

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

Secretary of Labor,
Complainant,
v.
Andrew Electric Company,
Respondent.

OSHRC Docket No. **08-0103**

Appearances:

Christopher Helms, Esquire, Atlanta, Georgia
For Complainant

Andrew Gross, Esquire, Suwanee, Georgia
For Respondent

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

DECISION AND ORDER

Andrew Electric Company, Inc. (AEC), is an electrical contracting company located in Lawrenceville, Georgia. On the morning of August 22, 2007, AEC electrician Marco Aleman was electrocuted while installing fluorescent light fixtures at a Lexus dealership undergoing remodeling on Satellite Boulevard in Duluth, Georgia. Occupational Safety and Health Administration (OSHA) compliance officer Kenny Dease arrived later that day to begin an inspection of the worksite. Dease visited the site two more times before turning the inspection over to OSHA compliance officer Maurice Starks. Starks completed the inspection and, upon his recommendation, the Secretary issued a two-item citation to AEC on December 10, 2007.

Item 1 of the Citation alleges a serious violation of 29 C. F. R. § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions.

Item 2 of the Citation alleges a serious violation of 29 C. F.,R. § 1926.416(a)(1), for permitting an employee to work in such proximity to an electric power circuit that the employee could come in contact with the electric power circuit. The Secretary proposed a penalty of \$4,900.00 for each item.

AEC timely contested the citation and the Secretary filed a complaint. AEC admitted jurisdiction and coverage in its answer. The court held a hearing in this matter on May 12, 2008, in Decatur, Georgia. The parties have filed post-hearing briefs. AEC contends any violation found by the court resulted from unpreventable employee misconduct on the part of Marco Aleman.

For the reasons discussed below, the court affirms Items 1 and 2 of the Citation, and assesses a penalty of \$ 2,000.00 for Item 1, and \$ 4,900.00 for Item 2.

Facts

AEC's offices are located in Lawrenceville, Georgia. In October 2006, AEC began electrical contractor work on a remodeling project for a Lexus dealership (a two-story building) on Satellite Boulevard in Duluth, Georgia. Supervisor Mark Ostrander was in charge of the project for AEC, supervising a crew of six to seven employees.

The AEC crew was still there ten months later, when AEC electrician Marco Aleman found himself between jobs. AEC assigned Aleman to the Lexus project. Aleman arrived at the site on August 21, 2007. Ostrander assigned Aleman to install fluorescent light fixtures in the ceiling of a 75-foot long hallway on the second floor. Aleman worked a full shift that day and returned the next day, August 22, arriving at 7:00 a.m., to continue the installation. At approximately 8:30 a.m. an AEC crew member alerted Ostrander, who was working on the first floor, that he had found Aleman lying on the floor of the upstairs hallway. Ostrander rushed upstairs, ordered one of the crew members to call 911, and administered CPR to Aleman. The stepladder Aleman had been standing on was positioned at the end of the hallway. Aleman had installed the last light fixture in the series, located near a junction box in the ceiling. Emergency medical personnel soon arrived, but Aleman was dead. No one witnessed the electrocution.

After the medical emergency personnel removed Aleman's body, Ostrander went downstairs to the electrical room and opened the door to the breaker box (also referred to as a panel box) for the breakers controlling the upstairs. Breakers number 3 and 5 controlled the upstairs lights. Breaker number 5 was switched to the "off" position, but breaker number 3 was in the "on" position. The junction box near the last light fixture Aleman installed had been energized. The breaker box door had been locked. Two keys to the breaker boxes were on the site. Ostrander had one on his key ring and he had placed the other on top of the time clock near the breaker boxes in the electrical room. Compliance officer Kenny Dease arrived at the worksite around noon that day. Dease

held an opening conference with Ostrander and took photographs of the site. Dease returned the next afternoon and interviewed Ostrander for several hours.

On September 17, 2007, Dease returned to the site with fellow compliance officer Maurice Starks. Due to Dease's heavy caseload, including several fatality cases, OSHA team leader Keith Hass reassigned the AEC inspection to Starks. Dease introduced Starks to Ostrander and showed him the site. Starks then took over the case. Starks returned to the site on September 27 and October 23. Starks interviewed AEC employees, requested documents relating to safety training, and took additional photographs. Based on Starks's recommendation, the Secretary issued the instant citation to AEC on December 10, 2007.

The Citation

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

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

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.21(b)(2)

The standard at 29 C. F. R. § 1926.21(b)(2) provides:

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.

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) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

Date: On or about 8/22/2007

Location: Second floor in the hallway, training and adjacent office, 3383 Satellite Blvd., Duluth, GA 30096

Equipment: Fluorescent light fixture

Condition: An employee was installing fluorescent lighting without the approximately 120-270 V circuits being de-energized.

Three of the four elements of the Secretary's case are not at issue. AEC does not dispute the applicability of 29 C. F. R. § 1926.21(b)(2) to its working conditions at the Lexus dealership. AEC is an electrical contractor performing the electrical work on a remodeling construction project. Employee exposure to a hazardous condition is established by Aleman's death by electrocution. The standard at 29 C. F. R. § 1926.21(b)(2) addresses safety training, so the employer necessarily knows whether or not it instructed each employee in the recognition and avoidance of unsafe conditions; the unpreventable employee misconduct defense does not apply here.

The only element at issue is whether AEC complied with the standard's terms—in this instance, whether AEC instructed Aleman in the recognition and avoidance of working in proximity to an energized circuit. AEC contends it has an adequate safety program and it trained all of its employees, including Aleman.

AEC's safety program at the time of the hearing differed significantly from its program at the time of Aleman's death. In the words of AEC's founder and owner Michael Andrews, the safety program had "evolved" since that tragedy (Tr. 50). Victor Palmeri, who was AEC's safety director at the time of Aleman's death, had "put [the old safety program] together from various sources" (Tr. 51). The program had no written disciplinary policy. It contained sections explaining its policies on hazard communication, personal protective equipment, fall protection, confined space entry, bloodborne pathogens, and hearing conservation, but, oddly for an electrical contracting company, no section on electrical safety (Exh. C-7). The program had a section on lockout/tag-out policy (which covered some electrical hazards), but nothing addressing a situation like the one in the present case, where AEC was not using a lockout/tag-out system.¹

The program did not prohibit employees from working on energized circuits, or instruct them to wear appropriate personal protective equipment (PPE) when working on energized circuits. Andrew and Ostrander testified the company had an unwritten rule prohibiting employees from working on energized circuits. Andrew explained the company's procedure in rare circumstances where a circuit could not be deenergized (in a hospital, for instance): "The employee that's involved has to request permission to work on an energized circuit and they have to explain why it can't be deenergized, and then proper procedures are put in place and the PPE equipment for working on an

¹ Ostrander testified AEC could not use its lockout/tag-out procedure on this site because there was not enough room in the breaker boxes for the tags.

energized circuit and proper personnel are assigned” (Tr. 58). AEC did not have appropriate PPE on the site for working on an energized circuit.

Prior to Aleman’s death, AEC’s approach to safety training was haphazard. Ostrander did not document each of the safety meetings he conducted. Before Aleman’s death, Ostrander had never issued a written warning to employees in his seven years as a foreman for AEC. He stated AEC provided no “written guidance” for disciplining employees (Tr. 81). Ostrander did not believe he had the authority to send employees home without pay for safety infractions. He testified he imposed his own rules instead of following company policy.

Aleman had received some general electrical safety training. The Independent Electrical Contractors Association (IEC) “is an organization of independent electrical contractors for the purpose of training employees for an apprenticeship program through the journeyman apprenticeship program” (Tr. 208). Aleman attended one year of the four year program (Exh. R-5). He had also attended the OSHA 10 Hour training course (Exh. R-4). AEC adduced copies of sign-up sheets for various company safety meetings over the years. Aleman’s name appears on several sign-up sheets from 2001 and 2006 (Exh. C-11).²

In the two days Aleman was at the dealership, he did not attend a safety meeting. Starks testified, “[E]ach construction site is different, which requires the employees to be instructed and trained on the hazard associated, based on the type of work, which is electrical work, that they’re doing, and building setup, which is different (Tr. 158). IEC instructor Shawn Masters agreed employees should receive site specific safety training.

AEC failed to meet the terms of the standard. The safety program it had in place at the time of Aleman’s death was inadequate. It did not sufficiently address electrical safety. The program failed to provide clear guidelines for enforcement of the safety rules. Ostrander did not provide Aleman with site specific safety instructions, even though Aleman’s work assignment required him to work in proximity to an energized circuit.

² Aleman’s signatures from sign-up sheets held the year of his death differ markedly from the signatures from meetings held in 2001 and 2006. On the sign-up sheets from 2001 and 2006, both Marco Aleman’s first and last names appear. His name is one in a column of names, written one beneath the other, as is typical on a sign-up sheet. On several sign-up sheets from 2007, only Aleman’s first name appears. He is the only employee whose last name is not on each of the sheets. Instead of being written horizontally, parallel to the other names on the sheets, “Marco” is written diagonally, as though it is being inserted. On the sign-up sheet from July 17, 2007, “Marco” is written over another signature. The court determines Aleman’s presence at the 2007 meetings is not established.

The Secretary has established a violation of 29 C. F. R. § 1926.21(b)(2). She classified the violation as serious. Under §17(k) of the Act, a violation is serious if it creates a substantial probability of death or serious physical harm. In this instance, Aleman's death demonstrates the violation was serious.

Item 2: Alleged Serious Violation of 29 C. F. R. § 1926.416(a)(1)

The standard at 29 C. F. R. § 1926.416(a)(1) provides:

No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Item 2 alleges:

29 CFR 1926.416(a)(1): Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means:

Date: On or about 8/22/2007

Location: Second floor in the hallway, training and adjacent office 3383 Satellite Blvd, Duluth, Georgia, 30096

Equipment: Fluorescent light fixtures

Condition: The employer did not ensure the employees were protected from an energized circuit while installing overhead fluorescent lighting.

When AEC needed to deenergize circuits at this worksite, Ostrander would switch off the appropriate breaker in the electrical room. The electrical room is located on the first floor of the dealership. There is a door to the room, but the door does not have a lock on it. Ostrander estimated the room is 10 feet by 10 feet (Tr. 90). Dease estimated it to be smaller, "approximately four foot by maybe six foot, like the size of a –a good-sized closet" (Tr. 23). At least three breaker boxes with doors are located on one wall of the electrical room. At the time of Aleman's fatality, a yellow sheet of paper on top of one of the breaker boxes listed the breakers by number, designating what area of the building each breaker energized. Two smaller metal boxes are on the wall near the doorway. A small metal box is above and to the left of the larger metal box (Exhs. C-9, C-10). The larger one is a time clock. Starks estimated the time clock to be "a little over six feet" from the floor (Tr. 131).

Ostrander estimated the time clock to be 7½ feet from the floor (Tr. 106). Neither party introduced actual measurements of the distance.

Ostrander testified he had had an ongoing problem at the site with employees of the dealership coming into the electrical room and switching on breakers that Ostrander had switched off. Ostrander asked the owner of the building for all of the keys to the electrical breaker boxes. The owner gave Ostrander six keys in November 2006. Ostrander placed four of the keys in his truck, and eventually lost them (when, he speculated, he cleaned out his truck). Ostrander kept the other two keys while at the site. One of the keys was on his key ring.

The second key was the subject of much testimony, especially on the part of Ostrander, both at the hearing and in his deposition. Ostrander claims that at some point during Aleman's time at the worksite, he took Aleman to the electrical room, showed him the second key, and placed the key on top of the time clock. Ostrander stated he did this, "Because when [Aleman] got to the point he had to make the last tap into the feed box or junction box, he would have to shut the circuit off, and that's why I left him the key so he could come down and do it" (Tr. 99).

Perhaps the trauma of Aleman's death affected Ostrander's memory, or perhaps it was just the passage of time, but Ostrander could not say with certainty when he showed Aleman the key in the electrical room. Both at the hearing and in his deposition, Ostrander first stated he had shown Aleman the key the morning of August 21, then changed his testimony to state he first showed it to him the morning of the 22nd. Ostrander also said alternately that he showed Aleman the key on the 21st, but late in the day when the shift was almost over; that he placed the key in the electrical room the morning of the 21st, and told Aleman about it later that day; and that he placed the key in the electrical room the morning of the 21st, but did not tell Aleman about it until the next day. In some versions, Aleman physically accompanies him to the electrical room key, and watches Ostrander place the key on the time clock; in others Ostrander simply tells Aleman where to find it. (*see* Exh. C-8; Tr. 90-100, 277-278).

At one point in his deposition testimony, it appears Ostrander is stating he kept the second key on top of the time clock on a daily basis (Exh. C-8, p. 74, emphasis added): "But I had two keys left [after losing the other four keys], and I had them on my key chain, *and I stuck one on top of the time clock and one on my key chain so that if I lost that one, I would have an extra one.*" Just a few lines later, however, Ostrander states he kept both keys on him "the whole time" until August 22 (Exh. C-8, p. 75).

Starks testified Ostrander told him during the inspection (when his recollection of events was fresher) that “on August 22 at seven o’clock . . . he said he spent about fifteen minutes with [Aleman] showing him the panel, put the key on top and told him when he was ready to tap into the electrical panel the key would be there” (Tr. 161). Regardless of when Ostrander first placed the key in the electrical room, the record indicates it was there the morning of August 22.

Applicability: The applicability of this standard to AEC’s worksite is not in dispute. Its employees were performing electrical construction work at the dealership.

Noncompliance with Terms of the Standard: In order to establish AEC failed to comply with the terms of 29 C. F. R. § 1926.416(a)(1), the Secretary must show AEC permitted Aleman to work in such proximity to any part of an electric power circuit that Aleman could contact the circuit in the course of work, unless Aleman was protected against electric shock by deenergizing the circuit and grounding it (AEC does not contend it guarded the circuit by insulation or other means). In discussing the meaning of “proximity” as used in this standard (formerly 29 C. F. R. § 1926.400(c)(1)), the Commission stated:

The clear meaning and evident purpose of the standard is therefore that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work. Thus, the standard, when read in its entirety, prescribes a specific area and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

Cleveland Consolidated, Inc., 13 BNA OSHC 1114, 1117 (No. 84-696, 1987).

Ostrander assigned Aleman to install a series of twelve or thirteen fluorescent light fixtures that hang approximately 9 feet above the floor. When the project was finished, the fixtures would be flush with the dropped ceiling. An additional space of 9 to 12 inches was between the fixtures and the actual ceiling for the second floor. Aleman stood on a 6-foot stepladder to install the fixtures. Both Dease and Starks estimated the junction box which Aleman was supposed to tap into was approximately 6 to 8 inches above the last light fixture in the series, attached to a joist. Ostrander at first estimated the distance between the last fixture and the junction box to be 1½ to 2 feet vertically (Tr. 109-110). Later he changed his estimate to “at the most” 1 foot vertically, but stated the box was 1½ to 2 feet to the side of the fixture (Tr. 282-283). Ostrander’s testimony regarding salient facts changed frequently during the course of his testimony, and was often internally inconsistent. The court finds Ostrander to be an unreliable witness on the issue of the

distance between the light fixture and the junction box. The court credits the testimony of both Dease and Starks that the junction box was 6 to 8 inches from the last light fixture, which is consistent with Exh. C-3. The cover was not on the junction box, exposing unprotected wires (Exh. C-2). According to Ostrander, the exposed blue wires, called traveling wires, were not insulated and were energized.

It could reasonably be anticipated that an employee standing on a 6-foot stepladder while installing a light fixture 9 feet above the floor could inadvertently contact a junction box 8 inches above the light fixture. The junction box was energized, as evidenced by Aleman's death. When Ostrander unlocked the door to the breaker box in the electrical room, breaker number 3 was switched to the "on" position. The second key to the breaker box was on the top of the time clock. Ostrander assigned Aleman to work in such proximity to an energized junction box so that Aleman could contact it. In Ostrander's written statement taken by Starks, Ostrander speculated Aleman may have touched the blue traveler wire while removing the temporary lighting (Exh. C-12). The Secretary has established AEC failed to comply with the terms of the standard.

Employee Exposure: The Secretary has also established employee exposure. Aleman was required to work within 8 inches of an energized circuit. Aleman's death establishes his access to the violative condition.

Actual Knowledge: The Secretary contends Ostrander had actual knowledge of the violative condition, which would be imputed to AEC. "[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). The court rejects the contention Ostrander had actual knowledge Aleman was working in proximity to an energized circuit.

Although Ostrander assigned Aleman to install the lights, and thus knew Aleman would be working in proximity to the junction box, he believed Aleman would deenergize the junction box by switching off the relevant breakers in the electrical room. Ostrander expected Aleman to go down to the electrical room, use the second key to unlock the breaker door, switch off the necessary breakers as indicated on the yellow sheet of paper, lock the breaker door, and return to the second floor to tap into the junction box. Actual knowledge is not established.

Constructive Knowledge: The Secretary has, however, established AEC's constructive knowledge of the violation. AEC could have known of the violation with the exercise of reasonable diligence. "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003).

Previously, when discussing Item 1 of the Citation, the court concluded AEC's safety program was inadequate at the time of Aleman's death. The safety program did not have a written rule prohibiting employees from working on energized circuits, although Ostrander and Andrew both testified that was the company policy. Aleman did not attend a safety meeting during the time he worked at the dealership. AEC claims Aleman was a foreman, but concedes Ostrander was the overall foreman on the site, and he had supervisory authority over Aleman.

AEC's greatest failure in exercising reasonable diligence in this case is in anticipating a hazard to which employees may be exposed, and in taking measures to prevent the occurrence of violations. Andrew testified "standard procedure" for AEC was to have one key to the breaker boxes where it deenergizes circuits (Tr. 57), but Ostrander stated the company had no such policy and he had not been so trained. In the instant case, Ostrander had two keys to the breaker boxes, one of which he left in the unlocked electrical room. Ostrander contends he had to reach up to place the key on top of the time clock, that the key was not visible to anyone standing in the room, and that he told only Aleman where the key was located. There is no evidence Ostrander told Aleman not to share this information with other employees, or that he instructed Aleman to keep the key in his pocket after he had deenergized the circuit.

Furthermore, Ostrander had experienced ongoing problems with dealership employees turning on deenergized circuits without asking his permission or informing him they planned to do so. "Hiding" the key by placing it on the time clock in the electrical room is akin to hiding the house key under the front doormat or tucking the car keys in the driver's side sun visor, *i.e.*, putting the key in the first place someone searching for a key would look. IEC instructor Shawn Masters (who was called as a witness by AEC) testified on this point (Tr. 218-219):

Q. Do you discuss just simply locking a panel box with a key?

Masters: No. Well, we do discuss that but that's not a proper method of deenergizing—safely deenergizing the circuit.

Q. And why is that?

Masters: Because other people may have the key.

...

Q. And what about locking—I realize you say it's not a safe method, but locking the breaker box with a key and leaving the key in the same room with the breaker box? Would that be something you teach your—

Masters: No.

Q. Why not?

Masters: Because you don't want just anyone opening up that box.

Masters's concerns were shared by Starks, who was asked if anyone walking into the electrical room would recognize the key for what it was (Tr. 177-178):

I would say yes, and the reason I would say yes is because of the Hennessy Lexus dealer technicians and mechanics, which Mr. Ostrander indicated to me, when they were having—their tools were getting cut off because of the tripping of circuit breakers. They were familiar with the keys. They knew which control panel controlled the circuit breaker, so they may have walked in there and saw that key laying there, and one of the circuit breakers had tripped on one of their tools. They possibly—they would have been familiar with the key, grabbed the key, opened it up and knew that it actually went to the panel box.

The Secretary has established AEC failed to exercise reasonable diligence. Ostrander left a key in a readily accessible place in the electrical room, knowing the history of dealership employees switching on deenergized circuits at will. Ostrander could have prevented this violation by pocketing both keys and following procedure he had used the day before Aleman's death: when electrician Marcus White was ready to tap into a circuit on August 21, he contacted Ostrander. White and Ostrander both went to the electrical room, where Ostrander unlocked the breaker box, switched off the circuit, locked the box, then went upstairs with White to verify the circuit was off. After White finished tapping into the circuit, he notified Ostrander, who went back to the electrical room and switched the circuit back on.

The Secretary has established a serious violation of 29 C. F. R. § 1926.416(a)(1).

Unpreventable Employee Misconduct

AEC contends any violation of the cited standard resulted from unpreventable employee misconduct on the part of Aleman. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

AEC's defense must fail because the record establishes no misconduct on Aleman's part. It is AEC's theory Aleman neglected to deenergize the circuit at the breaker box, as instructed by Ostrander. Aleman was working alone. No one can say with certainty that he did not go down to the electrical room and deenergize the circuit. Ostrander estimated it would take 30 to 60 seconds for Aleman to deenergize the circuit. The second key was in the electrical room. Given the history of other employees switching on deenergized circuits, it is at least as reasonable to conclude an unauthorized person used the key as it is that an experienced electrician forgot to deenergize a circuit.

AEC focused exclusively on Aleman's actions (which are, for the most part, unknown), while missing the real source of the violation—allowing a second key on the site, accessible to anyone who looked in the most obvious place (or who had heard where the key was kept). The purpose of this proceeding with regard to Item 2 is not to determine the specifics of Aleman's actions, but to determine whether AEC violated 29 C. F. R. § 1926.416(a)(1). Had Aleman not been electrocuted, the violation would remain the same: AEC could not comply with the standard when its procedure for deenergizing circuits was compromised by leaving the second key in the unlocked electrical room. Under these circumstances, the key was unsecured and AEC could not ensure its employees were “protected against electric shock by deenergizing and grounding the circuits.”

AEC's employee misconduct defense is rejected.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business,

history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is generally the principal factor to be considered.

At the time of the OSHA inspection, AEC employed "a little over 100 employees" (Tr. 150). The Secretary had not issued a citation to AEC in the previous three years. The Secretary presented no evidence showing AEC lacked good faith during the inspection. The gravity of the violations is the remaining factor to be determined.

Item 1 of the Citation—29 C. F. R. § 1926.21(b)(2): The gravity of this violation is high. At the time of Aleman's death, AEC's safety program was inadequate. Important safety rules were unwritten, and AEC's disciplinary procedure was unclear. Ostrander did not document safety training he conducted. He did not provide Aleman site specific safety instructions.

The gravity is mitigated slightly by evidence Aleman had received other safety training. While general safety training is not a substitute for site specific training administered by the employer, it does provide a basis for employee recognition of unsafe conditions. Aleman was an experienced electrician. He had attended one year of IEC's program, as well as the OSHA 10 Hour safety training.

It is determined a penalty of \$ 2,000.00 is appropriate.

Item 2 of the Citation—29 C. F. R. § 1926.416(a)(1): The gravity of this violation is high, with no mitigating circumstances. AEC chose not to use the lockout/tag-out procedure it had in place, but to simply lock the breaker boxes. Had there been only one key to the boxes, this method may have been adequate. Unfortunately, a second key was present on a site where the dealership employees had repeatedly demonstrated a cavalier attitude towards the safety of AEC's employees, flipping on deenergized breakers, heedless of the consequences. Leaving the second key accessible in the unlocked electrical room manifested a lack of diligence towards safety, and a willingness to turn a blind eye to the foreseeable.

The court agrees the Secretary's proposed penalty of \$ 4,900.00 is appropriate.

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 that:

1. Item 1 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.21(b)(2), is affirmed and a penalty of \$ 2,000.00 is assessed; and
2. Item 2 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.416(a)(1), is affirmed and a penalty of \$ 4,900.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: January 15, 2009