

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

Secretary of Labor,

Complainant

v.

ACME Energy Services, Inc. d/b/a
Big Dog Drilling,

Respondent.

OSHRC Docket No. **05-0336**

Appearances:

Josh Bernstein, Esquire and Clara Saafir, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For Complainant

Steven R. McCown, Esquire and Malone Lankford, Esquire, Littler Mendelson, P.C., Dallas, Texas

For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Acme Energy Services Inc. d/b/a Big Dog Drilling (Big Dog) is in the oil drilling business in Midland, Texas. On September 1, 2004, an employee who was picking up trash and debris, died of electrical shock when his left shoulder contacted the metal frame of the tool pusher's trailer at a rig site, near Rankin, Texas. As a result of an investigation by the Occupational Safety and Health Administration (OSHA), Big Dog received serious and willful citations on February 28, 2005. Big Dog timely contested the citations.

Citation no. 1 alleges serious violations of 29 C.F.R. § 1910.303(f) (item 1) for failing to have each electrical disconnecting means legibly marked to indicate its purpose; 29 C.F.R. § 1910.304(f)(4) (item 2) for failing to have the path to ground from circuits, equipment, and enclosures permanent and continuous; 29 C.F.R. § 1910.305(b)(1) (item 3) for failing to effectively close unused openings in cabinets, boxes, and fittings; 29 C.F.R. § 1910.305(g)(1)(i) (item 4) for

failing to use flexible cords and cables approved and suitable for conditions of use and location; and, 29 C.F.R. § 1910.305(j)(1)(i) (item 5) for failing to have receptacles with no live parts exposed to employee contact. The serious citation proposes total penalties of \$30,500.00.

Citation no. 2 alleges a willful violation of 29 C.F.R. § 1910.305(a)(2)(iii)(G) (item 1) for failing to have flexible cords and cables protected from accidental damage. The willful citation proposes a penalty of \$70,000.00.

After Big Dog contested the citations, the case was stayed to allow OSHA time to consider pursuing criminal prosecution. In November 2008, the stay was lifted and the case was assigned for mandatory settlement proceedings under Rule 120, 29 C.F.R. § 2200.120. When a settlement was not achieved, the case was set for hearing.¹

The hearing, held on July 14-15, 2009, was in Midland, Texas. The parties stipulated jurisdiction and coverage. Big Dog presented no witnesses except Dr. Andrew Neuhalfen, an electrical engineer who examined a piece of the flexible cable allegedly involved in the accident. Post hearing briefs were filed on October 2, 2009 (Tr. 11-12).

Big Dog denies the alleged violations. It asserts it did not know or should have known of the alleged unsafe conditions because it relied upon Impulse Electric Ltd., an independent electrical company, to ensure and maintain electrical safety at its rig site. Also, Big Dog denies the willful classification for Citation no. 2, item 1, alleges that it duplicates Citation no. 1, item 4, and claims the standard does not apply to the facts at issue.

For the reasons discussed, the violations identified in citation no. 1, items 2, 4 and 5 are vacated. The violations identified in citation no. 1, items 1 and 3 and citation no. 2, item 1, are affirmed as serious and a total penalty of \$8,000.00 is assessed.

The Accident

Big Dog is engaged in the business of drilling for oil. It has an office in Midland, Texas and employs approximately 300 employees. Big Dog utilizes a number of on-land mobile drill rigs which are moved to location. The crew on each rig, includes the tool pusher, who is the rig

¹This judge handled the mandatory settlement proceeding and the hearing. The parties agreed to the continued involvement of the judge during a conference call on April 17, 2009 and at the hearing on July 14, 2009 (Tr. 10-11). This judge's fairness and impartiality was not compromised in any way by participation in the settlement proceedings.

supervisor, a driller, and a number of derrick hands. Generally, the drilling operation is 24/7. The working conditions at the rig site are often wet and muddy (Tr. 29, 144, 170, 228).

In June 2004, prior to Rig #1 moving to the site of the accident, the crew began receiving electrical shocks when they touched the metal parts on the tool pusher's trailer. Tool pusher Clint Lux contacted Impulse Electric, based in Odessa, Texas. Impulse electrician Shiloh Chandler went to the rig site on June 25, 2004, and replaced the cable from the generator house which provided electrical power to the tool pusher's trailer (Exh. C-1; Tr. 41-42, 213-214).

In mid-August, 2004, Rig #1 was moved to the drill site referred to as the Geronimo Lease #27-7, located approximately two miles south of FM 1492 and 1787, Rankin, Texas. The rig site consisted of, among other structures, the drill (rig) platform, generator plant (house), doghouse (changing room), a mud house, and tool pusher trailer. The tool pushers were Clint Lux and Glenn Criswell (relief). The derrick hands who worked the evening tour (shift), 2:00 p.m. to 10:00 p.m., included brothers, Jerry "Cord" Hall and older brother Cody Hall, 28 years old (Exh. C-8; Tr. 13, 40, 125, 145, 173). The same cable replaced by Impulse Electric in June was used to provide electricity to the tool pusher's trailer. The cable was laid on the ground and ran across a dirt road used by all vehicular traffic to access the rig site. After the drilling operation began, the crew again began experiencing electrical shocks when touching the metals parts on the tool pusher's trailer. The crew reported the shocks to tool pushers' Criswell and Lux (Tr. 149-150, 171, 215).

On August 25, 2004, Big Dog contacted Impulse Electric about the lack of power to the tool pusher's trailer at Rig #1. Impulse electrician Shiloh Chandler, who had earlier replaced the cable at the other site, was not told of the electric shocks. After arriving on site, Chandler visually inspected the 220-volt phase to phase cable which ran on the ground, approximately 200 feet from the generator plant, across the dirt access road, to the control panel on the tool pusher's trailer. Where the cable crossed the access road, Chandler observed bad spots/pinholes and blown places where the phases had touched together. He noted that trucks and vehicles, accessing the site, had repeatedly run over the cable and rocks in the road bed had cut into the cable (Tr. 44, 99, 112, 114-115).

Chandler told relief tool pusher Criswell that the cable needed to be replaced. Instead, Criswell asked Chandler to repair the cable and he would address replacing the cable with the tool

pusher. Chandler spliced the bad section of the cable on the access road and ran a safety test on it by checking the voltage at the trailer. He then left the site (Exh. C-2; Tr. 100, 117). Despite the repair, employees continued receiving shocks (Tr. 151, 214-215).

On September 1, 2004, brothers, Jerry and Cody Hall, were picking up trash and debris from around the site. According to Jerry Hall, it was around 5:00 p.m., when he saw his brother Cody crouching down, next to the tool pusher's trailer, not moving. He observed Cody's right knee was on the ground and his left shoulder was touching the metal frame of the trailer (Tr. 129, 133). When he got closer, Jerry Hall saw drool coming from Cody's mouth. When he touched Cody's left shoulder, Jerry said his hand became stuck because of the electric shock. When he tried to grab his brother with both hands, "it was more intense and it hurt a lot more" (Tr. 130). In describing the scene, Jerry Hall testified:

I couldn't move my body. I couldn't get away. Finally, I was able to let my hands go and I just took a couple of steps back and I kind of ran at him and I hit him from behind and kind of tackled him and I pulled him off to the side and I just -- when I pulled him off to the side, I picked him from behind.

He was sitting in front of me and I kept asking him. I kept asking him, "Are you all right? Are you all right?" And I kept rubbing his back as hard as I could and kept asking him if he was okay.

He kept moaning, making like loud grunting noises, just a real weird noise. I didn't know what was wrong with him. I was looking at him. I seen him -- I seen him pee in his pants. I seen his pants get wet and he peed in his pants.

I got up and I laid him down on the ground and I just kind of talked to him. His eyes were open and then he was looking at me and I kept asking him, you know, "Are you okay, are you okay, are you okay?"

Then all of a sudden, I seen his eyes just roll back and I was really scared and didn't know what was going on. I started to -- I leaned down and I noticed he wasn't breathing, so I started giving him mouth to mouth (Tr. 130-131).

Cody Hall was not alive when the EMS arrived (Tr. 134).

On September 2, 2004, OSHA compliance officer Violet Hobbs began an investigation into the accident. She visibly inspected the cable to the tool pusher's trailer and observed in the portion which ran across the access road, holes in the outside insulation and areas where it was no longer round in shape (Tr. 211).

Big Dog called Don Johnston, owner of Impulse Electric, who came to the site on September 3, 2004, to find the cause of the accident (Tr. 48). Johnston described the flexible cable as SDT (sunlight resistant, direct burial) with an outer PVC jacket and two insulated current-carrying wires, one insulated neutral wire, and one bare copper ground wire inside the jacket (Tr. 42, 57-58). Upon inspecting the cable, Johnston observed pinholes in the outer jacket of the cable where it ran across the dirt road. When he removed the outer jacket, Johnston saw pinholes in the insulation around the conductors and neutral. He also observed water inside the outer jacket and corrosion around the current carrying conductors (Exh. C-9; Tr. 50-51).

Johnston opined that water inside the jacket and the condition of the wire allowed voltage to pass from the current carrying conductor to the ground wire which connected to the trailer. He found 107 volts on the trailer frame to earth (Tr. 52, 78). His tests also showed continuity between one of the current carrying wires and the ground wire (Tr. 79). Johnston concluded the "live wire touching the ground would put voltage on the ground wire, which put voltage on the trailer" (Tr. 93). His written report stated, in part:

The integrity of the insulated wire had become damaged most likely from being run over by vehicles or by jagged rocks in earth bed buried on location. The water inside the jacket conducted electricity from the bad place in insulated wire to bare ground. The bare ground connected to the ground in the trailer house made the frame electrified. (Exh. C-3).

Several months later, Big Dog's contacted Dr. Andrew Neuhalfen, a professional electrical engineer, to examine and test "the piece of cabling provided . . . by Big Dog Drilling." Dr. Neuhalfen did not go to the rig site and the piece of cable provided to him was not from area on the access road. Dr. Neuhalfen concluded that "there is no indication" that the cable "was problematic or a cause of the electrocution incident" (Exh. C-23).

On February 28, 2005, Big Dog received two citations alleging violations of OSHA's electrical standards.

Discussion

In order to establish a violation of a safety 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).

There is no dispute the electrical standards at § 1910.301 *et. seq.* applied to Big Dog's Rig #1 site and the crew was exposed to any unsafe conditions caused by the electrical circuit breakers, panel boxes, receptacles, grounding, and flexible cables on site (Tr. 19-20).² Each cited standard involves electric equipment and instrumentation used to provide electric power and light for Big Dog's crew.

Big Dog disputes whether it knew or should have known of the cited violative conditions because it relied on an electrical contractor, Impulse Electric, to maintain the electrical system at the rig site. Big Dog employed no electricians on site.

Serious Citation No. 1 **Item 1 - Alleged Violation of §1910.303(f)**

The Secretary alleges the panel box inside the generator house containing the disconnecting means for the tool pusher's trailer and other equipment was not labeled to identify each switch. Section 1910.303(f) provides:

Identification of disconnecting means and circuits. Each disconnecting means required by this subpart for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. These markings shall be of sufficient durability to withstand the environment involved.

²Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

Compliance Officer Hobbs testified and her photographs show that the circuit breakers inside the panel box in the generator house were not labeled to indicate their purpose (Exh. C-15; Tr. 237). The lack of labeling is also shown on the videotape of Johnston's inspection of the cable after the accident (Exh. C-9). Big Dog does not argue that the purpose of the circuit breakers was evident. Hobbs considered the most common exposure for employees was during the turning on or off the equipment (Tr. 238).

The application of § 1910.303(f), its noncompliance, and employees' exposure to the lack of labeling is established and undisputed by Big Dog. There is no dispute the breakers were not labeled.

Big Dog argues the record fails to establish it had knowledge of the lack of labeling particularly since the generator house was an area where the tool pushers did not work. Big Dog claims it relied upon Impulse Electric to address the electrical issues on site.

Big Dog's lack of knowledge argument is rejected. An employer's knowledge is established if the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer who lacks actual knowledge can have constructive knowledge of conditions that could be detected through an inspection of the worksite. An employer is expected to use reasonable diligence to anticipate and discover the particular hazards to which its employees may be exposed during the course of their scheduled work. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

By installing the panel box with the unlabeled circuit breakers, Big Dog assumed responsibility for the circuit breakers' compliance with OSHA's electrical standards. There is no showing that Impulse Electric was involved in the installation or connection. Impulse Electric was not called by Big Dog to assess whether the breakers in the panel box were labeled (Tr. 27). As the employer, Big Dog was responsible for ensuring visibly obvious hazards at its worksite were corrected either by itself or by an independent contractor. The lack of labeling of the circuit breakers was in plain view which Big Dog's supervisors should have been aware with the exercise of reasonable diligence. The tool pushers performed a walk around inspection when assigned to a rig. Also, their weekly rig site inspections included the generator house and the circuit breakers. Their

inspection reports specifically asked whether the “Electrical controls marked” (Exh. C-14; Tr. 221-222). The tool pushers should have detected the lack of labeling. It is not necessary to show the tool pushers knew the condition violated a standard. *U. S. Steel Corp.*, 12 BNA OSHC 1692, 1699, (No. 79-1998, 1986).

The tool pushers’ constructive knowledge is imputed to Big Dog. Big Dog is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc.*, 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). When a supervisory employee has constructive knowledge of the violation conditions, his knowledge is imputed to the employer. *Dover Elevator Co.* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Big Dog’s violation of § 1910.303(f) was properly classified as serious. In order to establish a serious violation under § 17(k) of the Occupational Safety and Health Act (Act), there must be a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation. In determining substantial probability, the Secretary must show that an accident resulting in death or serious harm is possible, not that an accident is likely. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020,1024 (No. 86-521, 1991).

The lack of labeling of the circuit breakers exposed employees to an electrical hazard and if an accident occurred, the expected result would be death or serious injury. As discussed, Big Dog should have known of the violative condition.

The serious violation of § 1910.303(f) is established.

Item 2 - Alleged Violation of §1910.304(f)(4)

The Secretary alleges the grounding system did not ensure a continuous path to ground for the tool pusher’s trailer. Section 1910.304(f)(4) provides:

Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

There is no dispute the grounding rods used on the rig site were less than 8 feet long. The copper rods purchased from Impulse Electric were five-eighths in diameter and came in 6 and 8 foot lengths (Exh. C-1). Big Dog’s crew cut the rods into 2 ½ to 3-foot lengths. The rods were then hammered into “the ground 4-6 inches, just enough to where it wouldn’t fall over” (Tr. 181). A

clamp attached the wire to the rod and whatever needed to be grounded. Impulse Electric did not install the grounding rods (Tr. 31, 33, 179). When compliance officer Hobbs checked the grounding rod at the trailer, she found it was approximately 3 feet in length and no more than 11 inches in the ground (Exh. C-13; Tr. 242).

The National Electric Code (NEC) Section 250.52 states grounding rods shall be no less than 8 feet in length and shall be driven into the ground so that the top of the rod is about 12 inches below ground level (Exh. C-24; Tr. 243, 344). Big Dog's electrical engineer, Dr. Neuhalfen conceded the use of short rods driven into the ground such a minimal amount violates the NEC (Tr. 345-346).

Johnston, owner of Impulse Electric and a licensed master electrician, opined that if the rod was only in the ground 6 inches at the trailer site which he described as a "rock bed," he did not consider that a sufficient path to ground (Tr. 37-38). He testified that a grounding rod would typically be driven into the ground 5 to 6 feet in order to ensure a continuous path to ground (Tr. 34).

The application of § 1910.304(f)(4), employees' exposure, and Big Dog's knowledge of the installation of the 3-foot grounding rods are established and undisputed by Big Dog.

The record, however, fails to establish a violation of § 1910.304(f)(4). According to tests performed by Impulse electrician Chandler, the trailer was grounded and the path to ground was safe a week before the accident. After he spliced the cable on August 25, 2004, Chandler checked the grounding to ensure it was properly grounded before he left the rig site. With a T-1000 electric meter, Chandler checked the phases, neutral and ground. He saw the grounding rod in the ground. Chandler testified his tests verified that "everything checked okay" (Tr. 85-86, 110, 117-118). Electrical engineer Neuhalfen testified that Chandler's tests of the resistance and voltage demonstrated there was a proper path to ground (Tr. 346). It is noted that compliance officer Hobbs during her inspection did not test the resistance of the grounding rod or conduct other tests at the trailer (Tr. 258). Johnston acknowledged the potential sufficiency of the 2-foot grounding rod on site. He testified that "in certain conditions a two-foot ground rod might be adequate" (Tr. 37).

The record fails to show the length of the grounding rods and their placement in the ground affected the path to ground for the tool pusher's trailer. Neither Impulse Electric, who sold the grounding rods, nor Chandler, who observed the grounding rod at the tool pusher's trailer, advised Big Dog that the grounding rods were too short or inadequate for the purpose of ensuring a continuous path to ground.

Also, the Secretary fails to show that the requirements of the NEC §250.52 are incorporated by § 1910.304(f)(4). As stated by the Secretary in the preamble to the Subpart S “Electrical” standards:

The final rule places relevant requirements of the National Electric Code (NEC) into the text of the regulations, making it unnecessary for employers to refer to the NEC to determine their obligations and unnecessary for OSHA to continue to incorporate the NEC by reference. 46 FR 4034, January 16, 1981.

A violation of § 1910.304(f)(4) is not established.

Item 3 - Alleged Violation of §1910.305(b)(1)

The Secretary alleges the circuit breaker in the generator plant and the circuit breaker for the tool pusher’s trailer and other equipment did not have all openings effectively closed. Section 1910.305(b)(1) provides:

Conductors entering cutout boxes, cabinets or fittings shall be protected from abrasion and openings through which conductors enter shall be effectively closed.

There is no dispute the openings in the panel boxes for the circuit breakers in the generator house and trailer were not closed (Exh. C-15; Tr. 237). Big Dog apparently installed the panel boxes. The crew worked in and around the generator house particularly during rig-up and rig-down. Proper coverings for the openings protect employees from accidental exposure to the conductors (Tr. 27-28, 238).

The application of § 1910.305(b)(1), its noncompliance, and employees’ exposure to the lack of effective coverings is established and undisputed by Big Dog. Big Dog argues the record fails to show Big Dog had knowledge of the lack of coverings particularly since the generator house was an area where the tool pushers did not work. Big Dog claims it relied upon Impulse Electric to address the electrical issues.

Big Dog’s lack of knowledge argument is rejected. By installing the panel boxes, Big Dog assumed the responsibility for compliance with the electrical standards regarding effective closing of openings. There is no showing Big Dog asked Impulse Electric to ensure the panel boxes complied and were safe. Impulse Electric was not called by Big Dog to address the lack of covers

over the openings (Tr. 27-28). The openings in the panel boxes were clearly visible to Big Dog's tool pushers during their inspections when first assigned to the rig site and during their weekly site inspections. Their weekly inspection reports of the generator area specifically asked whether "unused electrical outlets covered" (Exh. C-14; Tr. 221). During these inspections, the openings should have been detected by the tool pushers and their constructive knowledge is imputed to Big Dog, as the employer.

A violation of § 1910.305(b)(1) is established as serious. The lack of covers for openings in the panel boxes exposed employees to an electrical hazard which could result in death or serious injury. Big Dog should have known of the violative condition.

Item 4 - Alleged Violation of §1910.305(g)(1)(i)

The Secretary alleges the Southwire Type TC flexible cable was not used in accordance with its listing and labeling. The cable was laying on the access road and subject to damage by the vehicular traffic. Section 1910.305(g)(1)(i) provides, in part:

Flexible cords and cables shall be approved and suitable for conditions of use and location.

There is no dispute the cable from the generator house to the tool pusher's trailer was a flexible cable and its use was within one of the standard's identified uses for flexible cables. See § 1910.305(g)(1)(i). The cable provided power to the tool pusher's trailer which the crew regularly accessed. The approximate 200 feet of cable was laying on the ground and across a dirt/gravel road which was used daily by vehicles and trucks including 18-wheelers to access the rig site (Tr. 111, 114, 226). Impulse electrician Chandler, who examined the cable on August 25, 2004, observed pinholes and other damage on the cable where it crossed the access road. Chandler testified the damage was caused by vehicles running over it and rocks cutting into it (Tr. 115). He recommended that Big Dog replace the cable (Exh. C-2; Tr. 100). Johnston, the owner of Impulse Electric who inspected the cable immediately after the accident, observed "the wire had been run over numerous times by trucks, can see pinholes in the outer jacket of the wire." In his opinion, the pinholes allowed water to pass inside the jacket and voltage to pass from the current-carrying conductor to the ground wire. This caused the tool pusher's trailer to be energized (Tr. 50-52).

The Secretary argues the manufacturer's listing and label for the flexible cable requires that

the cable be buried or hung to avoid damage (Tr. 225). Big Dog knew the cable was not buried. Johnston testified that the new flexible cable which Impulse had installed as a replacement cable on June 25, 2003 was rated for direct burial (Tr. 41).

Despite derrick hand Wheeler's testimony that he thought the cable was buried, the evidence from other witnesses, OSHA's photographs, and the videotape taken the day after the accident, establishes the cable was laying on top of the ground and across the roadway. It was not buried to protect it from damage (Exhs. C-6, C-7, C-9; Tr. 191-192). The cable was exposed to damage from the vehicular traffic. The cable was in plain view and any damage should have been detected by the tool pushers when performing walk around inspections of the rig site (Exh. C-14; Tr. 221-222).

A violation of § 1910.305(g)(1)(i), however, is not established. Nowhere in the standard is there any discussion of whether a particular type of cable is required to be buried. The standard requires that the flexible cable be approved and suitable for its use and location. The manufacturer's instruction was not offered by OSHA except through the recollection of the compliance officer. Impulse owner and master electrician Johnston whose company had replaced the cable on June 25, 2004, contradicted OSHA's position and testified the cable did not have to be buried. He testified the 6/3 SDT cable was suitable for direct burial. "Its okay to bury it in the ground" because "the jacket is capable to be buried, it won't deteriorate." When asked whether the cable was supposed to be buried, Johnston testified that "This cable can or cannot be." (Tr. 42-43). He did not believe the cable needed to be buried (Tr. 87).

There is no evidence electrician Chandler who replaced the cable on June 25, 2004 and spliced it on August 25, 2004, advised Big Dog that the cable was not suitable for the location across the roadway or that it needed to be buried or hung. Since the flexible cable was replaced by Impulse Electric, the manufacturer's specifications regarding approval and suitability for use and location are not something Big Dog should have known.

A violation of § 1910.305(g)(1)(i) is not established.

Item 5 - Alleged Violation of §1910.305(j)(1)(i)

The Secretary alleges that receptacles in the bottom doghouse and the mud house had live parts exposed. Section 1910.305(j)(1)(i) provides:

Fixtures, lampholders, lamps, rosettes, and receptacles may have no live parts normally exposed to employee contact. However, rosettes and cleat type lampholders and receptacles located at least 8 feet above the floor may have exposed parts.

Compliance officer Hobbs observed and photographed receptacles with live parts exposed in the bottom dog house and the mud house (Tr. 233). Three former Big Dog employees testified about the receptacles with live exposed parts. The crew used the bottom dog house to change into work clothes every day. The mud house was used to mix mud daily for drilling (Tr. 40, 139, 152, 157). The receptacle in the mudhouse was described as hanging down from the ceiling approximately 10 inches. It had wires hanging down and the box was off (Exhs. C-10, C-11; Tr. 156, 175, 177, 234-235). The receptacle in the doghouse was also described as mounted in the ceiling, close to the door (Exh C-12; Tr. 178, 233-234).

Derrick hand Ottie Calvert testified he received a shock when he attempted to plug his cell phone into the receptacle in the bottom dog house two days before Hall's accident. He described the receptacle as dangling and in plain view (Tr. 154-155, 233-234). Aaron Wheeler said he reported the dangling receptacles in the mudhouse and dog house to the tool pushers, Lux and Criswell who responded that they would get them fixed.

Big Dog argues the Secretary failed to show knowledge, particularly since the alleged violations were located in areas in which the supervisors did not work. Also, Big Dog relied upon Impulse Electric to address electrical issues on the rig site.

Big Dog's lack of knowledge argument is rejected. The receptacles were hanging from the ceiling with exposed live parts clearly visible. The receptacles should have been seen by Big Dog's tool pushers. As an obvious unsafe condition which should have been detected by the tool pushers during inspections in the dog house and mud house, their knowledge is imputed to Big Dog. Big Dog offered no evidence that Impulse Electric or another electrician was called to repair the receptacles (Tr. 178).

However, OSHA failed to show the height of ceilings in the dog house and mud house.

Section 1910.305(j)(1)(i) allows exposed parts if the receptacles are located at least 8 feet above the floor. Hobbs testified the receptacles at issue were located in the ceiling. But, she never answered the question as to the height of the ceiling (Tr. 234). Also, the testimony of Calvert does not establish that it was the same receptacle as cited by the Secretary or the height of the ceiling.

A violation of § 1910.305(j)(1)(i) is not established.

Willful Citation No. 2
Item 1 - Alleged Violation of §1910.305(a)(2)(iii)(G)

The citation alleges that a Southwire Type TC flexible cable, leading from the generator house to the tool pusher's trailer was laying on the dirt access road and not protected from damage.

Section 1910.305(a)(2)(iii)(G) provides:

Flexible cords and cables shall be protected from accidental damage. Sharp corners and projections shall be avoided. Where passing through doorways or other pinch points, flexible cords and cables shall be provided with protections to avoid damage.

The record shows the cable from the generator house used to provide electric power to the tool pusher's trailer crossed over the dirt access road. The road was used daily by vehicles and trucks to access the drill site. As many as 14 vehicles including automobiles, pickup trucks, and "18-wheeler" trailers passed over the cable each day (Tr. 158, 161, 187). Big Dog laid the cable from the generator house to the trailer as part of the rig set up.

There is no dispute the cable was a flexible cable. The cable was described as an SDT (sunlight resistant, direct burial) flexible cable with an outer PVC jacket and two insulated current-carrying wires, one insulated neutral wire, and one bare copper ground wire inside the jacket (Tr. 42, 57-58).³

Big Dog's Duplication Argument

Big Dog's claim the violation alleged in Citation no. 2, item 1 duplicates Citation no. 1, item 4 is rejected. Violations are considered duplicative "where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement

³The citation refers to the cable as "Southwire Type TC Flexible Cable." Although not identified by manufacturer during the hearing, the important aspect of compliance with the electrical standard is that it was a flexible cable.

of the other item as well.” *Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1082 fn. 5 (No. 99-0018, 2003). Violations are not duplicative if they are directed at fundamentally different conduct or where one of the provisions is broad and comprehensive and the other provision is narrow and specific. *Burkes Mechanical, Inc.*, 21 BNA OSHC 2136, 2141 (No. 04-0475, 2007).

Item 4, which alleges a violation of § 910.305(g)(1)(i) requires flexible cords and cables to be approved and suitable for conditions of use and location. On the other hand, § 1910.305(a)(2)(iii)(G) (Willful Item 1) requires that flexible cords and cables be protected from accidental damage. The standards address different hazards: the approval and suitability of the cable for the use and location versus whether the cable is protected from accidental damage. The abatement of one hazard does not necessarily abate the other hazard. The alleged violations are not duplicative.

Flexible Cable Was Exposed to Accidental Damage

The record shows that where the flexible cable crossed the active roadway into the rig site, it was damaged as evident by the visible pinholes and cuts. The cable was not protected from damage by the vehicular traffic passing over it. Electrician Chandler who observed the cable on August 25, 2004 (seven days before the accident), saw pinholes and cuts in the cable jacket which he attributed to the vehicular traffic. Because of this visible damage, Chandler recommended the cable be replaced (Exh. C-2; Tr. 100, 115). Chandler testified the pinholes remained after he spliced the cable (Tr. 116). Similarly, Impulse Electric’s owner and master electrician Johnston who saw the same physical damage to the cable the day after the accident, also considered it caused by the vehicular traffic (Exhs. C-4, C-5, C-9; Tr. 49-50). The only visible damage to the approximate 200 feet of cable was where it crossed the access road.

Big Dog’s argument that the record fails to establish a violation because the standard does not identify damage from vehicular traffic within the specific ways that cords and cables could accidentally be damaged, *i.e.* sharp corners, projections, doorways or other pinch points, is rejected. A safety standard such as §1910.305(a)(2)(iii)(G) is generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working conditions. The wording of a standard must be viewed in context, not in isolation and interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries*, 10 BNA OSHC 1596 (No. 77-4313, 1982).

Section 1910.305(a)(2)(iii)(G) is directed at protecting flexible cords and cables from “accidental damage” and identifies specific conditions or locations which require special care in protecting the cable. The identified conditions are not exhaustive and are not intended to limit the definition of “accidental damage.” Electricians Johnston and Chandler who observed pinholes and other damage in the cable crossing the access road identified the cause as vehicular traffic. Damage to the cable by vehicular traffic is the type of accidental damage which should be avoided. Vehicular traffic running over the cable on the access road is similar subjecting the cable to a “pinch point” as prohibited by the standard. Dr. Neuhalfen testimony that his examination of a portion of the cable revealed no evidence it was crushed by being run over by vehicles is not given weight because he examined only a portion of the cable which was not on the access road (Tr. 310, 317).

The record, in this case, establishes a violation. Big Dog installed the flexible cable and assumed the responsibility to keep the cable free of accidental damage. Impulse Electric was hired by Big Dog only on an as needed basis to repair specific electrical issues (Tr. 30, 91). Impulse Electric was not under contract with Big Dog and there is no evidence it assisted or advised Big Dog in the laying of the cable across the access road at the Rig #1 site (Tr. 45, 46). Big Dog never requested Impulse Electric to ensure the flexible cable providing electric power to the tool pusher’s trailer was protected from accidental damage (Tr. 43).

The flexible cable over the access road sustained damage as a result of Big Dog’s failure to protect it from accidental damage. The cable was laid across an active road which was the only means of access into the rig site (Exh. C-8). After listening to the trial testimony and reviewing the exhibits, Dr. Neuhalfen agreed the flexible cable was damaged. His only explanation for such damage was the vehicular traffic (Tr. 385).

The record establishes employee exposure. According to master electrician Johnston, the crew was exposed to electric shocks from touching the metal parts of the pusher’s trailer as a result of the damage to the cable by the vehicular traffic (Exh. C-3; Tr. 61). The crew received and complained of electric shocks when touching the trailer (Tr. 149-150, 169, 171). Moreover, after Chandler spliced the cable as instructed by Big Dog, the crew continued to receive and report the electric shocks (Tr. 151, 215).

Also, Big Dog knew that the flexible cable was subject to damage from the vehicular traffic.

Big Dog knew cars and trucks drove over the cable several times per day. Seven days before the accident, Dig Dog was told by electrician Chandler the cable was damaged by the vehicular traffic (Tr. 45, 112, 114). The cable across the roadway was in plain view and visible to the tool pushers during their inspections of the rig site. The tool pushers' weekly inspections included inspecting for electrical hazards and the condition of electrical wiring (Exh. C-14; Tr. 221-222). A walk around inspection by the tool pushers should have revealed the damage to the flexible cable. Based upon the testimony of Chandler and Hobbs, such damage was easily observable.

Big Dog's claim that OSHA failed to establish a violation because the cable was safe as of August 25, the date Chandler spliced the cable and then tested it to ensure it was safe is rejected (Tr. 108-109). Its argument addresses the cause of the accident to Cody Hall. This court is not making any finding as to the cause of the accident. The issue before the Commission is not the cause of the accident but whether the terms of the standard were violated. Also, Chandler testified the pinholes in the cable were still evident after he had spliced it (Tr. 116). Big Dog should have taken steps to protect the cable from the vehicular damage.

The violation of §1910.305(a)(2)(iii)(G) is established.

Willful Classification

OSHA classified the violation of §1910.305(a)(2)(iii)(G) as willful. "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

The record in this case fails to establish Big Dog's violation of §1910.305(a)(2)(iii)(G) was willful. According to invoices, it appears Impulse Electric was repeatedly called regarding problems with the cable. Impulse Electric, on January 26, 2004, performed trouble shooting on the power cable at the tool pusher trailer when it was at another site. The electrician found that hot wires and the neutral crossed. He spliced the power cable. On February 26, 2004, Impulse Electric again was called to trouble shoot the tool pusher trailer. A short was found in the power cable and it was

repaired. On June 25, 2004, Impulse Electric replaced the power cable to the tool pusher trailer. (Exh. C-1). In these situations, the problems with the cable were corrected.

On August 25, 2004, at the site of the accident, Impulse Electric's electrician Chandler states "Drove to location to work on pusher trailer house, found wire cut in where truck ran over, had lots of holes in line, Needs to be replaced" (Exh. C-2). Although Big Dog did not replace the cable as recommended by Impulse Electric, Chandler spliced the cable and verified it was safe before leaving the site.

There is no showing Big Dog's failure to protect the cable from accidental damage was intentional or the result of plain indifference to employee safety. Chandler tested the cable after it was spliced and determined it was safe before leaving the site. There is no showing that Chandler advised Big Dog of an urgency to replace the cable or to take action to protect it from further damage. Chandler did not tell Big Dog on August 25, 2004 that the cable needed to be removed from the access road. He considered splicing a temporary fix until it was replaced.

In response to complaints about shocks from the crew, Big Dog called Impulse Electric to address the problem. The cable was replaced or spliced. Its response to the complaints of shocks in June and August, belies any argument that it was indifferent to the complaints of shocks. The electrician, who spliced the cable seven days before the accident, did not consider it to be imminently dangerous (Tr. 107). If Chandler did not think it was dangerous, Big Dog's failure to replace the cable can not be considered intentional or plain indifference. Despite Chandler not being told about the electric shocks to employees, there is no showing such omission was willful as opposed to an oversight. Chandler testified that even if he had been told about the electric shocks, he would not have performed any different tests (Tr. 122). He was satisfied the cable was safe when he left the rig site.

Hobbs agreed that none of Big Dog's supervisors expressed an intent not to fix the problem causing the electric shocks. She agreed Big Dog "didn't totally ignore the issue" (Tr. 259). Criswell told Wheeler that he would get somebody out there to fix it (Tr. 172). Although in hindsight it should have taken a more aggressive action, the record shows that Big Dog continually attempted to remedy the problem reported by the crew. Its failure to act promptly was not due to intentional or voluntary disregard of the Act's requirements or with plain indifference to employee safety.

The classification for Big Dog's violation of §1910.305(a)(2)(iii)(G) is amended to serious. Big Dog should have known the flexible cable laying across the access road was not protected from accidental damage due to the vehicular traffic. Such damage to the cable exposed the crew to an electrical hazard.

Penalty Consideration

Section 17(j) of the Act requires that when assessing penalties, the Commission must 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 prior history of violations. 29 U. S. C. § 666(j). The gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

Big Dog is not entitled to credit for size because it is a large company with more than 300 employees. It is also not entitled to credit for history and good faith. Big Dog has received two earlier citations and no evidence was presented showing the adequacy of company's safety programs. It has no written provisions relating to electrical safety in its safety manual, and provides no electrical safety training to employees (Tr. 183, 219).

A penalty of \$1,000.00 is reasonable for serious violation of § 1910.303(f) (Citation 1, Item 1). The lack of labeling of circuits was obvious and visible. The crew on the rig was exposed to an electrical hazard.

A penalty of \$1,000.00 is reasonable for serious violation of § 1910.305(b)(1) (Citation 1, Item 3). The lack of covers of unused openings in the circuit panel was obvious and visible. The crew on the rig was exposed to an electrical hazard.

A penalty of \$6,000.00 is reasonable for serious violation of § 1910.305(a)(2)(iii)(G) (Citation 2, Item 1). The accidental damage to the cable across the access road was obvious and visible. The crew on the rig was exposed to an electrical hazard.

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:

Citation no. 1, item 1, alleged serious violation of § 1910.303(f), is affirmed and a penalty of \$1,000.00 is assessed.

Citation no. 1, item 2, alleged serious violation of § 1910.304(f)(4), is vacated and no penalty is assessed.

Citation no. 1, item 3, alleged serious violation of § 1910.305(b)(1), is affirmed and a penalty of \$1,000.00 is assessed,

Citation no. 1, item 4, alleged serious violation of § 1910.305(g)(1)(i), is vacated and no penalty is assessed.

Citation no. 1, item 5, alleged serious violation of § 1910.305(j)(1)(i), is vacated and no penalty is assessed.

Citation no. 2, item 1, alleged willful violation of § 1910.305(a)(2)(iii)(G), is affirmed as serious and a penalty of \$6,000.00 is assessed.

/s/

KEN S. WELSCH
Judge

Date: November 17, 2009