

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

)))))))))))))))))))))))))))))))))))))))))) ,
Secretary of Labor, :
Complainant, :
v. : OSHRC Docket No. **01-1029**
Texas Electric Utility Construction, Inc., :
Respondent. :
)))))))))))))))))))))))))))))))))))))))) -

Appearances:

Christopher V. Grier, Esquire
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Robert E. Rader, Jr., Esquire
Rader & Campbell
Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Texas Electric Utility, Inc. (TEUC), is a contractor engaged in building, repairing and maintaining high voltage electric power distribution and transmission lines. In December 2000, a severe ice storm in east Texas damaged power lines and caused major power outages. Rusk County Electric Cooperative (RCEC) asked respondent and other companies to assist in restoring electrical power to its customers.

On December 19, 2000, an employee of the respondent was fatally electrocuted while working on power lines for RCEC near Longview, Texas. A fatality investigation was conducted by the Occupational Safety and Health Administration on December 20, 2000. As a result of this investigation, a citation was issued to TEUC on June 1, 2001.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1910.269(m)(3)(iv) for failing to use tags to ensure protection of employees against the reenergizing of the power lines on which they were working. A penalty of \$6,300.00 was proposed. TEUC timely contested the citation.

The case was originally designated for E-Z trial procedures under 29 C.F.R. § 2200.200, *et seq.*; however, E-Z trial procedures were discontinued. The hearing was held in Dallas, Texas, on December 13, 2001. The parties stipulated that the testimony of Ronnie Spencer in *Secretary v. Rusk County Cooperative*, OSHRC Docket No. 01-1071, on December 12, 2001, would be testimony in this case. TEUC admitted jurisdiction and coverage in its answer. As affirmative defenses, respondent asserts that:

1. Respondent did not create or control the alleged violation. Rather, the alleged violation was created and controlled by the supervising contractor.

2. Alternatively, any “violation” created or controlled by employees of respondent was an isolated instance of employee misconduct of which respondent had no knowledge, and which respondent could not have reasonably foreseen.

3. Adoption, implementation, use, or compliance by respondent with the practices, means, methods, operations, or processes sought by the Secretary is not feasible or possible.

For the reasons that follow, Citation No. 1, item 1, is vacated and no penalty is assessed.

Background

In the aftermath of the ice storm in east Texas, TEUC sent its foreman, John Colfax, and four apprentice linemen to assist RCEC in repairing the storm break. Respondent instructed Colfax to report to RCEC and to do whatever it needed to be done. When Colfax reported to Keith Holmes at RCEC, Holmes told him that the crew would be split up and assigned to work under different RCEC supervisors. Colfax objected to splitting up his crew because the other four workers in his crew were only apprentice linemen who needed to be supervised by a journeyman lineman. Holmes assured Colfax the apprentices would be working under experienced journeyman linemen. Colfax and two of his men were assigned to work under RCEC supervisor Joe Collins. Shane Freeman and

Bryan Hale were assigned to work under RCEC supervisor Ronnie Spencer. Two men from Sam Houston Electric Cooperative and two tree trimmers from Brock Tree Service were also assigned to work under Spencer.

Spencer supervised the crew and the entire jobsite. He assigned tasks and made all decisions as to work to be done. He was responsible for safety compliance by the crew. He directed the work of Freeman and Hale and had the authority to fire them. Freeman, a TEUC apprentice lineman, testified that he considered Spencer to be his foreman on this job and that Spencer was in charge of this crew or group of employees. Freeman normally worked under the supervision of John Colfax, a journeyman lineman for TEUC. When Freeman worked in Colfax's crew, Colfax had the responsibility to tag the disconnect. He testified that Spencer took the place of Colfax on this job.

On December 19, 2000, these employees, working under the supervision of RCEC supervisor Ronnie Spencer, were repairing power lines along FM 349, a Farm and Market road. When Ronnie Spencer, the Texas Electric employees, and the Brock employees arrived at the power line disconnect location, Spencer visually checked the "OCR" and "air gap" and determined that the power line at this location had been deenergized. These devices, when disconnected, deenergize the line and prevent reenergization. They had been disconnected by the Sam Houston employees twenty minutes earlier. Neither Spencer nor any employee under his supervision tagged the OCR or the air gap to indicate that employees were working and to prohibit operation of the disconnecting means at three locations. The first location was a quarter mile from the OCR involving a split segment of the line. A quarter mile further down the line, and a half mile from the OCR, an insulator was broken. At the third location, three quarters of a mile from the OCR, a tree had fallen onto the distribution line.

Spencer assigned the two Texas Electric employees to replace the broken insulator at the second location one-half mile from the OCR. The OCR and air gap were not visible from the three problem areas, and employees working at the three areas were not visible to each other. When the repairs were made, Spencer reenergized the line after he received a confirmation via walkie-talkie from Horn of Sam Houston Electrical Cooperative that all employees were clear of the power lines. Bryan Hale of TEUC was fatally electrocuted when he came into contact with the energized line.

Discussion

The Secretary has the burden of proving the violation:

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Alleged Serious Violation of 29 C.F.R. § 1910.269(m)(3)(iv)

The Secretary in Citation No. 1, item 1, alleges that:

Tags were not used to prohibit the operation of disconnecting means to indicate that employees are at work:

FM 349, 1/4 mile South of FM 2011, Longview, Texas:

On or about December 19, 2000, tags were not used at work site to ensure the protection of the work crews against the re-energizing of the power lines on which they were working.

The standard at 29 C.F.R. § 1910.269(m)(3)(iv) provides:

(3) *Deenergizing lines and equipment.* (iv) Tags shall prohibit operation of the disconnecting means and shall indicate that employees are at work.

The Secretary must prove that 29 C.F.R. § 1910.269(m)(3)(iv) applies to work, working conditions, or work practices.

29 C.F.R. § 1910.269(a)(1) sets forth the general application of this section providing in part: (A) *General--(1) Application.* (I) This section covers the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment. These provisions apply to:

(A) Power generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering, which are accessible only to qualified employees;

More specifically, 29 C.F.R. § 1910.269(m)(1) provides in part:

(M) *Deenergizing lines and equipment for employee protection--(1) Application.*
Paragraph (m) of this section applies to the deenergizing of transmission and distribution lines and equipment for the purpose of protecting employees.

Respondent's employees, Freeman and Hale, were working on power distribution lines on December 19, 2002. The standard directly relates to protecting employees working on such lines. The standard is clearly applicable to work, working conditions, and work practices on this jobsite.

The Secretary has the burden of proving the employer's noncompliance with the terms of the cited standard. It is undisputed that respondent did not use tags at the disconnect location on this site to prohibit the operation of disconnecting means or to indicate that employees were at work. Respondent does not assert that it tagged this location, but argues that the foreman for RCEC was responsible for such tagging. The Secretary has met her burden, proving that TEUC did not comply with the terms of the cited standard when it did not use the required tags.

Respondent's employees had access to the violative conditions. They were working on distribution lines and equipment when the disconnecting means on these lines were not tagged. The Secretary has met her burden of proof relating to this element.

The issue remaining to be decided is whether the respondent, TEUC, knew, or with the exercise of reasonable diligence, could have known of the violative conditions.

As discussed above, respondent's employees, Hale and Freeman, were inexperienced apprentices in need of close supervision by a journeyman lineman or foreman. John Colfax, the TEUC journeyman lineman in charge of the TEUC crew, told Rusk's supervisor Keith Holmes that the four employees with him were apprentices needing such supervision. He even objected to splitting up his crew due to the inexperience of the four apprentices. Holmes denied the request by Colfax to keep the crew together, but assured him that the apprentices would work under the supervision of experienced journeyman linemen. Freeman and Hale also told Holmes of their lack of experience. Holmes told them he would take care of them.

As an electrical cooperative, Rusk specializes in the repair of storm damaged power lines, and is fully capable of working safely under adverse emergency conditions to restore electrical power.

Ronny Spencer, with Rusk, directly supervising the work of Freeman and Hale, was responsible for their safety compliance and had authority to fire them. Freeman testified that he considered Spencer to be his foreman on this job, and that he felt Spencer took the place of Colfax as his supervisor. Rusk considered Spencer the supervisor of the crew, which included Freeman and Hale. Both TEUC and RCEC have policies to deenergize and tag out power lines while they are being repaired. Both companies had done so in the past.

Respondent, TEUC, was reasonably diligent in informing RCEC management of the inexperience of its apprentice employees and the need for direct close supervision at all stages of the work. Respondent's reliance on RCEC to provide such supervision was reasonable in this situation, since RCEC had expertise in repair of storm damaged power lines, controlled the jobsite, and was knowledgeable of the terrain and layout of the power lines in this part of east Texas. The Secretary produced insufficient evidence to prove that TEUC had actual or constructive knowledge that the power line was not tagged to prohibit the operation of disconnecting means and to indicate that employees were at work.

There being a failure to prove that respondent TEUC knew, or with the exercise of reasonable diligence, could have known of the violative condition, the alleged violation of 29 C.F.R. § 1910.269(m)(3)(iv) is vacated and no penalty is assessed.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

It is ORDERED:

Citation No. 1, item 1, alleging a serious violation of 29 C.F.R. § 1910.269(m)(3)(iv), is vacated and no penalty is assessed.

/s/

STEPHEN J. SIMKO, JR.

Judge

Date: July 29, 2002