United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. LAKE ERIE CONSTRUCTION CO., Respondent.	OSHRC Docket No. 11-0146

ON BRIEFS:

Kimberly A. Robinson, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Robert E. Blackham, Esq.; Nathan J. Pangrace, Esq.; Roetzel & Andress, LPA, Cleveland, OH
For the Respondent

DECISION AND REMAND

Before: ATTWOOD, Acting Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

Lake Erie Construction Co. is a highway construction company that is primarily involved in projects erecting signs, guardrails, and fences. On June 17, 2010, a Lake Erie crew was removing old guardrail posts along a highway near Minerva, Ohio. During this work, a crew member was electrocuted when electricity from an overhead power line flowed through equipment used to remove the posts. Following an inspection, the Occupational Safety and Health Administration issued Lake Erie a citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging a willful violation of 29 C.F.R. § 1926.600(a)(6) (2010), a construction standard setting forth minimum clearances that must be maintained between certain equipment and power lines or energy transmitters. The Secretary proposed a penalty of $70,000.

Administrative Law Judge Sharon D. Calhoun affirmed the citation as willful and assessed a penalty of $35,000. In affirming the citation, the judge applied the Commission's decision in *Gerard Leone & Sons, Inc.*, under which she found that the equipment used by Lake Erie was a "motor vehicle" covered by 29 C.F.R. § 1926.601(a) and that the requirements of the cited provision were therefore applicable. 9 BNA OSHC 1819, 1820-21 (No. 76-4105, 1981). For the reasons that follow, we overrule *Gerard Leone* and remand the case to the judge.

BACKGROUND

On a section of the highway that was closed to public traffic, the Lake Erie crew removed guardrail posts using a GTR Utilicorp Heavy Duty Combination Drill/Driver Attachment ("Attachment"), affixed to a truck cab and chassis (referred to, collectively, as the "pounder truck"). To remove each post, the operator of the Attachment positioned it over the post, and then another employee attached a chain between the post and the Attachment. After the operator used the Attachment's hydraulic cylinder to pull the post from the ground, the employee who had attached the chain disconnected it from the post and laid the post on the ground. The operator then drove the pounder truck to the next post to repeat the process. While the crew was working to remove a guardrail post near a set of energized overhead power lines, the Attachment contacted one of the power lines or was within close proximity and electricity either arced or travelled to the Attachment and chain, electrocuting the employee, who was holding the chain at the time.

In the citation, the Secretary alleges that Lake Erie violated a provision in subpart O, § 1926.600(a)(6) (2010),[1] by "not ensur[ing] that the boom of the 'pounder truck[,]' and/or the vehicle itself, was kept a safe distance from overhead power lines." Under the cited provision, "[a]ll equipment covered by [subpart O] shall comply with the requirements of [29 C.F.R. § 1926 .550(a)(15) (2010)[2]] when working or being moved in the vicinity of power lines or energized transmitters." 29 C.F.R. § 1926.600(a)(6) (2010). Subpart O covers, among other equipment, "[m]otor vehicles . . . that operate within an off-highway jobsite, not open to public traffic." 29

[1] This paragraph was amended several months after the alleged violative conduct to add the language of a provision it had previously only referenced. Cranes and Derricks in Construction, 75 Fed. Reg. 47,906, 47,920 (Aug. 9, 2010) (final rule, effective Nov. 8, 2010).

[2] This provision was re-designated as 29 C.F.R. § 1926.1501 several months after the alleged violative conduct, and § 1926.550 was reserved for future use. Cranes and Derricks in Construction, 75 Fed. Reg. at 47,920.

C.F.R. § 1926.601(a). Section 1926.600(a)(6) (2010), based on its incorporation of the requirements of 1926.550(a)(15) (2010), mandates that a minimum 10-foot clearance be maintained between power lines rated 50 kV or less and any part of the equipment or load.[3]

DISCUSSION

At issue here is whether Lake Erie's pounder truck was a covered "motor vehicle" under § 1926.601(a), and therefore subpart O's clearance requirement applied. At the time of the alleged violation, the pounder truck was operating on a section of the highway that was closed to public traffic. Before the judge, the Secretary argued that under *Gerard Leone*, which focused on whether the motor vehicle was the *type* of vehicle that operates off-highway (rather than where the vehicle was *located*), the pounder truck was a covered motor vehicle. 9 BNA OSHC at 1820-21. Although the judge expressed her view that *Gerard Leone* was wrongly decided, she acknowledged that the case was binding Commission precedent and, based on the Commission's interpretation of § 1926.601(a), she determined that the pounder truck was a motor vehicle covered by this provision and that the Secretary met his burden to show that the cited standard applied. On review, Lake Erie notes that other Commission judges have expressed similar concerns that the holding in *Gerard Leone* was unsound, and it asks that we revisit and overrule this precedent.[4]

Gerard Leone concerned whether a dump truck, operated on a residential street open to public traffic,[5] was a motor vehicle covered by § 1926.601(a). 9 BNA OSHC at 1820-21. The

[3] The power lines were energized at the time of the accident, but the record does not indicate whether their voltage exceeded 50 kV; if the voltage had exceeded this level, the minimum permissible clearance would have been more than 10 feet. 29 C.F.R. § 1926.550(a)(15) (2010).

[4] *Gerard Leone* was decided by a 2-1 vote with a dissenting opinion by then-Acting Chairman Barnako. In addition to the dissenting opinion in *Gerard Leone* and Judge Calhoun's disagreement here with the decision, at least two other Commission judges have expressed reservations about the Commission's treatment of § 1926.601(a) in *Gerard Leone*. *See Anderson Columbia Co.*, Docket No. 01-2210, 2003 WL 440525, at *4 (OSHRC Feb. 21, 2003) (ALJ) (agreeing with dissenting opinion in *Gerard Leone*, but stating that he was "bound to follow Commission precedent"); *Daniel Constr. Co.*, Docket No. 83-0400, 1984 WL 34835, at *2 (OSHRC Apr. 9, 1984) (ALJ) (explaining that although employer may be correct "that the *Leone* decision 'should' and 'probably will be reversed by the Commission if given the opportunity,' " he was "constrained to follow" precedent).

[5] These underlying facts were included in the administrative law judge's decision, but were not mentioned in the Commission's decision. *Gerard Leone*, Docket No. 76-4105, 1977 WL 24288, at *2 (OSHRC Sept. 21, 1977) (ALJ).

Commission held that § 1926.601(a) "limits the standard's applicability by vehicle and not by location." *Id.* at 1820. Thus, it concluded that the dump truck was a covered motor vehicle, and that the cited standard applied to "trucks that operate off highway even if they do not operate exclusively off highway, regardless of where they are generally operated or where they are operated at a particular time." *Id.* This interpretation rested on the following three bases.

> First, applying a textual analysis of the provision, the Commission concluded that:
>
> The first sentence of subsection 601(a) expressly applies to "those vehicles that operate off highway," while the second sentence specifically excludes "equipment for which rules are prescribed in [§] 1926.602." Section 1926.602, entitled "Material Handling Equipment," applies to . . . trucks operated exclusively off highway. This indicates that trucks that operate exclusively off-highway are not covered by [§] 1926.601. It follows, therefore, that [§] 1926.601 applies to trucks that operate both on and off highway.

Id. (footnote omitted). Second, the Commission found that § 1926.601 contains other provisions—paragraphs (b)(6) and (b)(8), which apply to haulage vehicles and employee-transport vehicles, respectively—"that clearly contemplate use of the regulated vehicles on the highway." *Id.* Finally, the Commission relied on a case involving farm vehicles, *Durant Elevator*, 8 BNA OSHC 2187 (No. 77-1518, 1980), as analogous support for its interpretation. *Gerard Leone*, 9 BNA OSHC at 1820-21.

This case represents the Commission's first reconsideration of the holding in *Gerard Leone* since it was decided 34 years ago. Upon close examination of the majority's reasoning and that of the dissenting opinion, we conclude that all three bases for the majority's rationale are flawed; therefore, we overrule *Gerard Leone*. *See Joel Yandell*, 18 BNA OSHC 1623, 1626-27 (No. 94-3080, 1999) ("While the Commission normally considers itself bound to follow its own precedent, it has not hesitated to overrule that precedent when further deliberations have led it to conclude that an earlier case was wrongly decided . . . ." (citation omitted)); *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.").

Specifically, reading § 1926.601(a) as addressing the *type* of vehicle operated rather than the *location* of its operation is contrary to the provision's language—"vehicles that operate within an off-highway jobsite, not open to public traffic." The language used in the standard is "vehicles *that* operate"—not "vehicles that *can* operate"—within a particular location. 29 C.F.R.

§ 1926.601(a) (emphasis added).[6] The *Gerard Leone* interpretation thus impermissibly ignores an explicitly stated requirement. *Id.*; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.' " (citation omitted)); *Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) (" 'In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.' " (citations omitted)), *aff'd*, 110 F.3d 1192 (5th Cir. 1997).

To the extent that the interplay between §§ 1926.601 and .602 addresses whether the former provision concerns vehicle type versus location, we find that the Secretary "act[ed] intentionally and purposely in the disparate inclusion or exclusion" of words and phrases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (citation omitted)). In § 1926.601(a), the word "type" is not used—the provision states that what is covered are "those vehicles that operate within" a particular location. In contrast, § 1926.602 expressly covers certain "*types* of earthmoving equipment." 29 C.F.R. § 1926.602(a) (emphasis added); *see Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (" '[N]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.' "). Moreover, contrary to *Gerard Leone*'s finding, the inclusion of paragraphs (b)(6) (relating to "haulage" vehicles) and (b)(8) (relating to vehicles used to transport employees) in § 1926.601 does not manifest an intent that § 1926.601's coverage provision be construed as describing a vehicle type rather than location. The fact that

[6] In fact, in analyzing § 1926.601(a), *Gerard Leone* misquoted the operative language of the provision's first sentence, omitting two key words—"within" and "jobsite"—that plainly relate to location. *Compare Gerard Leone*, 9 BNA OSHC at 1820 (stating that first sentence of § 1926.601(a) "expressly applies to 'those vehicles that operate off highway' "), *with* 29 C.F.R. § 1926.601(a) (stating that coverage extends to "those vehicles that operate *within* an off-highway *jobsite*, not open to public traffic" (emphasis added)).

certain *types* of vehicles may be operated on- and off-highway does not alter the conclusion that the standard applies only when those vehicles are operated within off-highway *locations*. *See, e.g., AIC Marianas*, 24 BNA OSHC 1716 (No. 12-0484, 2013) (ALJ) (haulage vehicle—dump truck—operated on cordoned-off worksite, adjacent to roadway); *Victory Iron Works, Inc.*, Docket No. 77-3645, 1980 WL 10079, at *3 (OSHRC Feb. 4, 1980) (ALJ) (employees transported, in open rear body of pickup truck, within construction worksite approximately 200 yards away from highway).

Finally, we find that the Commission's reliance on *Durant Elevator* for analogous support is misplaced. *Durant Elevator* involved the meaning of the term "farm vehicle" as used in the standard regulating the storage and handling of hydrous ammonia, 29 C.F.R. § 1910.111. 8 BNA OSHC at 2189. The coverage provision at issue in *Durant Elevator* is based on vehicle type (not location), stating that "[t]his paragraph does not apply to farm vehicles." 29 C.F.R. § 1910.111(f)(1). The Commission vacated a citation alleged under § 1910.111(f)(7)(iii) (1980), finding that the "farm vehicle" exception applied to the vehicle at issue—a trailer with a mounted 1,000 gallon "nurse tank" that Durant towed from its facility to any farm within a 10-mile radius that ordered ammonia. *Durant Elevator*, 8 BNA OSHC at 2188-89. The Commission concluded that the nurse tank "fit within the literal definition of 'farm vehicle.' " *Id.* at 2189.[7]

Relying upon *Durant Elevator*, the Commission held that "[j]ust as use of the vehicle in *Durant* on the highway does not change its character as a 'farm vehicle,' the use of the dump truck on the highway in the instant case does not render the standard inapplicable to a vehicle that meets the standard's coverage requirement, *i.e.*, use off highway." *Gerard Leone*, 9 BNA OSHC at 1821. It is clear to us, however, that in contrast to *Gerard Leone*'s regulatory interpretation, *Durant*'s interpretation of § 1910.111(f)(1) did not strain that provision's plain meaning. The provision at issue in *Durant Elevator* focuses on vehicle type, not location. Conversely, we find the provision at issue here and in *Gerard Leone*, § 1926.601(a), explicitly

[7] The provision's definition of "farm vehicle," which includes as one of its parameters "*for use* on a farm," describes the function of a "farm vehicle" for purposes of the standard. 29 C.F.R. § 1910.111(a)(2)(vii) (emphasis added). In *Durant Elevator*, the nurse trailer enabled farmers to apply ammonia to their fields, and the Commission appeared to be of the view that this function did not change simply because the trailer was transported on a highway to a farm. 8 BNA OSHC at 2188-89.

covers vehicles based solely on the location of their operation. Given these distinct differences between the standards, we find that *Gerard Leone*'s reliance on *Durant Elevator* as analogous authority is unsound.

Accordingly, we overrule *Gerard Leone*'s holding that the language of § 1926.601(a) applies to motor vehicles based on their particular type. Relying on the plain language of the provision, we now conclude that it covers motor vehicles based on the location of their operation, i.e., "within an off-highway jobsite, not open to public traffic." 29 C.F.R. § 1926.601(a).

We therefore remand this case to the judge to reconsider the applicability of the cited standard, § 1926.600(a)(6) (2010). Specifically, the judge should determine whether, at the time of the alleged violation, the pounder truck was a "[m]otor vehicle[] . . . that [was] operat[ing] within an off-highway jobsite, not open to public traffic." 29 C.F.R. § 1926.601(a).

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: September 24, 2015

Some personal identifies have been redacted for privacy purposes

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Lake Erie Construction Company, Respondent.	OSHRC Docket No. 11-0146

Appearances:
Hema Steele, Esq. and Patrick L. DePace, Esq., U. S. Department of Labor,
Office of the Solicitor, Cleveland, Ohio,
For Complainant

Robert E. Blackham, Esq., National Practice Group Manager, Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Lake Erie Construction Company (Lake Erie) is a construction company which erects signs, guardrails and fences for highway construction projects. On June 17, 2010, Lake Erie was in the process of removing old guardrail posts when one of its employees was electrocuted. As a result of the fatality, Occupational Safety and Health Administration (OSHA) compliance officer Jocko Vermillion conducted an inspection of Lake Erie's worksite on US 30, Milepost 28 near Minerva, Ohio, on June 18, 2010. The OSHA inspection resulted in the Secretary issuing one citation to Lake Erie on December 6, 2010, alleging Lake Erie willfully violated a construction standard of the Occupational Safety and Health Act of 1970 (Act).

The citation issued alleges a violation of § 1926.600(a)(6), for failing to comply with the requirements of § 1926.550(a)(15) regarding equipment covered by Subpart O when working or being moved in the vicinity of power lines or energized transmitters. The Secretary proposed a

penalty of $70,000.00 for this alleged violation.

Lake Erie timely contested the citation. The undersigned held a hearing in this matter on June 7, 2011, in Cleveland, Ohio. The parties have filed post-hearing briefs.

For the reasons discussed below, Item 1 is affirmed as willful and a penalty of $35,000.00 is assessed.

Jurisdiction

Lake Erie admits that jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. (Answer, ¶ I). Lake Erie also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). (Answer, ¶ III(a)).

Stipulations

The following stipulations were agreed upon by the parties and admitted into evidence at the hearing in this matter:

1. Respondent is a construction company located in Norwalk, Ohio.

2. Respondent's principal business consists of highway construction projects, such as the erection of signs, guardrails, and fences.

3. On June 17, 2010, a crew of Respondent's employees were removing old guardrail posts on Route 30, near Minerva, Ohio.

4. On June 17, 2010, a crew of Respondent's employees was using the GRT Utilicorp Heavy Duty Combination Drill/Driver Attachment (the "Equipment') to remove the guardrail posts.

5. The Equipment was affixed to a truck cab and chassis.

6. On June 17, 2010, the crew included [redacted], Josh Collins, and Curtis Markley.

7. [redacted], Josh Collins and Curtis Markley were all employees of Respondent on June 17, 2010.

8. On June 17, 2010, Kevin Wolfe was the foreman of the crew.

9. On June 17, 2010, Curtis Markley was the operator of the Equipment.

10. To remove a guardrail post, Markley would position the Equipment over the post, and [redacted] would attach a chain between the post and the Equipment.

11. Markley would then use the Equipment's hydraulic cylinder to pull the post from the ground.

12. [redacted] would disconnect the chain from the post and place the post on the ground nearby.

13. Markley would then drive the Equipment to the next post and repeat the process.

14. At approximately 2:45 p.m. on June 17, 2010, the crew was removing guardrail posts near a set of overhead power lines that crossed over Route 30.

15. The power lines were energized and were approximately fifteen feet, two inches from the ground at the location of the accident.

16. The Equipment extended to a height of approximately seventeen feet from the ground.

17. Electrical current traveled through the Equipment and through the chain that [redacted] was holding.

18. [redacted] was electrocuted and was pronounced dead a few hours later.

19. On March 27, 2007, operator Curtis Markley caused utility damage while operating a driver attachment in the vicinity of overhead telephone wires ("2007 Incident").

20. Kevin Wolfe was the foreman of Markley's crew at the time of the 2007 Incident.

21. The 2007 Incident involved the driver attachment striking overhead telephone wires, which caused the guidewires to stretch and resulted in a utility pole cracking.

22. At the time and location of the 2007 Incident, there were electrical wires running above and parallel to the guidewires.

23. On December 6, 2010, the Cleveland Area office of the Occupational Safety and Health Administration ("OSHA") issued a citation to Respondent.

24. The citation alleged that Respondent willfully violated 29 C.F.R. 1926.600(a)(6).

(Exh. J-1).

Background

Lake Erie was working on a jobsite at US 30 near Minerva, Ohio, where it was building guardrail horizontal panels and then removing the old guardrail posts (Tr. 27). In order to accomplish the task, Lake Erie used a GRT Utilicorp Heavy Duty Combination Drill/Driver

Attachment on a GMC truck cab and chassis[1] (Tr. 27; Exh. J-1, Nos. 4 and 5). The guardrail post removal task utilized a crew of four employees: foreman Kevin Wolfe and employees [redacted], Josh Collins, and equipment operator Curtis Markley (Exh. J-1, Nos. 6, 7, 8 and 9). On June 17, 2010, Lake Erie was in the process of removing old guardrail posts on US 30, near Milepost 28, when the equipment they were working with came in proximity to energized overhead power lines, causing the electrocution of Lake Erie employee [redacted] (Exh. J-1, Nos. 17-18).

The process of removing the old guardrail posts required the truck containing the driver attachment to be driven up beside the post which was to be removed. The driver attachment was then swung around over the post, after which a hydraulic cylinder on the driver attachment would come down over the post. A chain would be placed around the post. Operator Markley, would then pull the cylinder up, which would pull the post out of the ground. After the post was out of the ground, [redacted] would walk the post (which was still attached to the chain) around to the back of the truck. Then the operator would lower the cylinder, thereby extending the chain, and the post would be placed on the ground behind the truck (Tr. 27-28). Once the post is on the ground, the chain is removed (Exh. J-1, No. 12). Foreman Wolfe drove a tractor to pick up the posts which had been removed and loaded them onto a semi-truck (Tr. 45). This process was repeated as the crew proceeded eastward on US 30 (Tr. 34-35; Exh. J-1, No.12).

The process described above was used on June 17, 2010, when [redacted] was electrocuted. At approximately 2:45 p.m., June 17, 2010, the crew and the driver attachments were on US 30 approximately at mile marker 28. The driver attachment was set up between two overhead power lines that crossed the road at that area (Tr. 30). The power lines were 15.2 feet high, and the height of the boom on the driver attachment was 17.4 feet (Tr. 33). The voltage of the power lines is not known (Tr. 90). Operator Markley told Vermillion that as they were positioning the post on the ground behind them, the boom arced or contacted the power lines, he was not sure. Markley said all he saw was [redacted] becoming stiff (Tr. 34-35). Wolfe, the foreman, was approximately 12 feet away from where the accident occurred (Tr. 45). Wolfe told Vermillion that before the accident he had talked to the crew and told them about the power lines and pointed to the lines as he drove by (Tr. 46). The foreman told Vermillion that he didn't know the height of the boom (Tr. 46). Wolfe also told Vermillion that the area where they were

[1] The GRT Utilicorp Heavy Duty Combination Drill/Driver Attachment on a GMC truck cab and chassis is referred to in the Citation as the "pounder truck."

working was closed to public traffic while Lake Erie was working, and that he personally set up the road zone and the signs and closed the road (Tr. 48).

Lake Erie has a written safety program and provides Tool Box Talks to its foremen (Tr. 69, 71).

Discussion[2]

The Secretary has the burden of establishing the employer violated the cited standards.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Citation

Item 1: Alleged Willful Violation of 29 C. F. R. § 1926.600(a)(6)[3]

The Secretary cited Lake Erie for a willful violation of § 1926.600(a)(6), alleging:

> On or about June 17, 2010, during guardrail system removal activities, the employer did not ensure that the boom of the 'pounder truck,' and or the vehicle itself, was kept a safe distance from overhead power line.

Section 1926.600 (a)(6) provides:

> 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) provides in relevant part:

> 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 50kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet; . . .

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[2] Both parties reference Respondent's Motion for Summary Judgment in this case and the exhibits in support. The undersigned denied the Motion for Summary Judgment by Order issued June 6, 2011. Accordingly, the undersigned will not consider any exhibits associated with that Motion in this decision, as it would be improper to do so regarding information not part of the record evidence in this case.

[3] OSHR revised § 1926.600(a)(6) effective Nov. 8, 2010. The standard at issue in this case is set forth in the July 1, 2010, version of the standards.

The parties do not disagree as to the basic facts in this case. The primary dispute is whether the equipment used on the jobsite was covered under Subpart O. For the reasons set forth below, the undersigned finds that the equipment is covered under Subpart O, and the cited standard and referenced standard are applicable.

Applicability

It is not disputed that the equipment used by Lake Erie to remove old guardrail posts on US 30, Milepost 28 on June 17, 2010, was located closer than 10 feet from energized overhead power lines. As a result, the Secretary cited Lake Erie for a violation of § 1926.600(a)(6), for failing to comply with the requirements of § 1926.550(a)(15) when working with or moving equipment covered by Subpart O in the vicinity of power lines or energized transmitters. The cited standard is found in Subpart O of the construction standards, which covers Motor Vehicles, Mechanized Equipment, and Marine Operations.

Motor vehicles covered by Subpart O "are those vehicles that operate within an off-highway jobsite, not open to public traffic. . ." (§ 1926.601(a)). Mechanized equipment covered by Subpart O includes material handling equipment such as earthmoving equipment (scrapers, loaders, crawler or wheel tractors, bulldozers, off-highway trucks, graders, agricultural and industrial tractors, and similar equipment); excavating and other equipment; lifting and hauling equipment (other than equipment covered under subpart N of this part) (§ 1926.602(a), (b) and (c)); and pile driving equipment (§ 1926.603). Marine operations and equipment covered by Subpart O include equipment used in longshoring operations (§ 1926.605).

The Secretary asserts that the GRT Utilicorp Heavy Duty Combination Drill/Driver Attachment on a GMC truck cab and chassis used by Lake Erie on the jobsite was a motor vehicle as defined by § 1926.601(a). (Secretary's Brief, p. 2). Respondent disagrees. A determination as to whether the equipment is covered requires an analysis of the types of equipment covered in Subpart O. It is clear Lake Erie was not engaged in longshoring operations, therefore, the equipment it utilized is not covered under § 1926.605 of Subpart O. The equipment used by Lake Erie does not appear to be pile driving equipment covered under § 1926.603. Vermillion described pile driving equipment as equipment which lifts heavy weight and drops it on a piling and pounds it into the earth (Tr. 94). Although Vermillion testified that the equipment could be considered pile driving equipment, he testified that the equipment used on the site at the time of the

accident was being used to pull old guardrail posts out, not drive them in (Tr. 95). Nor does the record evidence support a finding that the equipment was earth moving, excavating or other mechanized equipment as set forth in § 1926.602 of Subpart O. With the aforementioned sections deemed not applicable, a determination must be made regarding whether the GRT Utilicorp Heavy Duty Combination Drill/Driver Attachment on the GMC truck cab and chassis is a motor vehicle as described in § 1926.601(a) of Subpart O, as asserted by the Secretary.

The Review Commission addressed § 1926. 601(a) in *Gerard Leone & Sons, Inc.*, 9 BNA OSHC 1819 (No. 76-4105, 1981). There, the issue was whether § 1926.601(b) applied to dump trucks not equipped with certain safety devices. The respondent argued that § 1926.601 did not apply because the dump trucks were being operated on a highway open to public traffic, and the standard is limited to vehicles being operated on off-highway jobsites. The Review Commission rejected this approach, finding that "the coverage provision at section 1926.601(a) limits the standards' applicability by vehicle and not by location." *Id.* at 1820. The Review Commission found "that the standard applies to trucks that operate off highway even if they do not operate exclusively off highway, regardless of where they are generally operated or where they are operated at a particular time." *Id* . The Commission reasoned that:

> the first sentence of subsection 601(a) expressly applies to "those vehicles that operate off highway," while the second sentence specifically excludes "equipment for which rules are prescribed in section 1926.602." Section 1926.602, entitled "Material Handling Equipment," applies to, among other things, *trucks operated exclusively off highway*. This indicates that trucks that operate exclusively off-highway are not covered by section 1926.601. It follows, therefore, that section 1926.601 applies to trucks that operate both on and off highway. *Id.* (emphasis added).

Chairman Barnako dissented. In his dissent, he pointed out the obvious flaws in the Commission's reasoning:

> The standards at issue in this case are expressly limited in application by subsection 601(a) to motor vehicles "that operate within an off-highway jobsite, not open to public traffic." Therefore, the cited standards apply only if it can be established that the vehicle is being operated in an off-highway jobsite.
>
> My colleagues conclude that section 601 applies to vehicles which *can* operate in off-highway jobsites, regardless of whether they operate at such a site at any particular time. Not only is such an interpretation contrary to the clear wording of subsection 601(a) but by focusing on the type of vehicle in question rather than the location the vehicle is actually used, my colleagues ignore the fact that material handling equipment governed by section 602, to which the cited standards do not apply, is expressly defined in terms of vehicle type. Furthermore, the term "that

> operate" in subsection 601(a) implies a test based on location of the vehicle; this term does not appear in subsection 602(a).

Id. at 1821-1822 (emphasis in original, footnote omitted).

ALJ Welsch followed this Commission precedent in *Anderson Columbia Co., Inc*., 20 BNA OSHC 1125 (No. 01-2210, 2003), when he determined that the standard applied to the Nissan pickup truck at issue because the truck could operate both on and off the highway. As did ALJ Welsch, the undersigned finds Chairman Barnako's analysis of § 1926. 601(a) persuasive; however, like ALJ Welsch, she is bound to follow Commission precedent.

Here, the evidence adduced at hearing reveals that the equipment used by Lake Erie can operate both on and off the highway. The attachment was used on a GMC truck (Tr. 27; Exhs. J-1, Nos. 4 and 5, and C-1). Vermillion testified that the equipment was typically used on off-highway projects (Tr. 136). He also testified that the equipment was working on the highway (Tr. 102-103). Therefore, based upon *Leone*, the undersigned finds that the GRT Utilicorp Heavy Duty Combination Drill/Driver Attachment on the GMC truck cab and chassis is a motor vehicle as defined by § 1926.601(a), and as such is covered under Subpart O.

Since the equipment here is covered under Subpart O, § 1926.600(a)(6), for which Lake Erie was cited, requires that equipment covered by Subpart O "shall comply with the requirements of § 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters." Respondent argues, however, that § 1926.550(a)(15) does not apply because § 1926.550(a)(15) in Subpart N only applies to cranes, and the equipment at issue is not a crane.

The Commission in *Concrete Construction Company, Inc.*, 12 BNA OSHC 1174 (No. 82-1210, 1985), addressed the issue of whether § 1926.550(a)(15) applies to equipment other than cranes. There, respondent argued that § 1926.550(a)(15), a crane standard, did not apply to its backhoe, which it asserted was excavation equipment. In *Concrete* the Commission stated that § 1926.550(a)(15) is different from other sections of the crane standard in that it expressly was made applicable to *non-crane equipment*, by the provision in Subpart O, § 1926.600(a)(6), which provides that "[a]ll equipment covered by this subpart [Subpart O] shall comply with the requirements of § 1926.550(a)(15), when working or being moved in the vicinity of power lines or energized transmitters." Accordingly, the Commission found that the excavation equipment there was covered by Subpart O, and that § 1926.550(a)(15) applied. *Concrete Construction Company, Inc.*, *id*. The undersigned finds that § 1926.550(a)(15) applies to the GRT Utilicorp

Heavy Duty Combination Drill/Driver Attachment on the GMC truck cab and chassis used by Lake Erie. Applicability of standards §§ 1926.550(a)(15) and 1926.600(a)(6) is established.[4]

Lake Erie argues in its brief that it lacked notice that the standards applied to it, stating that it was unaware the 10-foot rule applied to the equipment it used on the jobsite, believing that the rule only applied to cranes (Resp.'s Brief, pp. 1, 9-11). Even if Lake Erie believed that the standard only applied to cranes, it was nonetheless on notice that the equipment was not to be used within 10 feet of energized lines, as set forth in the owner's manual and on placards placed on the equipment. Further, ignorance of the law is no defense. It is well-settled that any misunderstanding about a respondent's legal obligations would not be relevant to whether it violated the standard. *See Manganas Painting Co., Inc*. 21 BNA OSHC 1964 (No. 94-0588, 2007) citing *Froedtert Mem. Lutheran Hosp., Inc*., 20 BNA OSHC, 1500, 1509 (No. 97-1839, 2004) (rejecting employer defense of ignorance that standards applied).

Noncompliance with the Terms of the Standard

The parties stipulated that on June 17, 2010, the crew was removing guardrail posts near a set of energized overhead power lines that crossed over Route 30. The power lines were approximately 15 feet, 2 inches from the ground at the location of the accident and the equipment extended to a height of approximately 17 feet from the ground. It is not clear from the record evidence whether the equipment actually contacted the lines or whether the power lines arced (Tr. 35). Vermillion testified that he believed contact occurred due to the burn marks on the boom and because the truck tires caught fire (Tr. 40-41). There is no doubt however, that whether contact occurred or not, the equipment was close enough to the lines that electrical current traveled through the equipment and through the chain that [redacted] was holding. (Exh. J-1, Nos. 14, 15, 16 and 17). The standard requires that at a minimum, for lines rated 50kV or below, there must be a clearance of 10 feet unless the lines are de-energized, grounded or protected with insulating

[4] At the conclusion of the hearing, the Secretary moved to amend the citation to allege a violation of section 5(a)(1) of the Act in the alternative. The undersigned denied the Secretary's Motion because of the unfair prejudice to the Respondent and because a violation of section 5(a)(1) had not been tried by consent. Although the Secretary during her direct examination of Vermillion asked a few questions regarding industry recognition of the hazard and feasible abatement methods (Tr. 51-58), the undersigned finds that this was insufficient to support the Secretary's claim that Respondent was on notice that the Secretary was putting forth evidence to support a general duty clause violation. Had the Secretary moved to amend prior to the conclusion of the presentation of evidence for both parties, affording Respondent an opportunity to defend the allegation, the undersigned may have ruled differently.

barriers (§ 1926.550(a)(15)(i)).[5] None of the required was done here. The Secretary has established noncompliance with the terms of the standard.

Access to the Violative Conditions

There is no dispute that Lake Erie's employees had access to the violative conditions. All three crew members were exposed to the hazardous conditions including [redacted] who was fatally injured (Tr. 50; Exh. J-1, No. 18). The Secretary has established that Lake Erie's employees had access to the violative condition.

Knowledge

The Secretary must establish actual or constructive knowledge of the violative conditions by Lake Erie in order to prove a violation of the standard. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman can be imputed to the employer).

Here, Foreman Wolfe was working with the employees and providing instructions to them regarding the work they were performing. Evidence adduced at the hearing reveals that Wolfe recognized the lines were low, and that on the day of the accident, he told the employees about the overhead power lines in the vicinity of their work (Tr. 46, 81; Exhs. C-7, C-8). Further, the evidence shows that Wolfe was aware of the power lines and that the crew was working in proximity to the power lines (Tr. 46, 61, 81; Exhs. C-7, C-8). Wolfe also told Vermillion that he knew about the 10-foot rule and that he was aware of the rule (Tr. 76). Wolfe's knowledge as

[5] The voltage of the power lines is not known, as no evidence regarding it was adduced at trial. The undersigned finds that the exact voltage is not necessary as it is clear the lines were energized; a minimum clearance distance of 10 feet is required for energized lines rated 50kV or below pursuant to § 1926.550(a)(15).

foreman is imputed to Lake Erie. The Secretary has shown by a preponderance of the evidence that Lake Erie has violated the cited standard.

Willful Classification

Willfulness is described in *A.E. Staley Manufacturing Co.,* 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000) as follows:

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.,* 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.,* conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

A.E. Staley Manufacturing Co., id.

The Secretary classifies Lake Erie's violation of § 1926.600(a)(6) as willful. In support, the Secretary relies on three pieces of evidence: (1) the Bureau Of Workers' Compensation Report (BWC Report) advising Lake Erie of safety precautions it needed to take; (2) warnings posted on the equipment and in the equipment manual; and (3) foreman Wolfe's statement to Vermillion that he knows the rule requiring a 10-foot clearance from power lines (Tr. 76). The Secretary also argues that plain indifference is supported by Lake Erie's continued violation of the 10-foot rule after the accident (Secretary's Brief, pp. 11-15).[6] The Secretary places a significant amount of weight on the BWC Report admitted as Exhibit C-9, arguing that it shows Lake Erie had a heightened awareness and that it failed to comply with the recommendations set forth in the BWC Report. The undersigned finds that the weight placed on the BWC Report by the Secretary is unwarranted. A careful review of the BWC Report reveals that its recommendations are general in nature, and provide no specifics regarding the 10-foot rule, grounding, de-energizing, or

[6] The undersigned has considered the Secretary's arguments as to the additional alleged violations by Lake Erie on Route 250 and finds that this evidence is not reliable and not corroborated. The only evidence in the record regarding this assertion is the compliance officer's testimony of what he was told by employee Ron Mayle. Apparently a signed statement exists, but it was not offered into evidence, nor was Mayle called as a witness. Similarly, the 2007 incident relating to different circumstances and the vacated 2005 citation are not persuasive.

insulating the lines, as required by the standard. Accordingly, the undersigned places little weight on the BWC Report.

However, the foreman's knowledge of the 10-foot rule and the warnings and notices on the equipment and in the equipment manual irrefutably show Lake Erie was aware it had to maintain a 10-foot clearance when the lines were energized and not otherwise protected (Tr. 54; Exhs. C-5, C-7, and C-8). Despite this knowledge, Lake Erie took no precautions on June 17, 2010, to ensure that the equipment was being operated within a safe clearance. The only evidence adduced at the hearing regarding any actions taken by Lake Erie was the statement of the foreman that he pointed the lines out to the crew as he drove by, and the equipment operator acknowledged this with a nod (Tr. 46, 61 and 81). Although Lake Erie had implemented a safety policy involving the use of green cones to caution employees regarding working in proximity to energized power lines, this process was not even utilized by Lake Erie at the time the accident occurred (Tr. 61). Even though Vermillion agreed that the verbal statements to the crew were analagous to use of the cones, he testified that the foreman was not always with the employees and the cones would remind them of the hazard. The foreman's failure to utilize the safety process set forth by Lake Erie shows an indifference to employee safety. Moreover, there is no evidence in the record showing that the foreman instructed the employees to do anything to protect themselves. He merely pointed out the lines to them. The undersigned finds that this is inadequate to meet the requirements of the standard, and shows plain indifference to employee safety.

"The employer is responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1539 (Nos. 86-360, 86-469; 1992). "The hallmark of a willful violation is the employer's state of mind at the time of the violation–an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd* 268 F.3d 1123 (D.C. Cir. 2001).

Lake Erie argues in its brief that "although [it] knew of the 10-foot rule, it was wholly unaware this standard applied to the equipment at issue." (Resp's Brief, pp. 9-10). The undersigned finds this argument begs the question. Both the equipment and the owner's manual set forth clearance requirements. And as previously stated, ignorance of the law is not a defense.

Lake Erie contends that it acted in good faith with respect to the cited conditions. The undersigned disagrees. "A willful charge is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard even though the employer's efforts are not effective or complete." *Valdeck Corp.,* 17 BNA OSCH 1135 (No. 93-0239, 1995), *aff'd* 73 F.3d 1466 (8th Cir. 1996). The test of good faith is an objective one, that is "whether the employer's belief concerning the factual matters in question was reasonable under all the circumstances." *Morrison-Knudson Co./Yonkers Contracting Co*., 16 BNA OSHC 1105 (No. 88-572, 1993). The undersigned finds that the foreman's pointing to the overhead lines as he was driving by in his vehicle, without more, is insufficient to show Lake Erie made a good faith effort to comply with the standard or eliminate the hazard. The Secretary has established the violation is willful.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (1) the size of the employer's business; (2) the gravity of the violation; (3) the good faith of the employer; and (4) the employer's prior history of violations. *29 U.S.C. § 666(j)*. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J. A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).

Vermillion had determined the probability of the violation as high since it was highly probable the equipment would contact the lines; the severity also was rated as high based on the fatality itself (Tr. 83). Vermillion testified the number of employees of Lake Erie was fewer than 250 employees (Tr. 88). Lake Erie had received one citation in 2005, but that citation was vacated. The undersigned finds that a high gravity is appropriate here because the proximity of the employees and equipment to the energized power lines exposed three employees, causing the death of one. Although Lake Erie failed to effectively follow the BWC recommendations to improve safety on the jobsite, it devised a new safety program and trained employees with respect to working near overhead lines (Tr. 180). This weighs in favor of a lower penalty. Also, the size

of the company weighs in favor of a lower penalty. Considering these facts and the statutory elements, a proposed penalty of $35,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Citation 1, item 1a, alleging a violation of § 1926.600(a)(6), is affirmed and a penalty of $35,000.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: April 10, 2012
Atlanta, Georgia