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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.

DAVIS H. ELLIOT COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 15-0799

APPEARANCES:

Matthew N. Babington, Esquire,
Jacob M. Hargraves, Esquire,
Department of Labor, Office of the Solicitor,
Arlington, Virginia
For the Secretary

Carl B. Carruth, Esquire,
McNair Law Firm, P.A.,
Columbia, South Carolina
For Respondent

BEFORE:

Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §

659(c) (the Act). On November 3, 2014, employees of Davis H. Elliot Company, Inc. (Elliot or Respondent) were installing missing or stolen neutral conductor wire on a power distribution line (line is used interchangeably with wire) near Goshorn Woods Road, in Cameron, West Virginia (Cameron worksite, worksite or job site). Two of the employees received an electric shock, which resulted in the death of one employee, lineman Greg Pruitt, age 35,¹ and injury to another, journeyman lineman Christopher Lynn Peterson, then age 34. Compliance Officer (CO) Anthony Milam of the Occupational Safety and Health Administration (OSHA) began his inspection at the Cameron worksite the following day. (Tr. 39, 52-54, 60, 101-02; Exs. 2, C, DHE_00075).

On April 13, 2015, OSHA issued a citation and notification of penalty (Citation) to Elliot. The citation originally alleged three items of serious violations of OSHA's power distribution standard with a total proposed penalty of \$21,000.² Elliot timely contested the citation.³

A three-day trial was held in Pittsburgh, Pennsylvania on March 3, 4, and 7, 2016. The Secretary presented testimony from four witnesses: CO Milam; Donnie Smith, a general foreman for Elliot; Messrs. Peterson, and Mark Wells, a distribution systems inspector for

¹ Mr. Pruitt worked at Elliot for the second time from about mid-September, 2014 through November 3, 2014. On October 9, 2014, he identified himself as an "A Lineman" on an Elliot Tool Box Talks form. (Ex. D, DHE_00092). Before that, he worked at Utility Lines Construction Services in a "bucket" from sometime on or after June 14, 2013 through September 7, 2014. He first worked at Elliot as a Low B-lineman from April 9, 2013 through June 13, 2013. Before that, he worked as a Fifth Step Apprentice Lineman, Heavy Equipment Operator and Ground Man at Utility Lines Construction Services from September, 2011 through about April, 2013. From August, 2010 through September, 2011, he worked as a Heavy Equipment Operator and Ground Man at Pike Electric. He worked as a laborer at Olan Pruitt Construction Inc. from February, 1999 through August, 2010. He completed the 11th grade at Beaver Creek High School. When completing his Personal Information & Work History for Elliot, dated March 25, 2013, Mr. Pruitt identified Chris Peterson as an "A Lineman", "co-worker" he had known for 2 1/2 years. When completing his Personal Information & Work History for Elliot, dated September 7, 2014, Mr. Pruitt identified Mr. Peterson as a "Friend" he had known for 6 years. (Tr. 373-74; Ex. C, DHE_00053, DHE_00062-74).

² Citation 1, items 1(a) and 1(b), alleged violations of 29 C.F.R. § 1910.269(a)(4)(viii) and 29 C.F.R. § 1910.269(c)(4)(ii)(A), respectively.

³ In its amended answer, Elliot set forth an affirmative defense for citation 1, items 1(a) and 3, that as "interpreted by Complainant and applied to the facts of this case, fails to afford a reasonable warning of the prescribed conduct in light of common understanding and practice." Elliot also set forth the affirmative defense of unpreventable employee misconduct for citation 1, item 2. *See* amended answer.

American Electric Power (AEP). (Tr. 39, 96, 105, 216). Respondent presented testimony from three witnesses: Donald Adkins, corporate manager of safety and training for Elliot⁴; William Vaden, a general foreman for Elliot; and, Mike Gibson, president of SafeTeach-Global LLC.

At the trial, the Secretary withdrew citation 1, item 1(b), and grouped serious citation 1, items 2 and 3, for purposes of penalty assessment.⁵ Consequently, the modified total proposed penalty in the case is \$14,000. (Tr. 10). Both parties simultaneously filed post-hearing briefs and reply briefs.

The primary issues in dispute are:

1. Did Elliot, through its foreman, adequately assess the environmental conditions at the worksite for safety?
2. Did Elliot take measures to ensure no employee came closer than the minimum approach distance (MAD)⁶ while working on or near energized parts?
3. Did Elliot use an equivalently safe method, while installing the neutral conductor wire, to minimize contact with the overhead energized primary line?
4. Was encroachment of the MAD the result of unpreventable employee misconduct?

Jurisdiction

Based upon the record, the Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5).⁷ The parties further agree that jurisdiction of this matter is properly before the Commission. (amended answer, p. 2; Tr. 34-35). The Court concludes that the Commission has jurisdiction over the parties and subject matter in this case.

Background & Job Description

⁴ In a pre-hearing motion the Secretary opposed Mr. Adkins as an expert witness. The motion was denied without prejudice. The Secretary did not renew its objection to Mr. Adkins as an expert during, or after, the trial.

⁵ The total proposed penalty for serious Citation 1, grouped items 2 and 3, is \$7,000.

⁶ The definition of MAD is “[t]he closest distance an employee may approach an energized or a grounded object.” 29 C.F.R. § 1910.269(x).

⁷ Respondent admitted it was engaged in a business affecting interstate commerce and was an employer employing employees. (amended answer, 2; Tr. 34). The record supports these admissions.

Elliot was contracted by a utility company, AEP, to replace missing neutral conductor wire on a powerline at a job site in Cameron, West Virginia. (Tr. 105, 197; Ex. AA). The worksite was located off-road on rural property that included ravines, brushy vegetation, woods, a fence, and bordered an adjacent coal mine. (Tr. 45, 54, 264, 592-93).

Chester Brown, the foreman, and four crew members were installing replacement neutral conductor line the afternoon of November 3, 2014. (Tr. 52, 57). The four employees on the crew were Messrs. Peterson, Pruitt, Travis Wilkes, and Walter Vencill. (Tr. 63). The crew had already installed replacement neutral conductor wire at a different location earlier that day. (Tr. 52, 525).

Chester Brown's November 3, 2014 job briefing⁸ document for the worksite noted the assignment as "various locations Goshorn Woods Rd & Dixon Ridge Rd" and included the following "description of work to be performed:"

Install missing neutrals DDE [double dead-end]⁹ copper & ACSR [aluminum wire]¹⁰ – Climbing Poles – Check poles before climbing for rotten or broken – off road on side of mountain – slips, trips, falls – Class 2 & 3 PPE – Work zone set up – Contract flaggers – Watch traffic working behind switch

(Tr. 55-56; Ex. 7).

The electric shock accident occurred at about 3:00 p.m., November 3, 2014. (Tr. 411). The Mine Safety & Health Administration (MSHA) arrived at the worksite later that day.

⁸ Elliot's Safety Handbook and Work Process Manual stated:

1.01 Job Briefing

Before starting each job, the employee in charge shall conduct a job briefing with the employees involved. The briefing shall cover such subjects as hazards associated with the job, work procedures involved, special precautions, energy source controls, and personal protective equipment requirements.

(Ex. A, DHE_00240).

⁹ Mr. Peterson testified that "double dead-end" references the way wire being pulled is connected to an actual pole. (Tr. 56).

¹⁰ Mr. Peterson testified that ACSR refers to the aluminum wire being pulled at the worksite and used to replace the missing copper wire. He said it was number 2 aluminum ACSR wire that was "a little bit bigger than my finger." (Tr. 57, 64).

MSHA collected information to determine whether MSHA or OSHA was responsible for the accident investigation. (Tr. 276).

Power Line Installation Methods

Installation of the wire on a powerline is referred to as stringing or pulling wire. (Tr. 69-70, 79). The installation can be done by either pulling line on the ground near the poles (ground-pulling) or directly overhead at the pole-top level. (Tr. 70). At the Cameron worksite, the crew was using a ground-pulling method to install the neutral conductor wire. (Tr. 70).

Pulling Wire at the Pole-Top Level

To pull wire overhead at the pole-top level, the pull of the wire is done under tension with machines at each end of the pull. (Tr. 71-75). Stringing blocks, attached at the top of each pole, guide the wire at approximately the point where the wire will be fastened onto the poles. (Tr. 348, 350). A pulling rig machine is at one end of the installation path and a wire rig machine, which holds the spool of new wire to be installed, is at the other end of the installation path. (Tr. 71-72). A rope wound on the pulling rig's reel is pulled through the stringing blocks on the poles and attached to the end of the wire on the wire rig to pull the wire through the stringing blocks. (Tr. 73, 349-354). The pulling rig then winds up the rope, which pulls wire from the reel through the stringing blocks. (Tr. 73-74). The wire rig has a gear-driven tensioner with a throttle that controls the speed of the wire as it is pulled off the reel. (Tr. 72-73). The pulling rig is gear driven with a brake to prevent reverse-spooling of the wire. (Tr. 73). The tension on the wire is adjusted and maintained to prevent contact with the existing energized line during the pull. (Tr. 354). Typically, pulling wire at the pole-top level is done in close proximity to the energized powerline and may be as close as one foot. (Tr. 352, 354). After the wire has been pulled through all the blocks, each end is secured to its permanent position on the poles at each

end of the pull. (Tr. 351). The tension on the wire is adjusted to achieve the correct amount of sag in the spans between the poles. (Tr. 352). The wire is then removed from each stringing block and attached to its permanent position on each pole. (Tr. 352).

Ground-Pulling

Ground-pulling starts with the crew pulling the wire from the reel and placing it on the ground next to the poles along the powerline's path. (Tr. 78). At the Cameron worksite, the wire unspooled from a device called the Reel Thing. (Tr. 345-46). The Reel Thing was a freestanding device suspended above the ground by either a boom truck or digger derrick. (Tr. 345-46). The wire unspooled freely from the reel as it was manually pulled by a lineman. (Tr. 345). Because there was no brake mechanism on the Reel Thing, someone stood next to it and used a shovel or foot to slow the reel to prevent any over-spooling. (Tr. 360-62). After the wire is pulled and laid out on the ground for the entire length of powerline being replaced, it is then pulled up and attached to each pole. (Tr. 356-57). An employee climbs the pole or works from a bucket truck to attach the line to the top of each pole. (Tr. 54, 78).

The Job at the Cameron Worksite

Several diagrams and photographic exhibits showing the layout and positions of poles at the Cameron worksite were entered into the record. (Exs. 2-6, G-I, K-AA). These exhibits plus witness testimony are the primary source of the worksite description that follows.

The worksite was in a rural area off-road in fields that were brushy and hilly. (Tr. 45, 54, 264, 592-93). The powerline consisted of a single "phase"¹¹ with a neutral line below it. (Tr. 368). Because the neutral line had been stolen, Elliot was assigned to install a replacement

¹¹ "Phase" refers to a hot, live, energized primary wire. (Tr. 368).

neutral line.¹² (Tr. 329-31). The first step in replacing the neutral conductor line at the worksite was ground-pulling the replacement wire along the path of the powerline. (Tr. 54).

Eight electrical poles were the focus of the line replacement job at the worksite.¹³ The replacement neutral line was to be installed for several spans¹⁴ along two legs of the powerline. The distance, or span, between each pole ranged from about 202 feet to about 304 feet. (Ex. 4). The first leg consisted of five poles, in a relatively straight line, between the adjacent coal mine's parking lot, down a hill, and up the next hill. The five poles for this leg, starting from the mine parking lot, are designated as the K-pole (pole #980), the J-pole (pole #979), the danger-pole (#978)¹⁵, the turn-pole (pole #977), and the N-pole (pole #976). The total distance from the K-pole (pole #980) (near the mine parking lot) to the N-pole (pole #976) on the opposite hill was approximately 961 feet. (Ex. 4).

The shorter leg of the powerline replacement job was three poles set in a line, at a near 90-degree angle to the other five poles, from the turn-pole (pole #977) to a pole (pole #1046) located across Goshorn Woods Road. (Exs. 2, 4). The reel truck was parked next to Goshorn Woods Road. (Tr. 60). The replacement line first ran from the reel truck to pole #1045. The new line continued from that pole for one span to the next pole, #1044, and then for another span to the turn-pole (pole #977). When standing with Goshorn Woods Road at one's back and facing the turn-pole (pole #977), the N-pole (pole #976) was to the left of the turn-pole (pole #977) and the danger-pole (pole #978), J-pole (pole #979), and K-pole (pole #980) were to the

¹² Mr. Peterson testified that the old copper neutral wire that was missing was worth a lot of money if taken to a scrap dealer. He said the neutral wire provides system ground protection to protect equipment from burning up. (Tr. 52-53).

¹³ These eight poles will be referred to by poles #1046, #1045, and #1044, "N-pole" (also known as (aka) "pole #976"), "turn-pole" (aka as the "junction-pole" or "pole #977"), "danger-pole" (aka "pole #978"), "J-pole" (aka "pole #979"), or "K-pole" (aka "pole #980"), and/or by the last 3 or 4 digit number that appears on the pole map in Exhibit 4. Each pole has been named for the purpose of clarity and consistency. There are multiple exhibits in the record where poles are shown. (e.g. Exs. 2-4, H).

¹⁴ A span is the distance from one pole to the next pole.

¹⁵ Pole #978 was referred to as the danger-pole because it was marked and not safe to climb. (Tr. 595).

right. (Exs. 2, 4). The total distance from Goshorn Woods Road to the turn-pole (pole #977) was approximately 887 feet. (Ex. 4). The pole designated as pole #1046 was located behind the reel truck across Goshorn Woods Road. (Ex. 4).

The worksite's ground-pull began at the reel truck. (Tr. 60-61; Ex. 2). Foreman Chester Brown stayed at the reel truck to monitor the wire as it unspooled from the reel. (Tr. 64, 197, 362). Messrs. Pruitt, Peterson, and Wilkes pulled the wire for the spans from the reel truck to the turn-pole (pole #977).¹⁶ Mr. Vencill carried tools. (Tr. 63-64; Exs. 2, 4).

The path from the reel truck extended downhill approximately 280 feet to pole #1045, which was in a ravine, then progressed 303 feet across the ravine and uphill to the pole #1044. (Tr. 592-94; Exs. 2, 4). Uphill from pole #1044, approximately another 304 feet, was the turn-pole (pole #977). (Tr. 592-94; Exs. 2, 4). Mr. Peterson testified that the terrain between the reel truck and the turn pole was “[s]lick, a few creeks, some briars, kind of growed up area.” He found it difficult to traverse. (Tr. 63).

A turning-block (also referred to as a “stringing block”, “pulley” or “roller”) was installed on the turn-pole (pole #977) at about waist height.¹⁷ (Tr. 61, 92-93, 171, 563; Ex. 2). The wire ran through the turning-block and the block temporarily directed the wire for the 90-degree turns to the left and right of the turn-pole (pole #977). (Tr. 62, 171).

The crew placed the wire through the turning block to direct the wire to the left of the turn-pole for the one span pull to the N-pole (pole #976). (Tr. 61, 563). From the turn-pole (pole #977), Mr. Peterson pulled the wire by himself¹⁸ approximately 224 feet up a steep hill to

¹⁶ Members of the crew wore their hard hats, safety glasses, work boots and leather gloves that were not insulated. (Tr. 64).

¹⁷ Mr. Peterson testified that a turning-block was like a pulley. He said it has an eye on it where a rope can be tied through or a bolt can be hooked onto it. A block can be put on a pole and it can be used to pull up wire. (Tr. 61-62).

¹⁸ Mr. Adkins inaccurately testified that both Messrs. Pruitt and Peterson pulled the wire to the left and up the hill to N-pole (pole #976). (Tr.460-61).

the N-pole (pole #976), with Messrs. Pruitt and Wilkes pulling slack through the block at the turn-pole. (Tr. 65, 594; Exs. 2, 4). When Mr. Peterson finished pulling the wire to the N-pole (pole #976), he left the wire's end there and returned downhill to the turn-pole (pole #977). (Tr. 65; Ex. 2). The wire was then cut at the turn-pole (pole # 977). Wire emanating from the reel was then re-threaded through the roller in the stringing block at the turn-pole (pole #977) to use for the pull to the right of turn-pole (pole #977). (Tr. 65).

After the wire was re-threaded, more wire from the truck's reel was pulled through the turn-block 90 degrees to the right for the remaining three spans of the pull. (Tr. 61, 171, 291, 563; Ex. 2). Mr. Peterson told Mr. Wilkes to go back to the reel truck to help Mr. Vencill with the tools. Messrs. Peterson and Pruitt would finish the pull by themselves.¹⁹ (Tr. 65). No one remained at the turn-pole (pole #977) pulling slack. (Tr. 418-19). Messrs. Peterson and Pruitt then pulled the wire for one span from the turn-pole (pole #977) to the danger-pole (pole #978). (Tr. 61, 595; Ex. 2). The danger-pole (pole #978) was at the bottom of the ravine, about 258 feet downhill from the turn-pole (pole #977). (Tr. 594-95; Ex. 4).

Messrs. Peterson and Pruitt continued the pull for the next span from the danger-pole (pole #978) approximately 277 feet uphill to the J-pole (pole #979). (Tr. 65-66, 207-09). The third span was approximately 202 feet uphill from the J-pole (pole #979) to the K-pole (pole #980). (Tr. 209, 593; Ex. 4). The parking lot for the coal mine was another approximately 329 feet uphill from the K-pole (pole #980). (Tr. 593; Ex. 4).

¹⁹ CO Milam testified that either Messrs. Wilkes or Vencill was located somewhere between pole #s 1044 and 1045 at the time of the accident while heading back with tools to the reel truck located at Goshorn Woods Road. (Tr. 192-96; Exs. 2, at "U", near "C", 4). The CO did not know where Mr. Vencill was specifically standing at the time of the accident. (Tr. 193). He testified that Chester Brown was operating the brake reel at the "Truck and Wire Reel" at Goshorn Woods Road at the time of the accident. (Tr. 197; Ex. 2). Mr. Adkins testified that Mr. Vencill was traversing up and down the hill between the turn-pole (pole #977) and the reel truck at the time of the accident. (Tr. 418-19). He further said that Mr. Wilkes was "approximate[ly] 10 feet from the turn-pole when the accident happened." (Tr. 419). The Court finds that when the accident happened Mr. Wilkes was about 10 feet from the turn-pole (#977) and Mr. Vencill was between pole #s 1044 and 1045. (Tr. 192-96, 419; Ex. 2).

The pull for the two spans from the turn-pole (pole #977) to the danger-pole (pole #978) and from the danger-pole (pole #978) to the J-pole (pole #979) was uneventful. While pulling the wire in the span from the J-pole (pole #979) to the K-pole (pole #980), the wire made contact with the 7200 volt energized primary line overhead. (Tr. 66, 177). The resulting electrical shock seriously injured Mr. Peterson and killed Mr. Pruitt. (Tr. 66, 17).

Relevant Testimony

Christopher Lynn Peterson

Mr. Peterson had a total of eight to nine years of experience in the electrical industry during which he worked for four or five companies.²⁰ (Tr. 40, 42). At the time of the accident, Mr. Peterson had worked for Elliot since about September 29, 2014. He testified that he pulled wire over the ground on one or two other occasion(s) during that 35 day period. (Tr. 40-41, 86-87; Ex. D, DHE_00079). He had previously worked for Elliot from about April 9, 2013 through June 13, 2013.²¹ (Tr. 42-43, 373; Ex. D, DHE_00077, DHE_00086). Elliot did not provide Mr. Peterson with any training²² on pulling lines over uneven terrain or pulling lines when the lines come under resistance during either period of his employment at Elliot.²³ (Tr. 48-50).

Most of Mr. Peterson's work experience had been the replacement and repair of energized lines for upgrade, replacement, and storm damages. (Tr. 43-44). He had worked in

²⁰ Mr. Peterson's educational background indicated that he was awarded a certificate of high school equivalency (GED). (Ex. D, DHE_00084-87).

²¹ When completing his Personal Information & Work History for Elliot, dated September 19, 2014, he identified Chester Brown as a "Friend" he had known for nine years. (Ex. D, DHE_00087).

²² Mr. Adkins, the person at Elliot responsible for providing safety and training oversight, admitted that before the accident Elliot did not have any specific work rules, or formal training, specific training topics or classes, concerning: 1) pulling wire on the ground, 2) pulling lines over uneven terrain, 3) pulling lines when encountering resistance or when the line came under tension, or 4) anything like that. Mr. Adkins testified that these were matters "that people learn as they progress" through on the job training. (Tr. 455-57). He further admitted that "[t]here is no documented pulling on the ground training"; including training over uneven terrain or pulling lines when facing resistance or counter resistance, by Elliot associated with Messrs. Peterson and Pruitt. (Tr. 458-59).

²³ Mr. Peterson testified that it becomes more difficult to physically pull line off the back of a reel truck over the shoulder because the weight of the wire "gets heavier the more that's laid out." (Tr. 49, 88). He also stated materials on the ground, including fences, trees, and bushes also make it harder to pull line. (Tr. 50).

several areas of the country; including North Carolina, Maryland, Washington, D.C., Oklahoma, and Tennessee. (Tr. 42-45).

Mr. Peterson worked as a lineman at Pike Electric from June, 2006 through September, 2010. (Ex. D, DHE_00085). He had been a journeyman lineman²⁴ from August, 2011 through about March, 2013 at Utility Lines Construction Services²⁵ and had twice been the foreman at companies other than Elliot on jobs where the line was pulled on the ground.²⁶ On October 9, 2014, he identified himself as a Journeyman Lineman on an Elliot Tool Box Talks form. (Ex. D, DHE_00092). As a journeyman lineman, he had worked out of a bucket truck and otherwise, close to, and in the proximity of, energized lines. (Tr. 41, 67, 85-86; Ex. D, DHE_00085). He said he had primarily worked on flat land. (Tr. 92). Mr. Peterson explained that stringing line is a standard skill for a lineman and a journeyman lineman is expected to know how to string wire. (Tr. 87, 98). Additionally, when new wire is being installed, a lineman is expected to not damage the wire. (Tr. 87). He also stated that when ground pulling, wire can get snagged or hung-up; when it does you go back and fix it. (Tr. 88-89).

Mr. Peterson explained that stringing line is a term that refers to pulling or installing new wire and can be done either by pulling line on the ground or by stringing at the pole-top.²⁷ (Tr. 69-70). At the trial in this case, Mr. Peterson testified that stringing and pulling wire are the “same thing.”²⁸ (Tr. 70). When ground pulling, the wire is pulled manually from the reel and

²⁴ According to Mr. Adkins, a journeyman lineman is at the top of his field. (Tr. 343).

²⁵ Mr. Peterson again worked as a journeyman at Utilities Lines Construction from November, 2013 through April, 2014. (Ex. D, DHE_00088).

²⁶ When working as a foreman, Mr. Peterson testified that he performed job hazard assessments where it was important to physically examine all of the areas employees would work. (Tr. 68). He said that Chester Brown was responsible for performing the job hazard assessment at the worksite. He also said he expected Chester Brown had performed a physical evaluation of all of the area where Mr. Peterson was going to walk and pull wire. (Tr. 91).

²⁷ Mr. Peterson testified that he had never done overhead, by hand, stringing (non-machine) at the pole-top on a re-conductive job. (Tr. 76-77).

²⁸ Mr. Peterson had previously stated at a deposition in another case that “pulling wire and stringing wire are two separate things.” (Tr. 81). Very shortly thereafter at the deposition he stated that pulling wire and stringing wire

the wire drags on the ground behind the lineman. (Tr. 77-78). The wire is laid along the path of the powerline next to the poles where the line will later be installed at pole-top. (Tr. 78). Mr. Peterson said he did not wear his insulating gloves and sleeves when ground-pulling wire at the worksite because he did not anticipate that the new wire was going to be energized until such time as the wire was deliberately lifted to pole-top.²⁹ (Tr. 78-79).

After arriving at the Cameron worksite sometime after lunch,³⁰ Chester Brown conducted a 5-10 minute job briefing with the crew, and included information that the terrain would have a creek, swamp, and fences as obstructions.³¹ (Tr. 52-54, 57-58, 84-85). The foreman described the plan for the wire replacement to the crew. The crew would first pull the replacement wire from the reel truck to the turn-pole (pole #977). (Tr. 61-62). A stringing block would then be installed on the turn-pole (pole #977). (Tr. 61-62). The wire would then be pulled through the stringing block and uphill for one span to the left. (Tr. 61-62). The wire would be cut at the turn-pole (pole #977) and pulled through the stringing block for several spans to the right of the turn-pole (pole #977). (Tr. 61-62). Mr. Peterson testified that there was no discussion of any differences in the elevation in the areas where he would be pulling line or of any “danger-pole.”³² Mr. Peterson testified there was also no discussion of the potential for uplift due to the hilly terrain and nothing about the conductor wire potentially contacting the overhead energized

was the “same thing.” (Tr. 94-95). The Court does not find that this discrepancy impeached Mr. Peterson’s credibility in any way.

²⁹ Mr. Peterson knew that the overhead power lines at the worksite were energized. (Tr. 85). He said that the voltage in the overhead lines was 7200 volts. (Tr. 95, 329).

³⁰ The crew and Chester Brown signed the job briefing that listed the anticipated hazards discussed. The Job Briefing is dated “11/3/14” and showed a time of “8:00 am.” (Tr. 55, 68, 84; Ex. 7). This discrepancy as to the time shown on the Job Briefing form and the actual time the job briefing occurred has not been fully explained. Crediting Mr. Peterson’s testimony, the Court finds Chester Brown conducted his job briefing at the worksite sometime after lunch, November 3, 2014. (Tr. 52-54, 57-58, 84-85).

³¹ Mr. Peterson testified that the terrain at the worksite was “[s]teep and hilly, rugged, slick.” He also stated that he had never pulled line in any such similar terrain before November 3, 2014. (Tr. 45-46).

³² Mr. Peterson testified that “danger-pole” meant “a bad pole, rotten pole, to be replaced, leaning.” (Tr. 59).

line. (Tr. 57-58). Mr. Peterson testified that Foreman Chester Brown provided no other information to the crew after the crew reached the worksite. (Tr. 57).

After describing how the crew performed its work at the job site consistent with the work described in the above “Background and Job Description” section, Mr. Peterson testified that after pulling wire beyond the J-pole (pole #979), [redacted]. [redacted].³³ (Tr. 66-67, 95, 139-40; Ex. 5, pp. 15-16). Mr. Pruitt died from the electrical shock. (Tr. 95). [redacted]. (Tr. 66).

Mr. Peterson had no recollection of the wire being harder to pull than usual when he and Mr. Pruitt were pulling it up the hill past the danger-pole (pole #978). (T. 67).

Q: Generally speaking what was your experience pulling the wire that day?

A: I mean by the time we had started from the junction pole [turn-pole, pole #977] it had done got heavy and it was nose to the grindstone, we were both bent over pulling all we could pull with it.

Q: Do you have any recollection of the wire getting difficult to pull, more difficult than usual, any time before the accident?

A: No, sir, not that I’ve seen in the previous and past. I mean the further you get out away from the truck, the harder the wire is to pull, in all jobs.

Q: Do you have any recollection of telling anyone after the accident that it got difficult to pull right before the accident?

A: I don’t remember that. (Tr. 67).

Mr. Peterson testified that no action he took at the worksite was inconsistent with any training Elliot had provided him, any of Elliot’s safety policies, or Foreman Chester Brown’s directions. (Tr. 69).

Anthony Milam, OSHA CO

CO Anthony Milam arrived at the Cameron worksite in the late morning/early afternoon of November 4, 2014, the day after the accident. (Tr. 101-02). This was the CO’s first electrical inspection on a power company’s side of the distribution system; other electrical-related

³³ Mr. Peterson has brought a civil case against Elliot. (Tr. 59).

inspections had been from the consumer's side of the system.³⁴ (Tr. 100, 178). He met with representatives of Elliot and AEP in the coal mine parking lot adjacent to the worksite and conducted his opening conference with Elliot's representatives, Messrs. Chester Brown and Adkins. (Tr. 102-04; Ex. 2). He gathered preliminary information about the company and the accident while waiting for MSHA to release the site to OSHA for inspection. (Tr. 103).

After MSHA released the site, the CO conducted a walk-through inspection of the worksite and took photographs. (Tr. 140; Ex. 5). He also interviewed employees and management at the worksite that day.³⁵ (Tr. 140).

During his walk-through of the site, the CO was accompanied by Messrs. Adkins, Wells, Smith (in part) and Chester Brown. (Tr. 142, 230-31). CO Milam walked from the coal mine parking lot down to the location of the accident, which was between the K-pole (pole #980) and the J-pole (pole #979). He began to take photographs at the accident site. (Tr. 105-06; Ex. 2). He testified that the top of the danger-pole (pole #978) was actually down below him when he was standing at the accident location between the J-pole (pole #979) and K-pole (pole #980). (Tr. 106, 120-21, 133-36, 142; Exs. 2, 5, pp. 3, 12 at "C"). He continued down the hill to the ravine where the danger-pole (pole #978) was located. (Tr. 106). He noted that the area between the accident location and the danger-pole (pole #978) was brushy, with briars and tall weeds, and he could see the top of the danger-pole (pole #978) from the area the accident occurred. (Tr. 106, 126-28; Ex. 5, at pp. 5- 6, 12, at "C"). He observed a cattle fence that crossed the power line's path between the accident location and the danger-pole (pole #978).³⁶ (Tr. 107, 124-29;

³⁴ CO Milam has a Bachelor of Science degree in chemistry and natural science. He also completed two years of graduate studies for industrial hygiene. He has been an OSHA CO since June, 2010. He is classified as an industrial hygienist. Before the accident, he did about 200 OSHA inspections, including inspections that involved high voltage equipment and electrical panel boxes. (Tr. 98-100).

³⁵ After his onsite inspection, he requested injury logs from Mr. Adkins and contacted AEP for a copy of its contract agreement with Elliot, including any procedures for ground-pulling. (Tr. 143).

³⁶ Messrs. Pruitt and Peterson pulled the wire over the fence and through brush and small trees. (Tr. 129; Ex. 5).

Ex. 2 at “K”, Ex. 5, p. 4, at “C”, p. 6 at “A”). Near the danger-pole (pole #978), he observed a black mark and damage on the conductor wire; he assumed this was the result of contact with the overhead line. (Tr. 107, 138-39; Exs. 2, 5, pp. 13- 14). He took a photograph that showed a portion of the wire (slightly blue in color) that Messrs. Peterson and Pruitt had pulled in the direction leading from the danger-pole (pole #978) to the K-pole (pole #980). (Tr. 129; Ex. 5, p. 6, at “B”).

CO Milam then walked up the next hill, toward the turn-pole (pole #977). (Tr. 107; Ex. 2). He stopped on the side of the hill between the danger-pole (pole #978) and the turn-pole (pole #977), and took more pictures. (Tr. 107). He did not walk further along the powerline’s path on the routes marked “1” and “2” at Exhibit 2. (Tr. 108; Ex. 2). CO Milam testified that the area where the crew pulled the line from the reel truck to the turn-pole (pole #977) ran through the wooded area shown on Exhibit 5, at “B.” There was a power pole located in the wooded area at Exhibit 2, at “C” [pole #1044]. (Tr. 118-19, Exs. 2, at “C”, 5, p. 2, at “A”). The CO observed the changes in the elevation for the powerline’s path as he walked the worksite. (Tr. 157-58; Ex. 5, pp. 4, 12).

CO Milam testified that no one told him they saw the conductor wire make contact with the overhead energized line. (Tr. 193-94). The CO testified that when he saw burn or electrical damage on the wire that was being pulled near the danger-pole (pole #978) he determined that “for some reason the line came up while they [Messrs. Pruitt and Peterson] were walking up the hill past the danger-pole (pole #978) and contacted the primary” overhead energized line. (Tr. 139-41, 200; Ex. 2, at “S” [accident site], Ex. 5, p. 13, at “A”, p. 14, at “A” [shows damage on pulled wire made by electrical contact]).³⁷ The CO believed that the “steepness of the terrain”

³⁷ Using the distances shown on Exhibit 4, the Court estimates the distance between the place the pulled wire was damaged by electrical contact to the accident site to be about 375 to 450 feet. (Tr. 208-09; Ex. 4).

and Messrs. Pruitt and Peterson pulling the wire “down the terrain and then back up the other side, caused the [pulled] line to contact the primary [overhead energized line] of the danger pole.” (Tr. 141).

CO Milam testified that Respondent should have identified the environmental conditions, including the steepness of the terrain, the differences in elevation, and the lesser height of the danger-pole (pole #978) in comparison to the two poles on either side of it, that existed in the area where the accident occurred before the work commenced on November 3, 2014. (Tr. 152-53). He said Respondent should have determined these environmental conditions beforehand and they should have been “gone over” in the job hazard analysis conducted before work commenced. (Tr. 153).

CO Milam testified that conducting a job hazard assessment was important because it identified the potential hazards of the work environment. He said the job hazard standard at 29 C.F.R. § 1910.269(a)(4)(viii) was intended to protect employees from being injured. (Tr. 166). The CO stated when an employer identifies a hazard it is supposed to “[e]liminate the hazard or make sure people are not exposed to the hazard.” (Tr. 166-67). He stated that the job hazard standard makes the person performing the job hazard assessment responsible for the identification, awareness and addressing of any hazards that exist at the job site. CO Milam testified that Chester Brown was responsible for observing the terrain and changes in elevation at the job site when he performed his job hazard assessment whether or not he actually observed these conditions. (Tr. 168, 209). He stated that employees could be exposed to hazards that were not identified when an inadequate job hazard assessment was performed. (Tr. 167). He further testified that the job hazard assessment needed to cover the entire area where employees were going to be working or traveling through. The CO said that the job hazard assessment

should identify all of the identifiable hazards associated with the job. He testified that the job hazard standard at 29 C.F.R. § 1910.269(a)(4)(viii) required Chester Brown to observe and/or physically travel through all of the areas where the employees would work or travel in order for him to perform “a complete job hazard assessment.” (Tr. 167-68, 176, 209).

CO Milam interviewed Chester Brown and determined the foreman had identified job-related hazards at the job briefing pertaining to: 1) possible rotten or broken poles, 2) the potential for slips, trips and falls due to the off-road environment, and 3) traffic.³⁸ CO Milam testified that during his interview of Chester Brown, Chester Brown did not indicate that he provided any other information about his job plan or job hazard assessment to his crew than what was listed on his written record of his job briefing.³⁹ Chester Brown did not identify as a job-related hazard the possibility that there could be contact between the wire that the crewmen were pulling and the energized primary line atop the danger-pole (pole #978). (Tr. 155; Ex. 7). The CO found that Chester Brown also did not identify that changes in the terrain and elevation created or contributed to a safety hazard associated with the possible contact of the pulled wire with overhead wire.⁴⁰ CO Milam testified that Chester Brown should have identified such a hazard. (Tr. 156-57).

Based upon his own personal observations at the area of the accident of the job site on November 4, 2014, CO Milam testified that Chester Brown should have been able to tell from the hilliness of the terrain there was the potential for uplift to the overhead energized primary line when pulling the line up the hill past the danger-pole (pole #978). (Tr. 157-58).

³⁸ He also identified the personal protective equipment (PPE) the employees needed to wear on the job. (Ex. 7).

³⁹ CO Milam testified that where an employer’s job plan creates a hazard that is not addressed by the employer when implementing the job plan, the employer has to identify and communicate the hazard to its employees. (Tr. 209-10).

⁴⁰ Chester Brown did not tell CO Milam what areas of the terrain at the job site he observed before the accident. CO Milam also testified that he did not know which areas of the job site Chester Brown had actually visited before November 3, 2014. (Tr. 159-60).

Specifically, CO Milam testified that Chester Brown “should have identified the potential for this conductive cable to rise with the terrain and contact the primary that is down below them as they’re walking it up the hill.” (Tr. 155-57, 209). He asserted that Chester Brown did not account for the environmental condition of change in the terrain’s elevation as a safety hazard with respect to possible contact by the wire being pulled with the overhead energized line atop the danger-pole (pole #978). (Tr. 156, 162).

CO Milam also testified that Respondent did not take any measure to minimize the potential for the wire being pulled over the ground to rise up and contact the overhead energized line. (Tr. 172). He said simply pulling the wire along the ground next to the poles was not sufficient to keep the wire being pulled from contacting the overhead energized line. (Tr. 175). He identified several methods that Respondent could have used to minimize the potential for contact; including, installing a block near the base of the danger-pole (pole #978), or further segmenting the wire runs so that they covered a shorter distance; e.g. from the J-Pole (#977) to the danger-pole (pole #978), and allowing the segmented wire to run only downhill, or uphill, as the case may be. (Tr. 172-74; Exs. 2, 4, 10). CO Milam testified the wire would not have come back up if it were pulled only downhill. (Tr. 174). He further stated that Respondent could have used a lookout to watch and alert the crew if the wire being pulled rose off the ground, or “had an employee back at the junction pole [turn-pole] to make sure that slack was being fed through the turn-block and also as a lookout so that [wire being pulled] wasn’t rising.” (Tr. 174-75).

The height of each pole at the worksite was included on a diagram of the site that AEP prepared after the accident. (Tr. 146-48; Ex. 4). The diagram included a numerical designation⁴¹

⁴¹ The designation consists of 14 numbers. For this decision, each pole will be referred to by the last 3 or 4 numbers in its designation. For example, the full designation for the “danger-pole” is 40-6107-9000-0978. Here it is referred to as pole #978 and/or by its pole name: e.g. “danger-pole”. (Ex. 4).

for each pole, the year each pole was set, the span or distance between the poles, and the height of each pole. (Ex. 4). CO Milam further stated that the turn-pole (pole #977) and J-pole (pole #979) both stood 35 feet in height. The danger-pole (pole #978) was a shorter pole than each pole on either side of it. (Tr. 148-149; Ex. 4).

The CO testified that the hill up to the K-pole (pole #980) was so steep that a fence that crossed the worksite between the J-pole (pole #979) and the danger-pole (pole # 978) could not be seen in the photograph he took while standing at the approximate location of the accident due to “[t]he steepness of the terrain.” (Tr. 121-125, 136, 199; Exs. 4-5, p. 12). CO Milam described the terrain of the area between the danger-pole (pole #978) and the accident site as steep. He said that the change in elevation and the fact that you could see the top of the danger-pole (pole #978) from the accident site were obvious features. (Tr. 142). Also, the CO asserted the photograph at Exhibit 5, page 12, better represented the steepness of the hills than the photograph at Exhibit 5, page 4. (Tr. 199; Ex. 5, p. 12). The Court reviewed all the photographs in the record taken by the CO and Mr. Adkins.⁴² (Tr. 110-139, 397). The Court agrees that the photographs at Exhibit 5, pp. 4, 10 and 12, illustrate the hilly and steep nature of the terrain at the worksite. For the photograph at page 4 of Exhibit 5, the CO was standing on the side of the hill between the turn-pole (pole #977) and the danger-pole (pole #978) looking across the ravine toward the next hill, where the J-pole (pole #979) and K-pole (pole #980) were located and the accident occurred. (Tr. 121-22; Ex. 5, p. 4). The total distance from the J-pole (pole #979) to the turn-pole (pole #977) was about 535 feet. (Tr. 208; Ex. 4). The danger-pole (pole #978), ravine, fence, and J-pole (pole #979) are all visible in this photograph. (Tr. 121-25; Ex. 5, p. 4).

⁴² For two of the photographs in the record (Exs. Z-AA), the identity of the photographer was not identified. (Tr. 397; Exs. Z-AA). The Court also reviewed these two photographs.

The photograph at Exhibit 5, page 10, was taken when the CO was standing on the side of the hill next to the J-pole (pole #979) below where the accident occurred, looking across the ravine towards the danger-pole (pole #978) below and turn-pole (pole #977).⁴³ CO Milam testified that the photograph showed the steepness of the terrain in the area shown. (Tr. 130-32; Ex. 5, p. 10). The photograph at Exhibit 5, page 12, was taken when the CO was standing on the side of the hill where the accident occurred, above the J-pole (pole #979), looking across the ravine towards the next hill, with the danger-pole (pole #978) in the valley below and the turn-pole (pole # 977) and N-pole (pole #976) on the opposite hillside. (Tr. 133-35; Ex. 2, at “S”, Exs. 4-5, p. 12).

The Court finds the three photographs at Exhibits 5, at pp. 4, 10, 12 show the hilliness, steepness, and brushy nature of the terrain over and through which the wire was pulled. These three photographs also show the general hilly nature of the worksite, and the placement of the poles, including the danger-pole (pole #978), turn-pole (pole #977) and J-pole (pole #979) near the accident site, and powerlines relative to the ground. (Ex. 5, pp. 4, 10, 12).

CO Milam testified that Respondent’s Safety Handbook and Work Process Manual⁴⁴ included a provision at ¶ 3.31 that stated:

⁴³ The photograph at Exhibit 5, page 10, shows the overhead energized power line cutting through the sky downward toward the danger-pole (pole #978). (Tr. 130-31; Ex. 5, p. 10 at “B”).

⁴⁴ Respondent’s Safety Handbook and Work Process Manual also included provisions that stated, in part:

1.0 – General Precautions:

1.01 Before any work is undertaken on or near energized equipment and lines, the nominal operating voltage of the equipment and lines shall be determined and workers shall be qualified by training or experience to perform work by the prescribed method for the voltage involved and shall be familiar with minimum working clearances stated in this section.

1.02 Maintenance, repair and construction work on electric circuits or apparatus shall not be done until proper authorization has been obtained for performing work, existing conditions have been determined and it has been determined that the work can be performed in a safe manner and is clearly understood by each worker.

Wire being strung, removed or sagged within 5 feet of energized lines or equipment shall be considered energized and shall be handled with insulating protective equipment, dry nonconductive hand lines, barriers or other necessary protective equipment, as voltage may require, unless de-energized procedures are followed including proper opening, testing, grounding, and tagging where applicable.
(Tr. 144-45; Ex. 8, at p. 4, ¶ 3.31).

CO Milam testified that ¶ 3.31 of Elliot's Safety Handbook and Work Process Manual applied to the work at issue because wire was being strung close to energized lines. (Tr. 145; Ex. 8). He also said that a table [Table L 3.03] in the Safety Handbook and Work Process Manual indicated the MAD from "Phase-to-Ground" and "Phase-to-Phase."⁴⁵ Table L 3.03 shows that the MAD for Phase-to-Ground for the work at issue was 2 feet, 2 inches.⁴⁶ (Tr. 144-45; Ex. 8, p. 2).

CO Milam also testified that Respondent issued a Safety Bulletin after the accident which set forth Respondent's "Procedure for Pulling Wire on the Ground."⁴⁷ (Tr. 172; Ex. 10). Exhibit

1.02.1 Existing conditions related to the safety of the work to be performed include, but are not limited to, the nominal voltage of lines and equipment, the maximum switching transient voltages, the presence of hazardous induced voltages, the presence and condition of protective grounds and equipment ground conductors, the condition of poles, **environmental conditions relative to safety**, and the locations of circuits and equipment, including power and communication lines and fire protective signaling circuits. (Ex. 8, p. 1). [Emphasis added].

⁴⁵ The Safety Handbook and Work Process Manual stated:

3.03 Unless properly protected by an approved method, workers shall not go or take any conductive object within the approach distance of any exposed energized conductor or equipment: (See Table L 3.03)
Note: The approach distance is measured from the employee's longest reach plus the length of any conductive item (Such as but not limited to tie wire, armor rod, ground wire and etc.) or tool that is being used or is in reach of the employee.

⁴⁶ The Court finds both ¶ 3.31 and Table L 3.03 of Elliot's Safety Handbook and Work Process Manual applied to the work being performed at or around the danger-pole (pole #978) at the job site. Protective measures needed to be taken around the danger-pole (pole #978) because the wire being pulled there was being strung within 5 feet of the energized line and the MAD at that point was 2 feet, 2 inches. The Court further finds that Elliot failed to comply with both of these provisions.

⁴⁷ The Safety Bulletin stated:

For most of our line crews, installation of wire is a common task. Wire stringing has many different variations; reconductor projects, new build projects and existing line repair. Procedures for stringing wire under tension in close proximity to existing energized facilities are well established. However, we often use a much simpler method, especially in open areas, that being pulling wire on the ground. Pulling wire on the ground seems to be a simple application, but we can still encounter potential hazards. Special care shall be taken to assess the path the wire will take as it is pulled. Terrain, sag, tension, and existing overhead line positions shall be noted and considered during the assessment. Before starting an on-the-ground pull, the area must be fully assessed for all potentially hazardous conditions. A seasoned employee, such as a foreman or journeyman, but not a groundman or other

10 was admitted into evidence for the limited purposes of relating to the definition of stringing, the applicability of the standards in question, and the credibility of Respondent's position on those points. (Tr. 17).

CO Milam testified that Mr. Vaden had also conducted a pre-job evaluation of existing conditions and had a plan for the work at the job site that was different from Chester Brown's job plan.⁴⁸ He said Mr. Vaden's job plan had avoided and negated the hazard that resulted in the accident. (Tr. 182, 202-06). CO Milam testified that Respondent needed to perform a separate pre-job hazard analysis of existing conditions for both Messrs. Vaden's and Chester Brown's job plans. He said that different job plans might create or expose employees to different hazards. He testified that a single environmental condition such as slippery or steep terrain may relate to multiple, different safety hazards; such as steep terrain leading to both a tripping hazard or contact with an energized line hazard where a wire being strung at a higher elevation contacts the top of a pole located below. (Tr. 203-04). He stated that Respondent was required to identify and warn its crew of only hazards that were foreseeable. (Tr. 182).

Mark Alan Wells

Mark Alan Wells had been a Distribution Systems Inspector for Wheeling Power for just a few months prior to the accident. Wheeling Power was a division of AEP, also known as the

inexperienced employees, must walk the route of the pull to determine any condition that could cause harm to employees during the wire pull. The employee in charge shall form a plan based on the eyes on assessment of the present condition including any potentially hazardous condition and the procedure chosen to mitigate the identified hazards. The plan must then be communicated to all employees during the Pre-Job Briefing before the wire pull begins.

If the wire pull involves uneven terrain a stringing block shall be attached near at the base of the pole located geographically lowest along the terrain of the wire pull. This block will serve as a hold down to prevent tension from causing the conductor to rise up uncontrolled and encroach into the MAD of the energized part located above. Proper care should be used to secure the block to the pole and to secure the wire in the block. If multiple high and lower points are present along the path of the pull, stringing blocks shall be placed at all low points near the base of the poles. (Ex. 10).

⁴⁸ CO Milam testified that Mr. Vaden's job plan was different from Chester Brown's because Mr. Vaden's job plan proposed "doing multiple pulls" and Chester Brown's plan called for the crew to continuously pull the wire from the reel truck to and through the block on the turn-pole, down past the danger-pole (pole #978) and then up the hill. (Tr. 202-03).

Appalachian Power Company (APC). (Tr. 256-57). The previous 25 years, he had been a lineman for Wheeling Power. He pulled wire for many years. He also pulled wire in the past over uneven, hilly, and mountainous terrain. (Tr. 258-59, 300).

AEP and Elliot entered into contract no. 02613618X140 (Contract) to perform overhead line construction and maintenance services effective January 1, 2013. On April 20, 2014, AEP and Elliot agreed to amend the Contract by removing the Supplementary Terms and Conditions for Distribution Construction and Maintenance Contracts dated January 12, 2010, and replacing it with the Supplementary Terms and Conditions for Distribution Construction and Maintenance Contracts dated September 20, 2013 (Supplementary Terms).⁴⁹ The Supplementary Terms stated, in part:

SECTION 3
ENVIRONMENTAL, SAFETY AND HEALTH TERMS AND CONDITIONS

3.1.1 General

3.1.1 Contractor [Elliot] is hereby reminded that Owner's [AEP] Contractor Safety Program will be in effect. ...

3.1.2 Contractor [Elliot] shall adhere to all pertinent local, state and federal regulations and all rules and policies set forth in Contractor's [Elliot] own safety manual. ...⁵⁰

3.5.1 Event Reporting

3.5.1 When performing Work for Owner's Distribution and a safety event occurs, Contractor [Elliot] shall submit a written preliminary notification (no later than 8:00 a.m. the following work day of the event) to the Region Support Manager and/or designee listing any safety events occurring during performance of work. A separate report is required for each event. Events to be included are: ... OSHA (sic) recordable injuries, ... and OSHA/EPA citations/visits. This report should be in sufficient detail to identify the nature of occurrence, the extent of injury (if any) Within seven (7) days, Contractor shall submit an in depth report to the Region Support Manager and/or designee. **The report must include ... the injured employee's on the**

⁴⁹ The Amendment stated: "except as amended by this Second Amendment, all provisions, terms and conditions of the Contract shall remain in full force and effect." (Ex. DD, DHE_01682).

⁵⁰ The Court finds the Elliot Safety Manual referred to in this provision included Respondent's Safety Handbook and Work Process Manual.

job experience, description of event, factors that may have caused or contributed to the event, corrective actions taken and/or planned [Emphasis added].

3.6 Job Briefings

3.6.1 Prior to the commencement of Work in any location and before any changes are made in procedures or activities, Contractor [Elliot] shall perform a Job Briefing in a written report/form **to identify all potential worksite risks**. Each member of the work crew must sign his/her name to this form in order to affirm their presence at the time the information was presented during the Job Briefing. The report shall include, at a minimum, 1) **hazards associated with Work performance**, 2) Work performance procedures involved, 3) special precautions, 4) energy source controls, and 5) personal protective equipment requirements. ... (Emphasis added).

(Tr. 400-01, 452-55; Exs. A, DHE_00240; BB, DHE_01692-94).

Mr. Wells assigned and distributed the repair jobs to the companies contracted with AEP to repair and build its distribution lines. He gave Respondent about a dozen jobs under the Contract where the neutral wire was to be replaced.⁵¹ He said neutral wire needed to be replaced because there was “a lot of theft in the higher Marshall County [of] copper wire.”⁵² (Tr. 260-62, 400). He explained that there were a lot of things involved in replacing neutral line: “[F]irst identifying where it’s missing, identifying how much wire you need and material, identifying a way to go about changing or installing the neutral, and then actually doing the work.” (Tr. 260). He was also responsible for making safety observations at the assigned worksites and ensuring each job ran smoothly. (Tr. 257). When doing their work, Mr. Wells testified that Elliot “would go out, do their hazard assessment, have a job briefing, get material, assign duties, then proceed with the work.”⁵³ (Tr. 261).

⁵¹ AEP’s Job Order (also referred to as a Work Order or job packet) to Respondent for the job to replace stolen neutral wire at Goshorn Woods Road, Cameron, West Virginia is at Exhibits F and G. A general map of the work area is at Exhibit G. (Tr. 377; Exs. F-G).

⁵² Mr. Wells testified that the Cameron job entailed replacing about 1,600 feet of primary neutral cooper wire that had been stolen by thieves who used pruners to cut the overhead neutral wire that runs through the poles about 5 feet below the primary live wire. (Tr. 330-31; Ex. 5, p. 8).

⁵³ Mr. Wells testified that the pre-job briefing is the actual communication of the job plan and the job hazard assessment to the crew that is going to actually do the work. (Tr. 261).

On the morning of November 3, 2014, Mr. Wells spoke with Messrs. Chester Brown and Cary Brown⁵⁴ at a contractor yard in Wheeling.⁵⁵ He told the two brothers to just keep busy, careful and safe, and “do whatever you’ve got to do.” He told them “if they were going to do any neutral” forestry should be called “if there’s any problems with its right of way, trees, brush, if there’s any briars stuff”⁵⁶ He also told them if they encountered problems with these at the job site “[t]hey could just go to another place” because they had several other jobs available to work on. (Tr. 260-64).

Later that afternoon, at about 3:00 p.m., Mr. Wells received a call from Chester Brown that there had been an accident at the worksite. (Tr. 262-65). The Cameron job was one of several jobs Mr. Wells had distributed to Elliot’s foremen a few weeks before. (Tr. 259-62). He immediately drove to the Cameron worksite and arrived at about 4:00 p.m. (Tr. 265). The coal mine parking lot and building adjacent to the worksite were being used as a meeting and staging area; first responders were still at the accident scene when he arrived. (Tr. 231, 267-270). Mr. Wells went to where Respondent’s reel truck was located at Goshorn Woods Road. He saw that the boom⁵⁷ was out of the reel truck’s cradle and rotated to the back of the reel truck. The reel of wire was attached to the boom. He saw “a roll, a reel of wire, aluminum wire, and it was headed in the direction down the hill.” (Tr. 267; Ex. 2).

⁵⁴ Cary Brown was Chester Brown’s brother. Cary Brown was also one of Respondent’s foremen. To avoid confusion, Chester Brown and Cary Brown will be identified by their full name.

⁵⁵ Mr. Pruitt was “right behind” Cary Brown, “sitting on the ground”, during the discussion. (Tr. 263).

⁵⁶ Mr. Wells testified that “right of way” referred to 15 feet on either side of the actual path of the wire. He said objects near power lines were subject to right of way clearances. He testified that a reasonably diligent job hazard assessor was expected to identify right of way hazards, including trees and fences. He testified that right of way hazards were “[a]bsolutely” a safety issue. (Tr. 264-65, 299).

⁵⁷ Mr. Wells said the boom was a hydraulically-operated arm with a winch on it to handle loads. (Tr. 268).

Mr. Wells spoke with Chester Brown and noticed that he was “awful upset.” Chester Brown told him “he should have walked down over the hill, but his back was hurting him.”⁵⁸ (Tr. 272-74). It was Mr. Wells’ understanding that Chester Brown meant he had not walked the entire job site where workers were going to be carrying line before the job began.⁵⁹ (Tr. 274).

MSHA was determining whether it or OSHA had jurisdiction for the accident. (Tr. 276). Mr. Wells spent the rest of the day, until about 10:00 p.m., providing information about the worksite to MSHA. (Tr. 276).

Mr. Wells returned the next day, November 4, 2014, and walked the worksite after the CO finished his walk-through the job site. (Tr. 277). In an attempt to figure out how a wire being pulled on the ground made contact with the energized line overhead, Mr. Wells walked some of the path the wire had been pulled along -- he walked down from the mine parking lot, past the area of the accident, down to the danger-pole (pole #978) and up to the turn-pole (pole #977).⁶⁰ (Tr. 278-80). As he walked the route, he was trying to visualize how the lineman had

⁵⁸ Mr. Wells further testified that Chester Brown “said I didn’t walk down there because my back hurt.” (Tr. 315-16, 319).

⁵⁹ At the trial, Mr. Wells testified that he was “not aware of any areas” visited by Chester Brown at the job site. This March 4, 2016 trial testimony by Mr. Wells was undermined by prior deposition testimony he gave on February 17, 2016 where he stated he “knew that” Chester Brown had testified that he had walked from the truck down to a little past the turn pole [pole # 977]. (Tr. 316-21).

⁶⁰ While walking the worksite along the segment marked “3” at Ex. 2 from the accident site toward the danger-pole (pole #978), he saw a tree growing right underneath the energized line and was surprised no one had called him to get a crew out to clear the tree. He looked at the top of the tree and saw that if the primary overhead energized line was not touching the tree, “it was close enough to touch that tree.” (Tr. 280-81; Ex. 2, at “K”). He said “[t]hat’s a problem” because “there was no way they could have put that neutral up without shaking the primary, getting it in the tree, and that could energize that tree. There could be a shock from that or it could cause a flash.” (Tr. 281). He said anytime a primary line makes a contact there’s a potential for a flash. He further said such contact was “[a]bsolutely” a safety hazard that could cause burns and shock. Mr. Wells testified that he was surprised that the crew was pulling wire around the tree. He said the crew should not have been pulling the wire around the tree as he had “told them [including Chester Brown and Cary Brown] if they ran into any problems, they needed any right of way cleared, stop and give me a holler.” (Tr. 281-82). The Court finds that there is insufficient evidence to conclude that other members of Chester Brown’s crew were also told this by Mr. Wells. When Mr. Wells gave this instruction to Messrs. Chester Brown and Cary Brown, Mr. Pruitt was sitting on the ground behind Mr. Cary Brown; but there is no evidence that Mr. Pruitt actually heard or acknowledged overhearing Mr. Wells’ instruction to the Browns. The Court denied the Secretary’s motion to amend his complaint, specifically Citation 1, item 1(a), to include an allegation that a tree and fence were environmental hazards that should have been identified and assessed by Respondent. The Secretary made his motion to amend after resting his case. (Tr. 334-41).

pulled the wire. (Tr. 289). He saw the uneven terrain, brushy vegetation, and a steel-strand fence⁶¹ that crossed the path of the wire. (Tr. 279, 283, 287; Ex. 5, p. 6, at “A”). He noticed the danger-pole (pole #978) was in a low-lying area of the worksite.⁶² (Tr. 288-89). While standing at the turn-pole (pole #977), Mr. Wells assessed the worksite.⁶³ (Tr. 290).

Q: At that point, what did you -- did you start to gather an idea of what you thought happened?

A: Yes, sir.

Q: And what did you think happened?

A: I noticed once I started looking at everything, I noticed there was a burn mark on the wire that was pulled down. I was trying to figure out how they got the wire that was on the ground up into the primary. Then I turned around and looking back towards the location where the two got injured, and then I noticed the elevation change, and trying to piece a few things up in my mind how they sagged that wire up above that primary, wondering if the wire got caught up on something or what. I was just a lot of questions yet.

Q: Were you able to determine whether the line had gotten caught up on something?

A: No.

(Tr. 290).

Mr. Wells testified that he prefers to pull wire downhill because “it wouldn’t have any chance of it going up. It would stay down on the ground more. You wouldn’t have to worry about losing control of the wire.”⁶⁴ (Tr. 291-92, 300, 311). He said that it “usually” gets harder to pull wire the further you pull the wire away from the reel due to the weight of the wire, the amount of drag or resistance on the reel, and ground or block resistance. (Tr. 300). He described “positive control” as knowing what would be going on with wire being pulled. He said the crew could have had positive control of the wire walking up the hill toward the accident site had there

⁶¹ Mr. Wells said: “It was possibly an electric fence. And that’s just another hazard that I seen.” (Tr. 283). He said there was also a chance of slipping when crossing the fence. (Tr. 286-87; Ex. 5, p. 6, at “A”).

⁶² Mr. Wells recalled that he had been at the danger-pole (pole #978) about a year or two before when the primary line was knocked down by an excavator. He said a pole is identified as a danger-pole and marked for replacement when it is not climbable or poses a threat to work around. (Tr. 288).

⁶³ Mr. Wells saw a block at the base of the turn-pole. (Tr. 289).

⁶⁴ Mr. Wells testified that the crew could have pulled the wire downhill from “J” [pole # 979] to the turn-pole (pole # 977). (Tr. 312).

been “other things in place.”⁶⁵ He also said: “Well, if you did nothing at all, you’d have this same result.”⁶⁶ (Tr. 292).

Mr. Wells stated that uplift was a commonly known occurrence in the electrical industry; uplift is a hazard that should be identified and accounted for in a job plan. (Tr. 296-97). Mr. Wells agreed that terrain is an environmental condition that should also be considered in a hazard assessment. (Tr. 297). He testified that it was possible for the wire to rise up in the air and contact the primary energized line in the area between the turn-pole (pole #977) and where the accident occurred. He described the hillside going up from the danger-pole (pole #978) at the bottom of the ravine as being steep. The Cameron worksite had steep hills and changes in elevation that were obvious. (Tr. 294-95; Ex. 5, p.12). He agreed the worksite’s terrain contributed to the potential for uplift of the wire from the ground that could result in contact between a conductor and the energized line in the work plan designed by Chester Brown. (Tr. 295, 310-11).

Mr. Wells testified that, as site foreman, Chester Brown was responsible for the job hazard assessment.⁶⁷ (Tr. 280-81). Mr. Wells did not know what had been accounted for in Chester Brown’s hazard assessment of the worksite. He said there was no indication that uplift from the ground to the overhead line had been considered. (Tr. 304, 314). He also said that he

⁶⁵ Mr. Wells testified that he would have achieved positive control of the wire by staggering the crew “out, probably a couple of hundred feet apart.” He said he would have wanted to retain positive control over the line because “[a]ny time in our industry when things get away from you, things don’t end up well.” He further stated that one of the possible results of not retaining positive control at the job site including getting “in contact with an energized conductor.” (Tr. 312).

⁶⁶ Mr. Wells testified wire uplift can “absolutely” be prevented by securing the wire down, placing blocks on the poles, or spreading the workers pulling the wire out. Spreading the workers out reduces the resistance on the wire being pulled. (Tr. 301).

⁶⁷ Mr. Wells testified that Respondent’s job briefing should have identified all of the hazards identified in the job hazard assessment. He said the job briefing did not mention the difference in elevation around the danger-pole (pole #978) or the tree or fence in the right of way. He further stated that he was not aware of Chester Brown taking any measures to account for these hazards. (Tr. 324, 327; Ex. 7).

expected the tree growing underneath the energized line should have been identified as a hazard in the job hazard assessment. (Tr. 283, 297-98).

When performing a typical job hazard assessment, Mr. Wells “[l]ook[ed] for any type of hazard whether it be terrain, electrical contact, our facilities, hazards of the environment whether it be animals, terrain, pretty extensive, just look for anything that’ll get you in trouble.” (Tr. 274-75). When Mr. Wells did a job hazard assessment he generally walked pole-to-pole if it was convenient or used binoculars to assess the worksite’s conditions. (Tr. 275). He testified that he hoped and expected that Chester Brown would have identified the potential for uplift to the overhead line at the Cameron worksite when he did his pre-job hazard assessment.⁶⁸ He also said he hoped that he, himself, would have seen and identified the potential for uplift to the overhead line at the Cameron worksite if he had done the pre-job hazard assessment, but explained that there are “things that you miss.” Mr. Wells said he had identified the potential for uplift contact with overhead energized lines in previous job hazard assessments that he had conducted under conditions similar to those found at the Cameron worksite. (Tr. 295-96).

Mr. Wells testified that APC Policy/Procedure No. 25 applied to the work being done on the worksite on November 3, 2014 because the crew was there to replace missing primary

⁶⁸ Mr. Wells testified:

Q Would a reasonably diligent job hazard assessor, whether it’s a site foreman or inspector, or something like that, would a reasonably diligent job hazard assessor be expected to account for uplift either in that person’s assessment or related job design?

A He would be expected to.

Q And uplift, I think you’ve testified that there is a possibility for uplift when you have men walking a line down a hill and then up a subsequent hill?

A Yes.

Q The difference in elevation and the changing terrain at this work site, would you consider the differences in elevation and the change in terrain to be classified as environmental conditions?

A Yes.

Q Would you consider them to be environmental conditions that relate to safety?

A Yes.

(Tr. 297).

neutral.⁶⁹ (Tr. 306; Ex. 12). He testified that the policy provided Respondent with guidelines on how to go about “working on lines where the primary neutral is missing.” (Tr. 305; Ex. 12).

Policy/Procedure No. 25 stated:

1) Statement of policy:

When working on a primary conductor where the primary neutral is missing or when working to replace missing primary neutral, special precautions must be taken to assure that unintended exposure to potential differences as a result of the system’s condition do not occur.

(Tr. 306; Ex. 12).

Policy/Procedure No. 25 further stated:

Replacing the primary neutral: [Emphasis in original]

When making connections on the pole or when handling conductors near a pole, the following precautions shall be taken:

- Assess the jobsite for any hazards noting especially:
- ...
- Terrain and other hazards to pulling the new conductor.⁷⁰

(Tr. 308, Ex. 12).

Mr. Wells testified Respondent’s crew was “handling conductors near a pole” and the policy called for Respondent to:

[t]ake everything into account. Terrain, of course, up and down, flat, could be a creek, any body of water, it all has an effect on how you’re pulling a conductor; any hazards, tripping, slipping, grounding hole, electrical contact, electric fences, briars, anything in the right of way. There is a lot to it. It’s pretty –covers a lot of different things.

⁶⁹ The Court finds that APC Policy/Procedure No. 25 applied to the work being done at the worksite on November 3, 2014 notwithstanding Mr. Adkin’s testimony that there was no provision in the Supplementary Terms of the Contract that said Elliot had to work to Appalachian Power’s rules. (Tr. 401). The Supplementary Terms included a provision at ¶ 3.1.1 that stated AEP’s Contractor Safety Program remained in effect. The Supplementary Terms also did not affect all of the other provisions, terms and conditions of the Contract that continued to remain in full force and effect following the effective date of the Second Amendment. The Court credits Mr. Well’s testimony regarding the application of APC Policy/Procedure No. 25 to the work being done at the worksite on November 3, 2014 because he was responsible for the assignment and distribution of the repair jobs to the companies contracted with AEP to repair and build its distribution lines. Mr. Adkins was Elliot’s corporate manager of safety and training. There is insufficient evidence in the record to show that Mr. Adkins was intimately familiar with all of the terms of the Contract that governed the job at the worksite on November 3, 3014.

⁷⁰ Mr. Wells testified that he did not know if Chester Brown assessed the job site for any hazards noting especially terrain and other hazards to pulling the new conductor wire. (Tr. 314).

He said “any time you’re going up and down a hill, I think it’s a hazard.” He further said that uplift can occur when pulling a line by hand and the potential for uplift could be a hazard related to terrain being up and down. Mr. Wells’ opinion was that the hazard of contact between a conductor being pulled and energized parts is the type of hazard that “terrain and other hazards” referred to in Policy/Procedure 25. (Tr. 309-11; Ex. 12).

Mr. Wells testified that he expected two employees pulling wire along the ground to be aware that if they pull the wire up in the air to stop pulling before they pull the wire up into an overhead energized line. (Tr. 328).

William D. Vaden

Mr. Vaden had worked for Elliot on and off since 1989 as a groundman, lineman, journeyman lineman, crew foremen, and general foreman. (Tr. 554-57). He worked as a groundman for Elliot, briefly in 1989. (Tr. 558). A groundman assists the lineman by preparing the materials and tools. (Tr. 558). Between 1991 and 1995, he had been an apprentice lineman at Elliot. (Tr. 557). In 1995 he became a journeyman lineman for Elliot. (Tr. 556-57). He had also worked at Pike Electric for a year as a groundman in the mountainous terrain of North Carolina and Virginia. (Tr. 558). With Elliot, he had worked in areas all over the country. (Tr. 556-57). Mr. Vaden had been promoted from crew foreman to the position of general foreman just before the accident at the Cameron worksite. As a general foreman, he supervises six distribution crews in the Kingsport district, which includes southwest Virginia and northeast Tennessee. (Tr. 554-57).

Mr. Vaden had experience with both ground-pulling and pole-top stringing of wire. (Tr. 558-59, 565-65). He testified that when ground-pulling, the line spools freely off the reel without any mechanical assistance and the line just follows behind you on the ground. (Tr. 560).

He routinely pulled wire off a reel as both a groundman and a lineman in both hilly and flat terrain. (Tr. 559). He initially said it was not common for pulled wire to get hung up in a block, but it can happen. Shortly thereafter, he said “[i]t doesn’t happen all the time”, but “it’s not uncommon.” (Tr. 560-61). He stated that a job plan should account for the possibility of a line snagging or coming under tension. He agreed that Chester Brown’s job plan created the possibility of the line snagging or coming under tension because it included the use of a turn block and pulling wire downhill and then uphill after being routed through the turn block. (Tr. 603-04). He said linemen want the wire “to stay in the roller and free-spin” off the block, but he said “if you stop it can lay down, the wire can lay down and get in the groove and get hung up.” (Tr. 560-61). He said the purpose of a turning block was to direct the wire in a certain direction; for example to make a 90 degree turn. (Tr. 562-64).

Mr. Vaden testified that a line can snag in a block, which he thinks would likely happen to a lineman several times in his career. (Tr. 560). Mr. Vaden had pulled wire through a turning block like the one used at the Cameron worksite and had experienced a wire getting snagged in the block. (Tr. 560-63, 565). He knew the wire was snagged because he felt the wire stop pulling. (Tr. 565). When stringing line through the air at pole-top, he said there is more resistance on the line because gravity is pulling the line back toward the ground. He also said a lineman can feel the difference between wire being pulled on the ground and the resistance of wire that is in the air above the ground. (Tr. 565-66). Mr. Vaden had never accidentally pulled wire into the air while ground-pulling and he had never seen wire rise up like what happened at the job site on November 3, 2014. (Tr. 596).

Initially, the Cameron job had been assigned to him as the crew foreman. (Tr. 566-67). Mr. Vaden testified that he did a pre-job evaluation to determine existing characteristics and

conditions of the worksite. He said he had to look at the job site and do his job site evaluation so that he could identify all hazards and develop his preliminary work plan. He said he walked the entire length of the job and “looked at a little bit of everything.” (Tr. 567-78, 600; Exs. 2, I).

Mr. Vaden observed that to reach the turn-pole (pole #977) from Goshorn Woods Road, you first went down a hill and then back up another hill where the turn-pole (pole #977) was located. (Tr. 595). The span to the left of the turn-pole (pole #977) was up a steep hill. (Tr. 594). From the turn-pole (pole #977) to the right, the path went downhill to the danger-pole (pole #978), which stood in a ravine. (Tr. 594-95). The path then went up another hill from the danger-pole (pole #978) toward the coal mine’s parking lot. (Tr. 595).

Mr. Vaden drafted a preliminary job plan that consisted of three separate sections of pulls, all downhill pulls.⁷¹ (Tr. 588-89, 602). He said there was no possibility for the wire to rise up when pulling the line downhill from the K-pole (pole #980), to the danger-pole (pole #978) and terminating pulls at the bottom of the elevation, with no uphill pull. (Tr. 602-03). The first pull would be from the K-pole (pole #980), near the mine parking lot, down the hill to the danger-pole (pole #978), the second pull would be from the N-pole (pole #976) down to the danger-pole (pole #978), and the third pull would be from Goshorn Woods Road down to the turn-pole (pole #977). He described the terrain from the turn-pole (pole #977) toward the danger-pole (pole #978), located at the bottom of a holler, as downhill and after crossing the bottom going up another hill. He described the terrain from the turn-pole (pole #977) up to the N-pole (pole #976) to be going up a steep hill. He described the terrain from Goshorn Woods Road to the turn-pole (pole #977) as being hilly. He said from the reel truck you go down a hill, across a ravine, and back up a hill to get to the turn-pole (pole #977). (Tr. 593-95).

⁷¹ Mr. Vaden said he needed to obtain permission to set up his truck and reel along Goshorn Woods Road and also at the mine parking lot before starting work; something not done before he was reassigned and relocated. (Tr. 589-91).

Mr. Vaden said the job was reassigned to Chester Brown. Mr. Vaden said he did not give Chester Brown his preliminary job plan because Mr. Vaden was not going to tell Chester Brown how to run his crew. He testified that he told Chester Brown about the danger-pole (pole #978) and the combination sleeves on the job. He showed Chester Brown the map at Exhibit G and pointed out different things to him. (Tr. 579-91; Exs. G, I). Mr. Vaden said he “can’t remember exactly what all” he told Chester Brown, but was “pretty sure” he told him about “the hills and the hollers.” He said he told Chester Brown what he had found and saw at the job site. (Tr. 591-92).

When doing his pre-job site evaluation, Mr. Vaden did not evaluate the Cameron worksite for the hazard of uplift of the wire from the ground to the energized line overhead at the danger-pole (pole #978), because they would be pulling wire on the ground and he had never seen anything like that happen before. (Tr. 596-600). When ground-pulling off a reel he expected the wire to follow the terrain and stay on the ground. (Tr. 596-97). If the wire was caught or snagged, he said the lineman needed to stop pulling the wire because you’re damaging the wire. (Tr. 597, 600). Mr. Vaden stated that a lineman knows when it is snagged because “[i]t’s like pulling a rope and it’s tied to something, it stops.” (Tr. 597). He believed that a lineman continuing to pull wire on the ground at the accident site would know that the wire would start rising up in the air down at the bottom of the ravine where the danger-pole (pole #978) was if the wire got hung up at the turn pole (pole #977) because “it’s going to start pulling back on him, once it [the wire] comes off the ground and starts coming up. Gravity is going to start wanting to pull it back.” (Tr. 598-99). A lineman should stop when he feels tension on the wire and “get it unhung or find out why it’s coming up.” (Tr. 599).

Mr. Vaden initially testified that he believed it was not necessary to walk the entire path of the power line replacement to see that the poles were located over hills and valleys; the hilly terrain was obvious.⁷² (Tr. 592-93). He testified that a competent foreman did not have to walk all the spans to create the job plan for a site; he could drive a truck and check a lot of the job, or use binoculars to evaluate the terrain. (Tr. 610-11). From the vantage point of the turn-pole (pole #977), Mr. Vaden testified he could see the danger-pole (pole #978) and then up the hill all the way to the mine parking lot, including all the changes in elevation between. (Tr. 593).

Mr. Vaden testified that when he designed a job plan he identified all hazards; however, he did not design a job with the assumption that a lineman would continue pulling on the wire after it is snagged or stuck. (Tr. 600). He said the standard practice for a lineman is to go back, unsnag the wire, and check the wire for damage at the point it was snagged. (Tr. 597, 600, 609).

Mr. Vaden had never seen the wire allegedly damaged and shown at Exhibit U and does not know where it is. He said after a wire is hung up it is Elliot's normal practice to go back and check to see if there's any damage to the wire where it was hung up at. He said "if it's damaged we'll want to replace it." He said you can replace the damaged portion of the wire by splicing. (Tr. 608-09).

Donnie Smith

Mr. Smith worked for three companies in the electrical industry since 1993. He worked as a lineman, foreman, crew chief and general foreman. (Tr. 222). He has been a general

⁷² Mr. Vaden's testimony in this regard was impeached by prior deposition testimony given on February 9, 2016 in the parallel Peterson civil case where he stated:

Q Do you find that a prudent and competent foreman will walk the entire span of what's going to be done in order to formulate a job plan?

A I would.

After being confronted with his prior deposition testimony, Mr. Vaden stated at the trial in this case that he agreed with his prior deposition testimony.

(Tr. 607).

foreman for Elliot's Charleston and Huntington districts in West Virginia since 2013.⁷³ (Tr. 217-18). He had worked in the same geographical area for Pike Electric for 14 years and at MASTEC for six years as a general foreman. (Tr. 219-20). At Pike Electric, he was a general foreman for one year and a lineman for 13 years. (Tr. 219-20). Mr. Smith had experience as a lineman pulling line through hilly terrain for Pike Electric. (Tr. 220-24).

As a general foreman at Elliot, he assigned work projects, conducted job briefings, and conducted surprise spot-checks of his crews for safety compliance. (Tr. 221). At the time of the accident he had eight to nine crew foreman and work crews reporting to him. (Tr. 221). Both Chester Brown and Cary Brown reported to Mr. Smith. (Tr. 221, 277). Mr. Vaden was a crew foreman that also reported to Mr. Smith before the accident. Mr. Vaden has since been promoted to general foreman. (Tr. 221-22).

According to Mr. Smith, Mr. Wells assigned work to Mr. Smith's crews without notifying him in advance. Mr. Smith did not know that Mr. Vaden had been initially assigned to do the work at the job site. (Tr. 225). Mr. Smith testified that Mr. Wells was responsible for directing Mr. Vaden to do the job at the job site. (Tr. 225-26). He did not know until after the accident that Mr. Vaden had a job plan that involved wire being pulled over multiple, shorter segments that were all downhill. (Tr. 236). Prior to the accident, Mr. Smith was not aware that Chester Brown and his crew were working at the Cameron site. Mr. Smith testified that he did not direct Chester Brown when Chester Brown worked at the job site. He had "no idea" who directed Chester Brown when Chester Brown worked at the job site on November 3, 2014. (Tr. 225-26).

Cary Brown called Mr. Smith a couple of hours after the November 3, 2014 accident to tell him someone in Chester Brown's crew had been injured. (Tr. 227). In turn, Mr. Smith

⁷³ The accident occurred in Mr. Smith's Charleston district area of responsibility. (Tr. 220-21).

called his supervisor, Superintendent Charlie Clement, and informed him of the accident.⁷⁴ Mr. Smith also called Jeff Fleming, his area's "safety man." Mr. Smith arrived at the coal mine parking lot after sundown on November 3, 2014. (Tr. 227-31). He went to the coal mine cafeteria, where employees had gathered, to see if everyone was okay. He did not interview anyone about the accident that night. (Tr. 230). The next morning, November 4, he returned to the staging area at the coal mine parking lot and was a part of the group, that included Mr. Adkins, which walked the accident site with the CO. Mr. Smith did part of the walk. He went as far as the danger-pole (pole #978). He was not close enough to hear the CO's comments during the walk-through. (Tr. 230-31; Ex. 2). He did not pull any wire at the job site. He took no measurements, conducted no interviews, and did not return to the site after November 4, 2014. (Tr. 232-35). He did not know whether Chester Brown had walked the entire job site pole-to-pole. (Tr. 238). Mr. Smith believed that even if Chester Brown had walked the entire route he would not have foreseen the possibility of the wire lifting up during the ground-pull to the energized line overhead. (Tr. 238).

Mr. Smith testified that it's harder to pull wire the further you get away from the reel. This is due to "a little bit of tension on it" coming from the weight of the wire. He said increased tension on the wire might also occur when the wire gets "hung up on something" like a roller or scrub or brush.⁷⁵ (Tr. 223-24, 254). He said it can be more difficult to pull wire uphill, than downhill. (Tr. 225). He also testified that when doing a single pull of wire from the reel truck to the accident site, as was done on November 3, 2014, the wire would become heavier and

⁷⁴ Mr. Clement told Mr. Smith he would contact Respondent's safety department at Lexington and meet Mr. Smith at the accident site. (Tr. 228-29).

⁷⁵ Mr. Smith testified that he would have eliminated the turn-block used by the crew located at the turn-pole to keep it from snagging or damaging the wire at a 90 degree turn. (Tr. 236-37).

harder to pull the further the crew moved away from the reel truck because “[i]t’ll put more tension on it, yes.” (Tr. 234).

Mr. Smith did not believe that it would have been difficult pulling the line at the worksite because it was free-spooling off the reel with nothing to hold it back.⁷⁶ (Tr. 234-36). He believed the only way the conductor wire could have contacted the overhead energized line would be if the lineman continued to pull after it became snagged on something and was no longer spooling off the reel. (Tr. 238). When the pull on the wire became “real tight” the crew should have stopped and checked to see if the wire was snagged. (Tr. 238).

Prior to the accident at the Cameron worksite, he would not have believed it was possible for a wire to rise up when ground-pulling to the overhead energized line. (Tr. 254). He said he had not seen wire rise up to the height that occurred in this accident because he “stop[ped] pulling when it started coming up off the ground and went back to unhang it.” (Tr. 254). Mr. Smith testified that the wire being pulled over the ground had to be “caught up on something” for it to raise in the air. (Tr. 238). In his experience, a lineman always stopped when a wire became resistant and hard to pull because this indicated the wire was stuck or snagged somewhere. (Tr. 254).

In hindsight, Mr. Smith believed the accident was preventable based upon his observations at the accident site and his understanding of how the accident occurred. At trial, he

⁷⁶ The Court credits Mr. Peterson’s testimony that he found it difficult to pull the wire while performing the job at the job site on November 3, 2014 over the testimony of Mr. Smith that it would not be difficult in doing so. Although, Mr. Smith had experience pulling wire earlier in his career at other locations, he had an inadequate basis to refute Mr. Peterson’s testimony because Mr. Smith did not: interview any employee about the accident, measure any distances at the job site, walk the job site from the reel truck to the danger-pole (pole #978), or pull any wire at the job site at any time. Mr. Smith also based his opinion solely on his belief that it is easy to pull wire off a free spooling reel. (Tr. 235-36). The Court finds Mr. Smith’s testimony to be speculation. The Court also found Mr. Peterson’s testimony at trial to be credible based on an in-courtroom evaluation of his demeanor during his hour-long testimony. (Tr. 40-97). On the other hand, the Court found Mr. Smith’s testimony to not be credible based upon his courtroom demeanor and his impeachment by contradictions apparent in his courtroom and deposition testimony concerning the effect of Chester Brown not walking over the terrain when he conducted his pre-job hazard assessment. (Tr. 242).

testified that he did not “necessarily” think that Chester Brown could have avoided the accident by walking over the job site’s terrain beforehand.⁷⁷ After being impeached by his prior deposition testimony, Mr. Smith admitted at trial that changes in elevation would have been a red flag had they walked the terrain where he walked.⁷⁸ He acknowledged that the terrain itself raised a red flag.⁷⁹ (Tr. 243-44). He also testified that changes in elevation were the conditions that created the possibility for the contact between the conductive wire and the overhead energized primary line atop the danger-pole (pole #978).⁸⁰ (Tr. 243).

Donald Ray Adkins Jr.

Mr. Adkins was presented as both a fact and expert witness for the Respondent.⁸¹ (Tr. 443-45). Mr. Adkins had worked for Elliot for 17 years. (Tr. 342). He had been the corporate

⁷⁷ Mr. Smith’s trial testimony was contradicted by prior testimony he gave at his January 20, 2016 deposition in this case. There, he gave the following testimony under oath:

Q Did you think the accident was preventable?

A Yes.

Q In what way?

A I guess if you walked the terrain it would have maybe threw a flag or two, I’m not for sure – or I’m not sure.

Q Sorry, say that again?

A If it would have – if they walked the terrain and looked at the job maybe. I don’t know, I wasn’t there when they done it. Their job briefing or planning, so really couldn’t say.

Q You say the word flag, I didn’t catch the second part.

A Yes, flags – or flag.

Q So the flag issue with the terrain?

A Yes.

Q Because the terrain played a role in the accident occurring?

A Yes. Chester Brown is no longer with Davis H. Elliot. Is that the end of it?

(Tr. 239-41).

⁷⁸ At trial thereafter, Mr. Smith testified:

Q But the terrain – what your testimony is, is if they had walked the terrain, they would have seen that it would play a role in an accident, is that a fair characterization?

A Yeah.

(Tr. 242).

⁷⁹ Mr. Smith also testified that he might have designed the job without the 90-degree turn at the turn-pole (pole #977) to avoid damaging the wire as it was pulled through the block at the J-pole (pole #979). (Tr. 236). He believed the turn-block could have been a factor leading to the accident. (Tr. 242).

⁸⁰ Mr. Smith was unsure if he would have recognized the potential for contact with the overhead line if he had walked the Cameron job site for a pre-job hazard assessment. (Tr. 237-43). Mr. Smith was unsure that, prior to the accident, he would have foreseen the possibility of a wire lifting up to an overhead line. (Tr. 243).

⁸¹ Complainant did not object to Mr. Adkins testifying as a fact witness. Both before and after the trial, the Secretary objected to Mr. Adkins testifying as an expert witness. In its Order Denying Without Prejudice Complainant’s Motion to Strike Expert Witness Report and Expert Witness Testimony of Mr. Don Adkins, dated February 25, 2016, the Court found “that Respondent has presented information pertaining to Mr. Adkins’

manager of safety and training since early 2006. As corporate safety manager, his duties include general oversight of Elliot's safety program, ensuring compliance, production of safety materials, oversight of the Elliot's training program, keeping up to date with regulations, supervision of the apprentice programs, and accident investigation. (Tr. 342, 414-15). He was a regional safety manager from 2003-2006. (Tr. 342). As a regional safety manager he had similar duties and had also visited job sites. (Tr. 343). He would occasionally work as a general foreman or lineman, especially after storm damage. (Tr. 436). Before 2003, he had been a journeyman lineman, which meant he worked from poles, set poles, installed wire, installed transformers, repaired, and constructed powerlines. (Tr. 343). He became a Department of Labor certified journeyman in 2001. (Tr. 344). Before working at Elliot, he worked at Pike Electric as an entry-level groundman for just under 4 years. (Tr. 344). He stated that a journeyman lineman is a lineman that is at the top of his field. (Tr. 343). He estimated that he had pulled wire on the ground well over 100 times. (Tr. 358).

To stay current with industry issues and practices he attended conferences, had a network of industry peers, and participated on a best practices committee. (Tr. 440). The best practices committee was a working group sponsored by OSHA and included representatives from large electrical contractors in the transmission and distribution industry. (Tr. 440-41). The committee developed best practices for training and safety in the industry. (Tr. 440). There is nothing in the record to indicate that Mr. Adkins had attended any college or been awarded any college degrees, or authored any publications within the past ten years.

qualifications sufficient to justify the Court not granting the Secretary's Motion at this time before the trial. Such material shows that Mr. Adkins may qualify at trial as an expert in subject matter areas pertinent to this case that are included within his expert report, *e.g.*; electrical lines and equipment, including environmental conditions at the worksite, as well as circumstances surrounding metal wire or cable being manually pulled from a free spooling reel at the work site, and/or Respondent's practices."

Mr. Adkins learned of the accident the afternoon of November 3, 2014, while at his office in Lexington, Kentucky. (Tr. 341, 405). The accident had occurred approximately 3 p.m. that day. (Tr. 411). He immediately took a jet to West Virginia and drove to the Cameron worksite. (Tr. 405). The worksite was adjacent to a coal mine. The coal mine's parking lot, break room and conference room, were used as the post-accident staging and meeting location. (Tr. 407). When he arrived at the worksite, MSHA was there and prohibited his access to the accident site until the question of jurisdiction was resolved. (Tr. 406-07). After meeting with MSHA, he notified OSHA of the accident. (Tr. 407). Mr. Adkins talked to some of Elliot's employees that evening about what had happened. He also spoke to employees in the parking lot the following morning. (Tr. 407).

Mr. Adkins first saw the area of the accident the following day, November 4, after OSHA arrived at the site in early afternoon and took jurisdiction to inspect the site. (Tr. 407-08). He accompanied the CO during the inspection. (Tr. 408). After the CO left, he conducted further employee interviews and walked back to the site. He also took photographs. (Tr. 382-87, 392, 397-98, 408, Exs. K-Y). He interviewed Messrs. Vencill and Wilkes. He also spoke briefly with Mr. Peterson, who had stopped by the site at about 3 p.m., after being released from the hospital.⁸² (Tr. 408-11, 417).

Mr. Adkins documented his discussions or interviews with some employees. He took notes of the OSHA interview of Chester Brown, as well as MSHA's interviews of employees. He did not recall if he took any notes of his conversations or interviews with employees about

⁸² Mr. Adkin's recollection of what Mr. Peterson allegedly told him that day was allowed into evidence only insofar as Mr. Adkins was identified as an expert witness and as an expert he was entitled to consider hearsay when formulating his opinion. Mr. Adkins testified that Mr. Peterson told him on November 4, 2014 that he did not remember much of what occurred on November 3, 2014. Mr. Adkins said Mr. Peterson did tell him that as he and Mr. Pruitt were bowed over, looking at the ground, the wire got really hard to pull pretty quickly. He said Mr. Peterson also told him they did not look behind them to see why the wire got so heavy. The Secretary's objections to this testimony with respect to Federal Rules of Evidence (FRE) 803(6) [Records of a Regularly Conducted Activity] and FRE 803(1) [Present Sense Impression] were sustained. (Tr. 409-16).

the accident. He “did make some notes and little sketches and things.” He did not document his conversation with Mr. Peterson. (Tr. 416, 459).

To determine what happened at the worksite, Mr. Adkins spoke with each person on the crew. (Tr. 417-18). At the time of the accident, Mr. Vencill was between the reel truck and the turn-pole (pole #977) pre-positioning tools for the next phase of the installation. (Tr. 418). Mr. Vencill was staging the tools to minimize the number of times the fence, at the bottom of the gully between the reel truck and turn-pole (pole #977), would be crossed. (Tr. 418-19). The fence was four or five strands of smooth wire and not electrified. (Tr. 419). Chester Brown was at the truck watching the reel. Mr. Adkins said that Mr. Wilkes was about 10 feet from the turn-pole (pole #977). (Tr. 418-19). Mr. Adkins testified that he believed no one was in a position to see the wire being pulled between the turn-pole (pole #977) and the accident site when Messrs. Pruitt and Peterson were electrocuted. (Tr. 419).

Mr. Adkins testified that the line at the job site was a single phase system. There was one “hot” wire on top and one neutral wire below that was missing and being replaced. He said that the wire being pulled away from the reel at the truck was “just wire. It could be used for neutral, primary, secondary, a variety of things. It’s just wire.”⁸³ (Tr. 357). Mr. Adkins testified that the rule set forth in Respondent’s Safety Manual and Work Process Manual called for the MAD for Phase-to-Ground to be 2 feet, 2 inches⁸⁴ and for Phase-to-Phase to be 2 feet, 3 inches.⁸⁵ (Tr. 367-69; Ex. A, DHE_00191). Mr. Adkins measured the distance from the ground to the primary

⁸³ Mr. Adkins said that the wire being pulled along the ground would become neutral wire if and when it was ultimately connected to the system neutral in an overhead line. (Tr. 357).

⁸⁴ Mr. Adkins testified that Exhibit C was a printout of training completed by Mr. Pruitt. Mr. Pruitt’s Orientation Knowledge Review, dated April 9, 2013, showed that Mr. Pruitt then understood that workers on the ground exposed to 7200 voltage were required to satisfy Respondent’s requirement to maintain a MAD of 2 feet, 2 inches. (Tr. 371-73; Ex. C, DHE_00483). A similar document showed that Mr. Peterson had the same understanding on the same date. (Ex. D, DHE_00098).

⁸⁵ Mr. Adkins said Elliot’s Safety Manual and Work Process Manual at Exhibit A was in effect at the time of the accident. (Tr. 446).

line at the danger-pole (pole #978) at 23 feet, 8 inches. (Tr. 368, 460). According to Mr. Adkins, a pole is typically set at a depth that is roughly 10 percent of its length, plus 2 feet. He said the setting depth for a pole may change over the years. (Tr. 460). The pole map listed the danger-pole (pole #978) at “30’7 – SET in 1948”. (Tr. 460; Ex. 4). In Mr. Adkins’ opinion, Rule 3.31 in Respondent’s Safety Manual and Work Process Manual that called for protective measures where wire was being strung within 5 feet of energized lines, did not apply to the work being done by the crew at the time of the accident because the wire being pulled out on the ground was not being “Strung.” He said Rule 3.31 would apply once the crew started to attach the wire to the poles. (Tr. 464-65; Ex. 8, p. 4).

Mr. Adkins testified that he photographed a section of wire that had “approximately three broken strands” that he believed were damaged by electrical contact with the primary overhead line.⁸⁶ (Tr. 382-83, 420-21; Exs. L-M). He further testified that he discovered what he believed “**might have been the cause** of the wire not continuing to just run along the ground”.⁸⁷ [Emphasis added]. He said he discovered “a few feet”⁸⁸ of wire, approximately 5 feet from the turn-pole (pole #977), in the direction of the danger-pole, where the wire had been bent.⁸⁹ He

⁸⁶ Mr. Adkins specifically testified:

Q That damage point, is that where the contact was made, electrical contact?

A Yes, sir.

(Tr. 382-83; Ex. L).

⁸⁷ Later, during cross examination, Mr. Adkins testified that he was “pretty certain” and “feel certain” that the line snagged on the block at the turn-pole because the damage near the turn-pole “is indicative of what I have seen in other hang-ups.” (Tr. 463). The Court finds, based upon its observance of Mr. Adkins’ testimony and his demeanor in the Courtroom, as well as the discussion at n.89, herein, that Mr. Adkins testimony concerning the pulled wire being snagged at the pulley attached to the turn-pole (pole #977) to not be credible.

⁸⁸ Mr. Adkins drew a line with two arrows on Exhibit T denoting the extent of the damaged portion of the wire. (Tr. 391; Ex. T, at “A”). Mr. Adkins further testified that the photograph at Exhibit U was essentially the same as the photograph at Exhibit T to the extent that Exhibit U also showed the portion of the damaged wire. He drew a line with two arrows to show the damaged portion of the wire on Exhibit U. (Tr. 391; Ex. U, at “A”).

⁸⁹ The Court finds that Mr. Adkins’ testimony that the pulled wire was damaged and bent a few feet from the turn pole [between the turn-pole (pole #977) and the danger-pole (pole #978)] by excessive pulling by Messrs. Pruitt and Peterson to not be credible. Mr. Adkins took two photographs that allegedly showed bending in the wire located a few feet from the danger-pole (pole #978) from the turn-pole (pole #977) toward the danger-pole (pole #978). The photograph at Exhibit T appears to the Court to be closer to the allegedly damaged wire than the photograph of the wire at Exhibit U. However, both photographs were taken by Mr. Adkins at a distance such that the alleged bend in

said the wire there was “a little bit serpentine, where it had been bent”, with “some kinking”.⁹⁰ (Tr. 391-92, 420-21; Exs. T-U). Mr. Adkins believed that to sustain this type of damage, the wire had moved out of the turning block’s sheave (the grooved roller part), got caught against the body of the block, and then a lot of force or pull was applied by Messrs. Pruitt and Peterson to result in the bend in the wire he observed near the turn-pole (pole #977). He believed the force required to bend the wire in the vicinity of the turn block was significant. (Tr. 421, 529).

Mr. Adkins testified that he took a photograph of the “stringing block” at the turn-pole (pole #977). He said “[a] stringing block has the groove on the sheave, is polished and shaped and the bushings, they’re allowed to roll away or designed not to damage conductor – not to break the conductor. But they’re also used for various rigging applications.” He also said the stringing block was being used by the crew as a turning block. (Tr. 386). He testified that he

the wire is not visible in the photographs. (Tr. 397). On the contrary, Mr. Adkins took two photographs (Exs. L-M) of the damage to the wire caused by contact with the primary overhead line between the danger-pole (pole #978) and the pole marked “J” at Exhibit 2. These two photographs, which were taken as close-ups of the wire, clearly show damage similar to the wire as shown by two photographs taken by CO Milam. (Ex. 5, pp. 13-14). Obviously, Mr. Adkins was capable of taking photographs close-enough to clearly show damage to the wire, but he did not choose to do so when photographing the alleged bend in the wire near the turn-pole (pole #977). A key element of his expert opinion, as to what might have caused the wire to raise up from the ground instead of running along the ground, was based upon the premise that the wire had snagged at the turn block and the alleged bend in the wire he found near the turn-pole (pole #977) was the result of a snag at the turn-block combined with significant, continual pulling of the wire against that snag by Messrs. Pruitt and Peterson more than 600 feet away. CO Milam did not identify any bend in the wire during his visit to the job site on November 4, 2014, which included walking to around halfway between the danger-pole [pole #978] and the turn-pole [pole #977]. (Tr. 107). The actual wire from the worksite showing any such bend was not presented to the Court during the trial. There was no mention of a snag in either Elliot’s Forward Acton Plan, or the Safety Bulletin prepared by Mr. Adkins. (Tr. 466; Exs. 9-10). Mr. Peterson did not recall encountering a snag while pulling the wire up the hill at the accident site. Mr. Wilkes was only about 10 feet from the turn-pole (pole #977) at the time of the accident. There is no evidence that Mr. Wilkes saw or overheard any indication of a snag at the turn-pole (pole #977). (Tr. 418-19). When observing the wire’s path from the accident site to the turn-pole (pole #977), Mr. Wells observed the burn mark [located at about the danger pole]. (Tr. 139, 290). He was not able to determine whether the wire got caught up on something from the accident site to the turn-pole (pole #977). Mr. Wells made no mention of finding an area where the wire had been snagged during his evaluation of the worksite. (Tr. 289-90). Based upon the evidence before it, the Court finds that there is insufficient evidence before it to find that the wire had snagged in the turn-block or to find that there was a manifestation of damage resulting from a snag located about five feet away from the turn block in the direction of the danger-pole (pole #978).

⁹⁰ Mr. Adkins opined that in order for the wire to be kinked that way the wire had to come out of the grooved roller part of the turn block “and get against the body of block while under pressure while being pulled.” He said “[i]t would take significant pull to kink it up that way.” (Tr. 421, 529). The Court finds that the photographs at Exs. T and U do not show kinking, or snakelike, coiled or winding characteristics.

took the photograph at Exhibit Q that showed the wire did not run in a straight line from turn pole to the reel truck, but looped around weeds and bushes where the crew had walked. (Tr. 387-88, 449-50; Ex. Q).

Mr. Adkins also testified that Exhibit Z, a photograph he said he did not take, showed the damaged mark on the wire caused by contact with the primary overhead line. (Tr. 396; Ex. Z].

Mr. Adkins conducted an experiment at the Cameron worksite in an attempt to determine how the wire made contact with the overhead energized line. (Tr. 419-20). He took a spool of non-conductive string, about shoestring thickness, called a P-line, ran it from the accident site to the turn pole (pole #977) and pulled it through the turning block to see if pulling the string off the spool would get it to raise. The string did not rise. He then cut the string at the spool [also referred to as a reel], tied the string to the turn block on the turn-pole (pole #977), and had “them” pull tension on the string to see where it might raise up. The string rose up above the danger-pole (pole #978).⁹¹ (Tr. 420). He did not pull the P-line back from the pulley on the turn-pole (pole #977) to the reel truck. (Tr. 462).

Mr. Adkins testified that both Messrs. Vaden and Chester Brown had done pre-job assessments of the Cameron worksite.⁹² (Tr. 437). He testified that Chester Brown told him he had not walked the entire route of the neutral line replacement.⁹³ (Tr. 417, 437, 463). About a week before the accident, Chester Brown told him that he had walked up to the turn-pole (pole

⁹¹ Mr. Adkins did not say from where the tension was applied or identify who applied the tension.

⁹² Mr. Adkins testified that Messrs. Vaden and Chester Brown used AEP's job order to Respondent. (Tr. 377-78). He said Chester Brown told him he wrote a few words on AEP's diagram at Exhibit G. (Tr. 449; Ex. G). He also identified Exhibit H as a diagram or pole map representing the job site work area produced by AEP. (Tr. 378; Ex. H). Mr. Adkins also testified that he prepared a diagram or general rough sketch to explain the accident to Elliot's management. (Tr. 378; Ex. I). He testified that he believed the accident occurred at “A”, Exhibit I, northwest of, and close to, pole #979. (Tr. 379-80; Ex. I).

⁹³ Mr. Adkins testified that during a job hazard assessment it is important to assess the path the wire will take as it is pulled. He also said a job plan should account for the potential that the line will snag or come under tension for some reason. (Tr. 463-64).

#977)⁹⁴ from the area the reel truck would later be parked by Goshorn Woods Road on November 3, 2014, and from “the other perspective.” (Tr. 437, 463). Mr. Adkins said Chester Brown then formulated his job plan and job briefing. (Tr. 437). Mr. Adkins stated that paragraph 3.6.1 of Elliot’s contract with AEP required Elliot to include “[a]ll the hazards they could recognize” in Elliot’s job briefing. (Tr. 454-55; Ex. BB, DHE_01694). Mr. Adkins believed that Chester Brown recognized all the hazards that he could be expected to recognize during his pre-job assessment.⁹⁵ (Tr. 437). He testified that Chester Brown could not be expected to “have known the combination of the terrain, the hang-up, and the guys continuing to pull, you know, what happened, you know 20/20, now we know, hindsight, now we know.” (Tr. 437). He opined that Chester Brown’s “assessment was accurate from the information that he had.” He testified before this accident, neither he nor Elliot had recognized a hazard associated with the combination of the terrain and linemen continuing to pull wire after a snag. He said Elliot had no safety rules that addressed this possibility because wire rising up and contacting energized overhead lines while being pulled on the ground had never happened at Elliot before and he had also never heard it happening outside of Elliot under these circumstances.⁹⁶ (Tr. 438-42). Quickly after the accident, Elliot issued a Forward Action Plan that stated, in part:

FORWARD ACTION PLAN

Davis H. Elliot Company – Fatal Injury
November 3, 2014
Marshall County, WV (Wheeling Area)

⁹⁴ Mr. Adkins testified that from there Chester Brown looked over the hollow where the danger pole was located. (Tr. 437).

⁹⁵ The Court finds Mr. Adkins testimony to be evasive on this point. Earlier, he testified at his deposition in a parallel civil suit against Elliot that Chester Brown missed the hazard of the wire possibly raising up, and because he did not recognize that hazard “there was no planning about that hazard, there was no assessment of that hazard, there was no mitigation of that hazard...” Because he [Chester Brown] “didn’t ... recognize the hazard, therefore, they didn’t take any measure to prevent ... [the] wire from raising up.” (Tr. 467-68).

⁹⁶ Mr. Adkins also testified that, aside from minimum distances rules, he had never seen anybody in his industry having specific rules that would have prevented this sort of thing. (Tr. 441-42).

As a result of the recent event and to be sure the future safety and health of our workforce we are taking the following steps: ...

- A Safety Bulletin will be created immediately to enhance the procedure for a job site inspection to ensure hazard awareness, recognition and mitigation prior to creating the job plan and briefing.
- A Safety Bulletin will be distributed to all affected employees to communicate our adopted procedures for ground level wire stringing. This procedure mandates the usage of hold down blocks for ground level stringing along uneven terrain. ... (Tr. 465-66; Ex. 9).⁹⁷

⁹⁷ Exhibits 9 (forward action plan) and 10 (safety bulletin) were admitted into evidence for the limited purposes of relating to the definition of stringing, the applicability of the standards in question, and the credibility of Respondent's position on those points. (Tr. 14-17). These two documents were created by Respondent after the accident "to prevent similar situations from occurring in the future." (Tr. 13). Respondent objected to the admissibility of the forward action plan and safety bulletin to the extent that it would be offered to prove negligence or culpability. See FRE 407 (Subsequent Remedial Measures). (Tr. 13). FRE 407 "enacted the common law rule excluding subsequent remedial measures to prove negligence...." *Charles A. Albrecht v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329, 331 (4th Cir. 1987) (citation omitted). Rule 407 is a policy based rule "encouraging potential defendants to remedy hazardous conditions without fear that their actions will be used as evidence against them." *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir.1994). In determining whether to admit remedial evidence, the court should ask, whether this policy will be "served or subverted." *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 856 (4th Cir. 1980). The fourth circuit has held that the exceptions to Rule 407 are "illustrative, not exhaustive." *Id.* at 857 ("the listed exceptions deals with situations where the defendant might gain a direct benefit over and above the fact of exclusion and it seems to us that new exceptions to the rule should follow . . . if the policy behind the rule is to be protected."). Mr. Adkins testified when referring to the safety bulletin, "[e]ven without the procedure, I think the circumstances lining up to create this again would be not very probable to happen again. But since it happened, we know now that it can happen, we put the procedure into place." The Court notes that Mr. Adkins' testimony did not say whether or not the new procedure said anything about dealing with a pulled ground wire snag. During the course of the trial, Respondent repeatedly elicited testimony that a snag in the wire provided a key part of the explanation for the uplift that was the cause of the accident. Here, the remedial evidence does not address a snag. By testifying that a snag at the turn-block attached to the turn-pole (pole #977) was a key part of his explanation for the cause of the accident, Mr. Adkins opened the door for the court to consider the forward action plan and safety bulletin for the purpose of analyzing the causation of the accident. *Wetherill v. Univ. of Chicago*, 565 F. Supp. 1553, 1558 (N.D. Ill. 1983) ("Because causation is analytically distinct from fault '(negligence or culpable conduct)', it is plainly 'another purpose' for which evidence of subsequent remedial measures can be offered under Rule 407."). Further, Rule 407 "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as . . . impeachment." The impeachment exception allows a party to refute evidence that, if left uncontroverted, would mislead the other party. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1212-13 (10th Cir. 2006). One area of contention is whether pulling wire on the ground is part of the installation process. The safety bulletin refers to the phrases "installation of wire" and "pulling wire on the ground" in the same context. The Court admits the safety bulletin for the purpose of impeaching Mr. Adkins' testimony that "it was all distribution at that site." (Tr. 401). The Court finds that pulling wire on the ground is part of the installation process, and not "distribution" of the wire for it "to be installed" at a later time in the job. Additionally, one concern in relying on a judge's discretion in admitting remedial evidence for a limited purpose is the possible prejudicial effects of such evidence and the potential for jury confusion. *Powers v. J. B. Michael & Co.*, 329 F.2d 674, 677 (6th Cir. 1964); *Grenada Steel Indus., Inc. v. Ala. Oxygen Co.*, 695 F.2d 883, 888 (5th Cir. 1983) ("the introduction of evidence about subsequent changes in the product or its design threatens to confuse the jury."). This concern over prejudicial effects is not an issue here, as this is a bench trial. One of the basis the Court admitted exhibits 9 and 10 into evidence related to the definition of stringing and these two exhibits help demonstrate the difference between pulling wire on the ground and tension stringing.

Mr. Adkins testified that prior to the issuance of Elliot's safety bulletin, he had not seen the term "ground level wire stringing" used in any industry document. (Tr. 472). Mr. Adkins stated during direct examination that several days immediately after the accident Elliot adopted a "procedure where we [Elliot] require if you're pulling in terrain such as this and you have a pole that's located lower geographically, that we will secure that wire with a block to keep it from raising up." (Tr. 442).

Mr. Adkins testified that he had experienced wire being pulled on the ground getting hung up in a block while ground-pulling.⁹⁸ (Tr. 422). He had been able to feel the difference in resistance because the wire stopped moving along behind him. (Tr. 422). When ground-pulling, the wire generally came off the reel behind him and rested on the ground. (Tr. 423). He testified that as you're pulling wire on the ground there's a small amount of friction created by the weight of the wire that's resting on the ground. He said "if you stop pulling there's no more friction behind you. You drop the wire and it stays in place, or you stand there and there's no pull-back." (Tr. 528-29). He testified that if a wire became snagged, the forward progress of the wire from the reel stopped. "If you continue to pull . . . you start to feel the resistance pull-back on that wire." (Tr. 423, 529). He testified that when he had continued to pull wire after it had hung up, the wire rose up not more than a foot or so off the ground, whereupon he stopped pulling the wire and it stopped rising any further into the air.⁹⁹ (Tr. 424). He had experienced a snag in the

⁹⁸ When testifying as to his experience in pulling wire on the ground, Mr. Adkins did not describe or identify his qualifications at the time, surrounding terrain features, distances involved, number of crew pulling the wire, type or height of block used, how much time passed before he stopped pulling wire after it had risen into the air, or type of wire that he pulled. The Court finds Mr. Adkins' testimony of his personal experience pulling wire on the ground, or in the air, to be of little value in any application to the circumstances of the case at hand. For example, his experience that wire being pulled need only be shaken to free up a hang up is far afield and has little application to the situation here where the alleged source of any hang up at the turn block was located at the turn-pole (pole #977) and the accident site was between pole the J-pole (pole #979) and the K-pole (pole #980), a distance of at least 600 feet going up and down hills, across vegetation, and over a fence. (Tr. 424-25, 461-62).

⁹⁹ Mr. Adkins testified that he had never heard of, or experienced, a line rising up in the air, where wire was being pulled through bushes, and perhaps over a fence, going down a hill and up a hill, without the wire being hung-up.

wire when pulling it up a hill and had been able to tell “within a couple of steps” that the wire was hung up. (Tr. 426). Further, he knew that pulling the wire while it is stuck just made it tighter and could damage the wire. He said Respondent would be required to redo a job where wire was damaged because “[y]ou can’t put damaged wire in the air.” (Tr. 425).

Mr. Adkins believed the November 3, 2014 accident occurred when three conditions occurred simultaneously: “a terrain difference”, a hung up or snagged wire, and employees who continued to pull the wire after it snagged. He did not “think anybody could foresee all three factors coming together.”¹⁰⁰ (Tr. 428). He believed that Messrs. Pruitt and Peterson should have known that the wire being pulled was hung up and should have stopped pulling. He would expect this of a journeyman lineman.¹⁰¹ (Tr. 426).

Mr. Adkins could not imagine somebody not turning around to “look to see why” “the wire doesn’t want to advance or gets hung” He described not turning around, while continuing to pull the wire, to be “very weird behavior.” (Tr. 425). He testified that it was not acceptable conduct for Messrs. Pruitt and Peterson to continue pulling the wire with “a lot of force”¹⁰² after it was hung up or “something jammed up.”¹⁰³ He opined that he did not “think

He also opined the wire fence at the job site between the danger-pole (pole #978) and the J-pole (pole #979) (marked “J” at Exhibit 2) would not have hung-up the wire because it was a “very, very small strand” fence and “very smooth.” He also admitted that the crew had previously pulled wire across the same fence where it was also running between the reel truck and the turn-pole (pole #977). (Tr. 461-62, 473). He also speculated that if the wire had got hung up on the fence, the wire would only have tightened between Messrs. Peterson and Pruitt and the fence. (Tr. 442-43).

¹⁰⁰ Mr. Adkins testified that he doubted the accident could have been foreseen. He speculated that he would have said “there’s no way” the accident would have occurred when pulling from a free-spooling reel if asked before the accident occurred. (Tr. 427-28, 444-45).

¹⁰¹ The record shows and the Court finds that Mr. Pruitt was not a journeyman lineman on the date of the accident. He was an apprenticed lineman as of April, 2013, only about 18 months before the accident.

¹⁰² Mr. Adkins testified that “[i]t was obviously a lot of force to bend that wire up in the vicinity of the block. It takes a lot of force to bend those, and it would have been constant force, you know, pulling back against it.” (Tr. 529).

¹⁰³ The Court credits Mr. Peterson’s courtroom testimony that he did not recall the wire being hung up on anything and finds Mr. Adkins’ conclusion to the contrary to be speculative, at best. The Court observed the demeanor of both Messrs. Peterson and Adkins during the trial and found Mr. Peterson to be honest and truthful. On the other hand, the Court found Mr. Adkins’ testimony to be conclusory, self-serving, inaccurate, and tainted by the fact that as Eliot’s safety manager he was responsible for the safety and training of both Messrs. Pruitt and Peterson.

anybody could anticipate somebody continuing to pull after it [the wire] was hung up and developed that much – that much force.” (Tr. 531). In his opinion, once the wire being pulled started to come off the ground, Mr. Peterson would have felt resistance and significant pull-back of the weight of the wire pulling back against where they were trying to pull it. (Tr. 445, 528-32).

Mr. Adkins testified that it was his opinion that Messrs. Peterson and Pruitt pulled the wire up in the air until it contacted the primary overhead wire. He opined that they unintentionally violated Elliot’s MAD rule. He further opined that, excluding intent, they were guilty of violating Elliot’s MAD rule by their actions. He said both Messrs. Peterson and Pruitt would have been given a reprimand for violating Elliot’s MAD rule had they both remained employees at Elliot.¹⁰⁴ He said Elliot never had to make a decision on any reprimand because Mr. Peterson never returned to work at Elliot after the accident.¹⁰⁵ (Tr. 428-30, 489-90).

Mr. Adkins testified that Elliot communicated its work rules to its employees primarily through its safety manual. He said all employees had their own safety manual and were expected to know what was in the safety manual and work in accordance with its rules. He said Elliot also conducted safety training through safety meetings, safety bulletins,¹⁰⁶ tool box talks,¹⁰⁷ classroom training, registered apprenticeship training, and on the job training. Mr. Adkins testified that Elliot conducts job site audits (also called spot checks) by safety and management personnel to check on crews and insure that they are following the rules. Elliot also has foremen in charge of the job site to insure its work rules are followed. He said Elliot employees caught

¹⁰⁴ Mr. Adkins testified that although Elliot had not considered it, damaging of the pulled wire by continuing to pull the wire after it was a jammed up would also be considered a violation of normal work process. (Tr. 490-92).

¹⁰⁵ Mr. Adkins testified that Elliot’s penalty for violating its MAD rule was termination without the possibility of rehire. (Tr. 430-31).

¹⁰⁶ Mr. Adkins said “safety bulletins” were a “communication method for a lot of safety messages, training messages, and training subjects.” (Tr. 431).

¹⁰⁷ Mr. Adkins said tool box talks are “safety messages or training subjects that we send out to the foremen that they convey to their crew.” (Tr. 446).

violating safety rules are disciplined through written reprimands, coaching, retraining or termination without rehire. (Tr. 431-34). Mr. Adkins was not aware of Elliot disciplining any employee for actions relating to pulling line over uneven terrain or when the line came under tension or resistance. (Tr. 457-58).

Mr. Adkins testified that ground-pulling the neutral conductor wire was the method the crew had used to prevent contact with the overhead energized line. (Tr. 469). He believed that, in some circumstances, the distance from the ground to the line could provide greater protection than a barrier to the energized line. (Tr. 469-71). He believed having the wire on the ground was better than working close to an energized line using a physical barrier. (Tr. 469, 471).

Mr. Adkins testified that, other than providing AEP with the “simple diagram” that he prepared at Exhibit 2, Respondent did not provide AEP with any written report of the accident because of concerns of “potential anticipation of litigation” by Elliot’s management. Instead, he said AEP agreed to let Elliot explain [the accident] “verbally by conference call to them using that diagram [Ex. 2].” (Tr. 453-54; Ex. 2).

Michael William Gibson

Mr. Gibson was called as an expert by the Respondent.¹⁰⁸ Mr. Gibson was the President of SafeTeach Global, where for the past 7 years he had been a training consultant in the electrical

¹⁰⁸ Both before and after the trial, the Secretary objected to Mr. Gibson testifying as an expert. In its Order Denying Without Prejudice Complainant’s Motion to Strike Expert Witness Report and Expert Witness Testimony of Mr. Mike Gibson, dated February 25, 2016 (Order re: Mr. Gibson), the Court found “that Respondent has presented information pertaining to Mr. Gibson’s qualifications sufficient to justify the Court not granting the Secretary’s Motion at this time before the trial. Such material shows that Mr. Gibson may qualify at trial as an expert in subject matter areas pertinent to this case that are included within his expert report, e.g.; electrical lines and equipment, as well as circumstances surrounding metal wire or cable being manually pulled from a free spooling reel at the work site, and/or Respondent’s practices.” In its Order re: Mr. Gibson, the Court further stated:

The Secretary’s objections as to Mr. Gibson’s helpfulness to the Court, do not raise real *Daubert* or *Kumho Tire* reliability issues. In this instance, they go to weight, not admissibility. See *Avcon, Inc., Vasilios Saites, and Nicholas Saites*, 2000 WL 1466090, at *29 (No. 98-0775, 2011) (Consol.) (ALJ) (expert testimony entitled to little weight where no specialized knowledge relevant to the case present); see also *Taylor v. TECO Barge Line, Inc. et al.*, [642 F. Supp. 2d 689, 693 (W.D. Ky, 2009)] [citation omitted]

utility industry. (Tr. 533-34). He trained experienced journeyman lineman on hazard recognition and safety practices. (Tr. 550). For 30 years, he managed Louisville Gas and Electric's and Kentucky Utilities' safety and training programs, and also worked for E.ON. (Tr. 534-35). The first 12 years he worked in high voltage electrical switching and the next 18 years he was an electrical safety professional. (Tr. 533-34). There is nothing in the record to indicate that Mr. Gibson authored any publications within the past ten years.

While Mr. Gibson had not personally pulled line, he had supervised or observed crews pulling wire.¹⁰⁹ (Tr. 537, 544). He had seen a wire being pulled get hung up. When that happened, he testified that “[i]t just stopped. Stop, go check it out, walk it back, find out what it is.” (Tr. 537-38). In his experience, whoever was pulling the wire could detect when the wire was hung up, and even anticipate it happening. He said he would not expect linemen to continue to pull wire into the air off of a free-spooling reel that had hung up where they were pulling the wire from hilltop to hilltop because they would come to a stop. (Tr. 538-39).

Mr. Gibson testified that he had seen photographs of crimped wire that had been pulled through the block. He said the photograph at Exhibit T showed wire that was damaged with a “couple of bends” and crimping. He also said the photograph at Exhibit U showed crimping damage to the wire.¹¹⁰ (Tr. 539-40; Exs. T-U). He testified that “[i]t would take an enormous amount of force to put that much of a crimp or a bend in a conductor, that size wire.” (Tr. 540-41). Mr. Gibson did not know the amount of force needed to create a crimp in the wire. (Tr. 546). He also reviewed some photographs of the worksite that showed the terrain and poles at

(questions regarding expert's precise experience on various bodies of water are valid questions for cross-examination, but not determinative of expert status).

¹⁰⁹ Mr. Gibson had also never pulled a line from a free-spooling reel, including across uneven terrain, or when wire started facing resistance. (Tr. 545).

¹¹⁰ The Court is unable to see sufficient evidence of wire “crimping” in the two photographs at Exhibits T-U. The Court is unable to discern the presence of wire compression or pinching, waviness or bending, other than seeing a small bend appearing atop the portion of the wire bounded by Mr. Adkins' markings on the two photographs.

the worksite. (Tr. 545, 549). He was familiar with the type of wire, number two, used at the worksite. (Tr. 539, 545, 549-50). He never interviewed anyone involved in the accident.¹¹¹ He did not visit the worksite, inspect the path where the line was pulled or the general terrain of the worksite, physically observe the power poles, or examine or test the wire that had been damaged. He never calculated the weight of the line from the distance of the reel truck to the accident site. He never performed any resistance testing on the pulled line. He never performed any physics testing or analysis of any of the physical objects involved in the case. Mr. Gibson had not seen the actual allegedly “crimped” wire shown in the photograph at Exhibit U and did not know where it was or whether it was preserved. He also did not know where the wire that was damaged as a result of contact with the primary overhead line was. He never physically viewed portions of the actual wire that were either “crimped” or damaged. He never asked to see the wire. (Tr. 545-47, 551-52).

Mr. Gibson was familiar with the hazard of uplift and acknowledged that companies take measures to minimize uplift to an overhead line. (Tr. 550-51). While working at Louisville Gas and Electric and Kentucky Utilities, he had not recognized that there was a hazard of wire being pulled up into the air and contacting an overhead power line when wire was being pulled out on the ground.¹¹² He said he had also never recognized the need to take preventive steps, like installing hold down blocks or using observers, to make sure that hazard did not happen. (Tr. 536).

When he first learned of the accident at the Cameron worksite, he could not believe it had happened. (Tr. 544). He said when the wire comes off the free-spooling reel it lays on the

¹¹¹ Mr. Gibson was not present in the Courtroom when Mr. Peterson testified. (Tr. 547-48).

¹¹² Mr. Gibson also testified that no one else at Louisville Gas and Electric and Kentucky Utilities recognized that there was a hazard of wire being pulled up into the air and contacting an overhead power line when wire was being pulled out on the ground. The Court affords little, if any, weight to this assertion because there was no evidence offered to identify an adequate foundational basis for such a broad sweeping assertion.

ground behind the lineman as it is pulled. (Tr. 536, 543-44). He would not expect a lineman to pull a snagged wire with enough force to contact the overhead energized line. He said “it would be very unacceptable” and unpredictable for a lineman to continue to pull and try to force a wire through a block after it got hung up on the block. He also testified that he could not foresee linemen continually pulling wire up into the air high enough to contact an overhead primary line located at a low point.¹¹³ (Tr. 538, 541-42, 548). He opined that he did not see how anyone could manually pull the wire up 23 feet, or between 25-30 feet, into the air. (Tr. 548).

Elliot’s Safety Program

Elliot’s safety program included a Safety Handbook and Work Process Manual, new-hire training, toolbox talks, safety audits, classroom training, on-the-job training, and a disciplinary policy. (Tr. 431, 458-59; Ex. A).

Elliot’s Safety Handbook and Work Process Manual

Elliot’s Safety Handbook and Work Process Manual covered a broad range of safety rules on many topics, including electrical safety, use of insulating gloves, climbing poles, working from an aerial lift, and MADs. (Tr. 367; Ex. A). Every new employee received a Safety Handbook and Work Process Manual and was required to take a test. (Tr. 263, 371-73; Ex. A). The written safety test included questions on many subjects including grounding lines, testing de-energized lines, MADs, disciplinary actions, and job briefing topics. (Ex. C). After being given a copy of the Safety Handbook and Work Process Manual about the time when hired, Elliot employees, including Messrs. Pruitt and Peterson, signed an acknowledgement that stated “I understand and acknowledge that I am expected to work in compliance with the Safety Handbook and Work Process Manual.” Elliot employees, including Messrs. Pruitt and Peterson,

¹¹³ Mr. Gibson also testified he was not aware of any of the companies where he provided training being aware of, or taking steps to avoid, such a hazard. (Tr. 543-44).

also signed another acknowledgement that stated “I understand that I am expected to follow the policies and procedures as explained in the Handbook.” (Exs. C, DHE_00062-63, D, DHE_00083).

The Safety Handbook and Work Process Manual included a section entitled “NO EXCUSES SAFETY ENFORCEMENT POLICY” that stated:

It is the responsibility of each Foreman to assure that each employee working under his supervision performs his tasks in strict conformance with all applicable safety rules at all times. It is the Foreman’s responsibility to assure that each employee has been adequately trained and instructed in the Company’s safety rules and procedures. It is the responsibility of each Foreman to adequately supervise each of the crew members under his control to assure 100% compliance with safety rules. ...

Each Foreman should lead by example. They shall provide detailed, ongoing safety training and instruction. They shall insure constant reminders to crew members regarding safety requirements. They shall adequately supervise and discipline where appropriate....

It is the Superintendent’s responsibility to assure that each Forman [sic] under his supervision meets his above-described responsibilities regarding safety. The Superintendent must adequately supervise each of his Foremen and work crews to assure compliance with the above.

(Ex. A, DHE_00144-45).

Training and communication of Elliot work rules.

Elliot generally trained its employees on hazard recognition and safe behavior at their initial orientation, in toolbox talks, and on-the-job. (Tr. 370, 374, 448-49, 474-77; Exs. B-E).

The initial safety training was day-long and employees were required to take a written test; if they did not pass the test, they were not hired. (Tr. 363, 372-73). A toolbox talk from October 9, 2014, showed Chester Brown as the facilitator and attendees that included Messrs. Peterson, Pruitt, Wilkes, and Vencill. (Ex. D, DHE_00092). The talk covered safe practices for work on the ground,¹¹⁴ work from an aerial lift, work on a steel pole, and grounding and barricading

¹¹⁴ The Tool Box Talk included a sentence for “Workers on the ground” that stated: “Workers shall avoid being in the immediate area beneath poles and structures being worked to avoid struck by hazards and possible step potential.” (Ex. D, DHE_00092).

equipment at the worksite. (Ex. D, DHE_00092). A toolbox talk on general safety behavior dated October 29, 2014, was also led by Chester Brown for Messrs. Peterson, Pruitt, Wilkes, and Vencill. (Ex. E, DHE_00487). Mr. Adkins stated that training for ground-pulling, working on uneven terrain, and not pulling against resistance was done on-the-job. (Tr. 458-59). He testified that normally a lineman with a snagged line will stop, turn around, and evaluate the problem. (Tr. 424).

Mr. Peterson testified that Elliot never communicated any work rules about pulling lines, including pulling lines over uneven terrain or under resistance, to him. (Tr. 50-51).

Worksite audits to discover safety violations.

Routine safety audits were conducted at various worksites on a random basis to discover safety violations. (Tr. 432). Elliot had 18 field safety directors in various regions that conducted worksite inspections. (Tr. 433). General foremen also visited the worksites and enforced the safety rules. (Tr. 433). On a daily basis, the crew foreman was responsible for supervising the crew and discovering safety violations. (Tr. 432). Additionally, Elliot's clients, such as AEP, visited job sites and made their own safety observations, which were reported to Elliot. (Tr. 434)

Approximately 195 of Elliot's safety audits for 2013 and 2014 (prior to November 3, 2014) were admitted in evidence. Mr. Adkins testified that this sampling of safety audits related to work performed in West Virginia. (Tr. 494, 506; Ex. DD). Each job safety audit was a 2-page document that covered several topics, including the foreman's job briefing, personal protective equipment, rubber goods, energized lines, and the hazards at the worksite. (Ex. DD). Mr. Adkins testified the Job Safety Audit at Ex. DD, DHE_00909-10, was conducted on a job to replace stolen neutral wire for AEP at Switzer, West Virginia on September 23, 2013. The Job Safety Audit identified "uneven terrain" as a "Recognized Hazard" and indicated "poles on

mountain/watch your step” as a method used to eliminate/control the hazard. (Tr. 495-96; Ex. DD, DHE_00909-10).

Discipline and enforcement of safety rules.

Employees were notified at hire that a violation of safety rules results in discipline ranging from reprimand to termination. (Tr. 434; Ex. A, 2-4). Elliot categorized a safety violation as either minor or serious. The discipline for a minor violation ranged from a written reprimand with retraining for a first offense, to reduction in pay or termination for multiple minor offenses in a year. The discipline for a serious violation included written reprimands, suspension, and termination. (Ex. A, 2-4). Mr. Adkins testified that an employee who violated the MAD would be fired, with no possibility of rehire, on the first offense. (Tr. 365-66, 519; Ex. EE, DHE_01420). He said written reprimands were placed in an employee’s personnel file for a variety of infractions. (Tr. 508-19; Ex. EE). Elliot had reprimanded employees for not following proper procedure during overhead machine tension stringing. (Tr. 457). Foremen had also been disciplined for inadequate job briefings. (Ex. EE, DHE_01316, DHE_01437).

Elliot provided documentation of approximately 337 disciplinary actions from 2012 through 2014 (prior to November 3, 2014).¹¹⁵ (Tr. 508-520; Ex. EE). The following are examples of actions related to inadequate job briefings, conductor control, inadequate line cover and lack of adequate personal protective equipment within the MAD:

- on May 7, 2012, employee received a 40-hour suspension for inadequate cover of line in the MAD (Ex. EE, DHE_01301);
- on May 7, 2012, employee received a 40-hour suspension for not conducting a job briefing (Tr. 514; Ex. EE, DHE_01316);
- on June 6, 2012, employee received a 2-day suspension without pay for not installing protective hose on the line (Tr. 515; Ex. EE, DHE_01321);

¹¹⁵ The Court admitted into evidence those disciplinary actions where the event is dated as having occurred on or before November 3, 2014. (Tr. 525-26).

- on October 24, 2012, the crew received a 40-hour suspension for insufficient cover on the line (Tr. 516; Ex. EE, DHE_01345);
- on March 28, 2013, foreman received a written reprimand for failing to maintain control of a conductor (Ex. EE, DHE_01348);
- on May 8, 2013, employee was terminated for not wearing rubber glove sleeves within MAD (Tr. 508-09; Ex. EE, DHE_01290);
- on June 5, 2013, employee received a 4-day suspension for improper cover of line (Tr. 517; Ex. EE, DHE_01364);
- on June 5, 2013, employee received a 21-day suspension for inadequate job briefing (Ex. EE, DHE_01437);
- on November 12, 2013, employee received a 4-day suspension for an undocumented job briefing (Tr. 514; Ex. EE, DHE_01312);
- on December 20, 2013, employee received a written reprimand and retraining for not maintaining positive control of a conductor (Tr. 518; Ex. EE, DHE_1416); and
- on March 21, 2014, employee received a written reprimand and one year probation for not conducting a job briefing refresher when additional employees were added to the crew (Tr. 510; Ex. EE, DHE_01306).

Additionally, Mr. Adkins stated that an employee who damaged wire or tools was subject to written reprimand and discipline. (Tr. 490-92). Mr. Adkins was not aware of anyone disciplined for ground-pulling or pulling wire against resistance.¹¹⁶ (Tr. 458).

THE CITATIONS

Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited

¹¹⁶ Mr. Peterson testified that Elliot never disciplined him for any actions concerning his pulling lines, including actions that he took at the worksite on November 3, 2014. (Tr. 51).

condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982). *See also Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1097-98 (No. 98-1748, 2000) (same); Tr. 35.

The Electric Power Generation, Transmission, and Distribution Standard

The alleged violations at issue are based on OSHA's Electric Power Generation, Transmission, and Distribution standard found at 29 C.F.R. § 1921.269. On April 11, 2014, OSHA published an updated version of the Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment standard (2014 Power Generation standard), at 29 C.F.R. § 1910.269, with an effective date of July 10, 2014. In lieu of compliance with the 2014 Power Generation standard, employers had the option to continue compliance with the previous standard until February 18, 2015.¹¹⁷

As of February 18, 2015, employers were required to comply with the 2014 Power Generation standard's requirements with the exception of a few provisions with delayed effective dates. None of the provisions cited in the instant case were subject to these delayed effective dates. Because the Respondent did not elect to comply with the previous version of the standard, the requirements of the 2014 Power Generation effective July 10, 2014, are applicable to the instant case.

Citation 1, Item 1a

The Secretary cited Elliot for a serious violation of 29 C.F.R. § 1910.269(a)(4)(viii), which states:

(a)(4) *Existing characteristics and conditions.* Existing characteristics and conditions of electric lines and equipment that are related to the safety of the work to be performed shall be determined before work on or near the lines or

¹¹⁷ See OSHA's January 20, 2016 Memorandum to Regional Administrators about 29 CFR § 1910.269 and 29 CFR Part 1926, Subpart V-Enforcement dates for minimum approach distances at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=30191.

equipment is started. Such characteristics and conditions include, but are not limited to:

(viii) Environmental conditions relating to safety.

Specifically, the Secretary alleged that “[o]n or about 11/04/14”¹¹⁸ Elliot “did not determine the existing environmental conditions that could have effected safety, in that they did not evaluate the terrain to determine if changes in elevation could create conditions that could cause the neutral line that was being strung along the ground to contact an overhead energized 7200 volt primary line.” *See citation and complaint.*

Elliot asserts that it did assess environmental conditions related to safety. It argues the hilly terrain was not noted as an environmental condition presenting the hazard of contact with the energized overhead line because it is not a condition recognized by its two foremen or the industry as hazardous when ground-pulling wire.

The standard is applicable

The standard applies to work “on or near the lines or equipment.”¹¹⁹ “Electric supply lines” are defined as “[c]onductors used to transmit electric energy and their necessary supporting or containing structures.” “Equipment (electric)” is defined as “[a] general term including material, fittings, devices, appliances, fixtures, apparatus, and the like used as part of or in connection with an electrical installation.” “Conductor” is defined as “[a] material, usually in the form of a wire, cable, or bus bar, used for carrying an electric current.” 29 C.F.R. § 1910.269(x) (Definitions).

Here, the crew was going to perform work “on or near” both the electric lines at the worksite and the wire itself, which qualified as equipment as defined by the standard.

¹¹⁸ The evidence shows the violation occurred on November 3, 2014. Respondent was on notice that the accident occurred on November 3, 2014. The date the accident occurred, November 3, 2014, is not in dispute. (R. Br. 1, fn 1; Tr. 152).

¹¹⁹ *See* 29 C.F.R. § 1910.269(a)(4)(viii)

Id. The crew had been directed to replace the missing neutral wire on the series of power poles at the worksite. (Tr. 52 147, 233, 259-60; Ex. 4). After pulling the wire off the truck-mounted reel located on Goshorn Woods Road, the crew was pulling wire underneath power lines and alongside power poles; activities which qualify as work “on or near” electric lines and equipment. (Tr. 41, 63-67, 343, 401). Elliot’s installation of the neutral conductor wire at the worksite on November 3, 2014 constituted work on or near the lines or equipment. The standard is applicable.

The Secretary proved the standard was violated

The Secretary asserts the standard was violated because Elliot did not assess the environmental conditions at the Cameron worksite relating to safety in that Elliot did not evaluate the terrain to determine if changes in elevation could create conditions causing the line being strung along the ground to contact an overhead 7200 volt energized primary line. In particular, the Secretary asserts the foreman, Chester Brown, did not determine that ground-pulling wire uphill over steep, hilly terrain created the potential for uplift and contact with the overhead energized line. (S. Br. 15-18).

Elliot counters that two of its foremen did assess the existing environmental conditions at the Cameron worksite prior to work and the hilly terrain was not identified as a safety condition with the possibility of contact with the overhead line during ground-pulling because neither Elliot nor its industry could have anticipated or foreseen that a wire being pulled on the ground from a free spooling reel could be pulled up into the air as occurred here.¹²⁰ (R. Br. 42-44).

¹²⁰ Respondent argues that it complied with the standard because an earlier designated foreman, Mr. Vaden, performed his own job hazard assessment prior to Chester Brown developing his own job plan. This argument fails. First, the evidence shows that Mr. Vaden passed on very little about his job hazard assessment to Chester Brown. Mr. Vaden said he did not give Chester Brown his preliminary job plan. He testified that he told Chester Brown

The Court finds the evidence in this case shows that Respondent failed to comply with the standard's requirement to identify and assess the uplift hazard presented by the environmental condition of change in terrain elevation. An uplift hazard is a commonly known occurrence and the change in terrain elevation is an environmental condition relating to safety that should have been identified and accounted for in Chester Brown's job plan.

Mr. Wells stated that uplift was a commonly known occurrence in the electrical industry. He further stated that uplift is a hazard that should be identified and accounted for in a job plan. (Tr. 296-97). Mr. Wells also testified that terrain is an environmental condition that should be considered in a hazard assessment. (Tr. 297). He testified that it was possible for the wire to rise up in the air and contact the primary energized line in the area where the accident occurred, which was between the turn-pole (pole #977) and the K-pole (pole #980). He described the hillsides going up from the danger-pole (pole #978) at the bottom of the ravine as being steep. Mr. Wells said he had identified the potential for uplift contact with overhead energized lines in previous worksite job hazard

about the danger-pole (pole #978) and the combination sleeves on the job. He showed Chester Brown the map at Exhibit G and pointed out different things to him. (Tr. 579-96; Exs. 3, G, I). Mr. Vaden said he "can't remember exactly what all" he told Chester Brown, but was "pretty sure" he told him about the hills and hollers. Based upon its observance of Mr. Vaden's testimony at trial, the Court gives little credence to Mr. Vaden's sketchy, qualified testimony regarding sharing any assessment of existing environmental conditions relating to safety at the worksite with Chester Brown. (Tr. 591-92). Second, whatever inadequate information Mr. Vaden communicated to Chester Brown did not absolve Chester Brown from performing his own job hazard assessment. Mr. Vaden developed a job plan that was significantly different from the job plan developed by Chester Brown. (Tr. 54, 61, 92-93, 147-49, 171, 386, 567-71, 574-80, 602; Exs. 2, 4, 7, G, I, P). Mr. Vaden's job plan involved three wire pulls, all of which were downhill, which would have negated the possibility of the conductive wire being pulled into the air because it would not have required any employees to pull the wire uphill when encountering resistance. He did not communicate any information about the possibility of contact between the conductive wire and the energized parts at the top of the danger-pole (pole #978) to Chester Brown. (Tr. 567-96, 602; Exs. 2-4, G, I). Conversely, Chester Brown's job plan essentially involved one long pull which stretched from the truck-mounted reel on Goshorn Woods Road, through a block at the junction pole (pole #977), and down into and up out of a valley, all the while encountering obstruction-ridden, steep terrain. (Tr. 54, 61, 92-93, 147-49, 171, 386; Exs. 2, 4, 7, P). See *Trinity Indus., Inc.* 1997 WL 166156 at *7 (No. 95-455, 1997)(ALJ) (A follow-on evaluation is necessary when changes in the work procedures or job plan occur.).

assessments he had conducted under conditions similar to those found at the Cameron worksite. (Tr. 295-96).

APC Policy/Procedure No. 25 specifically required terrain to be assessed as a possible hazard when replacing primary neutral wire and handling conductors near a pole. (Tr. 308, Ex. 12). Mr. Wells testified the APC Policy/Procedure No. 25 called for Respondent to “[t]ake everything into account. Terrain, of course, up and down, flat, ... it all has an effect on how you’re pulling a conductor; any hazards, ... electrical contact There is a lot to it.” He stated APC Policy/Procedure No. 25 “covers a lot of different things.” Mr. Wells said “any time you’re going up and down a hill, I think it’s a hazard.” He further said that uplift can occur when pulling a line by hand and the potential for uplift could be a hazard related to terrain being up and down.

Likewise, CO Milam testified that Chester Brown should have identified the uplift hazard. (Tr. 156-57). Based upon his own personal observations at the area of the accident of the job site on November 4, 2014, CO Milam testified that Chester Brown should have been able to tell from the hilliness of the terrain there was the potential for uplift to the overhead energized primary line when pulling the line up the hill past the danger-pole (pole #978). (Tr. 157-58). Specifically, CO Milam testified that Chester Brown “should have identified the potential for this conductive cable to rise with the terrain and contact the primary that is down below them as they’re walking it up the hill.” (Tr. 155-57, 209).

The Court finds the testimony of CO Milam and Mr. Wells to be entirely credible on these matters based upon its observations of their courtroom demeanor when testifying.¹²¹ (Tr. 309-11; Ex. 12).

¹²¹ Conversely, the Court finds the conflicting testimony by Messrs. Adkins, Vaden, and Smith on this issue to not be credible based upon the self-serving nature of their testimony to excuse any individual or corporate responsibility

The Court finds that, through the exercise of reasonable diligence, Elliot should have recognized that the change in terrain elevation at the worksite was an environmental condition relating to safety that presented the hazard of wire rising up from the ground to the energized overhead line when being pulled down into a valley and up a steep hill. Elliot did not identify and adequately assess the change in terrain environmental condition relating to safety at the Cameron worksite before starting work pursuant to Chester Brown's job plan.

The violation of the 29 C.F.R. § 1910.269(a)(4)(viii) occurred when Chester Brown's crew began work at the job site without determining whether the change in terrain elevation was an environmental condition related to safety. *See Utils. Line Constr. Co.*, 4 BNA OSHC 1681, 1683 (No. 4105, 1976) (finding violation of 29 C.F.R. § 1910.950(b)(1)¹²² upheld where employer failed to first determine whether an assumed non-energized line later found to be energized posed a hazard); *see also Pike Elec., Inc.*, 21 BNA OSHC 2153 (No. 06-0166, 2007) (ALJ) (finding violation of § 1910.269(a)(3) [precursor to § 1910.269(a)(4)] noting a failure to conduct an organized search for generators).¹²³

for not preventing the accident. Mr. Adkins was responsible for providing safety and training oversight to Elliot's employees. (Tr. 342, 414-15). *See also* n.22, herein. Mr. Vaden conducted a pre-job hazard assessment of the worksite, but did not share his job plan and all that he saw with Chester Brown. (Tr. 579-91). *See also* n.120, herein. At best, Mr. Smith loosely supervised Chester Brown on November 3, 2014. (Tr. 220-26, 236, Ex A, DHE 00144-45). The Court gave little weight to Mr. Gibson's testimony on this point for the reasons stated below.¹²² 29 C.F.R. § 1910.269(a)(4) is based on 29 C.F.R. § 1926.950(b). Electric Power Generation, Transmission and Distribution, Electric Protective Equipment, 59 Fed. Reg.4320, 4344 (January 31, 1994) (to be codified at 29 C.F.R. Part 1910).

¹²³ Compare *Ga. Power Co.*, 24 BNA OSHC 1741, 1743-44 (No. 12-0553, 2013) (ALJ) where the employer was cited in violation of 29 C.F.R. § 1910.269(a)(3) [Existing Conditions] for failing to identify, evaluate and control the hazards associated with the configuration of the components on a three-phase recloser pole. There, the judge stated: The cited standard ... requires that existing conditions related to the safety of the work 'shall be determined' before work is started on or near electrical lines or equipment. Each work site has its own unique hazards, which is why a pre-work evaluation or assessment is significant. The standard, however, does not explain what 'shall be determined' means or set out what the employer must do to meet the terms of the standard. ... The Court concludes that § 1910.269(a)(3) ... requires a reasonable or rational

Elliot says it complied with the standard because two of its foremen performed a job hazard assessment and neither foremen nor the industry could have foreseen that a wire being pulled on the ground could be pulled up into the air as occurred here.

Chester Brown failed to determine that the physical layout of the worksite presented environmental conditions which were related to the safety of the work while executing his job plan. The physical layout at the job site involved changes in elevation, roughness of the terrain, placement of the power poles at different elevations, and different heights of the various power poles. (Tr. 45, 63, 68, 90-91, 106-07, 122-28, 132-36, 141-42, 152-55, 166-67, 199, 232, 274-75, 283-94, 367-68, 454-55, 460; Exs. 2, 5, at pp. 4-12). CO Milam described the terrain of the area between the danger-pole (pole #978) and the accident site as steep. He said that the change in elevation and the fact that you could see the top of the danger-pole (pole #978) from the accident site were obvious features of the job site. (Tr. 142). The Court finds these observations by CO Milam to be factual. The Court also agrees with CO Milam that Chester Brown should have identified in his job hazard assessment the potential for the wire being pulled to uplift to the primary overhead wire that was at a lower elevation relative to the crew members as they walked up the hill from the danger-pole (pole #978) to the accident site. (Tr. 155-57, 209; Ex. 4).

evaluation of existing conditions before work is started on or near electrical lines or equipment. *Id.*, at 1745.

The judge in *Ga. Power Co.* found the employee had performed a reasonable evaluation of the existing site conditions prior to starting work and vacated the citation. *Id.* at 1746. Here, the Court concludes otherwise.

Chester Brown also failed to determine that his job plan magnified the effect of these environmental conditions by increasing the likelihood of contact between the conductive wire and the energized parts at the top of the danger-pole (pole #978).¹²⁴ (Tr. 153-56, 202-04, 295-96, 310-11, 324; Ex. 7). Chester Brown directed his crew to pull the conductive wire through a block at a 90-degree angle, then down into and up out of a valley, at the bottom of which was a power pole with energized parts only 23 feet above the ground. (Tr. 54, 61, 92-93, 147-49, 171, 367-68, 386, 460; Exs. 2, 4, 7, P).

The obvious environmental conditions of the change in elevation at the worksite, in combination with Chester Brown's job plan, increased the potential for uplift and/or the wire snagging on the block at the turn-pole (pole #977), both of which carried the ultimate risk of contact with 7200 volts of electricity. (Tr. 87-88, 223-24, 236-37, 296-310, 359-60, 367, 463-64, 560, 603-04). Chester Brown failed to physically examine the worksite in its entirety, which hampered his ability to determine the impact of the worksite's environmental conditions relating to safety for the job plan he created.

Following the accident, Chester Brown informed Messrs. Adkins and Wells that he did not walk down into and up out of the valley in which the danger-pole (pole #978) was located. (Tr. 272-73, 315-16, 319, 417, 437, 463). Chester Brown spontaneously told Mr. Wells that he should have walked over the hill, but his back had been hurting. (Tr. 272-73). Mr. Brown missed identifying the change in terrain elevation that would have been readily apparent had he walked the entire work path, in particular, the terrain

¹²⁴ Respondent also elicited testimony suggesting that the terrain was determined to be a hazard because Chester Brown's discussion of slip, trip, and fall hazards in his job briefing adequately identify terrain as a hazard. A single environmental condition, such as terrain, can contribute to multiple hazards. A finding that the standard is satisfied when only some of the hazards present on a worksite are addressed would defeat the remedial purpose of the standard.

from the danger pole (#978) uphill to the K-pole (pole #980). Mr. Brown did not walk the path of his job plan, nor did he take any other measures to evaluate the entire worksite; such as using binoculars. His focus was on his back problem, not on doing an adequate job hazard assessment. The need to determine the effect of any change in terrain elevation as it related to safety should have been even more apparent to Chester Brown because he devised a job plan that called for his crew to pull wire both up and down hills. (Tr. 273-74, 437, 463; Exs. 2, 4).

Chester Brown knew he had to conduct a job hazard assessment before starting work at the job site. This is not in dispute. What is in dispute, is the adequacy of what Chester Brown did when he conducted his job hazard assessment. The evidence shows that Chester Brown's job hazard assessment was cursory, not thorough, and demonstrated a lack of the exercise of reasonable due diligence.¹²⁵ Mr. Vaden's courtroom testimony that it was not necessary to walk the entire path of the power line replacement was

¹²⁵ See the preamble's explanation for 29 C.F.R. § 1910.269(a)(4)(viii) which states, in pertinent part:

[29 C.F.R. § 1910.269(a)(4)(viii)] requires employers to determine, before work is started on or near electric lines or equipment, existing installation characteristics and work-area conditions related to the safety of the work to be performed. The requirement also includes examples of such characteristics and conditions. . . . Conditions of the installation, including the condition of protective grounds and equipment grounding conductors, the condition of poles, and *environmental conditions relating to safety, are worksite conditions*. In some cases, the employer already will have information on the condition of the installation, such as information on the condition of poles from pole-inspection programs or on the condition of electric equipment from equipment manufacturers. *In the usual case, however, the conditions . . . will be determined by employees through an inspection at the worksite*. This inspection need not be overly detailed, *but it does need to be thorough rather than cursory*. The standard does not require crews to determine "every imaginable condition," as EEI suggests. Rather, *the inspection must be designed to uncover the conditions specifically noted in this paragraph* as well as any other conditions of electric lines and equipment that are related to the safety of the work to be performed and that can be *discovered through the exercise of reasonable diligence*. Electric Power Generation, Transmission and Distribution, Electric Protective Equipment, 79 Fed. Reg. 20316, 20367 (April 11, 2014) (to be codified at 29 C.F.R. Part 1910, 1926) (Emphasis added).

The preamble of the 2014 Power Generation final rule, combined the discussion of the updated requirements of both the 29 C.F.R. § 1910 (general industry) and 29 C.F.R. § 1926 (construction) standards. Thus, the explanation of 29 C.F.R. § 1910.269(a)(4)(viii) effective July 10, 2014, can be found at the corresponding construction standard requirement, 29 C.F.R. § 1926.950(d). 79 Fed. Reg. 20316, 20546-20549 (April 11, 2014). See *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000) (A standard's preamble may be evidence of its meaning) citing *Tops Markets, Inc.*, 17 BNA OSHC 1935, 1936 (No. 94-2527, 1997), *aff'd* 132 F.3d 1482 (D.C. Cir. 1997) (unpublished).

impeached by prior deposition testimony given on February 9, 2016 where he stated that he, as a prudent and competent foreman, would walk the entire span of what's going to be done at the worksite in order to formulate a job plan. (Tr. 607). When performing his job hazard assessment, Mr. Vaden, walked the entire area where the conductive wire would be pulled.¹²⁶ (Tr. 567-71, 574-78). Mr. Smith testified that the accident could have been prevented if Chester Brown had walked the terrain. (Tr. 237, 239-242). According to Mr. Wells, wire uplift was a commonly known occurrence in the electrical industry. Wire uplift is not a rare occurrence. (Tr. 296-97, 550-51).

Chester Brown made no real, complete effort to discover, evaluate, or determine any wire uplift hazard tied to any change in terrain elevation along the full extent of the job's path. As foreman and the job plan's creator, it was Chester Brown's responsibility to adequately investigate the worksite for hazards within the entire scope of the job plan he devised. It was Chester Brown's responsibility to decide whether or not it was safe for his crew to execute his job plan on November 3, 2014. Chester Brown did not exercise due diligence when he conducted his limited job hazard assessment. (Tr. 295-97). Chester Brown's failure to walk the relevant terrain contributed to his failure to determine the impact of the worksite's environmental conditions relating to safety. OSHA sets the benchmark for a compliant assessment of a worksite's environmental conditions at what can be discovered through "reasonable diligence." The evidence shows that through the exercise of reasonable due diligence Chester Brown should have recognized that the change in terrain elevation at the job site from the danger-pole (pole #978) up a steep hill to the K-pole (pole #980) was an environmental condition relating to safety

¹²⁶ Mr. Vaden's own failure to determine the impact of the worksite's environmental conditions relating to safety was offset by the fact that his job plan eliminated the possibility of contact between the conductive wire and the energized parts at the top of the danger pole. (Tr. 595-96, 602).

that presented the hazard of contact with the energized line overhead. The Court finds Chester Brown's failure to adequately determine these environmental conditions resulted in a violation of § 1910.269(a)(4)(viii).

Elliot was on notice the standard required all environmental conditions relating to safety to be determined before starting work. In its amended answer, Respondent asserted that the cited standard fails to afford a reasonable warning of the prescribed conduct in light of common understanding and practice. The cited standard does not list the particular hazardous environmental conditions relating to safety the employer must identify before starting work. Instead, the requirement is expressed in terms of performance – “environmental conditions related to safety” shall be determined. When an OSHA standard does not specify the hazard, an employer must “identify the hazards peculiar to its own workplace and determine the steps necessary to abate them.” *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) (citations omitted). “[B]ecause performance standards . . . do not identify specific obligations, they are interpreted in light of what is reasonable.”¹²⁷ *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2151 (No. 08-1656, 2016) *citing Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287 (stating a “performance” standard is one that identifies an objective but does not specify the means for accomplishing it).

Here, Respondent recognized in its Safety Handbook and Work Process Manual that “existing environmental conditions relative to safety”¹²⁸ had to be determined before any work is undertaken on or near energized equipment and lines. (Ex. 8, p. 1). APC's Policy/Procedure No.25, applicable to Elliot's job at the worksite on November 3, 2014, also called for Elliot to

¹²⁷ See *Assoc. Underwater Svcs.*, 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012) (Under a performance standard, the employer is required to assess only those hazards that a “reasonably prudent employer” would recognize).

¹²⁸ Elliot's language in its Safety Handbook and Work Process Manual virtually mirrors the language found in the cited standard that states existing characteristics and conditions including environmental conditions relating to safety shall be determined before work on or near the lines or equipment is started. 29 C.F.R. § 1910.269(a)(4)(viii).

assess the jobsite “especially” for “[t]errain and other hazards to pulling the new conductor” when replacing primary neutral wire. (Tr. 308; Ex. 12).

Elliot knew “existing environmental conditions relative to safety” had to be “determined”¹²⁹ before undertaking any work on or near energized equipment and lines at the worksite. It knew existing environmental conditions relative to safety, especially including an assessment of terrain and other hazards associated with pulling new conductor wire, had to be identified. The Court finds that a reasonable job foreman in the electrical distribution industry should have determined the change in terrain elevation at the job site from the danger-pole (pole #978) up a steep hill to the K-pole (pole #980) presented the hazard of uplift to the overhead energized line when planning and executing a job plan that included pulling wire on the ground.

The Court finds that Chester Brown did not make a reasonable or rational evaluation or assessment, or make a reasonable determination, of the job site’s existing environmental conditions relating to safety, including change in terrain elevation, prior to starting work. It was neither reasonable nor rational for Chester Brown to devise a job plan that called for employees to pull wire up a steep hill under an energized line from a pole located below in a valley without first walking or closely observing the terrain from the danger pole (pole #978) to the K-pole (pole #980). Neither his job plan nor job hazard assessment of the worksite accounted for the possibility that wire being pulled could uplift to the overhead energized line.¹³⁰ At best, Chester Brown walked from Goshorn Woods Road to a little past the turn-pole (pole #977). After the accident, Chester Brown reportedly stated that he regretted not walking down over the hill [from

¹²⁹ Not every word in a standard needs to be defined in the standard itself. In its every day usage, the word “determined” means “having reached a decision: firmly resolved.” Similarly, “environmental” means “the circumstances, objects, or conditions by which one is surrounded.” The Court also notes that “terrain” means “the physical features of a tract of land.” *Merriam Webster’s Collegiate Dictionary* (11th ed. 2005).

¹³⁰ Mr. Vaden testified that job plans should account for the possibility of a line snagging or coming under tension; a circumstance that he said was “not uncommon.” (Tr. 560-61, 603-04).

the turn-pole (pole #977) to the K-pole (pole #980)] when he performed his job hazard assessment. (Tr. 273-74, 316-21, 437, 463; Ex. 4).

Mr. Vaden testified that a prudent and competent foreman would have walked the entire span of the job before formulating any job plan. (Tr. 607). Mr. Smith testified that changes in the elevation would have been apparent and raised “a red flag” to Chester Brown had he walked the terrain of the job beforehand. He said the terrain itself raised a red flag. In earlier deposition testimony, Mr. Smith said the accident was preventable had Chester Brown walked the terrain during his pre-job hazard assessment. (Tr. 242-44). Similarly, Mr. Adkins testified that during a job hazard assessment it is important to assess the path the wire will take as it is pulled. He also said a job plan should account for the potential that the line will snag or come under tension for some reason. (Tr. 463-64). A reasonably prudent employer would have assessed the hazard during its job hazard assessment.

The cited standard adequately describes the prescribed conduct and Respondent was reasonably warned and on notice of it.¹³¹

Employees were exposed to the hazard

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff’d*, 79 F.3d 1146 (5th Cir. 1996).

Respondent asserts the Secretary must prove it was reasonably foreseeable Elliot’s employees would be in the zone of danger to prove employees were exposed to the hazard. (R.

¹³¹ In its amended answer, Respondent asserted that the standard cited in Citation 1, item 1(a), fails to afford a reasonable warning of the prescribed conduct in light of common understanding and practice. In its post-hearing briefs, Respondent did not discuss this defense. Accordingly, the Court alternatively finds that Respondent has abandoned this defense. *See Manganas Painting Co., Inc.*, 1996 WL 478959, at *13 (No. 93-1612, Aug. 23, 1996) (Consol.) (ALJ), *aff’d on other grounds*, 273 F.3d 1131 (D.C. Cir. 2001) (“Respondent’s failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected.”); *Daniel Crowe Roof Repair and his Successors*, 23 BNA OSHC 2001, 2003 (No. 10-2090, 2011)(ALJ) (same).

Br. 39). Respondent relies on to *Kasper Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001), *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997), and *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-553, 1991) for its assertion that it was necessary for the Secretary to show that it was reasonably foreseeable for an employee to be in the zone of danger. (R. Br. 39). These cases are inapt. There was no proof of actual exposure in these three cases and in *Kasper Wire Works, Inc.* and *Fabricated Metal Prods., Inc.*, the Secretary failed to prove that it was reasonably predictable that employees would be in the zone of danger of a table saw or power press, as the case may be. *Kasper Wire Works, Inc.*, 18 BNA OSHC at 2196; *Fabricated Metal Prods., Inc.*, 18 BNA OSHC at 1074.

There is no dispute that two employees, Messrs. Peterson and Pruitt, were actually exposed to the hazard of electric shock when the conductor wire contacted the overhead energized primary line.¹³² (Tr. 158, 489). Because there was actual exposure to electrical hazards, the foreseeability of exposure is moot. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2004 n. 4 (No. 504, 1976) (finding that if employee was actually in the zone of danger and exposed to the hazardous condition, the element of exposure is established).

The Secretary has proved the element of employee exposure.

Knowledge

The Secretary has the burden to establish that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *See Contour Erection & Siding Syst., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007). Knowledge is imputed to the employer “through its supervisory employee.” *Am. Eng’g & Dev. Corp.*, 23 BNA

¹³² CO Milam testified that the wire being pulled by Messrs. Peterson and Pruitt was capable of conducting electricity. (Tr. 158). Mr. Adkins testified that they pulled the wire up into the MAD and the pulled wire contacted the primary overhead line. (Tr. 489).

OSHC 2093, 2095 (No. 10-0359, 2012) (citations omitted); *Ocean Elec. Corp.*, 3 BNA OSHC 1705, 1707 (No. 5811, 1975) (finding foreman's knowledge was properly imputed to employer, in case involving a violation of 29 C.F.R. § 1910.950(c) for failing to maintain the minimum distance, where the foreman's action and order leading to a fatality was not unforeseeable employee misconduct).

The Secretary asserts Elliot had both "actual and constructive knowledge of the violative conditions." (S. Br. 25). Here, the alleged violative condition is that the ground-pulling of wire in hilly, steep terrain, where poles of varied heights existed, presented an environmental condition that could result in the wire being uplifted and contacting the overhead energized line in the vicinity of the danger-pole (pole #978) and the K-pole (pole #980).

Respondent argues it had no actual knowledge of the violative condition. It further asserts it lacked constructive knowledge because it could not have "reasonably anticipated that the employees pulling a wire on the ground would inadvertently pull the wire 23 feet 8 inches into the air and contact an overhead primary." (R. Br. 41).

The Secretary asserts that Chester Brown had actual and constructive knowledge of the environmental conditions at the worksite because he had walked a portion of the worksite, could observe the obvious hilly terrain, developed the plan for ground-pulling the neutral conductor wire at the site, and was onsite during the installation of the conductor wire. (S. Br. 25-26; Tr. 168, 176). The Court finds that the evidence shows that, through Chester Brown, Elliot had constructive knowledge of the violative condition.¹³³

The Secretary may establish constructive knowledge by showing the employer would have known of the violative condition had it exercised reasonable diligence, or failed to

¹³³ The Secretary did not present sufficient evidence to show Chester Brown actually observed the significant change in the terrain elevation between the turn-pole (pole #977) and the K-pole (pole #980).

implement adequate work rules or training programs, adequately supervise employees, or anticipate hazards and take measures to prevent violations. *See Assoc. Underwater Svcs.*, 24 BNA OSHC at 1250 (“In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring.”); *S. J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016); *Assoc. Underwater Svcs.*, 24 BNA OSHC at 1250; *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287.

The Secretary also asserts that constructive knowledge can be found where the “conditions were in plain view.” *Am. Airlines*, 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (Consol.). (S. Br. 25). Here, the hilly, steep environmental conditions and varying pole heights at the job site were in plain view. The danger of uplift to the energized line 23 feet over head at the area of the danger-pole (pole #978) was obvious. Both Respondent’s Safety Handbook and Work Process Manual rule at ¶ 3.31, requiring wire being strung within 5 feet of energized lines to be considered energized, and the MAD of 2 feet 2 inches applied to the work at this job site. (Tr. 145; Exs. 8, 10, A, DHE_00191, DHE_00200). Respondent’s Safety Bulletin refers to “[w]ire stringing,” procedures for “stringing wire,” and “wire pull” in two places. (Ex. 10). The Court rejects Mr. Adkins testimony that wire was not being “strung” at the job site at the time of the accident and credits CO Milam’s testimony to the contrary.¹³⁴ (Tr. 145, 369). The Court

¹³⁴ Mr. Adkins testified that Rule 3.31 would become applicable at the job site once the wire being pulled was attached overhead to the poles. (Tr. 369-70). *See Sparton Corp. v. United States*, 77 Fed. Cl. 1, 8 (2007) (a law school professor’s testimony to serve the purpose of advising the Court on how to interpret the Armed Services Procurement Regulations, contract provisions, and whether to apply the *Christian* doctrine to the facts of the case was excluded because such legal conclusions were found to be within the province of the Court).

finds that there was “[w]ire being strung” by Messrs. Pruitt and Peterson at the job site, including when and where the accident occurred.¹³⁵

The Secretary notes that in the Fourth Circuit when the violation is based on supervisory misconduct, the Secretary must prove that the supervisor’s failure to comply was reasonably foreseeable. (S. Br. 26). *Arcon, Inc.*, 20 BNA OSHC 1760, 1767 (No. 99-1707, 2004).

The Secretary has shown that Chester Brown’s failure to take protective steps in compliance with 29 C.F.R. § 1910.269(a)(4)(viii) was reasonably foreseeable. *See N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1475 (No. 96-0721, 2001) (NLL) (holding that, to establish reasonable foreseeability, the Secretary must show that there were inadequacies in the employer’s safety program, training or supervision). Mr. Adkins admitted that prior to the accident Respondent had no safety work rules covering Chester Brown’s pre-job identification of hazards by walking the route of a wire pull.¹³⁶ (Tr. 439). The absence of an applicable work rule evinces a lack of reasonable diligence in the prevention of hazards. *Id.* at 1474-75.

Through the exercise of reasonable diligence, Chester Brown could and should have foreseen that wire being pulled up the steep terrain from the danger-pole (pole #978) to the accident site after being pulled down the hill from the turn-pole (pole #977) could rise up and contact the energized overhead line. Chester Brown reportedly walked as far as the turn-pole (pole #977) from Goshorn Woods Road while conducting his job hazard assessment. From there, looking in the direction of the K-pole (pole #980), he may have actually observed the terrain elevation change that presented a hazard of uplift to the overhead line when pulling down

¹³⁵ The Court further finds that the “[w]ire being strung” came within 5 feet of the energized primary line and Respondent was required to use the tension-stringing method, barriers, or other equivalent measures to minimize the possibility that conductors the employees were installing at the job site would contact energized power lines in violation of 29 C.F.R. § 1910.269(q)(2)(i) and Citation 1, item 3.

¹³⁶ In addition, Respondent did not have any work rules for pulling wire on the ground which could have served as a basis for discipline against Messrs. Peterson and Pruitt for any alleged misconduct. (Tr. 456). There is also no evidence that Elliot ever disciplined an employee for his or her actions in pulling wire on the ground. (Tr. 457-58).

and then up again from the turn-pole (pole #977). However, there is no credible evidence of what, if anything, Chester Brown actually saw beyond the danger-pole (pole #978) when he reportedly reached the turn-pole (pole #977) while performing his pre-job hazard assessment.¹³⁷ Following the accident, Chester Brown informed Messrs. Adkins and Wells that he did not walk down into and up out of the valley in which the danger- pole (pole #978) was located. Chester Brown told Mr. Wells that he did not walk that area because of back problems, but indicated that he should have. This admission by Chester Brown to Mr. Wells is telling. It shows that he knew that he had not properly checked out the terrain in the vicinity between the turn-pole (pole #977) and the K-pole (pole #980) where the accident occurred and where the environmental conditions relating to safety would have been obviously before him. There is no evidence that Chester Brown told anyone he would not have foreseen that the wire being pulled could rise up to the overhead energized line, even if he had walked the entire path of the wire in the area between the danger-pole (pole #978) and the K-pole (pole #980). The Court finds that if Chester Brown had properly checked out the terrain in the vicinity of the danger-pole (pole #978) and the K-pole (pole #980) he would have identified the violative condition. *See Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079 (“It need not ... be shown that the employer understood or acknowledged that the physical conditions were actually hazardous.”). Because Chester Brown’s conduct was foreseeable and preventable, his knowledge is imputable to Respondent. *NLL*, 19 BNA OSHC at 1475.

The Secretary has proven Elliot’s constructive knowledge of the violative condition.¹³⁸

¹³⁷ Chester Brown did not testify at the trial.

¹³⁸ *See also NLL*, 19 BNA OSHC at 1473-74 (upholding that Respondent’s agent had actual and constructive knowledge of an employee’s violation of the minimum working distance; the agent’s constructive knowledge was based on his failure to anticipate a violation of the working distance where he was aware of the location of the energized parts and yet still permitted the employee to access an area where there was a potential for violation of the working distance).

The Secretary proved the elements of exposure, and applicability for citation 1, item 1a. The Secretary further proved the standard was violated and that Elliot had constructive knowledge of the violative condition. The Court affirms citation 1, item 1a, and its proposed penalty.

Citation 1, Item 2

The Secretary cited Elliot for a serious violation of 29 C.F.R. § 1910.269(l)(3)(iii) which requires:¹³⁹

(l) Working on or near exposed energized parts. This paragraph applies to work on exposed live parts, *or near enough to them to expose the employee to any hazard they present.* . . .

(3) Minimum approach distances. . . . (iii) The employer shall ensure that no employee approaches *or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance*, unless:

(A) The employee is insulated from the energized part (rubber insulating gloves or rubber insulating gloves and sleeves worn in accordance with paragraph (l)(4) of this section constitutes insulation of the employee from the energized part upon which the employee is working provided that the employee has control of the part in a manner sufficient to prevent exposure to uninsulated portions of the employee's body), or

(B) The energized part is insulated from the employee and from any other conductive object at a different potential, or

(C) The employee is insulated from any other exposed conductive object in accordance with the requirements for live-line barehand work in paragraph (q)(3) of this section.

(Emphasis added.)

Specifically, the Secretary alleged that Elliot “did not ensure employees maintained the established MAD of 1’1” when a neutral line being pulled on the ground made contact with the energized 7200 volt primary line.” *See complaint and citation.*

The parties agree the MAD is 2 feet, 2 inches.¹⁴⁰ (S. Br. 11; Tr. 367; Ex. A, DHE_00191).

¹³⁹ This corresponds to the construction requirements found at 29 C.F.R. § 1926.960(c). 79 Fed. Reg. at 20548 (April 11, 2014).

The cited standard is applicable.

The cited standard applies when employees are working “near enough” to “exposed live parts” to expose an employee to “any hazard they present.” The Secretary asserts employees were near enough to exposed live parts when they were ground-pulling the conductive wire below the energized overhead line and the poles it was attached to. (S. Br. 17; S. Reply Br. 4).

Elliot asserts the standard does not apply because employees were not working on or near exposed live parts. Elliot asserts that the energized line 23 feet overhead is not “on or near” the employees or the conductive wire they were carrying only; the wire only came near the energized line when it was inadvertently lifted up, which was unexpected. (R. Reply Br. 2-3). Elliot attempts to use the example of a person walking down a city street below a powerline to illustrate that the overhead energized line at the Cameron worksite could not be construed as “on or near” the employees. (R. Reply Br. 2). The Court finds this example is not a relevant comparison.

The phrase “on or near” is not defined in the standard. However, the Commission has determined the meaning of an imprecise term can be given precision by evaluating it in context. *Cleveland Consol. Inc.*, 13 BNA OSHC 1114, 1116 (No. 84-696, 1987) (finding the term “proximity” was not imprecise when evaluated in context of the statute as a whole and thus the standard was not vague).

Elliot ignores the complete text and plain meaning of the standard, which requires the work to be “near enough to [exposed live parts] to expose the employee to any hazard they present.” The benchmark for determining if work is “near” the energized line is based on whether the employee, or a conductive object the employee is holding, can contact the overhead

¹⁴⁰ In his post-hearing brief, the Secretary alleged the MAD to be 2 feet, 2 inches based on the testimony of Mr. Adkins. (S. Br. 11, ¶ 54).

energized line. Here, the employees' bodies were not near the energized lines; however, the conductor wire (which is a conductive object) the employees were holding was near enough to contact the overhead line and thus exposed the employees to an electric shock hazard.

Elliot also asserts there is no proof the energized overhead line was closer to the ground than 23 feet 8 inches. (R. Reply Br. 2). However, the issue at hand is not the distance to the ground; it is the distance to exposed employees and any conductive object they are handling.

The Court finds the standard is applicable because employees were working with a conductive object near enough to the exposed live overhead line to be exposed to an electric shock hazard. The standard applies.¹⁴¹ (Tr. 165).

The standard was violated.

The Secretary asserts that Elliot's job plan for the site did not ensure employees would stay outside the MAD; instead, the job plan made it more likely the MAD would be encroached because of the pull up a steep hill. (S. Br. 20; Tr. 202-04, 295-96, 310-11). Further, the Secretary asserts that Elliot took no action to ensure employees would not encroach the MAD with the conductive wire, such as, a hold-down block at the danger-pole (pole #978), assigning a lookout to monitor the wire's uplift, instructing the crew to wear insulating gloves while pulling the wire, or spreading employees out along the pull to maintain positive control of the wire. (S. Br. 21).

Elliot asserts that the wire being pulled "should have been on the ground and not anywhere near the energized primary." It asserts that Chester Brown, positioned next to the reel truck parked on Goshorn Woods Road at the time of the accident, had no knowledge that the wire was anywhere close to the MAD.

¹⁴¹ The Court finds that none of the exceptions identified in the cited standard apply to this case. (Tr. 164-65). There is no dispute that Elliot did not take any of the measures provided in the cited standard as exceptions to the requirement to stay outside the MAD.

At the time of the accident the work performed by Messrs. Peterson and Pruitt was performed on or near energized parts. The job plan and physical layout of the worksite – the changes in elevation, the roughness of the terrain, the placement of the power poles, and the heights of the various power poles – contributed to the possibility that the conductive wire could contact energized power lines. (Tr. 45, 63, 68, 90-91, 106-07, 122-28, 132-42, 152-55, 166-67, 199, 202-04, 232, 274-75, 283, 285-87, 293-96, 310-11, 367-68, 454-55, 460; Exs. 2, 5 at pp. 4-12). This possibility was manifested when the conductive wire being pulled actually contacted the energized overhead primary line near the danger pole, indicating a violation of the MAD.¹⁴² (Tr. 95, 139-40, 158, 165, 169, 175-77; Ex. 5 at pp. 15-16).

Respondent was obligated to ensure that no employee, by himself or with any conductive object, approached closer to the energized parts than the MAD. Chester Brown developed and implemented a job design which directed work activities in such a way as to increase the likelihood for such contact to occur. (Tr. 202-04, 295-96, 310-11). This job design failed to address the potential for uplift. (Tr. 87-88, 223-24, 236-37, 296-301, 310, 359-60, 463-64, 560, 603-04). Chester Brown gave no instructions or guidance to the crew to ensure the wire stayed on the ground and outside the MAD. Elliot also took no measures to ensure its employees did not encroach the MAD.

The Secretary has proved the standard was violated. (Tr. 165).

Employees were exposed to the hazard.

¹⁴² See *NLL*, 19 BNA OSHC at 1467-72 (upholding a minimum working distance violation because: a) Respondent's agent approached an energized part within the working distance, b) Respondent's employee contacted the energized part, and c) Respondent failed to use any protective measures to prevent the approach and contact); *Pub. Utils. Maint., Inc.*, 23 BNA OSHC 1082, 1087 (No. 08-1831, 2009) (ALJ) (affirming a 29 C.F.R. § 1910.269(l) MAD violation where a part of the employee's body came within the three-foot distance); *All Fla. Tree & Landscape, Inc.*, 25 BNA OSHC 1310 (No. 13-0373, 2015) (ALJ) (noting violation of General Industry Standard, 29 C.F.R. § 1910.333 (c)(3), found where conductive object; *i.e.* metal chains, came within 10 feet of primary energized overhead line).

There is no dispute that two employees, Messrs. Peterson and Pruitt, were exposed to the hazard of the conductor wire getting closer than the MAD of the overhead energized line.¹⁴³ (S. Br. 25; Tr. 165-66). Circumstantial evidence shows that actual contact was made by the conductor wire with the energized line. The Secretary has proved the element of employee exposure.

Knowledge

The Secretary asserts Elliot had both actual and constructive knowledge the conductor wire encroached the MAD.

Elliot asserts it had no knowledge because it believed ground-pulling would keep the conductor wire away from the overhead energized line and thus presented no hazard of contact with the energized line.¹⁴⁴

It is not necessary to show Elliot believed pulling wire on the ground was hazardous to prove knowledge. The Commission has held that it is not necessary to show the employer understood the condition was hazardous to establish knowledge. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-80.

The Secretary asserts that Elliot had constructive knowledge of the violative condition. (S. Br. 25). The Secretary may establish constructive knowledge by showing the Respondent, with reasonable diligence, could have known of the violative condition. *See S. J. Louis Constr. of Tex.*, 25 BNA OSHC at 1894; *Assoc. Underwater Svcs.*, 24 BNA OSHC at 1250-51 (Employer required to take reasonable steps to discover the hazards it needed to assess).

Chester Brown was at the worksite when the Messrs. Peterson and Pruitt were ground-pulling the wire. He knew employees were walking the wire underneath the energized overhead

¹⁴³ The Secretary did not assert that the pull from the reel truck to the turn-pole (pole #977) or the uphill pull from the turn-pole (pole #977) to the N-pole (pole #976) presented a hazard of contact with the energized line.

¹⁴⁴ The Secretary set forth one, combined argument for all citation items for the element of knowledge.

lines. He knew or should have known the terrain was steep and that the danger-pole (pole #978) was shorter than the two poles on either side of it. He should have identified a means to ensure the crew could not bring the conductive wire they were pulling closer than the MAD. (Tr. 169). He provided no guidance on ground-pulling in hilly terrain or ways to keep the conductor wire on the ground. Further, Elliot had no guidance through work rules or training to keep the wire from uplift and encroachment of the MAD.

Elliot did not exercise reasonable diligence to ensure its employees did not encroach the MAD when working below overhead energized lines with conductor wire. Chester Brown should have identified the potential for the conductive wire being pulled coming into contact with the energized overhead primary line atop the danger-pole (pole #978) and, in doing so, he should have identified that there might be a violation of the MAD. (Tr. 169). The Secretary has proved constructive knowledge.

The Secretary has proved the standard was applicable, employees were exposed to the hazard, Elliot had knowledge of the violative condition, and the requirements of the standard were violated for citation 1, item 2.

Unpreventable Employee Misconduct

Elliot asserts any violation of the cited standard was due to the unpreventable employee misconduct of Messrs. Pruitt and Peterson.¹⁴⁵ (R. Br. 46-49). To establish the defense of unpreventable employee misconduct, the evidence must show that the employer: (1) had a work rule designed to prevent the violative condition, (2) adequately communicated that work rule, (3) took reasonable steps to discover violations of the rule, and (4) effectively enforced the rule when it was violated. *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2220 (No. 09-0004, 2014)

¹⁴⁵ Respondent only asserted the affirmative defense of unpreventable employee misconduct with respect to Citation 1, item 2.

(Consol.); *NLL*, 19 BNA OSHC at 1474.

In the Fourth Circuit the Secretary carries the burden of disproving the employer's unpreventable employee misconduct defense. "Although some sister circuits have held that unpreventable employee misconduct is an affirmative defense that an employer must plead and prove, this Circuit and others agree that such must be disproved by the Secretary in his case-in-chief." See *L.R. Willson & Sons, Inc. v OSHRC*, 134 F.3d 1235, 1240-41 (4th Cir. 1998). The Secretary must prove at least one of the four elements of the unpreventable employee misconduct defense in the negative to show an employee's actions were not unforeseeable or preventable.

In support of its unpreventable employee misconduct defense, Respondent asserted that an employee's violation of its MAD rule resulted in automatic termination, with no chance of rehire. (Tr. 366, 428-29). It contends that Messrs. Peterson and Pruitt acted negligently by continuing to pull the wire in the face of an alleged snag of the wire. It claimed that three factors unforeseeably came together and caused the accident. The three factors were: (1) the differences in terrain, (2) the pulled wire getting hung up or snagged, and (3) Messrs. Peterson and Pruitt continuing to pull the wire after it snagged at the turn-pole (pole #977). (Tr. 428).

Respondent's contention that Messrs. Peterson and Pruitt acted negligently depends upon uncorroborated, undocumented hearsay testimony allowed into evidence for a limited purpose. Mr. Adkins testified that, roughly twenty-four hours after the accident occurred, Mr. Peterson told Mr. Adkins that pulling the wire "got really hard pretty quickly," that the two men "were bowed over, looking at the ground," and that they did not look behind them to see why the wire got heavy. (Tr. 416). No other witness corroborated this alleged statement. Mr. Peterson himself suffered some memory loss about the accident and has no recollection of making any such statement to Mr. Adkins. (Tr. 67). In addition, Mr. Adkins did not document Mr.

Peterson's alleged statement, despite documenting the statements of multiple other employees. (Tr. 459-60). The Court has found: 1) Mr. Adkins' testimony that the pulled wire was damaged and bent by excessive pulling by Messrs. Pruitt and Peterson a few feet from the turn-pole (pole #977) [between the turn-pole (pole #977) and the danger-pole (pole #978)] to not be credible and 2) there is insufficient evidence before it to find that the wire snagged in the turn-block and a manifestation of damage resulting from a snag was located about five feet away from the turn block in the direction of the danger-pole (pole #978). *See* n.89, herein. The Court rejects Elliot's allegation that Messrs. Peterson and Pruitt were negligent at the time of the accident. Respondent's unpreventable employee misconduct defense is insufficient and without merit to overcome liability for item 2.

Elliot did not have a work rule designed to prevent the violative condition.

Elliot had general work rules and training on the MAD. However, Elliot's safety program was inadequate to the extent that it had no safety rule to ensure the conductive wire stayed outside the MAD while ground-pulling. (Ex. A, DHE_00250-51). The Commission has held that the absence of an applicable work rule evinces a lack of reasonable diligence in the prevention of hazards. *See NLL*, 19 BNA OSHC at 1474-75. The Secretary has shown that Elliot did not have a work rule with respect to keeping the conductive wire out of the MAD when ground-pulling.

Elliot did not communicate any work rule that ensured wire being pulled on the ground stayed outside the MAD to Messrs. Peterson and Pruitt.

Elliot asserted that its training for ground-pulling was on-the-job and that an experienced lineman knows to take care of, and not damage, wire. Mr. Vaden testified that a lineman knows to not damage the wire. (Tr. 598, 600). Elliot mistakenly relied on the general experience of its linemen and assumed each lineman knew what to do if a line became snagged during ground-

pulling to prevent damage to the wire and not increase the wire's uplift.¹⁴⁶ Relying on a lineman's experience to not pull against resistance is not enough. Elliot cannot shift its safety responsibilities to its employees. "An employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1815 (No. 87-692, 1992) (citations omitted).

The Secretary has shown that Elliot did not provide adequate training to employees on how to stay outside the MAD when ground-pulling wire. Elliot did not have established training for ground-pulling wire and keeping it outside the MAD. Elliot also did not have established training on how to proceed when a wire being pulled becomes snagged. With no established rule and only on-the-job training, there was no consistency of the procedures or methods that were conveyed to employees, including Messrs. Peterson and Pruitt.

Mr. Pruitt was an apprenticed lineman as of April, 2013, only about 18 months before the accident. Although a journeyman lineman, Mr. Peterson's experience as of November 3, 2014 had been limited to pulling wire over flat terrain. He had no experience or training in confronting the changes in terrain elevation at the work site. In addition, Respondent did not provide any specific training to Messrs. Peterson and Pruitt about pulling wire over uneven terrain, or pulling wire when under resistance. (Tr. 43-46, 48, 50-51, 86-87, 92, 458-59). These types of training would have been particularly helpful given the various physical conditions present at this worksite which could have made pulling the wire more difficult, including but not limited to the distances, ground cover, and steep terrain over which the wire was pulled and the

¹⁴⁶ Here, the Court has found there is insufficient evidence before it to find that the wire snagged in the turn-block and a manifestation of damage resulting from a snag was located about five feet away from the turn block in the direction of the danger-pole (pole #978). *See* n.89, herein.

fact that the wire was pulled uphill at multiple locations. (Tr. 45, 49-50, 63-67, 106-07, 122-29, 132-33, 142, 153, 223-25, 234, 283, 285-87, 291-94, 299-300, 418-19, 460-61; Exs. 2, 4, 5 at pp. 4-12). To the extent the conduct of Messrs. Peterson and Pruitt violated Respondent's MAD rule, such conduct was done under the direction of Chester Brown, without adequate training by Respondent, and without the employees' awareness of its hazardous consequences. *See Pub. Utils. Maint., Inc.*, 23 BNA OSHC at 1090 (rejecting Respondent's safety procedures as "constituting an undue reliance on employees to discover whether they could work safely" because its agent's "admonition to the employees to 'be careful' and to observe the MAD gave employees 'too much discretion in identifying unsafe conditions and was therefore too general to be effective in preventing employee exposure'"), *quoting Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997), *aff'd*, 158 F.3d 583 (5th Cir. 1997) (per curiam) (unpublished).

Elliot lacked adequate: 1) training on not encroaching the MAD when ground-pulling conductive wire, and 2) communication of any rule relating to the encroachment of the MAD when ground-pulling conductive wire.

Elliot's efforts to discover safety violations of the work rule designed to prevent encroaching the MAD when ground-pulling conductive wire

The Court finds that Elliot generally took reasonable measures to discover many safety violations at its worksites. However, Elliot had no safety or work rule designed to prevent encroaching the MAD when ground-pulling conductive wire. To that extent, Elliot's efforts to discover safety violations relating to encroaching the MAD when ground-pulling wire were inadequate.

Enforcement of any work rule relating to encroaching the MAD when ground-pulling wire when violations of any such rule discovered

Respondent did not have any work rules for pulling wire on the ground which could have served as a basis for discipline against any employee, including Messrs. Peterson and Pruitt, for any alleged misconduct related thereto. (Tr. 456). Respondent did not discipline Mr. Peterson for any action he took on November 3, 2014.¹⁴⁷ There is no evidence that Elliot ever disciplined any employee for his or her actions when pulling wire on the ground. (Tr. 457-58). Unverified and nonspecific “on-the-job training” is insufficient to serve as a basis to support the defense of unforeseeable employee misconduct.

For the reasons discussed above, the Court finds the Secretary has proven the Respondent’s unpreventable employee misconduct defense is without merit and Elliot’s safety program was not adequate with regard to any encroachment of the MAD when ground-pulling the wire. The Court also finds Messrs. Peterson and Pruitt’s encroachment of the MAD when ground-pulling the wire on November 3, 2014 was foreseeable and preventable. Elliot is liable for Citation 1, item 2.

Citation 1, Item 3

The Secretary cited Elliot for a serious violation of 29 C.F.R. § 1910.269(q)(2)(i) which requires:

(q) Overhead lines and live-line barehand work. This paragraph provides additional requirements for work performed on or near overhead lines and equipment and for live-line barehand work.

...

(2) Installing and removing overhead lines. The following provisions apply to the installation and removal of overhead conductors or cable (overhead lines). (i)

¹⁴⁷ Mr. Adkins testified that an employee who damages wire or tools is subject to written reprimand and discipline. (Tr. 490-92). Mr. Vaden stated that pulling on wire to the point of damage was unacceptable and would be addressed with the employee; if the employee continued to damage wire, he would be fired. (Tr. 600). With respect to Mr. Peterson’s actions the day of the accident, management had considered a possible reprimand to Mr. Peterson for continuing to pull the wire after it allegedly became snagged. Mr. Adkins did not believe Mr. Peterson intentionally pulled the wire up high enough to contact the overhead line; however, he believed Mr. Peterson had intentionally pulled against resistance and damaged the wire and was unaware of the wire’s uplift. (Tr. 488-89). Mr. Peterson did not return to work at Elliot following the accident. No disciplinary action was taken against Mr. Peterson. (R. Reply Br. 5; Tr. 430).

When lines that employees are installing or removing can contact energized parts, the employer shall use the tension-stringing method, barriers, or other equivalent measures to minimize the possibility that conductors and cables the employees are installing or removing will contact energized power lines or equipment. (Emphasis added.)

Specifically, the Secretary alleged that Elliot “did not employ the tension-stringing method,¹⁴⁸ install insulating barriers, or use other equivalent methods to prevent the neutral line being strung along the ground from contacting a 7200 volt energized primary line. The neutral line contacted the energized line as it was pulled, under tension, through mountainous terrain.”
See complaint and citation.

The standard is applicable.

The cited standard applies when overhead lines being installed can contact energized parts. As with citation 1, item 2, above, the standard applies when a line being installed “can contact energized parts.” As demonstrated at the Cameron worksite, the neutral conductor wire could and did contact the energized line.

Respondent asserts the cited standard is not applicable because ground-pulling wire is not installation. Further, Elliot asserts it was not reasonably foreseeable there was a possibility of contact with the energized wire.

The Secretary asserts that ground-pulling the wire beneath the poles it will ultimately be attached to was the first step in the installation process. (S. Br. 22). The Secretary also asserts that securing the wire through the turning-block is a step in installation. The Secretary relies on the dictionary’s definition of install – “to place in position or connect for service or use” -- to support its position that ground-pulling wire is a step in the installation process.¹⁴⁹ (S. Br. 22).

¹⁴⁸ The “tension-stringing method” is the mechanized pulling of conductive wire through previously-installed stringing blocks attached to a series of power poles. It is used to avoid contact with other nearby energized lines. (S. Br. 98; Tr. 348-55).

¹⁴⁹ The Secretary cites to <http://www.dictionary.com> for his definition of “install.” (S. Br. 22).

The Secretary's reasonable interpretation is entitled to deference. *See Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-51 (1991).

Elliot states that when the wire was placed on the ground, it was not "in position for service or use." (R. Reply Br. 3). Elliot asserts the installation process begins when the wire is being connected at the pole top. (R. Br. 45-46). Elliot cited no authority to support this position.

Respondent construes installation too narrowly. The Court finds that laying the wire along and underneath the powerline's path next to the poles it will be attached to is the first step in placing it in a position for service or use. Ground-pulling is equivalent to the first step of overhead tension stringing. After laying the wire on the ground next to the poles, the next activity would be lifting the wire up to attach to each pole. In overhead tension stringing, the step before connecting the wire in its permanent position at the pole top, is the placement of the wire in a temporary position on a stringing block attached to the pole.¹⁵⁰ In both ground-pulling and overhead tension stringing, the step immediately before the attachment to the pole is a step of installation.¹⁵¹

The Court finds the Secretary's interpretation of the meaning installation in the standard is reasonable and that ground-pulling the conductor wire along and under the path of the powerline was an initial step in the process of installing the overhead neutral conductor.

The standard was violated.

Elliot asserts it complied with the standard because ground-pulling is the equivalent method it used to minimize contact with energized lines, in lieu of tension-stringing or a barrier.

¹⁵⁰ See discussion earlier of steps in the tension-stringing method, which describes the blocks hold the wire in a temporary position until permanent attachment to a pole or cross arm.

¹⁵¹ Elliot's Job Briefing document shows it considered the work at the Cameron worksite as installation in that it stated the work was to "install missing neutrals." (Ex. 7).

The Secretary asserts the ground-pulling method was not equivalent to a barrier, which prevents contact with the line, or tension-stringing, which uses machines to keep the wire under tension and away from the energized line.¹⁵² (S. Br. 23).

The preamble described the requirements of 1910.269(q)(2)(i)¹⁵³ as:

Paragraph [(q)(2)] requires employers to take precautions to minimize the possibility that conductors and cables, during installation and removal, will contact energized power lines or equipment. This paragraph requires employers to do so by stringing conductors using the tension-stringing method (which keeps the conductors off the ground and clear of energized circuits) or by using barriers, such as rope nets and guards (which physically prevent one line from contacting another). *Employers also may use equivalent measures. This paragraph protects employees against electric shock and against the effects of equipment damage resulting from accidental contact between the line and energized parts during line installation and removal.*

Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 79 Fed. Reg. 20316, 20523-24 (April 11, 2014) (Emphasis added).

To determine OSHA’s meaning of the phrase “other equivalent measures,” the Court turns to the standard’s requirements for tension-stringing, which is a method specified to minimize contact with energized lines. When using tension-stringing as the method to minimize contact with the energized line, the employer must implement additional measures in the event of “failure of the pulling or tensioning equipment.” 29 C.F.R. § 1910.269(q)(2)(ii)(A). With the tension-stringing method the employer must implement an additional safety measure in the event of equipment failure. In other words, it is not enough to use tension-stringing equipment to prevent contact; the employer must also take additional measures in the event equipment failure results in possible contact with the energized line.

¹⁵² A barrier is defined at 29 C.F.R. § 1910.269(x) as “[a] physical obstruction that prevents contact with energized lines or equipment.” Barriers can be hardhats, certain kinds of gloves, and anything that provides insulation from an electrical charge. (Tr. 302-03, 469).

¹⁵³ The equivalent standard for construction worksites is found at 29 C.F.R. § 1926.964(b)(1).

The Court finds that for ground-pulling to be used as a means equivalent to tension-stringing, Elliot would need to implement additional measures in the event the wire did not stay on the ground as anticipated. Here, Elliot took no additional step to ensure the wire would not rise up from the ground.

Elliot's assertion that the distance between the overhead line and the ground was equivalent to a barrier also fails. A barrier physically prevents contact with the energized line if the wire gets close enough to make contact. There is no equivalent protection when the wire being ground-pulled is close enough to contact the energized line.

Elliot also asserts the standard only requires the risk of contact to be minimized, not eliminated, and that ground-pulling minimized the risk. (R. Reply Br. 4). The Court rejects this assertion; ground-pulling, without any additional measures to keep the wire near the ground and away from the overhead lines, does not minimize the risk of contact with the energized line.

The Court finds that Elliot's ground-pulling method was not a method equivalent to tension-stringing or an insulating barrier. The standard was violated because the tension-stringing method, barriers, or other equivalent measures were not used to minimize the possibility that the wire being pulled over the ground would contact the overhead energized primary line at the danger-pole (pole #978). (Tr. 171-72; Ex. 1, p. 10).

Employees were exposed to the hazard.

Messrs. Peterson and Pruitt were both exposed to the hazard when the conductor wire they were ground-pulling contacted the overhead energized primary line. (Tr. 175). The Secretary has proved the element of employee exposure.

Knowledge

The Secretary asserts Elliot had both actual and constructive knowledge the conductor wire being pulled could contact the overhead energized line. (S. Br. 25). Respondent asserts it had no knowledge because it did not believe the wire Messrs. Peterson and Pruitt were pulling would contact the overhead energized line as the employees were pulling the wire up a hill. (Tr. 48-49). The Secretary does not have to show that Elliot believed the condition was hazardous. To prove knowledge, the Secretary need only show the employer was aware of the condition itself, not knowledge that it was hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079-1080.

The Secretary may establish constructive knowledge by showing the employer failed to implement adequate work rules or training programs and failed to adequately supervise employees or anticipate hazards and take measures to prevent violations. *See S. J. Louis Constr. of Tex.*, 25 BNA OSHC at 1894; *Assoc. Underwater Svcs.*, 24 BNA OSHC at 1250; *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC at 2287.

Chester Brown was at the worksite when the Messrs. Peterson and Pruitt were ground-pulling the wire. He implemented no additional measures to minimize the possibility the wire being pulled along the ground would not make contact with the overhead line. Elliot provided no work rule, guidance, or procedures for minimizing contact with the overhead energized line when ground-pulling. As with citation 1, item 2, above, Elliot's safety program did not address the hazards of contact with an overhead wire during ground-pulling operations and had no procedures or training to follow to minimize the risk of contact with the energized line. Thus, Elliot did not take reasonably diligent measures to prevent the violation and the Secretary has proven constructive knowledge.

The Secretary has proved the standard was applicable, employees were exposed to the hazard, Elliot had knowledge,¹⁵⁴ and the requirements of the standard were violated for citation 1, item 3.

Citations Interrelated, but not Duplicative

Respondent asserts citation 1, items 2 and 3, are duplicative. The Commission has held that alleged “violations may be duplicative where the standards cited require the same abatement measures or where abatement of one citation item will necessarily result in the abatement of other item as well.” *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1082 n.5 (No. 99-0018, 2003); *see also Cleveland Consol., Inc.*, 13 BNA OSHC at 1118.

At the commencement of the trial, the Secretary agreed, without objection, to assess a single penalty for citation 1, items 2 and 3. (Tr. 10). CO Milam testified that items 2 and 3 of citation 1 address the same hazard and essentially require the same abatement. (Tr. 181-182, 201). It is appropriate to assess one penalty for “closely-related violations.” *L.E. Meyers Co.*, 16 BNA OSHC 1037, 1048 (No. 90-945, 1993).

The Court finds each standard requires distinct abatement measures that are interrelated, but not duplicative to the extent that one of these two items needs to be vacated. *H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981) (items not duplicative even though the abatement requirements of two applicable standards may be satisfied by compliance with more comprehensive standard); *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2141-42 (No. 04-0475, 2007) (same). Here, item 2 is broad and comprehensive and item 3 is narrow and specific.

¹⁵⁴ In its amended answer, Respondent asserted that the standard cited in Citation 1, item 3, fails to afford a reasonable warning of the prescribed conduct in light of common understanding and practice. In its post-hearing briefs, Respondent did not discuss this defense. Accordingly, the Court finds that Respondent has abandoned this defense. *See* n.131, herein.

Id. Both citation 1, items 2 and 3, are affirmed, but a single penalty of \$7,000 will be assessed for these two items.

Expert Michael William Gibson

Prior to the trial, the Secretary moved for Mr. Gibson's expert witness testimony to be excluded from the trial for various reasons, including his failure to consider an adequate collection of data or facts.¹⁵⁵ *See* n.108, herein. The Court denied the Secretary's motion without prejudice. After hearing Mr. Gibson's testimony, the Secretary renewed his motion to strike Mr. Gibson's expert testimony¹⁵⁶ in his post-hearing brief based on the following:

1. Mr. Gibson has never personally pulled conductive wire before, including from a free-spooling reel, across uneven terrain, or in the face of resistance. (Tr. 544-45).
2. Mr. Gibson never visited the worksite at which the accident occurred, which means he never walked or personally observed the areas over which the conductive wire was pulled and he never walked or personally observed the terrain or power poles involved in the accident. (Tr. 545-46).
3. Mr. Gibson did not personally observe the conductive wire involved in the accident, nor did he conduct any testing on the wire. (Tr. 546-47, 552).
4. Mr. Gibson never interviewed any of the witnesses of the accident, he was not present or any interviews or statements given by the witnesses of the accident, and he was not present for the testimony of Mr. Peterson at the trial. (Tr. 547-48).

(S. Br. 30-31).

In sum, the Secretary argues Mr. Gibson simply does not have the hands-on experience or

¹⁵⁵ Respondent did not respond to the Secretary's post-hearing motion to strike Mr. Gibson's expert testimony in its reply brief.

¹⁵⁶ Alternatively, the Secretary argues Mr. Gibson's expert testimony should be given no weight at all.

sufficient incident-specific data to render the expert opinion to which he testified at the trial.

The Court denies Complainant's post-hearing motion to strike Mr. Gibson's expert trial testimony. Mr. Gibson has worked in the electrical utility industry for 37 years. He is fully qualified to testify as an expert on electrical lines and equipment. He falls short and is only marginally qualified to provide expert testimony concerning circumstances surrounding metal wire or cable being manually pulled from a free spooling reel at the work site, and/or Respondent's practices. The Secretary's objections to Mr. Gibson's expert courtroom testimony go more to weight, than admissibility. The Court agrees with the Secretary that Mr. Gibson's expert testimony at the trial is entitled to little or no weight for the reasons stated above by the Secretary.¹⁵⁷ See *Avcon, Inc., Vasilios Saites, and Nicholas Saites*, 2000 WL 1466090, at *29 (expert testimony entitled to little weight where no specialized knowledge relevant to the case present).

Characterization and Penalty Amount¹⁵⁸

The Secretary classified the citation items as serious. A violation is classified as serious under section 17(k) of the Act if "there is a substantial probability that death or serious physical harm could result" if an accident occurred. 29 U.S.C. § 666(k); *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1136 (No. 06-1036, 2010), *aff'd*, 663 F.3d 1164 (10th Cir. 2011).¹⁵⁹ The Court finds that electric shock can result in serious physical harm or death. In the instant case,

¹⁵⁷ See generally *United States Steel Corp. v. OSHRC*, 537 F.2d 780, 783 (3d Cir. 1976) ("Expert testimony need not be accepted even if uncontradicted.").

¹⁵⁸ The court notes that OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). OSHA established new penalties effective August 1, 2016 for violations occurring after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred prior to November 2, 2015, thus the statutory maximum of \$7,000 applies here.

¹⁵⁹ The parties also agreed to the principles of law that "[a] violation is serious when 'there is a substantial probability that death or serious physical harm could result' from the hazardous condition at issue" and "[t]he Secretary need not show that there was a substantial probability than an accident would occur, only that if an accident did occur death or serious physical harm would result." See *Charles W. Mason, DDS & Assocs., PLLC*, 25 BNA OSHC 1792, 1795 (No. 10-2313, 2015); (Tr. 35-36).

one employee was fatally injured and the other, suffered severe injury. The Court finds the citation items were properly classified as serious. (Tr. 163, 169, 177-78; Ex. 13, pp. 1, 8, 13).

Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations.¹⁶⁰ *Id.* at 1137.

The maximum penalty for a serious citation is \$7,000. 29 U.S.C. § 666(b). For citation 1, item 1a, the Secretary proposed a penalty of \$7,000. For Citation 1, items 2 and 3, the Secretary proposed a combined penalty of \$7,000. (Tr. 163; Ex. 13, pp. 1, 8, 13).

In establishing the proposed penalties, OSHA considered the violation to be high severity with a greater probability of harm. No reduction was applied to the penalty for good faith. CO Milam testified that Respondent was a large employer, so there was no penalty reduction for company size. (Tr. 163-64, 177-78; Ex. 13, pp. 1, 8, 13).

The Court finds the Secretary has given due consideration to all the necessary criteria established by the Act. The Court does as well. The Court assesses a penalty of \$7,000 for citation 1, item 1a, and a grouped penalty of \$7,000 for citation 1, items 2 and 3. *See Cleveland Consol., Inc.*, 13 BNA OSHC at 1118 (two citation items involving substantially the same violative conduct held to be single violation and single penalty assessed).

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

¹⁶⁰ CO Milam testified that when OSHA calculated its proposed penalty, Respondent "received a ten percent increase due to previous high gravity serious violations," but such an increase could not be applied because of the statutory maximum of \$7,000 that existed at that time. (Tr. 164; Ex. 13, pp. 1, 8, 13).

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

a. Citation 1, item 1a, alleging a serious violation of 29 C.F.R. § 1910.269(a)(4)(viii) is AFFIRMED, and a penalty of \$7,000 is assessed.

b. Citation 1, item 2, alleging a serious violation of 29 C.F.R. § 1910.269(l)(3)(iii) is AFFIRMED, and a penalty of \$7,000 is assessed.

c. Citation 1, item 3, alleging a serious violation of 29 C.F.R. § 1910.269(q)(2)(i) is AFFIRMED, and grouped with Citation 1, item 2, for penalty purposes.

/s/ _____

The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: June 19, 2017
Washington, D.C.