



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 06-1036

COMPASS ENVIRONMENTAL, INC.,

Respondent.

APPEARANCES:

Gary K. Stearman, Attorney; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; Gregory F. Jacob, Solicitor of Labor; U.S. Department of Labor, Washington, DC  
For the Complainant

Jim Michael Hansen, Esq.; Jim M. Hansen, P.C., Golden, CO  
For the Respondent

**DECISION**

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

**STATEMENT OF THE CASE**

Compass Environmental, Inc. (“Compass”) is an “environmental construction and remediation” company that L.G. Everist, Inc. (“Everist”) hired to construct an underground slurry wall at Everist’s surface mine site in Fort Lupton, Colorado. During the slurry wall construction, the boom of a Compass excavator came into electrical contact with an overhead power line. A Compass employee, who was holding a grease line attached to the excavator, was fatally electrocuted. Following the accident, the Occupational Safety and Health Administration (“OSHA”) inspected the worksite and issued Compass a two-item serious citation under the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. §§ 651-78. In Item 1 of the citation, the Secretary alleged that Compass failed to properly instruct the excavator operator and

the decedent in “the recognition and avoidance of the 7,200-volt transmission and distribution line” in violation of 29 C.F.R. § 1926.21(b)(2).<sup>1</sup> The Secretary proposed a penalty of \$6,300 for this alleged violation.

Following a hearing, Administrative Law Judge James R. Rucker vacated this citation item based on his finding that the Secretary failed to establish “that the decedent’s exposure to the energized line was foreseeable” such that Compass was required to provide him with training.<sup>2</sup> For the reasons that follow, we reverse the judge, affirm the citation item, and assess a \$5,500 penalty.

#### ISSUE

At issue on review is whether the Secretary established that a reasonably prudent employer would have anticipated the decedent’s exposure to the electrocution hazard posed by the overhead power lines and provided the requisite training.

#### FINDINGS OF FACT

At the worksite, Compass used an excavator with a 75-foot boom to dig a trench for the slurry wall. During the excavation work, the excavator straddled the trench on a pre-compacted work pad. The worksite was bisected by energized overhead power lines no more than 34 feet high. Although the slurry wall was designed to cross underneath the power lines, at the time of the accident the excavation work had not yet reached that area. However, in the days leading up to the accident, Compass anticipated that its work would soon come under the power lines and arranged for their removal with Everist, the company responsible for ordering this action.

During the slurry wall construction, the decedent was responsible for periodically lubricating parts of the excavator, as well as measuring the depth of the trench dug by the excavator. To perform his lubrication duties, the decedent held a grease line—a rubber and metal hose that dispenses grease through a metal nozzle—which was connected to the excavator.

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<sup>1</sup> Section 1926.21(b)(2) provides as follows: “The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.”

<sup>2</sup> The judge found that Compass had adequately trained the excavator operator to recognize and avoid the overhead power lines, and the Secretary did not seek review of that finding. The judge also vacated Item 2 of the citation, in which the Secretary alleged that Compass violated 29 C.F.R. § 1926.600(a)(6), based on its failure to maintain the required minimum ten-foot clearance distance between the excavator and the overhead power lines. The Secretary did not petition for review of the judge’s ruling that Compass lacked knowledge of the cited condition.

The decedent performed this work after each cut by the excavator, generally at the same time that other maintenance, including refueling, was performed. Compass gave no specific instructions to employees on how or where to refuel the excavator, but it was typically refueled when located on its work pad. For this process, a forklift moved a 300-gallon fuel tank to the work pad, where the forklift's 12-volt battery was used to power the fuel tank's pump.

About a week before Compass hired the decedent, it instructed its other employees regarding the hazards associated with the worksite, including the electrocution hazard posed by the overhead power lines. Compass never provided the decedent with this training. Although a Compass project engineer provided the decedent with on-the-job training, that training did not address power line hazards.

At the end of the work day, three days before the overhead power lines were slated for removal, the excavator operator crawled the excavator approximately 200 feet from its work pad to an area located near the power lines where the fuel tank was staged. Minutes later, the decedent was electrocuted when the boom of the excavator moved sufficiently close to a 7,200-volt power line to allow electricity to arc from the power line to the excavator and through the attached grease line held by the decedent.

## DISCUSSION

### I. ALLEGED VIOLATION

Section 1926.21(b)(2) requires the Secretary to “establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances.” *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-1995 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106, 1993); *see also Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015, 1991-1993 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992) (holding § 1926.21(b)(2) requires that “an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware”); *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2009, 1991-1993 CCH OSHD ¶ 29,223, p. 39,130 (No. 85-369, 1991) (“Section 1926.21(b)(2) requires employers to instruct employees concerning ‘safety hazards which would be known to a reasonably prudent employer *or* which are addressed by specific OSHA regulations.’” (citation omitted)). In considering whether an employer has met its obligation under this general standard, “the Commission has specifically considered whether a reasonable person, examining the generalized standard in light of a

particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of the hazard and of a means to abate it.” *W. G. Fairfield Co.*, 19 BNA OSHC 1233, 1235, 2000 CCH OSHD ¶ 32,216, p. 48,865 (No. 99-0344, 2000) (citation and internal quotation marks omitted), *aff’d*, 285 F.3d 499 (6th Cir. 2002). Thus, the obligation to train “is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard.” *W. G. Fairfield Co.*, 19 BNA OSHC at 1236, 2000 CCH OSHD at p. 48,865.

Under the circumstances here, we conclude that a reasonably prudent employer would have anticipated the decedent’s exposure to the overhead power lines and provided the decedent with training addressing the electrocution hazard they posed to him. Compass clearly understood that any contact between the excavator and the power lines had to be avoided. Indeed, it used a spotter to assist in transiting the excavator underneath the energized power lines at the start of the project and had arranged for the removal of those lines just days prior to the accident.<sup>3</sup> Moreover, the training that Compass provided to the excavator operator, and all onsite employees except the decedent, addressed the electrocution hazard posed by the excavator getting too close to the power lines.

Contrary to Compass’s claims on review, the overhead power lines posed an electrocution hazard to the decedent. His work duties, particularly during the refueling process, required the decedent to be in physical contact with the grease line attached to the excavator and, therefore, in close proximity to the excavator. Although Compass maintains that the excavator was not expected to be moved from its work pad for refueling, this uninsulated piece of equipment was clearly mobile and had a 75-foot boom that was long enough to breach the safe clearance distance of the power lines. *See CMC Elec. Inc.*, 221 F.3d 861, 866 (6th Cir. 2000) (affirming § 1926.21(b)(2) violation where employer could have anticipated that employee would have approached a power line because of “the nature of the job”). As for the fuel tank, the forklift operator had the discretion to place it in almost any location at the worksite. In fact, on the day of the accident, the fuel tank was located underneath the power lines. And, according to the excavator operator, he did not need the forklift to power the fuel tank pump because he could

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<sup>3</sup> We note that when Compass initially brought the excavator to the worksite, it complied with an exception to the standard’s ten-foot clearance provision by transiting the excavator under the overhead power lines “with no load and boom lowered” while maintaining at least a four-foot clearance. 29 C.F.R. § 1926.550(a)(15)(iii).

use the excavator's own 24-volt battery to accomplish this task. With no evidence that its employees were prohibited from refueling the excavator in this manner, we consider Compass's expectation that the excavator would stay on its work pad for refueling incompatible with how a reasonably prudent employer would view these circumstances.

Although a reasonably prudent employer would have anticipated that (1) the excavator could be moved to refuel near the power lines and (2) the decedent was expected to lubricate the excavator during refueling, Compass never trained him to recognize and avoid the electrocution hazard associated with his job duties. Indeed, Compass admits that the decedent did not receive the same training that was given to the excavator operator and other onsite employees during the first week of the project because he was not hired until about a week after the project began.<sup>4</sup>

*See Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578 n.11, 1993-1995 CCH OSHD ¶ 30,345, p. 41,842 n.11 (No. 91-0237, 1994) (noting Commission "has expressed a special concern that new hires be made aware of hazards on the job"). There was also no mention of overhead power lines in a memorandum describing the decedent's on-the-job training. And although the decedent agreed—by signing an orientation safety sheet that did not mention the overhead power lines—to comply with Compass's safety plan for the project, there is no evidence in the record that he received any training on that safety plan or even read it. Cf. *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619-20, 1991-1993 CCH OSHD ¶ 29,681, p. 40,242 (No. 89-2019, 1992) (holding employer violated training standard where only training provided was that employee read a safety booklet addressing excavation safety "in a cursory fashion").

Nor does any prior experience of either the excavator operator or the decedent obviate the need for training. *See Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 811 (6th Cir. 2003) ("Employers cannot count on employees' common sense and experience to preclude the need for instructions."). Although the decedent apparently took an OSHA training course prior to his employment with Compass, there is no evidence that the course included instruction in the recognition and avoidance of the power line hazards. And the record shows that Compass

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<sup>4</sup> Although Compass complains that the Secretary "did not present any proof . . . as to the exact training" that it should have provided to the decedent, we note that the Secretary appears to accept as adequate the training Compass provided to its other employees at the site. In any event, the Secretary's failure to specify "what instructions should have been given . . . does not excuse [the employer] from its legal obligation to give proper instructions." *Pressure Concrete*, 15 BNA OSHC at 2017, 1991-1993 CCH OSHD at p. 40,812.

did not know what the course covered. In any event, the cited standard requires that employers take “some positive action” to train employees with respect to the specific conditions they may encounter at the particular worksite. *See Ford Dev. Corp.*, 15 BNA OSHC 2003, 2009, 1991-1993 CCH OSHD ¶ 29,900, p. 40,802 (No. 90-1505, 1992) (holding that “the plain language of the [training] standard requires some positive action on the part of the cited employer” and emphasizing that employers should not place “too much trust in the quality of experience and training an employee has already acquired elsewhere”), *aff’d without published opinion*, 16 F.3d 1219 (6th Cir. 1994). The fact that the power lines were “readily visible” likewise does not release Compass from its obligation to instruct the decedent to recognize and avoid the electrocution hazard. *See Pressure Concrete*, 15 BNA OSHC at 2016 n.5, 1991-1993 CCH OSHD at p. 40,811 n.5 (rejecting argument that employer need not instruct its employees on “obvious” hazards because “what is obvious to one person may not be obvious to another”).

Finally, for the reasons discussed above, we find that Compass had the requisite knowledge of the cited condition. *See A. P. O’Horo*, 14 BNA OSHC at 2007, 1991-1993 CCH OSHD at p. 39,128 (“[T]he Secretary must prove that a cited employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition.”); *see also Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079, 1993-1995 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995) (noting that “knowledge is established by a showing of employer awareness of the physical conditions constituting the violation”), *aff’d without opinion*, 79 F.3d 1146 (5th Cir. 1996). Thus, the record demonstrates that Compass anticipated potential exposure to the electrocution hazard and knew that it provided the relevant training to all employees except the decedent.<sup>5</sup> *See Pressure Concrete*, 15 BNA OSHC at 2017, 1991-1993 CCH OSHD at pp. 40,811-12 (affirming violation of § 1926.21(b)(2) where “the potential dangers” that

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<sup>5</sup> Compass contends that the Secretary failed to prove exposure, but Compass incorrectly focuses on the unforeseeability of the events that occurred on the day of the accident rather than the decedent’s lack of training about a known hazard. The cited standard requires an employer to instruct its employees to recognize and avoid the hazards they *may* encounter on the job and about the regulations applicable to those hazards. *Capform, Inc.*, 19 BNA OSHC 1374, 1376, 2001 CCH OSHD ¶ 32,320, p. 49,477 (No. 99-0322, 2001); *see Gen. Motors Corp.*, 22 BNA OSHC 1019, 1030, 2004-2009 CCH OSHD ¶ 32,928, p. 53,617 (No. 91-2834E, 2007) (consolidated cases) (finding it unreasonable to require that employee be exposed to a hazard before requiring that he be trained to recognize and avoid that hazard).

caused the possibly unforeseen drowning accident were known by the employer but its employees were not instructed). Accordingly, we affirm the alleged training violation.

## **II. CHARACTERIZATION AND PENALTY**

A violation is serious “if there is a substantial probability that death or serious physical harm could result from the violation.” *Capform, Inc.*, 16 BNA OSHC 2040, 2042, 1993-1995 CCH OSHD ¶ 30,589, p. 42,357 (No. 91-1613, 1994) (citing Section 17(k) of the Act, 29 U.S.C. § 666(k)); *see also Pressure Concrete*, 15 BNA OSHC at 2018, 1991-1993 CCH OSHD at p. 40,813 (emphasizing that a serious characterization “does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur”). Although Compass does not contest the serious characterization of this violation, we note that the evidence supports that characterization as Compass’s failure to provide the requisite training could, and did, result in death. *Pressure Concrete*, 15 BNA OSHC at 2018, 1991-1993 CCH OSHD at p. 40,813 (characterizing a § 1926.21(b)(2) violation as serious where flooding killed a storm sewer worker because “it is abundantly clear that the consequences of [the employer’s] failure to instruct its employees could result in serious harm”); *see also L & M Lignos Enters.*, 17 BNA OSHC 1066, 1067, 1993-1995 CCH OSHD ¶ 30,675, p. 42,571 (No. 92-1746, 1995) (affirming violation of § 1926.21(b)(2) as serious where employer did not challenge alleged serious characterization on review).

When assessing a penalty, the Commission must give due consideration to four factors: (1) the employer’s size; (2) the gravity of the violation; (3) the employer’s good faith; and (4) the employer’s prior history of violations. Section 17(j) of the Act, 29 U.S.C. § 666(j). In proposing a penalty of \$6,300 for this citation item, the Secretary considered the training violation to be of high gravity, but gave a reduction for Compass’s lack of prior history.

We find that a further reduction for good faith is appropriate under the circumstances present here. *See Capform, Inc.*, 19 BNA OSHC at 1378, 2001 CCH OSHD at p. 49,479 (noting that Commission considers a number of factors in considering good faith credit, including an employer’s overall safety and health program and other efforts to assure workplace safety). Although Compass failed to provide training for its new hire, it had an extensive safety program including (1) a disciplinary program; (2) safety audits; (3) written safety quizzes; (4) daily tailgate safety meetings; and (5) training for all of its other employees who worked at the job

site. *See, e.g., O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2064, 1999 CCH OSHD ¶ 32,026, p. 47,851 (No. 98-0471, 2000) (according good faith penalty reduction for training violation where employer provided some training). Moreover, Compass coordinated with Everist personnel to take down the power lines in anticipation of the approaching excavation work—demonstrating an intention to protect its workers. And after the accident, Compass developed a training course on energy hazards that it had provided to more than half of its employees by the time of the hearing. *See Ford Dev.*, 15 BNA OSHC at 2008, 1991-1993 CCH OSHD at pp. 40,800-01 (according good faith credit where employer “increase[d] its safety training activities” after the inspection). Accordingly, we find that a penalty of \$5,500 is appropriate.

#### CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that the Secretary established that Compass’s failure to train the decedent was a serious violation of § 1926.21(b)(2). We also conclude that an appropriate penalty for this violation is \$5,500.

#### ORDER

We reverse the judge’s vacatur of Citation 1, Item 1, affirm this citation item, and assess a \$5,500 penalty.

SO ORDERED.

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Chairman

/s/ \_\_\_\_\_  
Horace A. Thompson III  
Commissioner

Dated: June 10, 2010

/s/ \_\_\_\_\_  
Cynthia L. Attwood  
Commissioner



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SECRETARY OF LABOR,

Complainant,

v.

COMPASS ENVIRONMENTAL, INC., and its successors,

Respondent.

OSHRC DOCKET NO. 06-1036

APPEARANCES:

For the Complainant:

Tobias B. Fritz, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:

Jim M. Hansen, Esq., Jim M. Hansen, P.C. Golden, Colorado

Before:      Administrative Law Judge: James R. Rucker

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, Compass Environmental, Inc. (Compass), was engaged in the construction of a slurry trench cutoff wall for L.G. Everist at the Golden/Hill-Oakley Gravel Pit in Fort Lupton, Colorado. Respondent admits it is an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On March 18, 2006, a Compass employee, Chris Carder, was electrocuted at Compass' L.G. Everist worksite when an excavator he was servicing contacted a 7,200 volt transmission line. Following the accident, the Occupational Safety and Health Administration (OSHA) instituted an investigation of the incident. At OSHA's completion of its investigation, Compass was issued a citation alleging violations of the construction standards found at 29 CFR §§1926.21(b)(2) and 1926.600(a)(6). By filing a timely notice of contest Compass brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Denver, Colorado on October 10-11, 2007. Briefs have been submitted on the issues, and this matter is ready for disposition.

## **Facts**

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On the day of the accident, Compass employee Donnie Wren was operating a Komatsu 750 excavator with an extended boom on the L.G. Everist work site (Tr. 70). Another Compass employee, Chris Carder, was working as the second man on the two-man excavator crew. It was his job to check the trench depth, grease the excavator, and watch for problems with the excavator the operator could not see (Tr. 71-72, 273-74, 274, 442). During the OSHA investigation Donnie Wren told OSHA Safety and Health Compliance Officer (CO) Jack Seybert that his crew was going to quit early that day and had finished digging prior to the accident (Exh. C-2, 3/21/2006, p. 4). As was customary, Wren intended to refuel the Komatsu before leaving the site (Tr. 143; Exh. C-2, 3/21/2006, p. 4). Accordingly, Wren walked the Komatsu toward a 300 gallon auxiliary fuel tank that had been staged under an energized 7,200 volt transmission line. Wren told CO Seybert that Carder was acting as his spotter, watching for the power line while walking backwards holding the “grease stick,” a rubber hose with a metal end. (Tr. 69-72, 495; Exh. C-2, 3/21/2006, p. 4; 3/27/2006, p. 1). As they approached the fuel tank, the Komatsu’s boom came close enough to the transmission line for the electricity to arc from the transmission line to the track hoe and through Mr. Carder, electrocuting him (Tr. 30-31, 104, 510, Exh. C-2, 3/21/2006, p. 4; Exhibit C-7). Jerry Gardner, a loss control safety specialist for United Power (Tr. 19), testified that, in general, a 7,200 volt line will not arc more than  $\frac{1}{2}$  an inch (Tr. 42). The Komatsu’s boom, therefore, must have been within a foot of the line for an arc to occur (Tr. 42, 118).

Virgil Jarnagin, Compass’ operations manager, testified that, normally, the Komatsu sat above the slurry trench, on a level work pad constructed of compacted dirt stable enough to support a 250,000 to 300,000 pound tractor (Tr. 457). The Komatsu conducted excavation operations from the work pad. Service, including greasing and refueling of the Komatsu, was normally performed while the excavator was located on the work pad (Tr. 464-65). Though Wren was never specifically instructed not to walk the Komatsu around the site (Tr. 370), Jarnagin had never seen the Komatsu move off the trench during the L.G. Everist slurry wall construction. At the end of the day Wren generally backed the Komatsu up 20 feet or so to ensure it was on stable ground. He then radioed the forklift driver asking him to bring some diesel, and spun the cab around so that the forklift driver could access the excavator’s fuel tanks with the 300 gallon auxiliary fuel tank (Tr. 464-66, 468-70). Jarnagin could not explain why Wren walked the Komatsu off the trench towards the fuel tank rather than radioing for fuel on the day of the accident (Tr. 485).

Billy Plunkett, a site superintendent on the L.G. Everist job (Tr. 75, 500-01) similarly testified that he never observed the Komatsu outside its assigned area at any time during the project prior to the accident

(Tr. 505-06, 522-23). Though the auxiliary fuel tank was staged at various locations on the worksite throughout the job, its staging did not designate a fueling spot (Tr. 514-15). Normally the forklift driver brought the tank to the excavator (Tr. 516). Jeff Salas, Compass' senior project manager (Tr. 230-31), testified it was the practice at this worksite for the forklift driver to fill the 300-gallon fuel tank from a 1,000-gallon stationary tank and take it around to individual pieces of equipment for refueling at the end of each day (Tr. 283-285, 291-92).

Salas testified that on the day of the accident the Komatsu was still operating 200 feet from the power lines (Tr. 314). No work was supposed to be done near the overhead electrical lines that day (Tr. 314). Compass anticipated digging would approach the area near the power lines on the following Monday and Tuesday. However, they were coordinating with L.G. Everist to have the lines de-energized and expected them to be removed prior to digging in the area (Tr. 315). According to Salas there was no reason to believe Wren would be working with the Komatsu in that area prior to the removal of the power lines (Tr. 317-20, 334).

Mark Fleri, Compass' vice president in charge of safety (Tr. 184-85), testified that Compass, nonetheless, has a comprehensive safety program that includes a 20' minimim clearance requirement for overhead power lines (Tr. 189-91, 208, 226). Moreover, Compass had developed a site specific safety plan for the L.G. Everist work site, which stated:

High-voltage overhead lines will be identified to all equipment operators and safe clear distances will be maintained at all times.

(Tr. 419; Exh. F-2, p. 37). Job Safety Analyses (JSAs) were prepared the first week of the job and incorporated into morning safety meetings (Tr. 420; Exh. F-5). JSA 9-b identifies energized overhead lines as a potential hazard, and directs operators to "maintain 20 ft. clearance between hoe/overhead lines; use spotter, demarcate lines." (Tr. 421; Exh. F-5; JSA9-b). Jarnagin testified that if the crane was going to be near or under the power line, a spotter was to be used (Tr. 482). Prior to February 7, 2006, Janagin read the JSA aloud to his crew, which included Donnie Wren (Tr. 421-22). Wren signed off, indicating his presence at the safety meeting (Tr. 132-34, 422, 425).

The overhead power lines on the work site were readily apparent (Tr. 448). Moreover, Wren became aware of the overhead lines when he moved the Komatsu to the excavation site. Because the Komatsu was assembled on the far side of the transmission line, it was necessary for Wren to lower the boom as low as it would go, curl the bucket and walk the machine under the power line with Jarnagin acting as spotter. Jarnagin testified the Komatsu maintained 5 or 6 feet of clearance (Tr. 428-30, 481). In addition, on the Wednesday preceding the accident, Wren was present during discussions between

Jarnagin, Plunkett, and a representative of L.G. Everest regarding the impending de-energization and removal of the overhead power line (Tr. 449-52, 458). It was anticipated that the excavation would reach the power lines by the following Tuesday, necessitating their removal (Tr. 449-51).

CO Seybert testified that Wren and Plunkett both told him Compass had not provided site specific training on the hazards of overhead lines (Tr. 108-09, 136; Exh. C-2, 3/21/2006, p. 4). Wren, however, knew about the power lines that were on the site, and was able to tell Seybert that Compass required 20 feet of clearance between the excavator and power lines (Tr. 122, 129-30; Exh. C-2, 3/21/2006, pp. 4, 7). Jarnagin testified it was a common policy in the industry to maintain 20 feet of clearance from any power lines (Tr. 418). He had trained Wren accordingly when both worked for another contractor more than three years previously (Tr. 412-16). Placards warning of the hazards of high voltage lines, and listing required clearances were posted inside the Komatsu's cab (Tr. 439-40; Exh. F-11-B).

Chris Carder was hired on February 13, 2006 (Tr. 154, 430; Exh. F-7). On his application, Carder indicated he had previously participated in a 10-hour OSHA course (Tr. 155, 433; Exh. F-7, p. 324). Billy Plunkett reviewed Compass' general safety rules as part of Carder's new employee orientation (Tr. 157, 435-36; Exh. F-7, pp. 19846-47). There was no evidence that Carder received site specific training (Tr. 110). Jarnagin testified that the 10-hour OSHA course he participated in mentioned the potential dangers of high-voltage lines (Tr. 433); however, he had no personal knowledge about the contents of the course Carder attended (Tr. 478, 486). Jarnagin testified that Carder was not privy to his conversation with L.G. Everist regarding removal of the power line (Tr. 491).

#### **Alleged Violation of §1926.21(b)(2)**

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) **Compass Environmental Inc. at 12546 Weld County Road 18, Fort Lupton, CO 80621:** The employer did not instruct his employees regarding hazards associated with their work environment, in that the employer did not instruction employees in the recognition and avoidance of the 7,200 volt transmission and distribution line in the vicinity of the slurry wall which they were constructing. This condition exposed the employees to an electrocution hazard.

The cited standard provides:

(b) *Employer responsibility. . .*

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative condition, 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 condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994).

The cited standard, according to *H.C. Nutting Co. v. OSHRC*, 615 F.2d 1360 (6th Cir. 1980) (unpublished), quoted in *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2009, 1991 CCH OSHD ¶29,223, p. 39,130 (No. 85-369, 1991), does not outline any particular requirements for a safety program and requires only "that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations." Thus, the Commission will apply the standard with reference to either a reasonable person test or to OSHA standards, requiring that supervisory personnel advise employees, especially new employees, of recognized hazards associated with actual dangerous conduct in which they are presently engaging. *National Industrial Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1056 (8th Cir. 1978).

The record establishes Compass complied with the terms of §1926.21(b), in that it trained its Komatsu operator in the hazards associated in moving the excavator near energized lines. Compass recognized that the overhead lines on the L.G. Everist work site posed a hazard to the Komatsu operator. Its job safety analysis identified the overhead lines as a potential hazard and dictated that the lines be identified to equipment operators, and demarcated. Operators were to maintain 20 feet of clearance and use spotters to ensure they did so. Wren, the Komatsu operator, was aware of the need to maintain proper clearances when working around high voltage lines. He was present when the site specific job safety analysis was read during a daily safety meeting. He complied with Compass' requirement that spotters be used in the vicinity the overhead power lines when he walked the Komatsu onto the work site with his operations manager acting as spotter. His movement of the crane at that time demonstrated a knowledge of OSHA regulations beyond that conveyed by Compass' JSA. Contrary to the Secretary's assertions, §1926.550(a)(15)(iii) requires only that:

(iii) In transit with no load and boom lowered, the equipment clearance shall be a minimum of 4 feet for voltages less than 50 kV., . . .

The evidence establishes Wren maintained five or six feet of clearance. Clearly Wren, an experienced crane operator, received adequate instruction to allow him to recognize and avoid the 7,200 volt transmission and distribution line in the vicinity of the slurry wall.

On this record, it cannot be determined why he did not do so. The Secretary concludes that Compass' failure to train Wren's grease man in OSHA required clearances resulted in the Komatsu contacting the energized line. Such a conclusion is unsupportable. There is simply insufficient evidence in the record to determine the cause of the accident. In any event, the proper inquiry is not what caused the accident, but whether Compass violated the standard as alleged. See *Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 642 (5th Cir.1979) (Act is designed to achieve abatement of hazardous conditions, not fix blame for particular injury). Any finding of a violation here cannot be based on the occurrence of an accident but on the foreseeable exposure of the grease man, Carder, to the recognized hazard, *i.e.*, the energized overhead line.

The Secretary has not established, by a preponderance of the evidence, that Carder's exposure to the energized line was foreseeable. The Komatsu was digging 200 feet from the power lines and was not expected to reach the area under the lines until the following week, at which time the lines were to have been removed. All the witnesses testified that the trenching operation was conducted from a pre-compacted work pad directly over the trench. Servicing was performed on the Komatsu in situ. A forklift normally brought an auxiliary fuel tank out to the Komatsu. None of the witnesses could explain why Wren deviated from standard operating procedures by walking the Komatsu away from the work pad on the day of the accident. The Secretary introduced no evidence establishing Compass should have foreseen Wren would do so, taking Carder with him to act as his spotter, and exposing Carder to the hazard posed by the energized lines.

The Secretary has not established that a reasonably prudent employer would have known Carder would be exposed to the hazard addressed by §1926.600(a)(6). Therefore, it cannot be found that Compass' failure to train him in the requirements of that standard violated §1926.21(b)(2). Serious citation 1, item 1 must be dismissed.

#### **Alleged Violation of §1926.600(a)(6)**

Serious citation 1, item 2 alleges:

29 CFR 1926.600(a)(6): All equipment covered by this subpart did not comply with the requirements of 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters:

(a) **Compass Environmental Inc. at 12546 Weld County Road 18, Fort Lupton, CO**

**80621:** On March 18, 2006 the employer allowed employees to operate mechanical equipment where it was capable of vertical, lateral, and/or swing motion closer than 10 feet from overhead power lines. Therefore, the operator of the Komatsu PC 750 LC excavator fitted with a Pierce Pacific Long Reach attachment made contact with an overhead 7,200 volt transmission distribution line. This condition exposed the employees to an electrocution hazard.

Discussion

The cited standard provides:

(a) *General requirements. . . .*

(6) All equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

Section 1926.550(a)(15) requires that:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

Discussion

On this record it is clear that the Komatsu's boom came within 10 feet of the energized line. Compass concurs in that conclusion (Tr. 391), but maintains that it had no actual or constructive knowledge of the cited violation. The Secretary maintains that Compass had supervisory personnel on the L.G. Everist site who knew there were live overhead lines in the area. According to the Secretary, Compass failed to exercise reasonable diligence in ensuring the Komatsu would maintain the required clearance. Specifically, Complainant argues, Virgil Jarnagin undermined Compass' training by allowing the Komatsu to violate §1926.550(a)(15)(i)'s provisions when he and Wren moved the Komatsu onto the site (Secretary's Brief, pp. 13, 16). Complainant points to Jarnagin's testimony that he guided Wren to within five or six feet of the energized line at that time (Tr. 428-30, 481). Complainant's evidence is not sufficient to establish Compass' knowledge on this record.

**Knowledge.** To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that the cited employer had actual or constructive knowledge of those conditions. *See, e.g., Southwestern Bell Tel. Co. (SWBT)*, 19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶32,198, p. 48,747 (No. 98-1748, 2000), *aff'd without published opinion*, No. 00-60814 (5th Cir., Nov. 22, 2000). To establish constructive knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of the cited condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). A lack of reasonable diligence may be shown where employer failed to take measures to prevent foreseeable hazards. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992). A recent Commission case, *Donahue Industries Inc. (Donahue)*, 20 BNA OSHC 1346, 2002 CCH OSHD ¶32,679 (No. 99-0191, 2003) is illustrative. In *Donahue*, an experienced electrician failed to ground cited equipment in violation of a “basic tenet” of the electrical trade. The Commission vacated a citation charging the employer with failing to adequately ground a welder plug in violation of §1910.255(c)(6), holding that, where an employer’s work rules, training, and supervision were adequate, it could not be found that the cited employer knew an experienced employee would violate basic tenets of his trade.

In this case, Donnie Wren, a similarly experienced crane operator, failed to maintain 20 feet of clearance between the Komatsu and the 7,200 volt overhead lines, in contravention of his training and years of experience. Wren worked at Compass, without incident, for approximately three years. As discussed above, he received site specific training, including the proper means of avoiding the overhead lines on the L. G. Everist worksite, and had actually been shown the high voltage lines on the site by his supervisor. He and his supervisor had moved the Komatsu under the lines in conformance both with Compass’ site specific JSA and with OSHA regulations, as discussed above. The Komatsu’s work was being performed from a compacted work pad over the trench under construction. Supervisory personnel were on the work site. None had ever seen the Komatsu move off the work pad, much less violate the mandated clearance distances.

In sum, Complainant introduced no evidence indicating any lack of diligence on Compass’ part that would allow a finding of employer knowledge. Serious citation 1, item 2 is, therefore, dismissed.

## ORDER

1. Serious citation 1, item 1, alleging violation of §1926.21(b)(2) is VACATED.
2. Serious citation 1, item 2, alleging violation of §1926.600(a)(6) is VACATED.

/s/

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James R. Rucker  
Judge, OSHRC

Dated: January 22, 2008