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**United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,

Complainant,

v.

ECHO POWERLINE, LLC,

Respondent.

OSHRC Docket No. 17-1188

Appearances:

Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas,
Texas
For Complainant

Jane H. Heidingsfelder, Esq. & P.J. Kee, Esq., Jones Walker LLP, New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

Respondent was hired by the Tri-County Electric Corporation in Beaver, Oklahoma, to restore downed power lines and poles, which had fallen over during an ice storm on January 21, 2017. (Tr. 195). In a three- to four-mile area, Respondent had 12–13 crews working to rehang power lines, repair cross-arms, and re-set or adjust poles. (Tr. 365–66). One of the crews, led by Brad Brouillette, was rehangng distribution lines along a dirt road that terminated at an intersection with Highway 412 (“worksite”). Roughly mid-span between two sets of the poles being worked on, a high-power transmission line passed approximately four feet over the top of the distribution lines. (Tr. 184–186; Ex. C-7 at 2). The crew had successfully hung two of the three conductors

and was in the process of hanging the third and final conductor when the crew members heard somebody yell. (Tr. 75, 113). Two of the employees working as groundmen¹ fell to the ground, having suffered an electrical shock. (Tr. 74–75). One employee suffered burns to his arms and feet, and the other employee died from electrocution, notwithstanding his coworkers' efforts to resuscitate him. (Tr. 255; Ex. C-6).

Consistently with its obligations under the Occupational Safety and Health Act (“the Act”), Respondent reported the hospitalization and fatality within 24 hours of the incident. (Tr. 196; Ex. C-15). In response, Complainant dispatched Compliance Safety and Health Officer (CSHO) Robert Gay to conduct an inspection. (Tr. 245–46). After the accident, the trucks and equipment had been removed from the worksite, requiring CSHO Gay to reconstruct what happened based on his interviews with the crew members and what he could observe at the location where the accident occurred. (Tr. 247–53; Ex. C-5). Ultimately, CSHO Gay determined Respondent failed to take proper precautions when rehangng the conductors near Highway 412 in violation of the Act. Accordingly, Complainant issued a *Citation and Notification of Penalty*, alleging a serious violation of 29 C.F.R. § 1926.964(b)(1) and proposing a penalty of \$12,675.

Respondent submitted its Notice of Contest to Complainant, thereby initiating the present matter. A trial was held on July 26, 2018, in New Orleans, Louisiana. The following individuals testified: (1) Brad Brouillette, Respondent's on-site foreman; (2) Austin Ducote, a lineman for Respondent; (3) [redacted], an apprentice lineman; (4) Mike Grouvillia, Respondent's safety director; (5) CSHO Robert Gay; (6) Jeff Reed, Respondent's general foreman; and (7) Mike

1. A groundman is a gofer, of sorts. According to Marcotte, Respondent's expert, when he worked as a groundman, he sent the tools up, pulled the ropes out, pulled handlines, raised conductors, and generally helped raise materials and tools to the linemen. (Tr. 410).

Marcotte, Respondent's designated expert and Director of Utilities for the City of Alexandria, Louisiana.

Both parties submitted post-trial briefs, which the Court has considered, along with the record evidence, and relevant law. As will be discussed in depth below, the Court finds Respondent failed to employ adequate measures to minimize the possibility the distribution wire would contact the energized transmission cable² in violation of 29 C.F.R. § 1926.964(b)(1).

II. Stipulations & Jurisdiction

As indicated in their joint stipulation statement, submitted July 13, 2018, the parties agree the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c), and Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The remaining stipulations merely indicate agreements about procedural matters involving the issuance of the Citation and related Notice of Contest.

III. Factual Background

The facts of this case are not in serious dispute. The factual challenge in this case is recreating the scene of the accident based on the employees' accounts provided after the fact. While the particular poles and cables at issue were still in the same location, the vehicles and people had already been removed from the site by the time CSHO Gay arrived. While this is not unusual in and of itself, the difficulty lies in assessing the efficacy of certain safeguards based on their proximity to various hazards, which is an important consideration when dealing with high-voltage power sources. *See, e.g.*, 29 C.F.R. § 1926.960(c) (addressing minimum approach distances). Thus, as reflected below, the Court places substantial weight on the employees' testimony insofar

2. The case law, standards, and testimony tend to use the following terms interchangeably: cable, wire, conductor, phase, and lines. While trying to remain consistent, the Court uses some of those terms interchangeably, as well.

as their direct observations are concerned; however, as will be discussed later, their conclusions are not entitled to the same level of deference.

Respondent had multiple crews working to restore power in the area surrounding Beaver, Oklahoma, after an ice storm came through. This case is concerned with the crews supervised by Brouillette and Chris Bassett.³ The crews began work on the worksite located at the intersection of Highway 412 and 4120 in Beaver, Oklahoma. (Tr. 35). At this location, all three distribution lines running in a north-south direction had fallen to the ground as a result of the storm. (Tr. 59, 248, 257–58; Ex. C-5). In some cases, this was the result of the crossarms, which previously held the lines in place, falling apart or breaking. (Tr. 249, 257–58). Ultimately, it was up to Brouillette’s crew to repair and re-hang the lines, repair and/or replace damaged crossarms, and restore power. (Tr. 33).

Prior to beginning work, Brouillette gathered the crews to discuss the plan for re-hanging the distribution lines. (Tr. 56–57; Ex. C-12). He addressed how the work would be carried out and the plan for executing the work safely, including Personal Protective Equipment (PPE), positioning of equipment and people, and the use of barriers. (Tr. 57–62; Ex. C-12). Re-hanging the downed lines presented two significant electrical hazards: (1) the downed distribution lines connected to a pole that had additional, energized distribution lines running perpendicularly to them; and (2) approximately two to three spans down from the junction mentioned in (1), energized transmission lines ran over the top of the downed distribution lines.⁴ (Tr. 47, 174–75; Ex. C-5). Prior to

3. Although two foremen were present at the worksite, Mr. Bassett did not testify, and very little evidence was introduced regarding his presence at the site. Accordingly, the remainder of this decision will simply refer to Mr. Brouillette as the individual in charge of the worksite.

4. A distribution line carries 7200 volts, whereas a transmission line carries 69,000 volts, typically expressed as 7.2kv and 69 kv, respectively. (Tr. 47). For clarification, the transmission lines remained at their original height, roughly 24 feet above the ground and carry electricity to substations. (Tr. 47, 186). According to Michael Grouvillia, when the distribution lines were at normal height, the transmission lines were located about four feet above them. (Tr. 184–186).

beginning any work on the downed wire, Respondent had to put various safeguards into place. In the case of the adjacent transmission and distribution lines, Respondent used different methods for guarding against contact with each.

In the case of the adjacent distribution lines, Respondent's crew placed rubber blankets, also known as "guts", over the potential points of contact along the energized line. (Tr. 50, 100; Ex. C-5 at 4-7). This was standard procedure and in accordance with the dictates of Respondent's safety manual. (Ex. C-16 at 87, ¶21). No one in Respondent's crew was authorized, trained, or qualified to perform work on transmission lines. (Tr. 120, 150, 229). This meant they could not install the same barriers on the transmission lines as they did on the distribution lines, which they were qualified to work on. (Tr. 52). Instead, Brouillette designated one of the bucket trucks to serve as a barrier between the yet-to-be-hung distribution lines and the overhanging transmission lines. (Tr. 47; Ex. C-26 at ECHO-00018, C-27, C-28). According to Brouillette, the bucket truck, operated by Wayne,⁵ was parked at the nearest distribution pole, and its arm and attached bucket were raised over the distribution line to prevent it from whipping upward into the transmission line. (Tr. 70-71). He wanted to make it clear that Wayne was not positioned directly under the transmission line, but instead 15 feet to the north of it, consistently with Respondent's minimum clearance distance to a 69kv line. (Tr. 192; Ex. C-17 at 33).

In addition to the foregoing safeguards, Brouillette noticed the distribution pole adjacent to the 69kv lines was too tall, which placed the distribution lines too close to the overhanging transmission lines. (Tr. 98). Accordingly, he decided to shorten the distribution pole to maintain a safe distance between the distribution and transmission lines. (Tr. 98). Further, Respondent's employees were equipped with various forms of PPE, depending on their respective job duties and

5. Wayne's real name is Blake Hunley.

location. The linemen were all stationed in bucket trucks along the span of distribution wire to be installed, and each of them were equipped with the necessary PPE. (Tr. 87–88, 93; Ex. C-26). The bucket trucks were grounded and insulated in various locations. (Tr. 219–220). The groundmen, who were responsible for laying out and eventually raising the line to the linemen, wore electrical gloves rated to 30kv and sleeves, along with fire retardant clothing (“FRC”). (Tr. 60–61; Exs. C-6, C-12).

On the day of the accident, as depicted in the diagram created by Mike Grouvillia, Respondent’s Safety Director, Respondent had three bucket trucks and one digger truck on site.⁶ (Tr. 45–47; Ex. C-25). Wayne was directed to set his bucket to the north of the 69kv line and place his boom over the three-phase distribution line to prevent contact with the 69kv line. (Tr. 70–71; Ex. C-25). Linemen Taylor Hukins and Austin Ducote set their bucket trucks near the junction pole where the downed distribution lines came to a dead end, and another set of energized distribution lines ran perpendicular to the downed set. (Tr. 47, 174–75; Ex. C-5 at 6–7). Hukins and Ducote placed rubber line hoses and rubber blankets over the energized lines. (Tr. 121, 175; Ex. C-5 at 6–7). Groundmen [redacted], Roch Bordelon, [redacted], David Townsend, and Jake Thompson were all stationed near Hukins and Ducote. (Ex. C-28).

According to Brouillette, the groundmen had to “walk up” the wire, which required them to lay out the downed wire in separate strands along the ground before they could be pulled up and laid on the cross-arms of the poles for installation. (Tr. 62–63; Ex. C-25). This prevented the wires from becoming tangled amongst themselves prior to setting them in place. (Tr. 62). Meanwhile, the linemen, after installing barriers, set up a hoist and handline system, which allowed the groundmen to pull up the downed distribution line to the linemen, who set the lines into dead-end

6. The diagram was created with input based on post-accident interviews. (Ex. C-25). Another diagram created by Brouillette at trial reflects a similar orientation of trucks and employees. (Tr. 66–67; Ex. C-28).

shoes that hold the conductor in place on the cross-arm. (Tr. 54–55, 72–73). All of this was overseen by Brouillette and Bassett, the two crew leaders on the project. Brouillette stationed himself at the east end of the worksite, closest to the pole where the two sets of distribution lines met; Bassett stationed himself at the far east end, adjacent to Wayne. (Ex. C-28). Both stayed in contact through radio. (Tr. 70, 75).

At the time of the accident in this case, the crews had already re-strung the field and center conductors in the manner described above: the groundmen used the handline to lift the conductor to the linemen, who then placed the conductor into the dead-end shoe on the cross-arm.⁷ (Tr. 229). The lineman used the hoist to pull the conductor to the appropriate level above ground, taking into account the appropriate amount of sag.⁸ (Tr. 55). Before it was raised into the air, [redacted] had to splice the broken road conductor. (Tr. 136). Once he finished splicing the broken conductor, he and the other groundmen started to pull on the quarter-mile long conductor to set it in the handline and hoist it up to the linemen. (Tr. 134–138). As they were pulling, [redacted] began to feel tingling in his hands, like ants crawling on them, and dropped the cable, which snapped back and contacted his arm, sending electrical shock through his body and out of his foot. (Tr. 134). Further down the line, [redacted] fell to the ground and was unresponsive. None of the other groundmen suffered injury.

According to the testimony at trial, and contemporaneously provided accounts, nobody saw how the previously un-energized distribution wire became energized. The consensus, however, was that the wire, which was flexible, got snagged on something on the ground, causing it to snap upwards towards the 69 kv line; indeed, there were multiple mentions of a barbed wire fence that

7. The poles and attached cross-arms house three conductors, also referred to as phases, and a neutral conductor. (Tr. 103). The names of the phases relate to their orientation on the cross-arm; thus, the “field” phase is located next to the open field, the “center” phase runs down the middle, and the “road” phase runs adjacent to the road. (Tr. 103).

8. Sag is essentially a bow in the line, which allows for some degree of flexibility between poles. (Tr. 48–49).

ran along the ground adjacent to the downed lines. (Tr. 119, 138–39, 166, 250; Ex. C-5). Though most of those present testified that the road conductor contacted the 69kv line, this was based on deduction not on direct observation. Respondent’s report indicated the lines may not have touched but came close enough for the energy to jump from one line to another. (Ex. C-26 at 3).

[redacted] suffered substantial burns to his chest and feet. As for [redacted], his coworkers took turns providing CPR until the ambulance arrived, at which point both employees were taken to the hospital. [redacted] suffered severe burns and was in the hospital for a couple of days. [redacted], unfortunately, was unable to overcome his injuries and died at the hospital. Because of the hospitalization and fatality, Respondent contacted OSHA’s 1-800 phone line. (Ex. C-15). CSHO Gay came out on January 22, 2017, conducted an inspection, and performed interviews. Based on what he learned, CSHO Gay recommended, and Complainant issued, the following citation item.

IV. Discussion

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

29 CFR 1926.964(b)(1): Tension stringing method. 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.

On or about January 22, 2017, and at times prior there to [sic], the employer did not ensure that employees installing power lines that could contact energized parts utilized the tension-stringing method, barriers, or other equivalent measures to minimize the possibility of contact with live parts. Employees were exposed to electrical shock hazards.

(Ex. C-1).

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (*i.e.*, the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). “Preponderance of the evidence” has been defined as:

the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black’s Law Dictionary, “Preponderance of the Evidence” (10th ed. 2014) (emphasis added).

i. The Cited Standard Applies

According to the Scope and Application paragraph for Subpart V—Electric Power Transmission and Distribution, “This subpart . . . covers the construction of electric power transmission and distribution lines and equipment.” 29 C.F.R. § 1926.950(a)(1). ‘Construction’, as used in 1926.950(a)(1), “includes the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of existing electric transmission and distribution lines and equipment.” *Id.* Complainant asserts Respondent was performing construction-related electrical work on the downed distribution lines in a couple of respects: (1) Respondent replaced broken or missing wooden cross-arms with upgraded, new fiberglass cross-

arms, thereby *improving* existing electrical equipment; and (2) Respondent altered an existing distribution pole by shortening it to accommodate an overhanging transmission line. (Tr. 98, 249).

The Court finds the foregoing activities are sufficient to qualify Respondent's work as construction for the purpose of applying the Part 1926 electrical standards. Likewise, the Court finds the specific section cited, 29 C.F.R. § 1926.964, applies to Respondent's activities, because it "provides additional requirements for work performed *on or near overhead lines and equipment*", which is exactly what they were hired to do. 29 C.F.R. § 1926.964(a)(1) (emphasis added). Respondent did not dispute Complainant's application of the cited standard.

ii. The Terms of the Standard Were Violated

As will be discussed throughout this section, the debate over whether Respondent employed the tension-stringing method is largely semantic. Complainant contends that there is a *singular* tension-stringing method, which is highlighted by the standard's use of the definite article "the". See 29 C.F.R. § 1926.964(b)(1). This method, Complainant contends, requires the use of mechanical equipment that applies constant tension to new wires that are being strung or old ones that are being taken down. Conversely, Respondent contends that the use of handlines to raise the wires to the linemen constitutes *a* tension-stringing method, insofar as it is applied to re-stringing downed lines. While Respondent's groundmen were undoubtedly applying tension to the downed line in order to raise it to the linemen, this is not what is intended by *the* tension-stringing method as described at 29 C.F.R. § 1926.964(b)(1).

a. History of the Electric Power Standard

The first version of the Part 1926 electrical power standard was promulgated in 1972, along with waves of other existing federal and national consensus standards, during the initial promulgation of occupational safety and health standards under the OSH Act of 1970. See *Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment*, 79 Fed. Reg.

20316, 20316 (April 11, 2014). In 1994, the Part 1910 Electric Power standard was updated to replace out-of-date consensus standards with “a set of performance-oriented requirements that are consistent with the latest revisions” of those standards. Electric Power Generation, Transmission, and Distribution; Electrical Protective Equipment, 59 Fed. Reg. 4320, 4320 (January 31, 1994). The Part 1926 Electric Power standard, however, was not modified again for another 20 years. *Id.* According to the preamble to the Part 1926 final rule, “OSHA is revising the construction standard to make it more consistent with the general industry standard and is making some revisions to both the construction and general industry requirements.” *Id.* The need for an update was clear after 42 years, and the need for consistency is rendered plain in any case where the parties dispute whether a particular employer’s activities are construction or general industry. *See, e.g.*, 29 C.F.R. § 1926.950(a)(1)(i) note (“An employer that complies with § 1910.269 of this chapter will be considered in compliance with requirements in this subpart that do not reference other subparts of this part....”).

This interplay between the previous standard and the modified 1910 standard is on display in the application of the standard at issue to this case. *See* 79 Fed. Reg. at 20522. According to the preamble, “[T]he Agency used existing § 1910.269(q), rather than existing § 1926.955, as the base document in developing § 1926.964. However, OSHA also proposed requirements for § 1926.964 that the Agency took from existing § 1926.955 pertaining specifically to construction work.” *Id.* Ultimately, OSHA sought to “combine and simplify the construction requirements for stringing overhead lines” in a way that “will be easier for employers and employees to understand.” *Id.* at 20523. With that in mind, OSHA promulgated § 1926.964(b) with the intent that its subparagraphs serve as the “primary protection to employees installing conductors.” *Id.* at 20524.

The goal of the cited standard, 1926.964(b)(1), is to “minimize the possibility that conductors and cables the employees are installing or removing will contact energized power lines or equipment.” 29 C.F.R. § 1926.964(b)(1). An employer engaged in the installation or removal of overhead lines can accomplish this goal in one of three ways: (1) the tension-stringing method, as the subparagraph is entitled; (2) barriers; or (3) equivalent measures. *Id.* Prior to addressing the issue of whether Respondent utilized any of the enumerated methods, however, Respondent called into question what would constitute adequate “minimization” of the hazard, as it were. While Respondent implemented some measures, which undoubtedly served to reduce the hazard, the Court finds reduction is not the equivalent of “minimizing”, as that term is commonly understood, when such a standard is seen as the “primary protection” for employees installing conductors.

“Minimize”, though not defined in the standard, is commonly understood to mean “to reduce something to the smallest possible level or amount”. *See* Cambridge Dictionary (def. “minimize”) *available at* <https://dictionary.cambridge.org/us/dictionary/english/minimize> (Cambridge Univ. Press 2019). As the definition makes clear, to ‘minimize’ contemplates more than merely reducing the amount of something. As applied to this case, it means reducing the possibility of contact with an energized line to the smallest amount possible. As applied to the measures employed by Respondent to address the transmission line, the Court finds they failed to minimize the possibility of contact.

2. Respondent Did Not Use the Tension Stringing Method

The cited standard, which is entitled “Tension stringing method”, requires the use of the tension stringing method, barriers, or equivalent measures to prevent the line being installed from contacting energized lines or equipment. 29 C.F.R. § 1926.964(b)(1). Unfortunately, the standard does not define what the tension stringing method is. Complainant contends the tension stringing method refers to the use of mechanical equipment to maintain tension on the line throughout the

process of installation or removal. Accordingly, Complainant argues Respondent's use of a handline, although it applies tension to the line in a sense, does not qualify as the tension stringing method. Respondent, on the other hand, has called into question whether the tension stringing method is limited to the use of mechanical tensioning equipment, or whether the simple application of tension while re-hanging lines constitutes a tension stringing method. Based on the Court's review of the language of the standard, related standards, the preamble to the final rule, and associated case law, the Court finds Complainant's interpretation of the standard is the appropriate one.⁹

Initially, Respondent took the position that it did not use the tension-stringing method because it could not use mechanical tensioning equipment to re-string a downed line. (Tr. 87, 377–78). Upon further reflection, Respondent changed its position to assert that it was using *a* tension stringing method by using the handline to raise the line up to the lineman, who would ultimately set it in place.¹⁰ (Tr. 86, 147, 377). To Respondent, the handline applied tension to the line, which was attached at the farthest post from the highway, through the use of manpower—literally, someone pulling on the end of the wire. (Tr. 79–80). As will be shown, however, Respondent's initial position of asserting it was not using the tension stringing method because of the nature of its work in this particular instance is more consistent with the facts.

“When determining the meaning of the standard, the Commission must first look to its text and structure.” *The Davey Tree Expert Co.*, 2016 WL 845440 at *1 (No. 11-2556) (citing *Superior*

9. Respondent did not assert the affirmative defense of lack of proper notice; however, because its argument has the effect of calling the operative term, “tension stringing method”, into question, the Court must analyze the issue accordingly.

10. Complainant took the position that such a change caused undue prejudice to his case. While Complainant's frustration is understandable, Respondent is free to change its theory of the case at any time through the course of litigation insofar as it arises out of the same “conduct, transaction, or occurrence”. See *Metwest, Inc.*, 22 BNA OSHC 1066 at *5 (No. 04-0594, 2007) (describing the test for permitting an amendment to a cause of action). In fact, Respondent could renege on a previous denial in discovery based on newly discovered information. Arguments and case theories can change to conform to the evidence.

Masonry Builders Inc., 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003)). If the meaning of the standard’s language is “sufficiently clear” the inquiry ends. *Unarco Comm. Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). However, if “the meaning of the regulatory language is not free from doubt”, the standard is ambiguous. *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150–51 (1991). “A regulation is ‘ambiguous’ as applied to a particular dispute or circumstance when more than one interpretation is ‘plausible’ and ‘the text alone does not permit a more definitive reading.’” *Exelon Generation Co. v. Local 15, Int’l Bhd. of Elec. Workers*, 676 F.3d 566, 570 (7th Cir. 2012) (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011)). However, “a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). As such, the disputed provision should first be read within the context of the standard as a whole. If the ambiguity cannot be resolved, the next step is to review contemporaneous legislative histories of the standard. *Gen. Motors Corp.*, 17 BNA OSHC 1217 (No. 91-2973 *et al.*, 1995). If the question remains unsettled, then the Court will defer to Complainant’s interpretation of the standard insofar as it is reasonable. *Id.* (citing *Kiewit Western Co.*, 16 BNA OSHC 1689, 1693 (No. 91–2578, 1994)).

Although the term “tension stringing method” is not anywhere defined in the regulations, there are clues to its meaning both within the standard itself and in adjacent, related standards. First, the standard uses the definite article “the” to qualify “tension-stringing method”. A definite article is used to signify a particular, singular noun, as opposed to the generalized, indefinite article “a”. See Cambridge Dictionary, *supra* (defining “the” as a definite article “used before a noun to

refer to a particular thing *because it is clear which thing is intended*") (emphasis added). Thus, whatever the tension stringing method is, it is something specific and unique.

As previously noted, Complainant contends the plain language refers to a mechanical process whereby machines known as tensioners and pullers are used to string new electrical lines. These machines utilize a series of drums and brakes to reel out (or in, as the case may be) electrical line, while consistently maintaining tension on the line during the course of installation (or removal). (Tr. 384–85; Ex. C-31). *See also Davis H. Elliot Co., Inc.*, 26 BNA OSHC 1851 (No. 15-0799, 2017) (ALJ Phillips) (describing, in detail, the tension-stringing process). Complainant's argument, however, relies less on the actual language of the standard and focuses instead on case law that addresses the foregoing terminology. While that analysis has bearing on the reasonableness of Complainant's interpretation, it does not aid in the plain language analysis.

Respondent's formulation seems to suggest that the application of tension, alone, is what makes the tension stringing method unique as a method to install or remove wire. While Respondent's interpretation of tension-stringing is simple, its simplicity undermines the specificity indicated by the standard's use of the definite article. The installation of wires appears to require the application of tension as a matter of course, regardless of the method applied; wires, whether new or old, have to be pulled between the poles in order to be installed. As told by all of Respondent's employees, whether that is accomplished with mechanical pullers and tensioners, ground pulls by hand, or handlines and hoists, tension is applied to the line. The specific method employed depends on the job at hand. (Tr. 384).

At this worksite, where Respondent was working with previously downed wire, the crew could not use mechanical tensioning equipment because that equipment is only designed for taking line off of a spool or putting it back on. (Tr. 384–85). Thus, they separated and dragged the downed

line between the poles upon which the wires were to be hung. (Tr. 62–63). Only *after* the lines were laid out did Respondent’s crew apply tension to the line to *raise* it to the linemen above. Given the variety of ways in which tension appears to be applied to the wire during installation, Respondent’s interpretation proves to be too expansive if the standard’s use of the definite article is to have any meaning. *See, e.g., Davis H. Elliot*, 26 BNA OSHC 1851 (addressing the safeguards necessary for ground pulling a wire); *Williams Constr. Inc.*, 13 BNA OSHC 1834 (No. 87-0637, 1988) (ALJ Child) (addressing treating the wire as energized in lieu of tension-stringing).

Further undermining Respondent’s approach is that the definite article only applies to the tension stringing method, which itself is one of multiple ways to comply with 1926.964(b)(1). Stated in the disjunctive, “or”, the standard provides employers with an opportunity to accomplish the same level of protection through alternative means, such as barriers or “other equivalent measures”. 29 C.F.R. § 1926.964(b)(1). If an employer cannot use tension stringing—whether due to lack of equipment, as in this case, or because its use is inadvisable—then the employer has the option to use barriers or equivalent measures so long as they accomplish the same level of protection. *See Williams*, 13 BNA OSHC 1834 (discussing how treating the line as energized was the preferable method to tension-stringing under the circumstances). The availability of alternatives to the tension-stringing method within the standard also implies its uniqueness: the standard is a specification standard, requiring the use of tension-stringing, unless tension-stringing is not available. If tension-stringing is not available, the standard becomes a performance standard, which allows the employer to choose the appropriate measures to provide equivalent protection. *See Warnel Corp.*, 4 BNA OSHC 1034 (No. 4537, 1976) (describing three types of standards: specification standards, performance standards, and hybrid specification/performance standards, such as the one described here).

There is nothing in the standard or related definitions *per se* to exclude a handline, which is a mechanical implement that relies primarily on manpower, as a tension-stringing implement. Handlines are specifically referenced in paragraph 1926.964(c), governing live-line barehand work, but only as a restriction against their use between the aerial bucket and the ground. *See* 1926.964(c)(16). However, just because a handline’s use is restricted in this context does not, by virtue of its location in the regulations, exclude it as a tension-stringing method. Given this lingering ambiguity, the Court must look to “contemporaneous regulatory history” of the standard. *See Gen. Motors Corp.*, 17 BNA OSHC 1217.

While the lack of clarification within the standard leads to the conclusion the term is ambiguous, the preamble and Complainant’s consistent interpretation of the term “tension stringing method” clarify any lingering doubt as to its meaning. In the preamble to the final rule, which was issued in 2014, OSHA stated, “Paragraph (b)(1) requires employer to take precautions to minimize the possibility that conductors and cables, during installation and removal, will contact energized power lines or equipment.” 79 Fed. Reg. at 20523. In order to minimize the possibility of contact, paragraph (b)(1) “requires employers to do so by stringing conductors using the tension-stringing method (which *keeps* conductors *off the ground* and clear of energized circuits)” *Id.* at 20523–20524 (emphasis added). Thus, not only is the tension-stringing method a specific manner of installing electrical wire, it is one that is accomplished in a particular way: maintaining enough tension so that the electrical wire does not touch the ground during the course of installation. Tensioning and pulling equipment prevent electrical wires from getting tangled in the underbrush or adjacent structures, such as fences, by maintaining tension on the line *at all times*.

(Tr. 355–56). By maintaining mechanical tension, the line is never allowed to touch the ground.¹¹
(Tr. 258–59).

The purpose of the tension-stringing method is to control the flexible line and avoid the type of hazard that came to fruition in this case: underbrush and fencing along the ground that can snag the line and cause it to violently release into adjacent, energized lines. Although Respondent’s crew utilized tension to raise the wire for eventual installation, the foregoing illustrates the crew did not use the tension-stringing method. As indicated in the standard, and clarified in the preamble, the tension-stringing method requires wires to be kept off the ground and clear of energized circuits. *See* 79 Fed. Reg. at 20524. Brouillette recounted that a tension-stringer could not be used to re-hang old wire; instead, he testified how the wires were laid out on the ground and untangled from each other prior to raising them to the cross-arms. (Tr. 63). This is not tension-stringing. If tension was the only qualifier for the particular method discussed, then nearly every method for pulling or raising a wire would count as the tension-stringing method, even though the standard clearly mandates a singular methodology. Based on the testimony, the only time the line was kept clear of the ground was when it was being lifted, by handline, to the linemen in the aerial buckets. (Tr. 63). Because it was on the ground, it was thereby exposed to the snags and other obstacles the tension-stringing method, as described in the preamble, is designed to avoid. Accordingly, the Court finds Respondent did not utilize the tension-stringing method.

This conclusion is buttressed by case law addressing the use of tension-stringing, in which neither the Court nor the parties before it were operating under a cloud of confusion as to the proper meaning of the term. *See, e.g., Williams*, 13 BNA OSHC 1834 & *Davis H. Elliot*, 26 BNA OSHC 1851. In *Williams Construction*, the employer was hired to replace a distribution pole to comply

11. The Court also notes that there was no debate or confusion over the use of the term “tension-stringing method” during the Notice and Comment period preceding the issuance of the final rule. *See generally* 79 Fed. Reg. at 20524.

with new federal standards. *Williams Constr.*, 13 BNA OSHC 1834. The new, higher pole required the crew to replace the existing lines, which stretched for one span across the Clark Fork River near Paradise, Montana. *Id.* During the course of the job, one of the crew members was fatally electrocuted, which prompted OSHA to cite the employer for its failure to use the tension-stringing method.¹² *Id.* The employer opted not to use tension-stringing because, in its estimation, the additional hazards imposed by tension-stringing did not justify its use under the circumstances; namely, that there could be “excessive oscillation” using a tension-stringer on a one-span job. *Id.* at *7. Instead, the crew opted to treat the wire as energized, which came with its own set of necessary safeguards. *Id.* An expert supported this method as appropriate for the conditions, though he did note that the tension-stringing method would have prevented the wire from becoming snagged under the surface of the river. *Id.* Ultimately, the court agreed with the employer that tension-stringing was not required under the circumstances. *Id.*

Just as interesting as how the court and parties in *Williams* referred to tension-stringing as a method for raising a power line is how they did not characterize the work the employer was actually doing. According to the factual narrative, based on the testimony provided, the line at issue was being raised and controlled using tag lines, ropes, pulleys, and *handlines*. *Id.* Notwithstanding the fact that the employer in *Williams* was using the exact same equipment as Respondent did here, at no time was OSHA, the employer, or the court under the impression that *Williams* was employing the tension-stringing method.

Similarly, in *Davis H. Elliot*, the parties had the same understanding of tension-stringing. Based on the presentation of evidence, the court understood tension-stringing as “the mechanized

12. Because the events of this case occurred in 1986, Respondent was governed by the previous version of the electrical power standards for construction. See *Williams Constr.*, 13 BNA OSHC 1834 (citing 29 C.F.R. § 1926.955(d)(2) *effective until* July 9, 2014). As discussed above, both the predecessor and current standards require the use of the tension-stringing method.

pulling of conductive wire through previously-installed stringing blocks attached to a series of power poles.” *Davis H. Elliot*, 26 BNA OSHC 1851 at n.148. Further supporting this concept, the employer argued—in an attempt to show compliance with the cited standard—ground pulling was an “equivalent method” used to minimize contact with energized lines. *Id.* (citing 29 C.F.R. § 1910.269(q)(2)).¹³ Just like *Williams*, the employer in *Davis H. Elliot* admitted it was not using tension-stringing but attempted to show compliance through “equivalent measures”. *Id.* The Court does not see a meaningful distinction between the activities of Respondent in this case and the respondents in *Williams* or *Davis H. Elliot*. Accordingly, the Court finds Respondent was not using the tension-stringing method.

3. Respondent’s Barriers Were Insufficient to Minimize the Hazard Imposed by the 69kv Transmission Line

As an alternative to tension-stringing, 1926.964(b)(1) provides employers with the option to install barriers to minimize the possibility of contact with energized wires. A barrier, according to the definitions section of Subpart V, is “[a] physical obstruction that prevents contact with energized lines or equipment or prevents unauthorized access to a work area.” 29 C.F.R. § 1926.968. According to Respondent’s employees and its designated expert, the industry uses bucket trucks as barriers under certain circumstances. (Tr. 73–74, 99, 417). Although CSHO Gay disputes a bucket truck is a sufficient barrier under the standard, his experience was limited to a one-year stint as a groundman, which pales in comparison to the experience of Respondent’s linemen, groundmen, and expert that testified in this case. (Tr. 33–35, 299–301, 363, 408). The Court has no reason to doubt the testimony of Respondent’s witnesses on this account, and thus finds a bucket truck, under certain circumstances, can serve as a barrier. The key question is whether Respondent’s bucket truck, as a barrier, minimized the hazard. The Court finds it did not.

13. As previously noted, 1926.964(b) and 1910.269(q) are functionally equivalent and use identical language.

The only requirement of a barrier is that it “physically prevents” contact with energized lines. *See* 29 C.F.R. § 1926.968 (def. “barrier”), 79 Fed. Reg. at 20524 (barriers “physically prevent one line from contacting another”). Insofar as the boom and bucket of a bucket truck are utilized to accomplish such a result, it could conceivably be a barrier.¹⁴ However, merely because a bucket truck can qualify as a barrier in a general sense does not mean its use under the facts of this case renders it sufficient to minimize the hazard. The way Respondent used and oriented this particular bucket truck was inadequate to minimize the hazard presented by the overhead transmission lines.

Of particular concern to the Court is the lateral distance separating the truck from the overhanging hazard. (Tr. 73). According to Grouvillia, who performed Respondent’s investigation, the bucket truck was not directly between the two lines—indeed, this would have been difficult given only four feet separated the lines when fully installed. (Tr. 190). Instead, the bucket was parked over the top of the distribution line, roughly 15 feet to the north of the crossover in the direction of the junction pole. (Tr. 71; Ex. C-28). There was no barrier between or placed upon either of the two lines that would “physically prevent” the distribution line from contacting the live transmission line at the point where they crossed. *See, e.g.*, 79 Fed. Reg. at 20524 (discussing rope nets and guards as barriers that “physically prevent one line from contacting another”). (Tr. 190). While the line was hooked into a dead-end shoe at the end of the three-span set of poles,¹⁵ it was only “laid up” on the post adjacent to the transmission line, was still sagging to the ground in between poles, and had yet to be laid up on the junction pole where the two linemen were waiting to receive it. (Tr. 62–63, 93; Ex. C-27 at ECHO-00270). According to [redacted], the crew was handling roughly a quarter-mile of cable, which he characterized as

14. By so holding, the Court is not ruling that bucket trucks should be used as such; only that Complainant failed to prove bucket trucks could not be used as a barrier at all.

15. This was also referred to as the “take-off” pole, presumably to indicate that it was where the work of rehangng the wire began.

“flexible” and “not heavy”. (Tr. 138–39). This not only left ample space for the cable to rebound upwards, but it also meant there was an ample amount of cable capable of rebounding.

Further highlighting the inadequacy of Respondent’s efforts to address the hazard of the transmission lines is the manner in which it addressed the adjacent, energized distribution lines on the junction pole. As illustrated in the photographic exhibits, Respondent placed rubber blankets/guts over each of the adjacent lines and extended that protection out 8 feet on both sides of the pole. (Tr. 100; Ex. C-5 at 6–8). Thus, there was a barrier that physically prevented contact with the energized line at the potential point of contact: if the line to be installed whipped upwards, it would strike the rubber barrier. Respondent did not install barriers on the transmission lines because they did not have crew members qualified to work on them. Thus, in lieu of hiring someone to barricade the transmission lines, Respondent opted to use a single bucket truck, which Wayne could not operate any closer than 15 feet from the transmission lines due to Respondent’s self-imposed minimum clearance distance. There was nothing in between the two lines at the potential point of contact.¹⁶

Considering the foregoing circumstances, the Court finds Respondent failed to institute adequate barriers to address the specific hazard of the transmission lines.¹⁷ It is one thing to reduce the potential for a hazard to occur; it is quite another to minimize that possibility. *See Davis H. Elliot*, 26 BNA OSHC 1851 at *48 (rejecting argument implying a reduction in hazard is equivalent to minimizing the hazard). Although the bucket truck would prevent the line from bouncing

16. Some witnesses testified about induced energy or jumping, such that the lines at issue would not have to touch, but only come close enough, to transfer electricity from the live line to the de-energized one. Though it was referenced in some contemporaneous accounts and at trial, the Court was not presented with enough information to opine further on it; however, the extent to which such potential exists highlights the importance of considering the possibility of contact.

17. Respondent also characterized the gloves worn by the crew members as barriers. (Tr. 124). While that may be the case under a different set of circumstances—as with the bucket truck—the voltage rating was limited to 30kv, which is less than half of the voltage running through the transmission line. (Tr. 125). This is not an adequate barrier.

upwards at the point where it was located, the truck was not located underneath the potential point of contact, i.e., the transmission line. According to the trial testimony, the distribution line, which was a quarter-mile long and flexible, was not fastened anywhere but the post farthest from the junction pole; elsewhere it was merely laid up on the crossarm or stretched out across the ground. Along the entire distribution line being worked on, there was a single point at which it could rebound into an energized 69kv transmission line. Respondent opted to place a bucket truck over the top of the distribution line 15 feet to the north of this point. While this positioning may have been appropriate from the standpoint of Respondent's minimum approach distance requirements, there was nothing to physically prevent the remaining portion of the line from bouncing upwards at the point where the transmission line crossed over, or at any other point along the three spans of line.

4. Respondent Did Not Employ “Equivalent Measures” to Address the Hazard

As an alternative to tension-stringing or barriers, the cited standard allows an employer to institute “equivalent measures” to minimize the possibility of contact with energized power lines. *See* 29 C.F.R. § 1926.964(b)(1). This term, of course, is also undefined; however, the onus is on Respondent to adopt measures that provide protection equal to tension-stringing and/or barriers. To illustrate, the Court will briefly recount the two cases cited above, both of which provide examples of how employers have attempted to utilize (with varying degrees of success) “equivalent measures” to comply with the standard.

In *Williams*, the crew opted to treat the line as energized—even though it was not—during the period of time they were working on it. *Williams*, 13 BNA OSHC 1834. To treat the line as energized meant to “barricade, insulate or isolate yourself from the line, and insulate, isolate your equipment from the line where nobody, the public or the people that are working the job, will make

accidental contact.” *Id.* at *7 (quoting with approval to safety director for Montana Power Company). The ALJ found the employer took adequate steps to safeguard its employees by treating the installed line as energized and found the fatality that occurred was the result of employee misconduct. *Id.*

The employer in *Davis H. Elliot* attempted something similar; however, the ALJ found the employer’s efforts wanting. Davis’ crew performed a ground pull of the wire to be installed, during the course of which, the wire rebounded upward into an overhead, energized power line. *Davis H. Elliot*, 26 BNA OSHC 1851. Davis argued the distance between the overhead line and the ground was a sufficient barrier to prevent accidental contact. *Id.* The ALJ disagreed and found “[t]here is no equivalent protection when the wire being ground-pulled is close enough to contact the energized line.” *Id.* Accordingly, the ALJ concluded that ground-pulling, as executed by Davis, was not equivalent to tension-stringing or the use of insulating barriers and found Davis violated the standard.¹⁸

While Respondent instituted multiple measures to address the various hazards present at the worksite, the only measures in place to address the potential for contact with the transmission line were the bucket truck and rubber gloves that were not rated for the highest level of voltage to which Respondent’s employees were exposed. As the Court concluded above, the truck, alone, was insufficient as a barrier to minimize the hazard. The Court does not find Respondent, aside from the insufficiently protective gloves, implemented any additional, equivalent measures to

18. When determining the proper meaning of “equivalent measures”, the ALJ relied on the standard’s requirements for tension-stringing, which cross-reference a separate set of requirements within the standard cited. *See Davis H. Elliot*, 26 BNA OSHC 1851 (citing 29 C.F.R. § 1910.269(q)(2)(ii)). The Court need not rely on these equivalent measures, as neither the bucket truck nor the rubber gloves, either individually or in tandem, were sufficient to minimize the possibility of contact with the transmission line.

prevent exposure to the high-voltage transmission line. Accordingly, the Court finds the terms of the standard were violated.

iii. Respondent's Employees Were Exposed to the Hazard

To establish exposure, Complainant “must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997) (citing *Rockwell Int'l Corp.*, 9 BNA OSHC 1082 (No. 12470, 1980) & *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). Respondent's groundmen, including [redacted] and [redacted], were handling the downed distribution line when it whipped upward and contacted the energized transmission line. At that time, the lines were not outfitted with barriers, nor were Respondent's employees properly equipped with gloves designed to withstand the highest voltage to which they could be exposed. Accordingly, the Court finds Respondent's employees were exposed to the hazard.

iv. Respondent Knew of the Hazardous Condition

“To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation.” *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show “knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard.” *Id.* “Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfied his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.”

Dover Elevator Co., 16 BNA OSHC 1281 (No. 91-862, 1993); *see also Dana Container*, 25 BNA OSHC 1776 (No. 09-1184, 2015) (citing *Dover* for same proposition).

Respondent's worksite was supervised by Brad Brouillette. Brouillette was responsible for developing a work safety plan and for conveying the elements of that plan to his subordinates. (Tr. 35–36, 55; Ex. C-12). Part of the plan required Brouillette to serve as the "required observer" for the worksite. (Ex. C-12). Brouillette's testimony illustrates he was aware of all relevant hazards on the worksite, including the location where the transmission lines crossed over the distribution line being installed. Because Brouillette was Respondent's on-site foreman, the Court finds his knowledge is properly imputed to Respondent.

v. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072 (No. 88-0523, 1993).

V. One of Respondent's employees suffered severe burns requiring hospitalization, and another was fatally electrocuted as a result of his exposure to the hazard. The violation was serious. Accordingly, the Court shall AFFIRM Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.964(b)(1). **Penalty**

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's

business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of \$12,675. According to CSHO Gay, he assessed the citation as high gravity and high probability. This assessment was predicated on the fact that death or serious injury were the most likely injuries that could result from exposure, and that the probability of such an occurrence was high given the lack of adequate protection between the transmission and distribution lines. That such an unfortunate incident occurred reinforces this conclusion. Complainant did not provide any discounts for good faith, history, or size. While the Court generally agrees with Complainant's assessments as being supported by the record, the Court does not agree with Complainant's decision not to award a discount for size. According to Grouvillia, Respondent has roughly 70 employees, or nearly one-quarter of what would be considered a large employer under Complainant's Field Operations Manual. (Tr. 158). Size, unlike good faith or history, has nothing to do with the character of the employer or its attempts to comply; rather, it merely reflects a considered judgment that smaller employers are likely less able to afford penalties towards the top of the scale than their larger counterparts. As such, the Court shall apply a 10% discount based upon Respondent's size, to which the Court must give due consideration.

See R.G. Friday Masonry Inc., 17 BNA OSHC 1070, 1075 (No. 91-2027, 1995); 29 U.S.C. § 666(j). Accordingly, a penalty of \$11,400 shall be assessed.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED, and a penalty of \$11,400 is ASSESSED.

SO ORDERED

/s/
Peggy S. Ball
Judge, OSHRC

Date: June 18, 2019
Denver, Colorado