. He agreed that there is a harness that goes around the legs and waist like a saddle/seat with a metal clip at the front. The main line is hooked in a Y of the tree that is being climbed or to an adjacent tree. That has to be done every time someone climbs a tree. It was not attached to another tree because that takes time to look for another tree; when you're in a hurry, you do what you can. It is the company rule but two points

[14] Employer's counsel objected to this questioning on the basis of relevance. Claimant's counsel responded that the relevance is that the standard for forfeiture includes deliberate or reckless behavior versus something like thoughtlessness. The Hearing Officer overruled the objection.

of safety is acceptable. There are times when the climbers just use two points of safety instead of three, including Mr. Benitez.

On cross examination, Mr. Benitez is not related to Claimant. They are friends that are from the same country but are not family relations.

The main safety line that is attached to the safety saddle is the one that must be tied off to the tree or to adjacent tree. However, it is common to them to use a two safety line because sometimes the tree does not allow for three. The lifesaving rule is a company and safety requirement but occasionally they climb up the tree with just the two safety lanyards. He agreed that there are three lines attached to the safety saddle and they have to use at least two including the main line and one other lanyard any time they climb. He agrees that if the policy is disregarded and just the two safety lanyards are used to climb a tree, it is a violation of the company's safety policy; he added that sometimes they are working trees with no point to attach to and there was no line to attach to with this tree. He agreed that that is when they must attach to an adjacent tree to secure themselves. Mr. Benitez's main line was attached to the tree he was trimming. He felt rushed the day of this accident but he still attached his main line to trim his tree. He did not notice if Claimant was 100% tied in to his tree because everything happened so fast. He did observe that one of the two safety lanyards overlooped the tree and Claimant fell out of the tree to the ground. If the policy of being 100% tied in had been followed, Claimant would not have fallen from the tree to the ground.

On redirect examination, Mr. Benitez testified that he and Claimant did not have a conversation about using the safety lines or not.

Francisco Pacos's written statement was translated into the record, by stipulation of the parties. The statement indicated that Mr. Pacos was working with one of the groups. The group

was divided around noon and Mr. Pacos and his coworker were asked to help Claimant. They arrived at the work site and Mr. Pacos's coworker started to climb a tree with Claimant climbing the next tree. Mr. Pacos and the other workers were a little stressed, tired and had not had lunch. Mr. Pacos's coworker finished first and then they decided to wait for Claimant to finish in order to continue together. The tree was a little bit thin and that is why Claimant decided to top it. The only thing that Mr. Pacos saw was that when Claimant topped the tree, he moved backwards and fell on the ground. They ran to where Claimant was and tried to calm him down. They blew the whistles because there were no cell phones to call 9-1-1. Then the supervisor arrived. A person who was on the properly asked if he should call 9-1-1 and that supervisor said that we were fine. He said he was going to get his vehicle and take Claimant to the hospital. Mr. Pacos and two coworkers took Claimant to the supervisor's vehicle and that is all that he saw. This was the end of the written statement.[15]

Jorge Vasquez testified next.[16] He has been a general foreman for Asplundh for eight years. He has worked for Asplundh for ten years as a ground trimmer, climber, bucket operator, specialized equipment operator, foreman and GF. The responsibilities of a GF include supervising of crews and safe performance of jobs, training employees and reviewing and enforcing policies and work procedures. The safety of employees is the most important thing for Asplundh. The lifesaving rule is taught to all Asplundh employees from day one of employment. Three points of contact are necessary for safety. Any employee that sees something unsafe can call an all stop of the work.

[15] Mr. Pacos's written statement was marked into evidence as Claimant's Exhibit #7.
[16] Mr. Vasquez also testified with the assistance of a Spanish-language interpreter, Ms. Catalini.

Mr. Vasquez has been familiar with Claimant as an Asplundh employee for about three years. He is a good employee. He generally follows policies and procedures in the three years Mr. Vasquez has known him. He has not observed Claimant violating any company safety policies. He has not had any prior disciplinary actions in terms of fall protection.

Mr. Vasquez is very familiar with job briefings. He reviews them and he trains all employees on how to perform quality JBs. Every foreman of a crew is responsible to fill out JB forms. Mr. Vasquez does not necessarily review JBs before the work begins. Every time a task changes a new JB needs to be prepared; if there are multiple tasks within one day, there would be more than one JB in a day for any given employee. Everyone participating in the JB is supposed to sign off on it. Mr. Vasquez did not review the JB for the day Claimant fell prior to the accident. He agrees that there was a new afternoon task assigned to Claimant, Mr. Molina, Mr. Pacos and Mr. Benitez on September 8, 2021. Mr. Vasquez testified that he gave the workers the information about the different task for the afternoon in the morning, however. He told them that morning about the first job and then, after that, that Claimant would have a new task in the afternoon as a climber. He agreed that "fall from height" and "fall protection" would be hazards that should have been checked off on this JB form for the afternoon work.

Mr. Vasquez denied that Mr. Molina was asked to sign the job briefing form the day after the September 8, 2021 accident. He also denied making any changes to this document after Claimant fell. He also did not instruct anyone else to make changes to the form after the fall.

On the day of the accident, work began at 6:30 a.m. It is the normal start time. There were multiple locations to be worked along River Road that day. Mr. Vasquez denied that they were trying to take advantage of the power being off in getting the work complete. He testified that the power is turned off between 10:00 and 11:00 a.m. because customers do not want their power off;

once the work is finished, the electricity then can be turned back on. Employees are not pressed on time or told not to follow safety protocols or procedures when the power is turned off. The power was off when Claimant fell. The power was cut around 10:00 or 11:00am and was supposed to come back on around 12:30 or 1:00 p.m. or so. Mr. Vasquez had not made the decision to work through lunch that day; it was made by the forepersons. He never told anyone that he wanted the job to get done before the power was turned back on.

Mr. Vasquez testified that a spotter is a person assigned to watch an employee in a bucket or as a climber. It is a backup person to make sure that the climber did not miss something. Safety is important. Mr. Vasquez has worked as a spotter before and has many times observed a climber doing something that is not safe. He stopped the work. One responsibility of a spotter is to make sure that the climber is doing everything safely.

Mr. Vasquez completed a "GF Report" in the days after the work accident. The report indicates that Claimant was climbing a tree that was about 34 feet tall. He had been using only one point tied in with a 2-in-1 safety lanyard and no rope was placed on the tree in the process to be topped off or to any adjacent tree. He had been about 15 feet off the ground to remove the top of the tree using only one line of the 2-in-1 safety lanyard around the tree. When the top was cut with the chainsaw, the top of the tree detached and it caused the tree to shake back and forth, forcing his safety lanyard to overloop above the cut he made. This left Claimant with no tie in point to the tree and he fell to the ground. Mr. Vasquez also described the process of him driving Claimant to a clinic and ultimately to an ER. That was the end of the typed statement.[17]

Mr. Vasquez explained his conclusion that Claimant had only used one point tied in with a 2-in-1 safety lanyard with no rope placed on the tree to be topped off or to an adjacent tree. In

[17] Mr. Vasquez's "GF Report" was marked into evidence as Claimant's Exhibit #8.

order to be 100% tied in, the climber needs to put the main climbing line in the crotch of the tree and then use two lanyards around the tree; if one is 100% tied in, one would never fall from a tree. If something happens with one line, there are two more lines to support the climber because there are three points of contact with the tree. There always should be three lines of contact and only two cannot be used. Mr. Vasquez got the information that Claimant was only using one point of contact from Claimant's coworkers Mr. Molina, Mr. Benitez and Mr. Pacos. Mr. Vasquez had not observed Claimant climbing or falling from the tree himself.

Mr. Vasquez was notified of Claimant's fall from Mauricio Dega. This was around 12:40 or 1:00 p.m. He had heard the whistle and let Mr. Vasquez know. Claimant was sitting and drinking water and talking when Mr. Vasquez arrived at the accident site. Claimant told him he was feeling a little back pain. No one asked Mr. Vasquez to call an ambulance. Mr. Vasquez asked Claimant if he needed an ambulance but Claimant had said an ambulance was not necessary. The homeowner had not come out and talked to Mr. Vasquez. Claimant had asked for assistance in terms of getting him to Mr. Vasquez's truck. Mr. Vasquez knew that Claimant had fallen from a tree because his coworkers told him.

Mr. Vasquez used GPS to try to find the closest medical facility but it turned out to be the Veterans Hospital so he decided to go elsewhere. He then took Claimant to the Concentra on Route 40, but then he was told that it was by appointment only. Someone at Concentra told Mr. Vasquez to go to Christiana Hospital, so he took Claimant there. The GPS data shows Mr. Vasquez departing 12 Lodge Lane at 12:47 p.m. He then arrives at 1114 Rodman Road at 1:28 p.m. He was there for about 13 minutes. He then arrived at Concentra at 2:02 p.m. and was there for five minutes. He arrived at Christiana Hospital at 2:14 p.m. He parked in front of the ER door. The others were in the parking lot because Claimant had left his wallet and phone in the truck and

wanted it brought to him. The ER records indicate that Claimant did not go inside until 2:43 p.m.[18] Mr. Vasquez could not go inside the ER because of COVID-19 restrictions. He had gotten a wheelchair for Claimant, however. He was not sure if Claimant's Asplundh shirt was removed and knows nothing about that. Mr. Vasquez did not instruct Claimant to tell the ER that he had not fallen at work. He later learned that Claimant's injuries were significant.

On questioning by Asplundh's counsel, Claimant was a crew foreman and Mr. Vasquez was his GF on the date of the accident. Mr. Vasquez was in the general area where Claimant was working. As a crew foreman, Claimant was directing the safety of his crew. Each employee is responsible for his or her own safety. Safety is everyone's job at Asplundh. As a crew foreman, Claimant would have been trained on and promoted as a grounds person, general trimmer/laborer, tree climber, bucket operator and crew foreman. He would have had safety training on all of the preceding levels including safety saddles and harnesses and rigging and tying off. A crew foreman is the first supervisor level position at Asplundh.

The 100% tied in rule is the primary safety rule for tree climbers. It means that the climber has to be tied up correctly all of the time, when going up or down the tree, when positioning or when using a tool like a hand saw, chainsaw or clipper. It also applies while working in the truck or the buckets. The purpose of this rule is to make sure that while a tree climber is at an elevation, the workers cannot fall from a height out of a tree. This rule is meant to prevent the exact kind of injury that Claimant suffered in this accident. It is meant to avoid death or serious physical injury to an employee.

The safety saddle is what a tree climber uses to tie in. It goes around the groin and legs and waist. It makes the climber stable on the tree positioning the body in balance with the rope and

[18] The GPS data from Mr. Vasquez's work truck was marked into evidence as Claimant's Exhibit #9.

safety lanyards. The climber sits in the safety saddle like a seat. The main line is secured to the safety saddle by a carabiner to the tree that keeps the climber 100% tied into the tree. The two safety lanyards coming around the front are just meant to tie the climber to a certain level of the tree to work. The main line is secured to the strongest part of the tree, it is tied to it and then that is attached to the safety seat; if that type of notch is not available in a particular tree, it needs to be attached to a strong adjacent tree. If a tree climber is 100% tied in and the safety line overloops, the main safety line will suspend the worker in mid air or ease the worker back into the body of the tree.

The job briefing is also part of the safety policies and procedures. It is also a tool to use to evaluate the risks of the work. Each foreman has to be prepared to do the job briefing. There is a need to review procedure and the job assigned and check the energy source. All dangers have to be assessed and recognized and steps need to be taken to mitigate any dangers. Additionally, they also look at PPEs and inspect the tools. There are safety policies concerning the use of ropes and rigging, on the use of safety saddles/harnesses, on job briefing and checklists, the use of PPEs, on the role of grounds persons/spotters and the use of alerting devices/whistles. There are many separate training sessions for all Asplundh employees on the safety policies and procedures.[19] Mr. Vasquez confirmed that Claimant's signature is present as being successfully trained on these policies and procedures.[20] Additionally, he had training on certain Asplundh accidents that had occurred and how to avoid similar accidents.

On the morning that this accident occurred, Claimant was assigned to trim branches in the trees. He and the other groups were given the work assignments in the morning. The job briefing form reflects that Claimant and Devis Molina were a two-person crew as a tree climber/cutter and

[19] The "Safety Training Log" was marked into evidence as Employer's Exhibit #3.
[20] Claimant's "Capataz Destrezas Finales" training packet was marked into evidence as Employer's Exhibit #4.

a grounds person/spotter, respectively. As the crew foreman, Claimant was responsible to assess the work, follow the steps in the job briefing and identify any dangers. Mr. Vasquez did not fill out the job briefing form; as the crew foreman, Claimant would have filled out the form and reviewed it with his crew before the work began. Claimant signed the second page as crew foreman and filled out all of the Sections including the check boxes. "Fall from height" and "fall protection" were not checked off.

After Claimant's fall, Mr. Vasquez never had an opportunity to see Claimant's equipment. He was busy attending to Claimant and getting him to treatment. Mr. Vasquez did not return to the scene until the next day. He did not notice anything amiss with the safety saddle or the ropes and rigging when he observed it the next day. He investigated the accident. His conclusion was that Claimant had violated a lifesaving rule because he was not 100% tied up and that is why he fell from the tree. He failed to properly use the safety training and equipment provided to him the day of the incident. He failed to adhere to the 100% tied in lifesaving rule, the culture of safety and the other safety rules on the day of this accident. Had he properly used his safety equipment and training and been 100% tied in, he could not have fallen out of the tree. There is no excuse for not being 100% tied into a tree at any given time.

Claimant's counsel questioned Mr. Vasquez again. If policies and procedures are followed, accidents should not happen. However, accidents still do happen, as evidenced by some reviews shared with employees of other Asplundh accidents and injuries that have occurred. They share these incidents that happen as lessons to improve safety so that accidents do not happen in the future. A spotter is one safeguard in place to prevent accidents. Mr. Vasquez has worked as a spotter in the past and has stopped climbers when they have not been wearing gloves while working

with a chainsaw or hand saw. He would stop a climber from climbing if the climbers were not 100% tied off.

If Claimant fell, he must not have been 100% tied off. Mr. Molina was Claimant's spotter, according to the job briefing form. Mr. Vasquez is not aware of whether anyone called an all stop before Claimant fell. He was not there. No one reported that there was an all stop during Mr. Vasquez's investigation.

Mr. Vasquez did not realize that an ambulance should be called while on the scene. Claimant was talking and seemed fine and just complained of back discomfort. He had already been moved from the place he had fallen. All employees are trained in CPR/First Aid and can call 9-1-1 in an emergency. There were no cell phones on the workers, but they are in the trucks nearby.

The Hearing Officer questioned Mr. Vasquez. The spotter is the person to make sure that there is minimum separation with a worker in a bucket or in any situation where a climber is working to assist them. One responsibility is to make sure that the tree climber is safe, but that responsibility is also on the tree climber relating to all of the safety training that has been had.

Mr. Vasquez was questioned about whether the job briefing form was filled out the next day. He denied having anything to do with that. Mr. Molina testified that he had been asked to sign it the next day, but Mr. Vasquez testified that the form was filled out the day of the accident. If the workers move to a new area, normally the crew foreman completes a different job briefing.

On the day of this accident, even though the power was off, there was not a "hurry up" feeling or a rush to get this job done. It is true that the workers were told to hold off on lunch to complete this work before the power came back on, however.

Asplundh's counsel questioned Mr. Vasquez again. He testified that there is no excuse to violate the lifesaving rules such as the 100% tied in rule, to include not having had lunch yet, feeling tired or if there is a timeframe when the electricity will be coming back on.

Claimant testified next.[21] He is twenty-four years old. He had been employed at Asplundh for three years at the time of the accident. He was working as a crew foreman on the day of the accident; he has held all of the prior positions as well, such as climber and spotter.

On the day of the accident, Asplundh had been hired by Delmarva Power to clear whole trees or parts of trees along the electric lines. A tree climber would be the one that would cut trees that could not be reached from the ground.

Claimant is always aware of the "100% tied in" requirement. It says that three points must be connected to trees because if one or two fail, there is a third line that will protect the climber. There are safety belts around the waist that go around the tree in front of the climber. The main line is connected to the front of the safety belt that is then connected to the tree being climbed or to an adjacent tree. Safety is very important to Claimant at work.

On September 8, 2021, Claimant started work at 6:15 a.m. The start time is actually 6:30 a.m. but Mr. Vasquez's rule is that everyone needs to be present at the yard at 6:15 a.m.; if a worker arrives after 6:15 a.m., the worker will be written up. The workers went to the site on River Road after meeting at the yard at 6:15 a.m. There were no breaks after they began working. The lunch break is always at 12:00 p.m., but was not at noon on the day of the accident. Had Mr. Vasquez not been there as GF, the workers would have had lunch at noon; however, he was there and they were under his pressure and Claimant was under his direct command. As a crew foreman, Claimant already had his plan and he worked in the bucket in the morning. However, when Claimant finished

[21] Claimant also testified with the assistance of a Spanish-language interpreter, Ms. Catalini.

with his bucket work, Mr. Vasquez told Claimant to join the other foreman and finish the climber work before the electricity came back on. His helper Will stayed behind. Claimant did not know that he would be working as a climber that day until Mr. Vasquez told him he would be.

Claimant was shown the job briefing form from September 8, 2021. His signature is on page two of the document. However, the only information on the form when Claimant signed it had to do with the bucket work in the morning. The information about the afternoon climbing was added later. Claimant and his partner Will looked at the work in the morning and Will took notes; but this was only about the bucket work, not the climbing. Anything on the job briefing form to do with the afternoon climbing was added the next day. It was not there when Claimant signed it, to include the time change to "12pm." A totally new job briefing form will normally have to be done for the afternoon if the job changes. It should not be on the same form as that is prohibited.

Claimant worked in the mini bucket in the morning. Mr. Vasquez then called Claimant and his coworker Yony and there were no new job briefings because there was no time for anything. Yony had to do a job briefing too but it did not happen. Mr. Molina was sent by Mr. Vasquez as Claimant's new spotter at the new location. He had only been a spotter for Claimant in the bucket before. Claimant did not fall from the first tree he was working on; they had completed a couple of trees already. Claimant had his safety harness on when he got to the tree he fell from. He believed that he was 100% tied in to the tree he fell from when he climbed it; had he known he was not 100% tied in, he would not have climbed up the tree. He believed that he was doing everything correctly. He knows how important safety is as he has a child waiting for him at home. No one told Claimant that there were any safety issues. A spotter's responsibility is to make sure that the climber is properly tied off. It is the first thing that a tree climber must make sure of as well. Claimant had personally called for an all stop in the past as a spotter.

Claimant and Mr. Molina were working nearby Mr. Benitez and Mr. Pacos. The owner of the house nearby was also close and he had offered them water. There was no one else nearby. No one called for an all stop, and Claimant would have been very thankful if someone had noticed there was a problem and told him. Claimant had made sure he was safe before he climbed the tree and, in his mind, he was 100% tied in and safe. Unfortunately, he was also tired, had a headache and was hungry. No one was stopping and everyone was working. It never crossed his mind that something like this would happen. He never felt that he was in danger while climbing the tree, otherwise he would have stopped. He only remembers that he cut the top of the tree and it was shaking. This was a thin tree and some trees do shake. It happened very fast.

After he fell, Claimant remembers that he wanted to get up but could not and that he did not want anyone to touch him because he was hurting. He could only remember a little of what happened. All of the boys were scared. They were blowing the whistles. The phones were only kept in the trucks. Mr. Vasquez arrived and Claimant recalled his coworkers saying, "call an ambulance, call an ambulance!" Mr. Vasquez said that Claimant was fine and just had a little back pain, but that was never the case. Claimant could not bear anyone even looking at him or touching him because he had so much pain. Mr. Vasquez took him to get treatment in his car. He told the boys to help Claimant and he was screaming in pain. Once in the truck, Mr. Vasquez took Claimant to some lady who came out to the truck. Claimant could not get out. He was in pain and she gave him Tylenol. They went somewhere that was by appointment only. They eventually went to the ER, but Mr. Vasquez parked in a normal parking space. They waited for two of the boys (Devis Molina and a new person Mauricio) to come to take him into the ER. They got there quickly and then Mr. Vasquez took off Claimant's shirt; he was concerned that maybe Claimant had an arm fracture and could not take it off himself. Mr. Vasquez did not want Claimant to tell the ER people

that he had been hurt by the company and Claimant had another shirt underneath. Mr. Vasquez told Claimant to say that he had been hit at home and then he would be responsible for all of the bills. They were in the parking lot for about thirty minutes before Claimant went inside the ER via wheelchair. Claimant asked someone at the ER to put him to sleep, because he was in so much pain.

Claimant agreed that he knew he was supposed to be 100% tied in before he climbed the tree. He believed that he was 100% tied in before he climbed the tree. He cannot believe that he was not, and has no explanation for why he was not. He would have stopped the climbing immediately if he realized that he was not 100% tied in. His work at Asplundh is dangerous. He always did everything he could do to stay as safe as possible.

On cross examination, Claimant agreed that he had attended most of the training sessions. There was one day where Claimant was out during a training, but Mr. Vasquez or one of his assistants asked Claimant to sign as if he had attended. He thinks it was the rescue training, but he does not know for sure. He has attended the rescue training on other occasions, however.

Claimant testified that he always follows the "100% tied in" lifesaving rule. He had heard Mr. Molina's testimony that Claimant's main climbing line was not attached to the tree. Mr. Molina should have told Claimant that it was not attached. Yony had also said that the main climbing line was not attached, but Claimant thought that he was 100% tied in at the time he climbed the tree; otherwise, he would never have climbed it. He realizes now that there is no way he could have been 100% tied into that tree. However, had he noticed that before or if someone had told him, he would not have climbed. He would have appreciated it if someone stopped him. He agrees that he would not have fallen if he was 100% tied into the tree.

They were hurrying to work because the electricity was going to be turned back on. Normally, they would have stopped at 12:00 p.m. to eat lunch or if they were going to keep working, they would stop for 15 minutes to eat something and then keep going. Unfortunately, Mr. Vasquez would not allow any of this because he wanted to finish the job before the electricity came back on. Claimant was tired, hungry and had a headache but did not feel that he was unsafe while working. Unfortunately, it has become clear that Claimant was not 100% tied in, but he still cannot explain how this was possible. The 100% tied in rule is to prevent the kind of accident Claimant had. Claimant was told that it was a miracle that he did not die from the accident; he required multiple blood transfusions.

Claimant agreed that his testimony is that his coworker Will Allegria filled out the job briefing form. They had met about it and Mr. Allegria wrote on it. Claimant then signed. However, the afternoon stuff was added later on; Claimant had only signed off on the morning bucket work. Mr. Vasquez dictated the afternoon part to Claimant's coworker. Claimant believed that Mr. Vasquez would take care of him. Claimant agreed that he crossed off that he would be able to perform tasks safely on the job briefing form but added that this was only for the morning bucket work. He agreed that it might have been an error on his part or his coworker's part in not checking off "fall from height" for bucket work. Claimant was responsible for signing off on the job briefing form. He agreed that "fall protection" was also not checked off.

This had not been the first time that Claimant climbed a tree for Asplundh, even if a new job briefing form was not completed. The lifesaving rule and 100% tied in rule is always in effect, and Claimant added that he would observe these no matter what for his own welfare. He agreed that they always have to be 100% tied in regardless of what the job briefing form shows.

On redirect examination, Claimant agreed that the main safety line was attached to Claimant via his climbing belt. Claimant recalled having that main line attached to him and thought that he was well tied up.

The Hearing Officer questioned Claimant about whether they filled out the job briefing form in Spanish or English. Claimant testified that he tells the person in Spanish what to fill out on the form in English. Everything is planned as a crew.

Claimant was asked whether there is a routine to get ready to climb each tree in terms of rigging and safety equipment. He testified that they check the tools and equipment and that everything is safe.

Claimant was asked if he has any idea what went wrong on the day of the accident. He testified that he has asked himself that question many times. He thought that maybe if they had a break maybe something would have gone differently, but it is hard to say. He thought that maybe a step was missed under the circumstances, and that if his spotter had been totally focused maybe he might have told Claimant something was wrong. Unfortunately, nothing can be changed now. In Claimant's mind, when he went to climb the tree, everything was as it should have been in terms of his safety.

On recross examination, the parties stipulated that Claimant had testified earlier that while he was hungry, at no time did he feel unsafe to climb the tree he fell out of.

Kevin Hanley, DO, testified by deposition on behalf of Employer.[22] He examined Claimant in November 2021 and reviewed the pertinent medical records. At the defense medical examination ("DME"), Claimant reported that he was working as a climber for a tree service when he fell from a tree or ladder. He fell anywhere between 10 and 25 feet. There was some mixed

[22] Dr. Hanley's deposition was marked into evidence Employer's Exhibit #2.

information in the records. Claimant also provided a history of his treatment, including being admitted to the hospital and having surgery for a fractured pelvis.

Claimant's injuries were caused by this incident. The treatment was reasonable, necessary and causally related to the incident.

Jorge Vasquez was recalled as a witness for Employer.[23] Mr. Vasquez denied altering the job briefing form after Claimant signed it. He was not present when it was filled out. He has no information about the 12:00 p.m. time being added later on and is not sure about it. Mr. Vasquez did not personally add that time onto the form and did not direct anyone else to do so. Mr. Vasquez also did not add the afternoon information into box 1 on the job briefing form. He had no reason to have done so.

Claimant is directly responsible for what is written on the form, even if Mr. Allegria filled it out for him. The job briefing is done as a group and the crew foreman completes it with his or her assigned person/people. If the workers are working from heights, including bucket work, "fall from height" should have been checked off. "Fall protection" also should have been checked off. That could lead to increased danger that they were not checked off on the JB form. The information on the form that is indicated or not does not change Asplundh's 100% tied in policy, the LCQS training or the lifesaving rules.

No one asked Mr. Vasquez to call an ambulance after Claimant's accident. He did not realize how badly Claimant was hurt and was not aware until he arrived at the ER. He got Claimant a wheelchair and that is how he got into the ER. Mr. Vasquez was not allowed to go into the ER because of COVID-19 restrictions. He had not taken Claimant to the three medical treatment locations in an effort to delay his treatment.

[23] Mr. Vasquez testified again with the interpreting assistance of Ms. Catalini.

When questioned about Claimant's testimony that Mr. Vasquez had Claimant take off his Asplundh shirt at the ER and to instruct the ER personnel that he had fallen at home and that Mr. Vasquez would take care of Claimant's medical bills, he had no reason to have done that. He did not instruct Claimant not to reference a work accident.

On cross examination, Mr. Vasquez agreed that he testified he did not know the significance of Claimant's injuries until after he was admitted to the hospital. However, he admitted that he knew that Claimant was injured enough that he could not walk to his truck. He added that Claimant was not screaming and was drinking water. When Mr. Vasquez asked him how he was, he said he was fine and that there was just something with his back. He had no pain gestures. Mr. Vasquez did not see anyone move Claimant because he had gone to get his truck. He was helped by the coworkers into the truck.

Mr. Vasquez was not sure why the job briefing form used on the day of the accident was an English version because there are Spanish versions.

On redirect examination, this was not the first time Mr. Vasquez has seen Claimant fill out an English job briefing form.

The Hearing Officer questioned Mr. Vasquez. He was asked if when he arrived at the accident scene, he knew that Claimant had fallen from a tree. He responded that the workers there had already removed the equipment from Claimant, so the scene was not as it originally happened. They had told him that Claimant fell from the tree, however. Mr. Vasquez was asked if Asplundh has a policy of calling an ambulance whenever a worker has fallen from a tree and if he had decided not to call an ambulance. He responded that in the case of an emergency, everyone has the authority to call 9-1-1 or to call Mr. Vasquez. He added that he arrived at the scene but did not know how much time had passed since Claimant had fallen.

Mr. Vasquez was questioned about how long the job briefing meetings typically last. It depends on the discussion that needs to be had about the work circumstances and could last fifteen to twenty minutes. Each crew foreman has one or two workers assigned to them, and they talk, discuss and prepare a work plan for each assignment. Mr. Vasquez was questioned about whether the discussing and filling out of the job briefing form is kind of a "rubber stamp" sort of process of just checking off boxes as this is an everyday exercise for the workers or if they take the time with each job to really go through each potential item/hazard. He responded that there is a five step process during the job briefing where the crew foreman goes through all of the tools, procedures and safety measures/hazards. The Hearing Officer asked if there are circumstances where a job briefing is not completed when there is a change of jobs, such as what happened here with the afternoon transition. He responded that they do them in the morning and then again for the afternoon job if the work changes. Mr. Vasquez was questioned about witness testimony that there was no job briefing in the afternoon before Claimant was injured and if that was possible. Mr. Vasquez responded that he cannot answer that but the crew foreman is responsible to carry out the job briefing.

Mr. Vasquez was asked if there was any sense of urgency that day to get the job finished, to an extent to where lunch was purposely skipped because a worker had been injured around 1:00 p.m. with none of the workers having had lunch or a break yet. He responded that there is Human Performance training in which the workers are all trained that there should not be any time pressure placed because that is a safety trap. There was no time pressure that day. He agreed that this was the case even though the electricity was off and due to come back on.

On recross examination, "Will" is a grounds person. His name is Wilfredo Allegria.

In the morning, during the job briefing, the crew foreman is assigned work for the whole day; then, they complete a job briefing in the morning, and a separate one in the afternoon if the work assignment changes. Only one job briefing form was completed on the day of the accident. Mr. Vasquez has no knowledge as to why Mr. Molina claims that he was asked to sign the job briefing form the day after the accident.

On redirect examination, Mr. Vasquez agreed that the completion of a second job briefing form in the afternoon on the day of the accident would have been Claimant's responsibility as crew foreman.

Ivan Calderon testified next for Asplundh. He has been the regional safety supervisor for the company for two years and has worked there for a total of five years. He conducts training sessions and observes crews to make sure they are working safely. There is a culture of safety at Asplundh and they train the workers that safety starts with everyone no matter your role. It is a dangerous job. LCQS is a training that everyone goes through outlining all work procedures and company policies. One cannot work until 100% qualified through training.

The 100% tied in rule is a lifesaving rule standard. This means that before the climber is even off the ground, he or she needs to be already tied into the tree. The climber has the main safety line tied into the crotch of the tree and then two safety lanyards on the safety saddle. He confirmed that a picture of a tree climber roped in to a main safety line has one attached and then one down by his side.[24] There has to be two points of contact with a tree at all times, though there could be three. If somehow one of the safety lines is cut, there is the main climbing line to keep the climber in the tree. If the main line is in the crotch of the tree or tied off to an adjacent tree, there is no way a climber can fall out of a tree.

[24] A picture of a tree climber and the equipment involved was marked for identification as Employer's Exhibit #6.

There are various training sessions as a worker is promoted at Asplundh. Claimant's position on the day of the injury was as a crew foreman. It was the fifth level of promotion at the company. A tree climber is tested on ropes and rigging, the use of grounds people and PPEs. The vision of the company and mission statement is that at the end of the day, everyone gets home safely. The workers have family members to come home to and this is the reason for the policies and procedures. Asplundh tries to make the job as safe as possible by training each employee extensively on injury prevention. There is an exhibit showing a big catalog representative of the various training sessions. Asplundh believes that every injury is preventable. No job or activity is worth risking an injury.

Each employee is training on using safety equipment. Tree climbers are provided with PPEs including a hardhat, glasses, ear plugs, whistle, vests, proper boots, main climbing line, safety saddle, safety lanyards, ropes and spikes on feet to get up the tree. Failing to adhere to safety protocols and directives are grounds for termination and this is made clear on every worker's first day. The work is dangerous and failing to follow safety protocols could cause serious injury or death.

Mr. Calderon was not present the day of the accident. He conducted his own investigation and saw Mr. Vasquez's as well. He could not say if Claimant was 100% tied into the tree because he was not there. However, if he was 100% tied in, he could not have fallen.

On cross examination, Mr. Calderon agreed that if workers follow policy and safety measures, there should be no injuries. There have been other injuries at Asplundh before Claimant's injury. Mistakes do happen and, despite Asplundh's safety policies and procedures, something can be missed.

On redirect examination, Mr. Calderon testified that lifesaving rules are to prevent injury and death. Workers have gotten hurt and died in the past. There is a reason for the rules; had Claimant been 100% tied in, he would not have gotten injured.

The Hearing Officer questioned Mr. Calderon. He testified that even if the electricity is off, the workers are not rushed to get the job done. He was not sure why the workers were not eating lunch at their normal noon timeframe, however. Mr. Calderon was questioned about why there is training on avoiding pressure situations. He explained that that is the human performance training and that if someone feels pressure, they might take shortcuts to finish jobs quicker and skip a task. They might use a chainsaw without putting chaps on to finish a job quicker, and someone might be unsafe if they feel rushed. Asplundh tries to prevent that type of pressure. Mr. Calderon was questioned if there are any deadlines for the workers with these jobs, such as needing to get a job done on a certain day and not have to come back here tomorrow. He denied that there are such deadlines.

On redirect examination, Mr. Calderon confirmed that Claimant could have called for an all stop if he felt unsafe at any time on the date of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

The Delaware Workers' Compensation Act ("Act") provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment."[25] There is no dispute between the parties that Claimant was injured in a fall from a tree on September 8, 2021 while in the course and scope of employment with Asplundh. There also is no dispute as to the extent of Claimant's injuries or that his treatment has been reasonable,

[25] 19 *Del. C.*§ 2304.

necessary and causally related to this incident. In short, the parties agree that Claimant has a compensable claim to workers' compensation benefits unless Employer is successful with the defense that it raises here. In workers' compensation actions, the negligence of an employee is not a defense;[26] however, Employer raises a forfeiture defense pursuant to 19 *Del. C.* § 2353(b) which, if proven, renders Claimant ineligible for workers' compensation benefits. Under Section 2353(b), an employee shall not be entitled to compensation for an injury if the employee is injured "because of the employee's own deliberate and reckless indifference to danger...[and/or] "because of the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee." Employer argues that Claimant has forfeited his right to workers' compensation benefits under the Act on either or both of these bases.

Employer's argument surrounds Asplundh's many safety policies, most importantly the "100% tied in" lifesaving policy which will prevent a tree climber from falling from a tree as long as his or her main climbing line is securely tied into the tree being climbed or, if not feasible, to an adjacent tree. The main safety line being properly secured is essential, but is coupled with the use of two other safety lanyards also meant to help prevent injury or death; the evidence supports that Asplundh's policy is that each tree climber is ideally secured into all three of these lines but is required to be tied in to at least two, with the main safety line always having to be one of the two. Employer maintains that Claimant could not have been 100% tied into the tree he was climbing because of the very fact that he fell from a tree which, absent some other failure of the equipment, should not be possible. Thus, because he was not 100% tied in using the equipment provided to him in accordance with Asplundh's safety policy and procedures, Employer maintains that Claimant was injured specifically because of his willful failure or refusal to use reasonable

[26] 19 *Del. C.*§ 2314.

safety devices supplied to him and/or as a result of his deliberate and reckless indifference to danger. Thus, Asplundh argues that he forfeits his entitlement to workers' compensation benefits under 2353(b).

Conversely, Claimant maintains that this was a work-related accident and that any failure on his part in terms of safety devices and policy or procedure that led to his injury was unintentional and inadvertent as opposed to being reckless or willful. Claimant argues that the case law supports that his lack of willfulness or intent entitles him to workers' compensation benefits. Because Employer has asserted the defense of forfeiture, under the specific language of Section 2353(b), it has the burden of proof. In this case, after a thorough review of the evidence, I find that Employer has failed to meet its burden to show that Claimant forfeited his right to workers' compensation benefits under 2353(b).

Under the specific language of Section 2353(b), an employee shall not be entitled to compensation for an injury if the employee is injured "because of the employee's own deliberate and reckless indifference to danger." I first note that Black's Law Dictionary (also "Black's") defines the word "deliberate" as "[i]ntentional; premeditated; fully considered."[27] Likewise, "reckless" is defined as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash."[28] Black's goes on to note that "Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do."[29] The next Black's definition for "reckless disregard," is notable and is defined as "conscious indifference to the consequences (of an act)." Additionally relevant, Black's defines "recklessness" as "conduct

[27] BLACK'S LAW DICTIONARY 438 (7th ed. 1999).
[28] BLACK'S LAW DICTIONARY 1276 (7th ed. 1999).
[29] *Id.*

whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk." Black's secondarily defines "recklessness" as "the state of mind in which a person does not care about the consequences of his or her actions."[30]

Regarding Section 2353(b)'s provision for forfeiture "because of the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee," Black's defines "willful" as "voluntary and intentional, but not necessarily malicious."[31] Likewise, "failure" is defined as "deficiency, lack; want" or "an omission of an expected action, occurrence, or performance."[32] As for "refusal," Black's definition is "the denial or rejection of something offered or demanded."[33]

I explored these definitions in depth in order to confirm that both of these provisions for an employee's forfeiture under Section 2353(b) are consistent in pointing to some sort of consciousness, intent and/or contemplation of a foreseeable risk of harm that is purposely or indifferently discarded or dismissed when an employee takes a certain action. That Section 2353(b) specifies "deliberate *and* reckless" as opposed to "deliberate *or* reckless" as well as use of the phrase "*willful* failure or refusal" regarding the use of employer-provided safety devices points to the legislature's focus on forfeiture under these provisions due to intentional and conscious action on the part of the employee.

Thus, it appears that in Delaware, the statutory forfeiture provision for an employee's injury due to either a "deliberate and reckless indifference to danger" or "because of the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee" essentially constitutes a "willful misconduct" defense. According to *Larson's Workers' Compensation Law*

[30] *Id.* at 1277.
[31] *Id.* at 1593.
[32] *Id.* at 613.
[33] *Id.* at 1285.

(also "*Larson's*), the "willful misconduct" defense has generally been successful in only one narrow field, that of the intentional violation of safety regulations, most frequently involving intoxication.[34] Notably relevant here, *Larson's* recognizes that "[i]n most instances the ground [for] rejection of the defense was *the absence of "willfulness.*"[35] As such, usually the injured employee's action, although prohibited, was instinctive or thoughtless, rather than intentional or deliberate."[36] *Larson's* goes on to note that cases rejecting the defense have included actions such as reaching into a moving machine, wiping oil from a machine without shutting it off, and painting moving machinery. Further, *Larson's* points out that the condition repeatedly stressed is that "the employee must understand the seriousness of the consequence attending the violation of the safety rule, since otherwise the conduct can only be described as heedless rather than deliberate."[37]

Similarly, while not directly on point with this case in terms of the facts, the Delaware cases involving a successful forfeiture defense on the basis of failing to use employer-provided safety devices have also consistently required purposeful action and intent on the part of the employee. These cases "uniformly hold that willful misconduct is something more than negligence, and that every disregard or violation of a safety rule does not constitute willful misconduct. Under the statute, the misconduct must be willful in its nature."[38] In *Subielski*, the Court pointed out the Webster's Dictionary and Black's definitions of the word "willful" were "[g]overned by the will without yielding to reason; obstinate; perverse; inflexible; stubborn;

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[34] *See* 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §§ 34.01 and 34.02 (Internet ed. Jan., 2000) < www.mathewbender.com >

[35] Emphasis added.

[36] *Larson's, id.*

[37] *See* 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, §§ 34.01 and 34.02 (Internet ed. Jan., 2000) < www.mathewbender.com >.

[38] *Lobdell Car Wheel, Co. v. Subielski*, 2 W.W.Harr. 462, 32 Del. 462, 125 A. 462 at *463 (Del. Super. Ct., Mar. 5, 1924) citing *In re Nickerson*, 105 N. E. 604 (Mass., May 23, 1914).

refractory" and "[p]roceeding from a conscious motion of the will; intending the result which actually came to pass; designed; intentional; malicious," respectively.[39] The Court went on to point out that "the fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been willful, deliberate, not merely a thoughtless act on the spur of the moment." Finally, I note that *Subielski* stated that:

> The word "willful" may be defined with a reasonable degree of satisfaction, although the definitions vary in some respects, depending somewhat upon the meaning intended to be conveyed by its use with other words. In the present statute we believe it was used to define an act done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently.

While an older case, the *Subielski* Court's interpretation of the word "willful" appears to still be consistent with the plain language of the statute and caselaw today. In *Subielski*, the Court reversed the Board's finding that the claimant had not willfully failed to use a reasonable safety appliance supplied by the employer. The claimant was found to have purposely taken off his safety goggles before suffering an eye injury from projectile metal shavings. The claimant testified that "if" he purposely took his safety goggles off, it was because the goggles were heavy and he needed to rest his eyes. He went on to lose the injured eye. The Court found that his injury was a direct result of his *willful* failure to use the eye protection that the employer had provided him to protect him from this specific type of injury.[40]

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[39] *Subielski, id.* at *463.

[40] *Subielski, id.* at *463-64. (Emphasis added). The Court stated:

> "Outside of the question whether the claimant was or was not wearing goggles and the condition of the same at the time of the accident, there is substantially no conflict in the record. The company furnished the goggles for the protection of the employees and issued orders that the employees should wear them while working. The claimant admits that he understood this order and that they were necessary for the protection of his eyes. If he did not wear the goggles, the only explanation offered is his alleged statement that he took them off to rest his eyes, because they were heavy...We are therefore of the opinion that the conduct of the claimant in not wearing the goggles at the time of the accident was a willful failure on his part to use a reasonable safety appliance provided for him, and that the Industrial Accident Board was in error in finding that his act did not constitute a willful one on his part."

I note another case regarding a failure to use an employer-provided safety device with similar facts, but not directly on point with the facts here. In *Stewart v. Oliver B. Cannon & Son, Inc.*, a claimant also failed to use a safety harness meant to prevent injury from falls. The employer argued that this was grounds for forfeiture under Section 2353(b).[41] The claimant in *Stewart* had suffered a fall from scaffolding. It was noted that employer had a rule in place that a safety harness should be used by employees when working from heights, although the superintendent and other witnesses that testified were not familiar with the rule. Further, there was evidence presented that there was nowhere feasible to tie the safety harness at the work site where the claimant was injured, other than the same scaffolding that would have likely fallen onto the claimant in the event of a fall. Thus, while *Stewart* considered the failure of a claimant to use a safety harness to prevent serious injury in a fall from heights despite a company rule to that effect, the facts are significantly distinguished from the case here. In *Stewart*, the claimant actually considered where to tie his safety harness and, in finding nowhere he felt was feasible, he proceeded to work without it tying it anywhere, and then was injured in a fall. Further distinguishable, unlike here, it was arguable whether the claimant (and other employees) were aware that there was a company rule regarding mandatory use of a safety harness.[42] In the *Stewart* case, there also was an allegation that the claimant was intoxicated at the time of his fall, though the Board was ultimately unconvinced of this. The Board concluded that the claimant had not intentionally failed to use an employer-provided safety device on the basis that he was not aware of the rule and there was nowhere feasible to have tied the device. Conversely, in the present case, there is no dispute that Asplundh has made the safety rule regarding being 100% tied in in order to prevent falls from heights explicitly known, nor does Claimant deny that he has been made well aware of this rule. Additionally, while the tree

[41] 551 A.2d 818 (Del. Super. Ct., June 22, 1988).
[42] *Stewart, id.*

Claimant was working in at the time of his fall was arguably not feasible to tie the main safety line into, per company policy, there is no indication that there were no adjacent trees that could have instead been employed.

I next turn to the caselaw involving forfeiture on the basis of an employee's "deliberate and reckless indifference to danger" under Section 2353(b). In *Pierre v. Purdue*, the Board found that the claimant had forfeited his right to workers' compensation benefits due to his "deliberate and reckless indifference to danger" under Section 2353(b) because he was found to have been injured while sprinting through a plant against an explicit company rule prohibiting running on the job.[43] Upon appeal, the Superior Court noted that because of the "paucity of decisional authority in Delaware regarding the deliberate and reckless indifference to danger provision, the Court is left with the language of the statute itself."[44] Recognizing that there was no argument that the plain reading of the statutory language itself was ambiguous, the Court ultimately upheld the Board's determination that the claimant had forfeited his right to benefits in that he demonstrated "deliberate and reckless indifference to danger" in sprinting through a plant and exposing himself to injury. In *Pierre*, it was noted that the claimant admitted that he knew that running was a serious safety violation; he had been warned before and had received written discipline in the past for running in the plant. The *Pierre* Court further found it notable that the claimant had denied that he had been running at all, as opposed to having testified that he was thoughtlessly or heedlessly running at the time of his injury. The Board had instead found a witness to be more credible that the claimant was observed sprinting through the plant and had been told to stop running and/or to slow down right before the injury occurred. The Court concluded that the Board's decision that

[43] *Vauguel Pierre v. Purdue Farms*, Del. IAB Hearing No. 1486398 (Nov. 2, 2020).

[44] *Vauguel Pierre v. Purdue Farms*, No. K20A-11-001, Order at ¶ 18 (Del. Super. Ct. Aug. 12, 2021) *aff'd* Del Supr., No. 270, 2021 Order at ¶ 2 (March 11, 2022).

the claimant had forfeited his right to workers' compensation benefits under Section 2353(b) was supported in having been presented "with extensive testimony that Pierre's conduct was deliberate, not instinctive or thoughtless."[45]

Taking all of this as a whole, in order to successfully invoke the forfeiture provision under Section 2353(b), Employer has to prove by a preponderance of the evidence that Claimant violated or disobeyed Asplundh policy/procedure in terms of a willful, intentional and deliberate failure or refusal to use the Employer-provided main climbing line properly and securely, consistent with the "100% tied in" rule. In the alternative, Employer must prove that Claimant's violation was the exhibition of a deliberate and reckless indifference to danger as opposed to "instinctive or thoughtless" action.[46] After a very thorough review of the evidence in this case, I find that Asplundh has failed in its burden to show that Claimant has forfeited his entitlement to workers' compensation benefits under Section 2353(b).

Did Claimant violate Asplundh's "100% Tied-in" Rule?

Here, the first question is whether Claimant actually violated an Asplundh safety policy/procedure. There is some speculation involved because it seems that Claimant's equipment and the accident scene was not really investigated immediately after this incident. Mr. Vasquez testified that he did not return to observe the scene until the next day and he never had an opportunity to really judge the equipment; during the chaos involved in tending to Claimant after the accident, the equipment at the scene had been moved, removed and/or altered before he arrived.

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[45] *Pierre, id.* at ¶ 15 (Del. Super. Ct. Aug. 12, 2021) *aff'd* Del Supr., No. 270, 2021 Order at ¶ 2 (March 11, 2022).

[46] *Pierre, id. See also Carey v. Bryan & Rollins,* 117 A.2d 240, 49 Del. 387 at *392 (Del. Super. Ct., Oct. 11, 1955) ("The employer has not been able to point to anything in the evidence which would compel the inference that the actions of the claimant were intentional, deliberate and 'wilful'. Most operators of motor vehicles have, at one time or another, found themselves driving at 60 or 65 miles per hour on the open highway carelessly, thoughtlessly and inadvertently, without conscious intention to exceed the speed limit.")

Mr. Vasquez testified that when he viewed the scene the next day, he did not notice anything amiss with the safety saddle or the ropes and rigging, presumably meaning that none of Claimant's equipment appeared to have broken or failed the day before. I note that Mr. Vasquez reached the conclusion in his "G.F. Report" that Claimant "was using only one point tied in with a 2 in 1 safety lanyard, and no rope was placed on the tree in the process to be topped off or any adjacent tree." He further noted that because Claimant only used one line of the 2 in 1 safety lanyard around the tree, when the one line overlooped the tree after it was cut, he had no tie-in point to the tree and fell to the ground. Mr. Vasquez testified that Mr. Molina, Mr. Pacos and Mr. Benitez had all told him this information about Claimant having only used one point of the 2 in 1 safety lanyard and no main tie in to the tree in question or to an adjacent tree, but I note that he did not document these conversations or mention these witnesses in his G.F. Report, other than a mention of "the spotter" only in reference to what happened *after* Claimant fell. In fact, Mr. Molina and Mr. Benitez both testified that when Claimant fell, they had initially presumed that the main climbing line had "gotten loose" as opposed to never having been tied in the first place. Mr. Pacos's written statement did not reference at all whether or not Claimant had been 100% tied in.

However, I also recognize that Claimant himself concedes that it does not appear that he was 100% tied in at the time of his accident. There was no mention of any other failure of his safety equipment, and there does seem to be agreement that if a climber is 100% tied in according to Asplundh safety policies/procedures, barring some other failure, it should not be possible to fall from a tree.

Further, I recognize that Mr. Molina, Claimant's spotter at the time of the accident, wrote in his second statement that the tree Claimant climbed was thin. He added that when it was topped, the tree shook quite a bit and the safety belt overlooped the top of the tree, causing Claimant to fall

to the ground. He testified that it was not until after Claimant fell that he noticed that one end of the main safety line was properly connected to Claimant's harness, but the other end was lying freely on the ground instead of being tied to the tree being climbed or to an adjacent tree. Mr. Molina testified that when he saw this, he had first presumed that Claimant's main safety line had gotten loose. However, Mr. Molina acknowledged that the tree climber makes the decision on where to tie off the main safety line, and Claimant could not have tied it off to the tree he was trimming itself because it was too small. The main safety line should instead have been tied off to an adjacent tree; and, while one end of the main safety line was tied to Claimant, the other end apparently was not tied to anything. Mr. Molina had not noticed that anything was amiss until Claimant fell. He admitted that if Claimant had been 100% tied in, when the one safety lanyard overtopped the tree, Claimant would have been suspended in the air by his harness.

The evidence supports that because this tree was thin with no great place to tie the main safety line, the other end of the main safety line that was hooked to Claimant should have been tied to an adjacent tree. There is no indication that this had happened, as there was no witness to the main line being tied to the tree Claimant was climbing or to an adjacent tree. There is also no indication that the main safety line was observed getting loose from this tree or from an adjacent tree or having snapped or broken before Claimant fell. There is also no evidence that the safety saddle or other equipment had physically failed in relation to this incident. Claimant's testimony reflects that he mostly concedes that he could not have been 100% tied in at the time of his accident in terms of the main safety line, though he does emphatically maintain that he was completely unaware of it or he would never have climbed the tree.

After a thorough review of the evidence, I find that more likely than not Claimant was not 100% tied in at the time of the accident, in violation of Asplundh's "100% tied in" lifesaving policy.

Did Claimant understand the seriousness of the consequences of the violation?

The next question is whether Claimant understood the seriousness of the consequences in connection with a violation of Asplundh's "100% tied in" safety rule. I first note that there is no question that the "100% tied in" policy was reinforced continually by Asplundh and was well-known by Claimant and the other employees who testified at the hearing. Further, Claimant wholeheartedly admitted in his testimony that he fully understood the danger involved in not being "100% tied in" when climbing a tree, particularly involving the main safety line. He emphasized the fact that he "always" knew that he was in danger when climbing a tree and, for that reason, he would never knowingly climb a tree without being 100% tied in because of the danger of death or serious injury that could result. If a climber was not 100% tied in, it was considered "free climbing" and the consequence was termination from Asplundh, specifically because of the serious risk of injury or death involved. There was no question that Claimant was well aware of the importance of the "100% tied in" safety rule or of the consequences that could result from violating this rule, and he readily admitted and personally elaborated on the importance of following this rule every time a tree was climbed. I conclude that it was clear that Claimant understood that serious injury or death could result from the failure to be 100% tied in at the time of the accident.

Did Claimant willfully and intentionally fail or refuse to use the main climbing line and/or was he deliberately and recklessly indifferent to danger in violating the 100% tie-in rule?

Having found that Claimant violated a safety rule meant to prevent the type of injury he sustained in this incident and also concluding that he was well versed in the consequences of such a failure, the most important question left is whether the violation was intentional and deliberate

or the exhibition of a deliberate and reckless indifference to danger as opposed to just instinctive or thoughtless behavior. Here, I was convinced by a preponderance of the evidence that Claimant's failures here were not willful, deliberate or reckless and instead related to spur-of-the-moment thoughtlessness or oversight. In so finding, I should note that, primarily, I found the totality of Claimant's testimony to be extremely credible. I believed him that he always had the "100% tied in" rule in mind because he was hyperaware of the risk of suffering a serious injury or being killed from a fall any time he climbed a tree. He was very credible that he absolutely believed when he climbed the tree in question that he was 100% tied in and that he never would have climbed the tree if he realized that he was not. He was emotional when testifying about how he still ponders what went wrong and, even now, has no idea how it was missed that he was not fully secured at the time of the accident. He testified that he could hardly believe that this oversight occurred because he was always so cognizant of the importance of being 100% tied in.

I further believed Claimant that while he was responsible for making sure he was fully secure, with this particular tree, he and his spotter both somehow missed the fact that one end of the main climbing line was apparently not secured to this tree or to an adjacent tree before he climbed. A spotter must be present and is responsible to be a backup in recognizing such safety issues that the climber might have missed. That a spotter is necessary for each climber reflects some concession that not only is this dangerous work but also that it is possible that mistakes or omissions can happen despite all of Asplundh's safety training. Mr. Molina was the spotter for Claimant that afternoon and, notably, he had never been a spotter for a climber before this. There is no dispute that no one called an all stop to Claimant's work before the accident, to include the spotter, Mr. Molina.

I was convinced that both Claimant and Mr. Molina had not realized that Claimant was not 100% tied in until the accident occurred. I found Claimant very credible that this was an unintentional and reflexive type of oversight as opposed to willful and knowing or reckless behavior. There was no evidence supporting willfulness, intent or recklessness on the part of Claimant. That Mr. Molina and Mr. Benitez both initially thought that the failure had been due to the main climbing line having "gotten loose" suggests that Claimant had not verbally indicated or given off the idea to those around him that he was deliberately cutting corners to save time or knowingly climbing the tree without being 100% tied in. There is no evidence of Claimant's intent not to use or to recklessly disregard the main climbing line. On the contrary, technically, one end of the main climbing line was hooked to Claimant's safety saddle, so there is less indication of a *complete* disregard of this safety equipment. While the Hearing Officer obviously realizes that having the main climbing line hooked to Claimant is essentially useless in protecting him from falling from heights if the other end is not also 100% tied into an appropriate tree, that the main line was hooked to Claimant supports that he did not completely disregard the safety item altogether. One can perhaps presume that Claimant would not have bothered to hook the main climbing line to himself if he had not already used it or had no plan to use it at all. Claimant had successfully climbed other trees just before this one, with no evidence that he was not 100% tied in to those other trees. Additionally, there was no evidence that Claimant was ever disciplined or observed cutting corners in terms of safety; there was no evidence that Claimant was not 100% tied in ever before in the three years he worked for Asplundh. That a company that is so emphatic in valuing safety above all else promoted Claimant various times to a supervisory level also suggests that there was no indication of questions regarding his safety practices prior to this incident.

In sum, while there was much evidence that Claimant was well aware that the "100% tied in" rule was of the utmost importance at Asplundh, I was not convinced that Claimant willfully, deliberately or recklessly failed or refused to use the main climbing safety line at the time of his accident and injury. Instead, I found him to be very credible that the failure to tie the other end of the main safety line to an adjacent tree was simply unfortunate oversight or thoughtlessness on his and his spotter's part that allowed the accident to occur.

Finally, it perhaps cannot be overstated that Employer's own actions likely contributed to Claimant and Mr. Molina's oversight and/or thoughtlessness on the day in question. First, in the hearing, in addition to rules such as the "100% tied in rule," the importance of filling out the job briefing form was also emphasized in terms of maintaining safe work practices. The totality of the testimony supports that there was a rushed or somewhat pressured atmosphere in terms of getting the afternoon work done because the electricity was off and would come back on. This was notable as Mr. Vasquez and Mr. Calderon both emphasized that placing time pressure on the workers is prohibited because it poses major safety risks. They both testified that there is Asplundh training specifically in this area because of the fact that when the workers feel pressured to finish this dangerous kind of work, there is a heightened risk of mistakes being made, to include the oversight or failure in terms of safety precautions and proper use of safety devices; when the workers feel time pressure to finish dangerous work, accidents and injuries tend to happen.

Mr. Vasquez specifically denied that there was any rush to get the work done on the day in question and he also denied that the fact that the electricity was off placed any added stress or pressure on the workers. I did not find him credible in this regard. Instead, I believed the various workers that testified that this was not the normal day and there was, in fact, a feeling of needing

to hurry or being time pressured because the electricity was off and would need to come back on and also, specifically because Mr. Vasquez himself was present and directing the work.

The workers all consistently testified that on a normal work day the first break was lunch and typically taken from noon to 1:00p.m.; if there was any kind of "rush" to get a job done, the supervisors would at least allow the workers to take a fifteen to twenty minute lunch break and then work through the rest of the lunch period. The witnesses were consistent that this day was not normal and had been different; it was abnormal to completely work through lunch, without even a short lunch break taken. I note that on the day in question there was no dispute that the workers had worked since approximately 6:15 or 6:30 a.m., and then completely through lunch. Claimant was injured at some point around 1:00 p.m., with no one having eaten lunch or taken a break yet at that point. I found it very notable that in every written statement provided after this accident, each worker had mentioned that they had not yet had lunch at the time of this accident, as this was clearly a factor that stood out that day for each of them. Mr. Benitez testified that there was no time to eat anything because "everything was fast." Claimant testified that he was hungry, tired and had a headache at the time of this incident. Mr. Pacos's statement also reflects that at the time of the accident, the workers were "a little bit stressed, tired and we had not had lunch."

I simply did not find Mr. Vasquez credible that there was no pressure whatsoever on the workers to get the work done more quickly given the fact that the lunch break was skipped entirely, something that all of the workers testified was very atypical. I did not believe that it made sense that the workers would be made to completely skip lunch after having had no breaks if there were no time constraints at all to get this particular job done. The typical course when Asplundh wanted the work finished earlier would still have the workers stopping to eat lunch for fifteen to twenty minutes and then continuing to work. Each of the Asplundh workers testifying for Claimant

consistently maintained that this was not a normal day and that there was some form of pressure or stress felt to get the afternoon climbing work done on this date; whether that was direct verbal pressure from Mr. Vasquez himself, a "hurry up" type of atmosphere because the electricity was known to be off and coming back on at some point, and/or perhaps because the workers necessarily realized that given the atypical nature of the lunch break having been skipped entirely, they would have to get the job done to be able to break for lunch at all. It did appear that, under any or all of these scenarios, Asplundh's actions through Mr. Vasquez contributed to a pressurized or rushed environment on the day of Claimant's accident—a situation which Asplundh's own witnesses admit is prohibited specifically because accidents and injuries tend to occur. In sum, I do believe that if Claimant's accident occurred as the result of thoughtlessness on his and/or Mr. Molina's part, there was likely some contribution from the atypical and trying circumstances involved on this particular day.[47]

In conclusion, it is clear is that the legislature and the Courts have contemplated that in order to successfully invoke these forfeiture provisions under Section 2353(b), there must be some

[47] I also note that I believed the witnesses that this rushed, "fast" and pressurized environment contributed to the lack of a second job briefing taking place before the afternoon work began. I believed the witnesses' consistent testimony that the gears were suddenly shifted around noon to a new area and new climbing duties, as opposed to the typical noon lunch break. Their testimony suggested that there was a feel as if there was no time for a second job briefing with a lot of work left and not many workers to do the work that needed to be done. I believed that there was a rushed feel conveyed by Mr. Vasquez in having to get a lot of work done prior to the electricity coming back on. A job briefing before the climbing work began would have been another layer of safety, and I believed that this opportunity was also missed prior to the accident in question due to the pressured circumstances on this day.

I should note that I often did not find Mr. Vasquez credible. It was not clear to me why Mr. Vasquez did certain things that he did after this accident, but the denial of these actions did not bolster his credibility. I first did not find him believable that he had not altered or caused the job briefing form to be altered after the accident. Instead, I found Claimant and the other Asplundh workers believable that a separate form should have been prepared and that the afternoon information had been added to the morning's form and Mr. Molina was asked to sign it after Claimant's accident. I further did not find Mr. Vasquez credible as to why he had not called an ambulance after this incident. He testified that no one had told him to call 9-1-1 and noted that "anyone else also could have called for an ambulance." He was the supervisor and the only one with a phone on site. The entire hearing had emphasized the constant risk of serious injury or death in falling out of trees, yet while Mr. Vasquez knew that Claimant had fallen from a tree, he downplayed any awareness that Claimant could be hurt badly after this fall. I finally did not find Mr. Vasquez credible in denying that he had facilitated the removal of Claimant's Asplundh shirt or telling Claimant at the ER to hide that he had been injured at work. I am not clear on why Mr. Vasquez responded to Claimant's accident in the various questionable ways he had but, overall, it did not help his credibility in this case.

willfulness or conscious intent to disregard safety rules or policies while knowing the inherent risk of doing so. Additionally, there has been a consistent indication that forfeiture is inappropriate under the Act where the employee's action is thoughtless or inadvertent as opposed to willful in nature.

Based on a thorough review of the evidence, I conclude that Asplundh has failed to show that Claimant's policy violation here was willful, reckless or deliberate as opposed to reflexive or thoughtless in nature. For the additional reasons cited, I further recognize that Employer's actions likely contributed to Claimant's and his spotter's mistake, oversight or spur-of-the-moment thoughtlessness on the day of the accident. Thus, for all of these reasons, I reject Asplundh's forfeiture defense and I find that Claimant is entitled to workers' compensation benefits under the Act.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller."[48] At the current time, the maximum based on Delaware's average weekly wage calculates to $11,969.40. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded.[49] A "reasonable"

[48] DEL. CODE ANN. tit. 19, § 2320.

[49] *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).

fee does not generally mean a generous fee.[50] Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

In this case, Claimant has achieved success regarding the compensability of his work accident and related injuries. Claimant's counsel submitted an affidavit stating that over 28 hours were spent preparing for the hearing. The hearing itself lasted about 11 hours over two hearing days. Claimant's counsel was admitted to the Delaware Bar in 2002 and is very experienced in workers' compensation litigation, a specialized area of law. His initial contact with Claimant was in September 2021, so the period of representation has been for less than one year. This case involved no unusual or difficult questions of law or fact. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, though this case was more complex in terms of time than the typical case. There is no evidence that counsel was precluded from accepting other employment because of his representation of Claimant, although naturally he could not work on other matters at the exact same time that he was working on this case. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not expect to receive compensation from any other source with respect to this particular litigation. There is no evidence that the employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and all of the factors set forth above, I find that an attorney's fee in the maximum allowable amount of $11,969.40 is reasonable in this case.[51]

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[50] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).
[51] *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

Medical witness fees for testimony on behalf of Claimant are also awarded to Claimant, in accordance with title 19, Section 2322(e) of the Delaware Code.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's petition for DCD is **GRANTED** as the Hearing Officer has concluded that Claimant has not forfeited his right to workers' compensation benefits under 19 Del C. §2353(b). Having been successful, Claimant is granted a reasonable attorney's fee in the maximum allowable amount of $11,969.40 as well as his medical witness fees.

IT IS SO ORDERED THIS 19th DAY OF MAY, 2022.

INDUSTRIAL ACCIDENT BOARD

KIMBERLY A. WILSON
Workers' Compensation Hearing Officer

Mailed Date: May 23, 2022

OWC Staff