

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Sam Houston Electric Coop., Inc.,

Respondent.

OSHRC Docket No. 01-1253

**Appearances:**

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

Tony R. Rosenstein, Esq., Baker Botts, LLP, Houston, Texas  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**DECISION AND ORDER**

Sam Houston Electric Coop., Inc. (SHECO), contests a one-item citation issued by the Secretary on June 12, 2001. SHECO is a rural electric cooperative chartered by the state government to provide electricity to its members. In December 2000, a severe ice storm in eastern Texas caused extensive damage to several power lines, resulting in outages in that part of the state. Two of SHECO's employees volunteered to assist Rusk County Electric Cooperative, Inc. (RCEC), in restoring power to RCEC's approximately 17,000 members. On December 19, 2000, a lineman for another electric service company also assisting RCEC, Texas Electric Utility Construction, Inc. (TEUC), was electrocuted while working on a power line at a location near Longview, Texas. The Secretary investigated the fatality and issued citations to SHECO, RCEC, and TEUC.

The citation alleges that SHECO committed a serious violation of § 1910.269(m)(3)(iv), because its employees failed to use tags to ensure the protection of employees against re-energizing power lines on which they were working.

A hearing in this matter was held on December 3, 2001, in Houston, Texas. SHECO argues that it did not violate the terms of the cited standard; that it was not an employer within the meaning of the Occupational Safety and Health Act of 1970 (Act) at the fatality site; that its employees were not exposed to a hazardous condition; and that the lineman's electrocution was the result of unpreventable employee misconduct. The parties have filed post-hearing briefs.

For the reasons discussed below, it is determined that the Secretary failed to establish that SHECO had actual or constructive knowledge of the violative condition. The citation will be vacated.

### **Background**

In December 2000, RCEC was experiencing emergency operational problems in Rusk County due to downed power lines resulting from a severe ice storm. The ice storm did not affect power lines serviced by SHECO, whose service area is in Livingston, Texas, located approximately 80 miles southwest of Rusk County. RCEC asked area electric service companies for assistance in repairing the lines. Two SHECO linemen, Larry Horn and Ronnie Hindsman, volunteered to help, as did TEUC linemen Bryan Hale and Shane Freeman. RCEC also arranged for Brock Contractors to cut fallen tree branches that had become entangled in the power lines.

Ronnie Spencer, a staking engineer for RCEC, supervised the emergency power restoration effort (Tr. 55). His crew on December 19 consisted of SHECO employees Horn and Hindsman, TEUC employees Hale and Freeman, and two employees from Brock Contractors (Tr. 56-57). Their last job on December 19 was repairing power lines located along Highway 349, approximately 4 miles from Kilgore, Texas (Tr. 56). Spencer assigned the employees from TEUC to replace a damaged insulator, and he assigned the Brock Contractors employees to accompany them and to trim some branches around the power lines. The employees from TEUC and Brock Contractors did not have walkie-talkies or any other means of communicating with Spencer once he left their assigned site. Spencer, Horn, and Hindsman drove to another location along the road, approximately ¼ mile away, where a pine tree had fallen across the power lines (Tr. 64-65, 112-113).

The bucket truck operated by the TEUC employees became stuck in a ditch by the side of the road as Hale and Freeman attempted to untangle two power lines. Spencer learned of their predicament from some RCEC employees who had driven by to deliver lunch to the TEUC and Brock employees. Spencer sent Horn and Hindsman to pull them out of the ditch with their SHECO truck. After doing so, Horn

radioed Spencer that Hale and Freeman were clear of the power lines. Spencer re-energized the lines (Tr. 66-70, 168-171).

RCEC contends that Horn mistakenly thought that Hale and Freeman were finished with their task and prematurely signaled that they were clear of the line. The Secretary contends that Horn correctly signaled Spencer that the TEUC employees were clear of the line, but for some reason (not explored at the hearing) Hale returned to the bucket and began working on the power line again. In any event, when Spencer re-energized the line, Hale was electrocuted (Tr. 11).

### **The Citation**

The Secretary has the burden of proving her case by a preponderance of the evidence.

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 OSHC 2131, 2138 (No. 90-1747, 1994).

#### **Item 1: Alleged Serious Violation of § 1910.269(m)(3)(iv)**

The Secretary charges SHECO with a serious violation of § 1910.269(m)(3)(iv), which provides:

Tags shall prohibit operation of the disconnecting means and shall indicate that employees are at work.

The citation alleges:

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

#### **(1) Applicability of Cited Standard**

Section 1910.269(a)(1) provides that § 1910.269 (Electric power generation, transmission, and distribution) “covers the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment.” Section 1910.269(m) (1) provides: “Paragraph (m) of this section applies to the deenergizing of transmission and distribution lines and equipment for the purpose of protecting employees.” SHECO employee Horn testified that he was working on a distribution line on December 19, 2000 (Tr. 52). Section 1910.269(m)(3)(iv) applies to the cited condition.

(2) Violation of Terms of the Cited Standard

None of the seven employees working on the Rusk County power lines on December 19, 2000, used tags to indicate that employees were working on deenergized power lines (Tr. 51, 61-62). SHECO argues that the seven employees working on the power lines comprised a single crew, and thus were not required to use tags under an exception provided in § 1910.269(m)(2)(iii).

Section 1910.269(m)(2)(i) provides:

If a system operator is in charge of the lines or equipment and their means of disconnection, all of the requirements of paragraph (m)(3) of this section shall be observed, in the order given.

Thus, if there is a system operator, the standard requires that tags be used. However, the Secretary's own witness, OSHA assistant area director Stephen Boyd, testified that there was no system operator working on December 19, 2000 (Tr. 216). This brings into play § 1910.269(m)(2)(ii), which provides:

If no system operator is in charge of the lines or equipment and their means of disconnection, one employee in the crew shall be designated as being in charge of the clearance. All of the requirements of paragraph (m)(3) of this section apply, in the order given, except as provided in paragraph (m)(2)(iii) of this section. The employee in charge of the clearance shall take the place of the system operator, as necessary.

Spencer testified that, as supervisor, he was the member of the crew designated as being in charge of the clearance (Tr. 80-81). As noted, if a crew member is designated as being in charge of clearance, the requirements of paragraph (m)(3) (including the use of tags) apply, except as provided in § 1910.269(m)(2)(iii), which provides:

If only one crew will be working on the lines or equipment and if the means of disconnection is accessible and visible to and under the sole control of the employee in charge of the clearance, paragraphs (m)(3)(i), (m)(3)(iii), (m)(3)(iv), (m)(3)(viii), and (m)(3)(xii) of this section do not apply. Additionally, tags required by the remaining provisions of paragraph (m)(3) of this section need not be used.

SHECO argues that only one crew was working on the power lines at the time of the fatality, and thus tags were not required. In support of its argument, SHECO introduced an OSHA Standard Interpretation and Compliance Letter addressing the subject of "Clarification of single and multiple crews

for purposes of deenergizing lines” (Exh. R-2). The pertinent part of the letter states (Exh. R-2; emphasis in original):

**Question #1:** At what point do we no longer have a single crew working on this single transmission line which may be as much as 100 miles long and instead have independent crews needing separate clearance as required by 29 CFR 1910.269(m)(3)(iii)?

**Reply:** Paragraph 1910.269(m)(3)(viii) requires each independent crew to follow steps outlined in § 1910.269(m)(3) **separately** to ensure that a group of workers does not make faulty assumptions about what steps to de-energize lines or equipment have been or will be taken by another group. The preamble summary and explanation section to this rule (**Federal Register**, 59(20), Monday, January 31, 1994, p. 4391.) contains the following paragraph (m)(3)(iii) discussion on multiple crews:

**Additionally, this paragraph does not apply to work performed by two crews working on lines or equipment controlled by the same disconnecting means. (A group of employees made up of several ‘crews’ of employees who are under the direction of a single employee and who are working in a coordinated manner to accomplish a task on the same lines or equipment are considered to be a single crew, rather than as multiple independent crews. . .)**

Therefore, for purposes of paragraph 1910.269(m), workplace scenarios with two or more crews that do not meet this test are independent crews. The employee in charge of the single crew must have **sole control** of the work and must coordinate the activities of all employees involved in the job. In addition, the employee in charge must be responsible for the clearance for the entire job and must be the only person communicating with the system operator, unless responsibility has been transferred under § 1910.269(m)(3)(ix). The procedures must include effective visual or verbal (e.g., radio) communications with all crew members. In addition, the employee in charge, in accordance with § 1910.269(c), must conduct **a single job briefing with all the employees** involved before they start the job.

Under this interpretation, the seven employees working on the Rusk County power lines on December 19 were not a single crew. The record establishes that Spencer was the employees’ supervisor and had sole control of the work, but he did not have effective visual or radio communications with all crew members. While it is not the purpose of this proceeding and decision to determine the cause of the fatal accident, it is apparent from the record that the TEUC employees’ lack of direct communication with Spencer resulted in the miscommunication of vital information.

TEUC employee Freeman testified as follows (Tr. 112-113):

Freeman: [W]hen [Spencer] told me to clear up the line, he did tell me, "Send the tree trimmers down there when you all are finished," and I never did send the tree trimmers down there. They were standing right there beside me.

Q.: Were you in communication with anyone when the line was energized?

Freeman: The only person would have been when the tree trimmers were there, and they were standing right there besides me.

...

Q.: Were they in communication with anyone?

Freeman: No, they would have to drive down there to the breaker pole.

Horn testified that shortly after he and Hindsman had pulled the TEUC vehicle out of the ditch, he received a call on the radio from Spencer, wanting to know if the lines were clear to be re-energized. Horn stated (Tr. 171-172):

One of the gentlemen--I don't know if it was Shane or Brian, I couldn't tell you which individual it was, we were all dressed in cold-weather gear. The gentlemen looked very similar, very similar height--indicated to me that they were in the clear. And, I was still walking towards him. I said, "You all have already cleared the lines?"

And he verified by saying, "Yes, we are clear," and he gave me, I call it a old lineman's signal in the clear [motioning hands with thumbs and forefingers up].

It is the Secretary's theory that one of the TEUC employees told Horn that they were clear, and then, for reasons unknown, started working on the lines again. However the miscommunication occurred, if the TEUC employees had had their own radio to communicate directly with Spencer, there would have been less likelihood of a fatal accident. Hale or Freeman could have radioed Spencer to tell him they were clear, and if they believed it necessary to continue working on the line, they could have radioed him and let him know of the change. Reliance on a third party resulted in confusion that may have contributed to Hale's death.

Based on the guidelines set out in the compliance letter, the seven workers comprised more than one crew, and were therefore required to use tags. In failing to use tags, the employees violated §1910.269(m)(3)(iv).

### (3) Employee Exposure

SHECO claims that Horn and Hindsman were not exposed to hazardous condition because they followed safe work practices, including using insulated gloves and a hot stick, while working on the Rusk County power lines (Tr. 157). This argument is rejected.

“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 (No. 90-2148, 1995). SHECO contends that Horn and Hindsman’s safety precautions eliminates their exposure to the violative condition. But the SHECO employees’ access to the untagged power lines was reasonably predictable. Reasonable predictability is established by showing “that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger.” *Giles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). Horn and Hindsman were assigned to work on the power lines, which were in the zone of danger. “The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.” *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

Regardless of the safety precautions taken by Horn and Hindsman, they were in the zone of danger of the untagged lines. The Secretary has established their exposure to the violative condition.

### (4) Employer knowledge

The final element that the Secretary must prove is that SHECO had actual or constructive knowledge that its employees did not use tags on December 19. On this element the Secretary has failed to make her case.

Horn and Hindsman responded to a call for volunteers from RCEC. At the time in question, they were both linemen; neither of them were supervisors. Horn and Hindsman worked on restoring the power in Rusk County for several days. During that time they stayed in a hotel in Longview, Texas, at RCEC’s expense (Tr. 152-152).

RCEC engineer Spencer supervised Horn and Hindsman, as well as the TEUC and Brock employees. Horn testified that he and Hindsman “did nothing unless we were directed to do so” (Tr. 20).

During the period that they worked on the Rusk County power lines under Spencer's supervision, neither Horn nor Hindsman had any contact with SHECO's management personnel (Tr. 154, 189).

The Secretary did not show that SHECO had actual knowledge of the violation. It did not know that its employees worked in separate crews or failed to tag out while doing so on December 19, 2000. The record establishes that SHECO received no information regarding its employees' work activities during the time in question.

The Secretary argues that SHECO had constructive knowledge that its employees would be exposed to the hazard of working with untagged power lines. She cites the digest of an unreviewed ALJ case, *Charles T. Driscoll Masonry Restoration Company, Inc.*, 6 BNA OSHC 1657, 1658 (No. 77-2320, 1978), in support of her position: "An employer cannot avoid liability for violation of safety standards by merely failing to authorize any employee to act in a managerial or supervisory capacity. The employer could have known of the violative conditions had it carried out its duty to oversee the operation."

In *Driscoll*, the employer argued that its president had not seen the cited scaffolds prior to the OSHA inspection, and therefore did not know of the violations. The employer had never designated one of the workers to be the supervisor in the president's absence, and so all of the workers were of equal status. *Driscoll* is easily distinguishable from the present case, where SHECO's employees volunteered to work for another employer under the supervision of an engineer. SHECO had no duty to oversee the emergency operation at a remote worksite for which its employees volunteered.

The Secretary also contends that SHECO had constructive knowledge that its employees were not using tags because the company failed to train them in the use of tags. Horn testified that he did not use tags and had not received training in their use (Tr. 52, 190). SHECO maintains that it trained all of its employees in the safety requirements of § 1910.269.

SHECO introduced a copy of Horn's safety training classes. Included among the many courses Horn took is "OSHA Working Energy '95," a one-day course apparently taught by OSHA personnel on the subject of § 1910.269 (Exh. R-1; Tr. 201-202). SHECO employs a full-time training and safety instructor, and it holds weekly safety meetings during which its safety manual is reviewed (Tr. 150-151, 200). Horn's admission that he did not use tags does not establish that SHECO failed to train its employees on this requirement, or that it had constructive knowledge that its employees would fail to use tags if ever working in separate crews with RCEC. Horn's lack of awareness of the tagging requirement

may have resulted from his own inattention to the safety training. In any event, the citation of § 1910.269(a)(2)(i) would be more applicable for a lapse in training, which SHECO would be wise to address. Section 1910.269(a)(2)(i) provides in pertinent part:

Employees shall be trained in and familiar with the safety-related work practices, safety procedures, and other safety requirements in this section that pertain to their respective job assignments.

The Secretary is attempting to use an alleged safety training violation to establish the constructive knowledge element of her case. The Secretary's evidence is too slender to support a finding of constructive knowledge for the off-site employer. Some training was provided in tagging, even if SHECO did not ordinarily use tags for its own work. It is determined that the Secretary has failed to prove that SHECO knew its employees were not using tags while working under the supervision of a RCEC supervisor on December 19, 2000. Horn and Hindsman were out of contact with SHECO's management personnel, and SHECO had no supervisory personnel on the site. Because of the disposition of this case, it is unnecessary to address any other legal arguments.

Item 1 is vacated.

#### **Findings of Fact and Conclusions of Law**

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

#### **Order**

Based upon the foregoing decision, it is hereby ORDERED that item 1 of citation no. 1 is vacated, and no penalty is assessed.

/s/

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NANCY J. SPIES  
Judge

Date: May 13, 2002