

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW**



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

COMPASS ENVIRONMENTAL, INC., and its
successors,

Respondent.

OSHRC DOCKET NO. 06-1036

APPEARANCES:

For the Complainant:

Tobias B. Fritz, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:

Jim M. Hansen, Esq., Jim M. Hansen, P.C. Golden, Colorado

Before: Administrative Law Judge: James R. Rucker

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Compass Environmental, Inc. (Compass), was engaged in the construction of a slurry trench cutoff wall for L.G. Everist at the Golden/Hill-Oakley Gravel Pit in Fort Lupton, Colorado. Respondent admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On March 18, 2006, a Compass employee, Chris Carder, was electrocuted at Compass' L.G. Everist worksite when an excavator he was servicing contacted a 7,200 volt transmission line. Following the accident, the Occupational Safety and Health Administration (OSHA) instituted an investigation of the incident. At OSHA's completion of its investigation, Compass was issued a citation alleging violations of the construction standards found at 29 CFR §§1926.21(b)(2) and 1926.600(a)(6). By filing a timely notice of contest Compass brought this proceeding before the Occupational Safety and Health Review

Commission (Commission). A hearing was held in Denver, Colorado on October 10-11, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

Facts

On the day of the accident, Compass employee Donnie Wren was operating a Komatsu 750 excavator with an extended boom on the L.G. Everist work site (Tr. 70). Another Compass employee, Chris Carder, was working as the second man on the two-man excavator crew. It was his job to check the trench depth, grease the excavator, and watch for problems with the excavator the operator could not see (Tr. 71-72, 273-74, 274, 442). During the OSHA investigation Donnie Wren told OSHA Safety and Health Compliance Officer (CO) Jack Seybert that his crew was going to quit early that day and had finished digging prior to the accident (Exh. C-2, 3/21/2006, p. 4). As was customary, Wren intended to refuel the Komatsu before leaving the site (Tr. 143; Exh. C-2, 3/21/2006, p. 4). Accordingly, Wren walked the Komatsu toward a 300 gallon auxiliary fuel tank that had been staged under an energized 7,200 volt transmission line. Wren told CO Seybert that Carder was acting as his spotter, watching for the power line while walking backwards holding the “grease stick,” a rubber hose with a metal end. (Tr. 69-72, 495; Exh. C-2, 3/21/2006, p. 4; 3/27/2006, p. 1). As they approached the fuel tank, the Komatsu’s boom came close enough to the transmission line for the electricity to arc from the transmission line to the track hoe and through Mr. Carder, electrocuting him (Tr. 30-31, 104, 510, Exh. C-2, 3/21/2006, p. 4; Exhibit C-7). Jerry Gardner, a loss control safety specialist for United Power (Tr. 19), testified that, in general, a 7,200 volt line will not arc more than ½ an inch (Tr. 42). The Komatsu’s boom, therefore, must have been within a foot of the line for an arc to occur (Tr. 42, 118).

Virgil Jarnagin, Compass’ operations manager, testified that, normally, the Komatsu sat above the slurry trench, on a level work pad constructed of compacted dirt stable enough to support a 250,000 to 300,000 pound tractor (Tr. 457). The Komatsu conducted excavation operations from the work pad. Service, including greasing and refueling of the Komatsu, was normally performed while the excavator was located on the work pad (Tr. 464-65). Though Wren was never specifically instructed not to walk the Komatsu around the site (Tr. 370), Jarnagin had never seen the Komatsu move off the trench during the L.G. Everist slurry wall construction. At the end of the day Wren generally backed the Komatsu up 20 feet or so to ensure it was on stable ground. He then radioed the forklift driver asking him to bring some diesel, and spun the cab around so that the forklift driver could access the excavator’s fuel tanks with the 300 gallon auxiliary fuel tank (Tr. 464-66, 468-70). Jarnagin could not explain why Wren walked the

Komatsu off the trench towards the fuel tank rather than radioing for fuel on the day of the accident (Tr. 485).

Billy Plunkett, a site superintendent on the L.G. Everist job (Tr. 75, 500-01) similarly testified that he never observed the Komatsu outside its assigned area at any time during the project prior to the accident (Tr. 505-06, 522-23). Though the auxiliary fuel tank was staged at various locations on the worksite throughout the job, its staging did not designate a fueling spot (Tr. 514-15). Normally the forklift driver brought the tank to the excavator (Tr. 516). Jeff Salas, Compass' senior project manager (Tr. 230-31), testified it was the practice at this worksite for the forklift driver to fill the 300-gallon fuel tank from a 1,000-gallon stationary tank and take it around to individual pieces of equipment for refueling at the end of each day (Tr. 283-285, 291-92).

Salas testified that on the day of the accident the Komatsu was still operating 200 feet from the power lines (Tr. 314). No work was supposed to be done near the overhead electrical lines that day (Tr. 314). Compass anticipated digging would approach the area near the power lines on the following Monday and Tuesday. However, they were coordinating with L.G. Everist to have the lines de-energized and expected them to be removed prior to digging in the area (Tr. 315). According to Salas there was no reason to believe Wren would be working with the Komatsu in that area prior to the removal of the power lines (Tr. 317-20, 334).

Mark Fleri, Compass' vice president in charge of safety (Tr. 184-85), testified that Compass, nonetheless, has a comprehensive safety program that includes a 20' minimum clearance requirement for overhead power lines (Tr. 189-91, 208, 226). Moreover, Compass had developed a site specific safety plan for the L.G. Everist work site, which stated:

High-voltage overhead lines will be identified to all equipment operators and safe clear distances will be maintained at all times.

(Tr. 419; Exh. F-2, p. 37). Job Safety Analyses (JSAs) were prepared the first week of the job and incorporated into morning safety meetings (Tr. 420; Exh. F-5). JSA 9-b identifies energized overhead lines as a potential hazard, and directs operators to "maintain 20 ft. clearance between hoe/overhead lines; use spotter, demarcate lines." (Tr. 421; Exh. F-5; JSA9-b). Jarnagin testified that if the crane was going to be near or under the power line, a spotter was to be used (Tr. 482). Prior to February 7, 2006, Janagin read the JSA aloud to his crew, which included Donnie Wren (Tr. 421-22). Wren signed off, indicating his presence at the safety meeting (Tr. 132-34, 422, 425).

The overhead power lines on the work site were readily apparent (Tr. 448). Moreover, Wren became aware of the overhead lines when he moved the Komatsu to the excavation site. Because the

Komatsu was assembled on the far side of the transmission line, it was necessary for Wren to lower the boom as low as it would go, curl the bucket and walk the machine under the power line with Jarnagin acting as spotter. Jarnagin testified the Komatsu maintained 5 or 6 feet of clearance (Tr. 428-30, 481). In addition, on the Wednesday preceding the accident, Wren was present during discussions between Jarnagin, Plunkett, and a representative of L.G. Everest regarding the impending de-energization and removal of the overhead power line (Tr. 449-52, 458). It was anticipated that the excavation would reach the power lines by the following Tuesday, necessitating their removal (Tr. 449-51).

CO Seybert testified that Wren and Plunkett both told him Compass had not provided site specific training on the hazards of overhead lines (Tr. 108-09, 136; Exh. C-2, 3/21/2006, p. 4). Wren, however, knew about the power lines that were on the site, and was able to tell Seybert that Compass required 20 feet of clearance between the excavator and power lines (Tr. 122, 129-30; Exh. C-2, 3/21/2006, pp. 4, 7). Jarnagin testified it was a common policy in the industry to maintain 20 feet of clearance from any power lines (Tr. 418). He had trained Wren accordingly when both worked for another contractor more than three years previously (Tr. 412-16). Placards warning of the hazards of high voltage lines, and listing required clearances were posted inside the Komatsu's cab (Tr. 439-40; Exh. F-11-B).

Chris Carder was hired on February 13, 2006 (Tr. 154, 430; Exh. F-7). On his application, Carder indicated he had previously participated in a 10-hour OSHA course (Tr. 155, 433; Exh. F-7, p. 324). Billy Plunkett reviewed Compass' general safety rules as part of Carder's new employee orientation (Tr. 157, 435-36; Exh. F-7, pp. 19846-47). There was no evidence that Carder received site specific training (Tr. 110). Jarnagin testified that the 10-hour OSHA course he participated in mentioned the potential dangers of high-voltage lines (Tr. 433); however, he had no personal knowledge about the contents of the course Carder attended (Tr. 478, 486). Jarnagin testified that Carder was not privy to his conversation with L.G. Everest regarding removal of the power line (Tr. 491).

Alleged Violation of §1926.21(b)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) Compass Environmental Inc. at 12546 Weld County Road 18, Fort Lupton, CO 80621: The employer did not instruct his employees regarding hazards associated with their work environment, in that the employer did not instruction employees in the recognition and avoidance of the 7,200 volt transmission and distribution line in the

vicinity of the slurry wall which they were constructing. This condition exposed the employees to an electrocution hazard.

The cited standard provides:

(b) *Employer responsibility*. . .

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

The cited standard, according to *H.C. Nutting Co. v. OSHRC*, 615 F.2d 1360 (6th Cir. 1980) (unpublished), quoted in *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2009, 1991 CCH OSHD ¶29,223, p. 39,130 (No. 85-369, 1991), does not outline any particular requirements for a safety program and requires only "that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations." Thus, the Commission will apply the standard with reference to either a reasonable person test or to OSHA standards, requiring that supervisory personnel advise employees, especially new employees, of recognized hazards associated with actual dangerous conduct in which they are presently engaging. *National Industrial Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1056 (8th Cir. 1978).

The record establishes Compass complied with the terms of §1926.21(b), in that it trained its Komatsu operator in the hazards associated in moving the excavator near energized lines. Compass recognized that the overhead lines on the L.G. Everist work site posed a hazard to the Komatsu operator. Its job safety analysis identified the overhead lines as a potential hazard and dictated that the lines be identified to equipment operators, and demarcated. Operators were to maintain 20 feet of clearance and use spotters to ensure they did so. Wren, the Komatsu operator, was aware of the need to maintain proper clearances when working around high voltage lines. He was present when the site specific job safety analysis was read during a daily safety meeting. He complied with Compass' requirement that spotters be used in the vicinity the overhead power lines when he walked the Komatsu onto the work site with his

operations manager acting as spotter. His movement of the crane at that time demonstrated a knowledge of OSHA regulations beyond that conveyed by Compass' JSA. Contrary to the Secretary's assertions, §1926.550(a)(15)(iii) requires only that:

(iii) In transit with no load and boom lowered, the equipment clearance shall be a minimum of 4 feet for voltages less than 50 kV., . . .

The evidence establishes Wren maintained five or six feet of clearance. Clearly Wren, an experienced crane operator, received adequate instruction to allow him to recognize and avoid the 7,200 volt transmission and distribution line in the vicinity of the slurry wall.

On this record, it cannot be determined why he did not do so. The Secretary concludes that Compass' failure to train Wren's grease man in OSHA required clearances resulted in the Komatsu contacting the energized line. Such a conclusion is unsupported. There is simply insufficient evidence in the record to determine the cause of the accident. In any event, the proper inquiry is not what caused the accident, but whether Compass violated the standard as alleged. See *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 642 (5th Cir.1979) (Act is designed to achieve abatement of hazardous conditions, not fix blame for particular injury). Any finding of a violation here cannot be based on the occurrence of an accident but on the foreseeable exposure of the grease man, Carder, to the recognized hazard, *i.e.*, the energized overhead line.

The Secretary has not established, by a preponderance of the evidence, that Carder's exposure to the energized line was foreseeable. The Komatsu was digging 200 feet from the power lines and was not expected to reach the area under the lines until the following week, at which time the lines were to have been removed. All the witnesses testified that the trenching operation was conducted from a pre-compacted work pad directly over the trench. Servicing was performed on the Komatsu in situ. A forklift normally brought an auxiliary fuel tank out to the Komatsu. None of the witnesses could explain why Wren deviated from standard operating procedures by walking the Komatsu away from the work pad on the day of the accident. The Secretary introduced no evidence establishing Compass should have foreseen Wren would do so, taking Carder with him to act as his spotter, and exposing Carder to the hazard posed by the energized lines.

The Secretary has not established that a reasonably prudent employer would have known Carder would be exposed to the hazard addressed by §1926.600(a)(6). Therefore, it cannot be found that Compass' failure to train him in the requirements of that standard violated §1926.21(b)(2). Serious citation 1, item 1 must be dismissed.

Alleged Violation of §1926.600(a)(6)

Serious citation 1, item 2 alleges:

29 CFR 1926.600(a)(6): All equipment covered by this subpart did not comply with the requirements of 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters:

(a) **Compass Environmental Inc. at 12546 Weld County Road 18, Fort Lupton, CO 80621:** On March 18, 2006 the employer allowed employees to operate mechanical equipment where it was capable of vertical, lateral, and/or swing motion closer than 10 feet from overhead power lines. Therefore, the operator of the Komatsu PC 750 LC excavator fitted with a Pierce Pacific Long Reach attachment made contact with an overhead 7,200 volt transmission distribution line. This condition exposed the employees to an electrocution hazard.

Discussion

The cited standard provides:

(a) *General requirements.* . . .

(6) All equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

Section 1926.550(a)(15) requires that:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

Discussion

On this record it is clear that the Komatsu's boom came within 10 feet of the energized line. Compass concurs in that conclusion (Tr. 391), but maintains that it had no actual or constructive knowledge of the cited violation. The Secretary maintains that Compass had supervisory personnel on the L.G. Everist site who knew there were live overhead lines in the area. According to the Secretary, Compass failed to exercise reasonable diligence in ensuring the Komatsu would maintain the required clearance. Specifically, Complainant argues, Virgil Jarnagin undermined Compass' training by allowing the Komatsu to violate §1926.550(a)(15)(i)'s provisions when he and Wren moved the Komatsu onto the site (Secretary's Brief, pp. 13, 16). Complainant points to Jarnagin's testimony that he guided Wren to

within five or six feet of the energized line at that time (Tr. 428-30, 481). Complainant's evidence is not sufficient to establish Compass' knowledge on this record.

Knowledge. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that the cited employer had actual or constructive knowledge of those conditions. *See, e.g., Southwestern Bell Tel. Co. (SWBT)*, 19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶32,198, p. 48,747 (No. 98-1748, 2000), *aff'd without published opinion*, No. 00-60814 (5th Cir., Nov. 22, 2000). To establish constructive knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of the cited condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). A lack of reasonable diligence may be shown where employer failed to take measures to prevent foreseeable hazards. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). A recent Commission case, *Donahue Industries Inc. (Donahue)*, 20 BNA OSHC 1346, 2002 CCH OSHD ¶32,679 (No. 99-0191, 2003) is illustrative. In *Donahue*, an experienced electrician failed to ground cited equipment in violation of a "basic tenet" of the electrical trade. The Commission vacated a citation charging the employer with failing to adequately ground a welder plug in violation of §1910.255(c)(6), holding that, where an employer's work rules, training, and supervision were adequate, it could not be found that the cited employer knew an experienced employee would violate basic tenets of his trade.

In this case, Donnie Wren, a similarly experienced crane operator, failed to maintain 20 feet of clearance between the Komatsu and the 7,200 volt overhead lines, in contravention of his training and years of experience. Wren worked at Compass, without incident, for approximately three years. As discussed above, he received site specific training, including the proper means of avoiding the overhead lines on the L. G. Everist worksite, and had actually been shown the high voltage lines on the site by his supervisor. He and his supervisor had moved the Komatsu under the lines in conformance both with Compass' site specific JSA and with OSHA regulations, as discussed above. The Komatsu's work was being performed from a compacted work pad over the trench under construction. Supervisory personnel were on the work site. None had ever seen the Komatsu move off the work pad, much less violate the mandated clearance distances.

In sum, Complainant introduced no evidence indicating any lack of diligence on Compass' part that would allow a finding of employer knowledge. Serious citation 1, item 2 is, therefore, dismissed.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
2. Serious citation 1, item 2, alleging violation of §1926.600(a)(6) is VACATED.

/s/ _____

James R. Rucker
Judge, OSHRC

Dated: January 22, 2008