

Secretary of Labor,  
Complainant,  
v.  
Westar Energy,  
Respondent.

OSHRC Docket No. **03-0752**

Attorneys of Record:

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Office of the Solicitor  
U. S. Department of Labor  
Kansas City, Missouri  
For Complainant

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For Respondent

**DECISION AND ORDER**

Westar Energy Inc. (Westar), with offices in Topeka, Kansas, is engaged in the business of electrical power transmission and distribution. On December 4, 2002, an apprentice cable splicer was electrocuted when the apprentice and his foreman were preparing to repair a lightning arrester inside a transformer's primary compartment at a shopping mall in Wichita, Kansas. As a result of the fatality, the Occupational Safety and Health Administration (OSHA) investigated the accident and issued a serious citation on March 14, 2003.

The serious citation, as amended,<sup>1</sup> alleges that Westar violated 29 C.F.R. § 1910.269(l)(2) when the apprentice was working within the minimum approach distance to live 7,200 volts AC without wearing electrically safe personal protective equipment. The citation proposes a penalty of \$5,000.

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<sup>1</sup> The citation also alleged violations of 29 C.F.R. § 1910.333(a)(1)(i) (item 1) and 29 C.F.R. § 1910.333(c)(2) (item 2), which were withdrawn by the Secretary. In her complaint, the Secretary amended an alleged violation of 29 C.F.R. § 1910.335(a)(1)(i) (item 3) to allege a serious violation of 29 C.F.R. § 1910.269(l)(2).

Westar denies that it violated § 1910.269(1)(2) and asserts unpreventable employee misconduct. Westar argues that the cable splicer apprentice and foreman failed to comply with its safety rules which Westar communicated to employees, monitored for compliance and enforced through discipline.

The parties waived a hearing and submitted the case on a stipulated record pursuant to Commission Rule 61, 29 C.F.R. § 220.61. The parties' stipulated record consists of a joint statement of uncontroverted material facts (Exh. 1); Westar's motion for summary judgment (Exh. 2); Westar's motion for reconsideration (Exh. 3); Westar's internal accident investigation report (Exh. 4); affidavit of Westar's director of work force coordination, James Wishart (Exh. 5); affidavit of foreman Cory Saylor (Exh. 6); Westar's *Energy Customer Operations Safety Manual* (Exh. 7); signed acknowledgments of the safety manual (Exh. 8); standards of apprenticeship (Exh. 9); training records of apprentice Terry Palmer (Exh. 10); work records of apprentice Terry Palmer (Exh. 11); training records of foreman Cory Saylor (Exh. 12); affidavit of Westar's manager of electric distribution, Raymond Lara, with safety assessments (Exh. 13); apprentice evaluations of Terry Palmer (Exh. 14); affidavit of Westar's executive director of human resources, Steve Long, with corrective action report (Exh. 15); corrective action notice for foreman Cory Saylor (Exh. 16); and an affidavit of Westar's director of electric distribution, Thomas M. Bowman, with expectations for the Wichita manager (Exh. 17). Based on the stipulated record, the parties filed briefs.

Jurisdiction and coverage are stipulated (Exh. 1). For the reasons discussed, Westar's unpreventable employee misconduct is established and the citation for a violation of § 1910.269(1)(2) is vacated.

#### *The Accident*

The parties stipulate that Westar's investigation report (Exh. 4), Westar's memorandum in support of motion for summary judgment (Exh. 2), the affidavit of Jim Wishart (Exh. 5), and the affidavit of Cory Saylor (Exh. 6) comprise an accurate description of the accident.

Westar is in the business of power distribution. Its principal office is located in Topeka, Kansas. Westar employs 1,800 employees.

On December 3, 2002, Westar assigned a crew to work early the next morning on a scheduled outage for an expansion project at the Town West Shopping Mall in Wichita, Kansas. The job involved de-energizing the secondary compartment on a pad mount transformer adjacent to the expansion project. With the secondary compartment de-energized, five of the six secondary cables on each phase would be removed to begin the transfer of this load to a new pad mount transformer located approximately 200 feet to the west. The existing transformer was to be removed within a few weeks. This job was part of Westar's initial work on the project.

The Westar crew assigned the initial job consisted of cable foreman Cory Saylor, journeyman cable splicer Eric Schwaiger, and apprentice cable splicer Terry Palmer.<sup>2</sup> The crew arrived on the mall site at approximately 5:00 a.m. on December 4, 2002. It was snowing with 3 inches of accumulation on the ground and a 20-degree temperature.

After arriving on site, the crew held a tailgate meeting to discuss the job and obtain a hot work permit for the outage work planned on the transformer. The permit allowed the crew to work on electrical circuits without locking out the energy source.

The secondary compartment at the transformer was de-energized by use of the secondary disconnect switch located in the upper left area of the primary side compartment. Apprentice Palmer de-energized the secondary compartment. He was wearing a switching jacket, hood flame retardant shirt, 20 kv (Class II) rubber gloves, and used a non-conductive switching stick (hot stick).

After de-energizing the secondary compartment, the crew opened the primary compartment and observed that the lightning arrester on the right outside lead was blown. The arrester had parted between the metal cap and porcelain body with the cap remaining attached to the pigtail wire. The arrester cap was several inches to the side, with its edge approximately 1½ inches away from the grounded steel partition dividing the primary and secondary compartments. The crew decided to wait until the secondary work was completed before repairing the lightning arrester. The primary compartment was closed to prevent inadvertent contact with the energized primary side. Then, each phase on the secondary side was tested to verify no voltage was present and the crew began removing five of six

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<sup>2</sup> Palmer had almost completed his second year of apprenticeship.

conductors on each phase. The crew's removal work was completed on the secondary side by approximately 5:50 a.m.

Upon completion, a commercial waste hauler notified the crew that their truck was blocking access to a dumpster. Journeyman Eric Schwaiger left the job to move the truck.

While Schwaiger was gone, foreman Saylor and apprentice Palmer decided to repair the lightning arrester. Apprentice Palmer opened the primary compartment door and they discussed how to repair the arrester. Since the transformer would be moved within several weeks, foreman Saylor decided against replacing the arrester and advised Palmer that only the loose arrester cap needed to be moved away from the partition wall to provide more clearance.

Apprentice Palmer was still wearing a switching jacket and his leather work gloves with jersey liners. His 20 kv (Class II) rubber gloves utilized in the initial switching operation were in a protective bag on the concrete pad toward the left side of the primary compartment door. Palmer had removed his rubber gloves after de-energizing the secondary compartment and closing the door to the primary compartment. The switching stick was leaning against the barrier fence a few feet behind Saylor.

As their discussion continued, Saylor turned to get the switching stick and Palmer gestured or pointed with his left hand toward the primary compartment as he was turning toward the transformer. At this point, a flash was observed from the primary compartment when Palmer's hand probably contacted 7,200 volts from the primary circuit. An ambulance was called and emergency assistance was rendered. Palmer was transported to a hospital where he died as a result of the electrical shock.

Westar's internal investigation into the accident determined that apprentice Palmer had made probable contact with the energized lightning arrester cap as he gestured into the primary compartment. It was also found that when the problem with the lightning arrester was discovered, the crew understood that the primary side equipment was still energized. When the primary door was opened, the report noted that the apprentice "was very close to the open live front primary compartment" and "when the employee turned and gestured toward the equipment in the primary compartment, his left hand entered the primary compartment well inside the required minimum approach distance exceeding the personal protective equipment being worn by the employee at that time" (Exh. 4). Westar's internal investigation concluded that the pre-job briefing between Saylor and Palmer prior to repairing the lightning arrester should have been held prior to opening the primary door or away from the energized primary to prevent

inadvertent contact. Also, when the primary compartment was opened to repair the lightning arrester, Palmer should have been wearing his 20 kv (Class II) rubber gloves or Saylor as foreman, should have instructed Palmer to step away from the transformer, close the door to the primary side or put on his Class II rubber gloves to avoid inadvertent contact. As a result of the accident, Saylor received a 15-day suspension on January 10, 2003 (Exh. 16).

Based on OSHA's inspection into the accident, Westar received a serious citation issued March 14, 2003.

### Discussion

The Secretary has the burden of proving a 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 OSHC 2131, 2138 (No. 90-1747, 1994).

### Alleged Violation of §1910.269(1)(2)

The citation, as amended, alleges that Westar violated § 1910.269(1)(2) in that an employee was permitted to work within the minimum safe distance without adequate personal protective equipment (PPE), including appropriate rubber gloves. Section 1910.269(1)(2) provides:

The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10, unless

- (i) The employee is insulated from the energized part (insulating gloves or insulating gloves and sleeves worn in accordance with paragraph (1)(3) of this section are considered insulation of the employee only with regard to the energized part upon which work is being performed), or
- (ii) The energized part is insulated from the employee and from any other conductive object at a different potential, or
- (iii) The employee is insulated from any other exposed conductive object, as during live-line bare-hand work.

Westar agrees that the § 1910.269 “electric power transmission and distribution” standards apply to the work being performed by the crew on December 4, 2002 (Exhs. 1 & 2, fn. 1). Also, the parties stipulate that apprentice Palmer was not in compliance with the requirements of § 1926.269(1)(2) because when the primary compartment door was opened, he was within the minimum approach distance to an energized circuit and he was not wearing 20 kv (Class II) rubber gloves. The parties also agree that the primary circuit was energized with 7,200 volts and that the minimum approach distance was 2 feet 1 inch for phase-to-ground exposure and 2 feet 2 inches for phase-to-phase exposure (Exh. 2). There is no dispute that 20 kv (Class II) rubber gloves were required PPE in this case to comply with the requirements of § 1910.269(1)(2), and Palmer was not wearing such gloves at the time of the accident.

Therefore, the application of § 1910.269(1)(2) to the work, Palmer’s noncompliance with its requirements, and employee exposure are not in dispute and are established by the parties’ stipulated record. Also, Westar does not dispute that if its unpreventable employee misconduct defense is rejected, employer knowledge is established by the presence of foreman Saylor at the time of the accident. Saylor was present on site and was directly working with Palmer at the time of the accident. As foreman, Saylor’s responsibilities included assigning work and ensuring safe working conditions for his crew. Saylor’s knowledge of the unsafe conditions and Palmer’s work within the safe minimum approach distance without appropriate rubber gloves may be imputed to Westar. *Revoli Construction Co.*, 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001).

#### Unpreventable Employee Misconduct

Westar asserts that any violation of § 1910.269(1)(2) was the result of supervisor and employee misconduct. In addition to Palmer, Westar argues that foreman Saylor’s failure to instruct Palmer to utilize PPE or move away from the open primary compartment was also unpreventable misconduct.

As an affirmative defense, it is Westar’s burden to show that Saylor and Palmer’s misconduct were unpreventable. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). In order to establish unpreventable employee misconduct, the Review Commission requires an employer to prove that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these work rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087

(No. 91-2494, 1997). The action of the employee must represent a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991).

In addition, the Review Commission noted that “where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his supervision . . . . A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Westar’s employee misconduct defense is established based on the parties’ stipulated record and the Secretary’s lack of rebuttal evidence. The record shows that Westar has established work rules designed to prevent the cited unsafe condition which were communicated to employees, including Saylor and Palmer, monitored for compliance, and enforced by Westar.

The Secretary’s sole argument in her brief that Westar’s misconduct defense must be denied because “for a supervisor with Mr. Saylor’s experience and training to engage in such activity [stand by and watch a second year apprentice open an energized compartment and be within the minimum approach distance without appropriate PPE] suggests that this is not an isolated occurrence and that respondent’s safety program is lax, is speculative, and not supported by the record (Secretary’s Brief, p. 5). On the contrary, the parties’ stipulated record shows that Westar’s periodic monitoring visits never observed safety infractions regarding Saylor’s crew, and there was no reason shown for Westar to believe Saylor would not have complied with its safety rules (Exhs. 1, stip. #17 and 13).

“[T]he proper focus in employee misconduct cases is on the effectiveness of the employer’s implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee,” *Brock v. L.E. Meyers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987). There is no dispute that when the crew initiated and performed their work on the secondary compartment, as well as when they initially opened the primary compartment door, the crew including apprentice Palmer were utilizing appropriate PPE. Also, although foreman Saylor was working directly with Palmer when they re-opened the primary compartment door, the stipulated record fails to show that he was actually aware at the time that Palmer was not wearing his rubber gloves. Palmer was wearing all other appropriate PPE.

### Westar's Work Rule

As an essential element of the misconduct defense, the employer needs to establish that it has work rules designed to prevent the unsafe condition or violation of an OSHA standard. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). A work rule is defined as “an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.” *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977) (warnings to employees to avoid unsafe areas are “too general to be an effective work rule”).

In this case, the parties' joint statement of uncontroverted material facts shows that Westar maintains a written *Customer Operations Safety Manual* dated May 8, 2002 (Exhs. 1, 7). Section 1600 of the safety manual which is entitled “Minimum Approach Distance” includes the AC live-line work minimum approach distance table. The table is similar to OSHA's Table R-6 incorporated as part of § 1910.269. Both tables identify the minimum approach distance for 7,500 volts AC as 2 feet 1 inch phase to ground and 2 feet 2 inches phase-to-phase exposure. Also, section 1600 identifies as the primary area the “area surrounding exposed conductors and apparatus, energized at 600 volts or above in all directions with a radius the length of the Minimum Approach Distance,” and advises employees that they are considered in the primary area if they can reach, slip or drop anything into the primary area.

Section 800 of Westar's safety manual entitled *Personal Protective Equipment (PPE)*, requires employees to wear 20 kv (Class II) rubber gloves when “a worker is or will be within the primary area.” The manual instructs employees to “wear rubber gloves in the primary area” as part of Westar's list of “Six Fundamental Rules” of safety (Exh. 7, pg. 8). It is also noted that Class II rubber gloves are required, regardless of the voltage when handling any equipment or enclosure when it may become energized by internal failure or physical damage until the worker proves the case ground is intact by visual inspection including “opening doors on pad mounted equipment or breaker doors” (§ 802.0.2).

Westar's *Customer Operations Safety Manual* and updates are given to each employee upon their employment or when there are revisions. Saylor and Palmer received the safety manual revisions dated May 8, 2002, on June 4, 2002 (Exh. 8).



Westar has established that it has work rules applicable to the work being performed on December 4, 2002, and that the work rules are designed to prevent the unsafe condition addressed by § 1910.269(l)(2). The Secretary does not dispute that Westar's work rules were effective and clear enough to eliminate an employee's exposure to the hazard addressed by the standard and were designed to prevent the hazard. *Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349 (No. 89-287, 1993).

The adequacy of Westar's work rules is shown by the parties' stipulation that the accident on December 4, 2002, would not have occurred if Saylor and Palmer had complied with Westar's safety rules (Exh. 1, Stip. #26). Also, it is noted that Saylor, Palmer and Schwaiger complied with Westar's safety rules during the planned portion of the scheduled work. Palmer wore 20 kv (Class II) rubber gloves along with other PPE, including a switching jacket, hood and flame retardant shirt, and used a hot stick until the secondary compartment was de-energized and the door to the primary side was closed.

#### **Westar's Communication of its Work Rules**

The parties' statement of uncontroverted material facts describe Westar's efforts at communicating its work rules to employees (Exh 1). The parties agree that employees, such as Palmer in the apprenticeship program, are regularly instructed on the safety rules and appropriate procedures (Stip. #8). The apprenticeship program which is jointly administered by local chapters of the I.B.E.W., provides extensive instruction and testing relating to hot work and requisite safety precautions (Stip. #9).

Foreman Saylor had completed the cable splicer apprenticeship program and has been a journeyman cable splicer for ten years (Stip. #9). Terry Palmer was about to enter the third year of the Apprenticeship Program (Stip. #9).

Upon employment, Westar provides and covers with employees its safety manual (Stip. #8). Moreover, work procedures and safety rules are further discussed during monthly safety meetings and other safety training sessions (Stip. #8).

The parties also agree that while employed by Westar, Terry Palmer received training on the use of PPE, live line tools, hot work, safe electrical work practices, and appropriate clearances on the following dates: January 31, 2002; February 23, 2001; July 7, 2002; August 6, 2002; September 9, 2002; September 12, 2002; and October 23, 2002. Palmer also received on the job supervised training for the

type of work that was performed on December 4, 2002; on May 21, 2001; June 5, 2001; July 4-5, 12 and 24, 2001; August 24 and 28, 2001; October 7 and 16, 2001; November 8-9, 11, and 18, 2001; January 11, 19 and 26, 2002; February 11, 2002; March 4, 8, 11, 13 and 26, 2002; April 14, 2002; May 14, 21, 27 and 29-31, 2002; July 3, 10, 12, 14, 18, 22 and 24, 2002; August 1, 15 and 30, 2002; and September 15 and 25, 2002. Further, Palmer attended apprentice school from October 15-17, 2002, two months prior to the accident, wherein these work safety rules were covered (Stip. #10).

The parties stipulate that foreman Saylor received training on use of PPE, live line tools, hot work, safe electrical work practices and appropriate clearances on January 1, 1990; March 28, 1990; February 25, 1993; July 7, 1993; August 24, 1994; November 15, 1994; December 20, 1994; April 26, 1995; May 4, 1995; January 4 and 30, 1996; March 3, 1997; May 17 and 24, 1999; March 3, 2000; December 11, 2000; January 31, 2001; July 2, 2002; August 6 and 8, 2002; September 3 and 12, 2002; and October 16, 2002. The Secretary also stipulates that as journeyman cable splicer for ten years, Saylor had performed this type of work on a regular basis (Stip. #11).

Based on the parties' stipulations, the record establishes that Westar's safety rules regarding minimum approach distances and use of PPE were adequately communicated to employees, including foreman Saylor and apprentice Palmer. The Secretary does not argue and made no showing that Westar's communication of its work rules was deficient or ineffective.

#### **Westar's Steps to Discover Violations**

Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999); also *see Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995) (employer's duty is to take reasonably diligent measures to detect hazardous conditions through inspections of worksites; it is not obligated to detect or become aware of every instance of a hazard). Effective program implementation requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Brothers.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). Also, it is noted that § 1910.269(a)(2)(iii) provides that employers are required, through regular supervision and annual inspections, to monitor employee compliance with, among other things, § 1910.269(l)(2). Westar was not cited for noncompliance with § 1910.269(a)(2)(iii).

The parties' stipulation of unconverted material facts (Exh. 1) include:

1. Section 102.1 of Westar's *Customer Operations Safety Manual* requires all employees to review and comply with its mandates as well as to enforce safety rules with fellow employees by discussing violations with them directly or reporting them to their supervisors (Stip. #12). Also, § 102.2 of the safety manual mandates that foremen instruct their crews regarding safe work practices, monitor compliance by the crews, counsel and/or discipline those who violated the safety manual, and to report such violations to a supervisor so that those violations can be investigated (Stip. #13).

2. Westar's management conducts jobsite visits almost daily (Stip. #14). In April 2002, Westar's director of electrical distribution instructed electric distribution managers to go to jobsites on a daily basis (when practicable) and, at a minimum, perform weekly crew audits. The record shows that manager Raymond Lara, who supervised Saylor's crew and two other crews, visited Saylor's jobsites at least once a week and made reports of the crew audits to the director of electric distribution (Stip. #14). According to Lara's affidavit, the purpose of his visits was to observe the crew's compliance with Westar's *Customer Operations Safety Manual* (Exh. 13).

3. The electric distribution managers were additionally required to conduct monthly employee safety assessments (Stip. #15). The safety assessments required managers to evaluate, among other things, the use of PPE. Manager Lara conducted 8 employee safety evaluations over the eight months preceding the accident on December 4, 2002. Lara's evaluations found that Saylor's crew complied with, among other things, Westar's PPE requirements (Stip. #15). The safety assessments were conducted pursuant to a safety checklist which included assessment of rubber gloves in the primary area, PPE, and a hot work permit (Exh. 13, with attachments) Lara's predecessor had previously conducted employee safety assessments of Saylor and his crew. He similarly found that Saylor's crew complied with, among other things, Westar's PPE requirements. Two of the evaluations included instances in which the crew was performing hot work (Stip. #16). Lara's affidavit states that he never observed any safety infractions by Saylor or his crew and never had to issue a corrective action notice (Exh. 13). Lara concludes that he had no reason to believe that "Saylor or Palmer would not have complied with Westar's *Customer Operations Safety Manual* on December 4, 2002" (Exh. 13).

4. Customer Operations Safety personnel periodically visit jobsites to ensure compliance with the safety manual. When violations of safety rules are observed, disciplinary notices are issued. Saylor had been a cable foreman since October 19, 2000, without incident. Based on jobsite visits by Customer Operations safety personnel, no safety infractions were observed regarding Saylor's crew (Stip. #17).

5. Palmer had performed similar work as performed on December 4, 2002, for two years as an apprentice without incident. During those two years, Palmer had performed work on electrical transformers on at least 40 separate days, including multiple transformers. Even on days when Palmer was not servicing transformers, he frequently performed work that required him to maintain minimum clearance or use proper PPE (Stip. #19). Also, in the apprentice program, foremen consistently rated Palmer in the highest possible category for safety - "Very safety conscious, knows safety rules, makes safety suggestions" (Stip. #20).

The parties' stipulated record establishes that Westar's monitoring was adequate. The Secretary acknowledges that Westar had no reason to believe Saylor would not have complied with its safety rules (Stip. #17). "In such circumstances, where the employer maintains an appropriate monitoring or inspection program, the burden is on the Secretary to demonstrate that the employer's failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence" *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1050 (No. 91-3467, 1995). The Secretary made no such showing as to Saylor or Palmer. Also, there is no showing that Westar had received any prior OSHA citations including a prior citation for violation of § 1910.269(l)(2).

#### **Westar's Enforcement of Safety Rules**

Adequate enforcement is also viewed as a critical element of the misconduct defense. To show that an employer's disciplinary system is more than a paper program, an employer must have evidence of having actually administered the discipline outlined in its policy and procedures. *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003) (despite written disciplinary policy, there was no showing that there was any progressive discipline). Evidence of a variety of disciplinary measures, which progress to higher levels of punishment designed to provide deterrence, tends to demonstrate that an effective disciplinary system is in place. On the other hand, evidence showing a failure to progress to higher levels of discipline may indicate ineffective enforcement. Also, factors such

as the employees' repeated noncompliance with work rules or misconduct involving a number of employees may be indications of ineffective enforcement. *GEM Industrial Inc.*, 17 BNA OSHC 1861, 1865, (No. 93-1122, 1996) *aff'd*, 18 BNA OSHC 1358 (6<sup>th</sup> Cir. 1998) (although the employer had several verbal and written reprimands, it was proved to be ineffective enforcement because the same work rule had been violated three times in the month prior to the OSHA inspection).

Based on the parties' stipulation of uncontroverted material facts (Exh. 1), Westar has disciplined more than 29 employees since November 1990 for safety infractions (Stip. #21). This includes employees who have been disciplined and/or terminated for failing to use PPE and foremen disciplined, demoted, or terminated for failing to ensure their crews used PPE (Exh. 15 with attachment). Westar's discipline included written warnings, suspensions of up to two weeks, and demotion.

As a result of the accident on December 4, 2002, Saylor received a 15-day suspension for failing to ensure that Palmer was wearing proper PPE (namely, 20 kv Class II rubber gloves) within the minimum approach distance of the energized live front transformer (Stip. #27). Saylor received a notice of corrective action dated January 10, 2003, which was two months before receiving the OSHA citation (Exh. 16). *Precast Services, Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6<sup>th</sup> Cir. 1997) (consideration of post inspection discipline may be considered provided that it is viewed in conjunction with pre-inspection discipline).

Although the stipulated record fails to detail Westar's disciplinary program, the record does show that it enforced progressive discipline for noncompliance with its safety rules. The Secretary does not dispute the existence of Westar's disciplinary program or that it was not enforced.

Therefore, Westar's unpreventable employee misconduct defense is supported by the parties' stipulated record.

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**FINDINGS OF FACT AND**  
**CONCLUSIONS OF LAW**

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

**ORDER**

Based upon the foregoing decision, it is ORDERED:

1. Serious violation of § 1910.333(a)(1) was withdrawn by the Secretary.
2. Serious violation of § 1910.333(c)(2) was withdrawn by the Secretary.
3. Serious violation of § 1910.269(l)(2), as amended, is vacated and no penalty is assessed.

/s/ Ken S. Welsch  
**KEN S. WELSCH**  
Judge

Date: January 6, 2004