



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR,

Complainant,

v.

L.E. MYERS COMPANY,

Respondent.

OSHRC Docket No. 90-945

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTROYA, Commissioners.
BY THE COMMISSION:

This case involves an accident that resulted in the death of an employee of the L.E. Myers Company ("Myers") at a jobsite near Napoleon, Ohio. At the time of the accident, Myers was engaged in the replacement of electric utility poles and lines. Following a subsequent inspection of the jobsite by the Occupational Safety and Health Administration ("OSHA"), Myers was issued a citation that alleged four willful violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act").

Administrative Law Judge Paul L. Brady affirmed the violations as willful and assessed a penalty of \$10,000 for each violation. Myers filed a petition for discretionary review that was granted by the Commission. For the reasons set forth below, we affirm the judge's decision in part and modify it in part.

I. Background

L. E. Myers is an electrical contractor employing approximately 800 people. It was awarded a contract by the town of Napoleon, Ohio, to replace electric utility poles and

electric lines along a 5.5-mile stretch on State Route 424. According to the contract, Myers was permitted to deenergize power lines only when it would not cause service interruptions. As a result, the power lines remained energized during replacement.

The existing lines were mounted on poles 30 to 35 feet high. The replacement poles were 35 to 45 feet high. The wires were 3-phase and carried a voltage of 12,470 volts. Each pole carried three wires. One wire was on the top of the pole while the others were on each end of an 8-foot arm. The wires were approximately 4-feet apart. The work was carried out by a 4-man crew. The crew leader was general foreman Eldon Nye, a journeyman lineman with more than thirty years experience. As general foreman, Nye was ultimately responsible for safety on the job. Also on the crew was Jack Beard, the working foreman, who had approximately twenty years experience as a journeyman lineman. Beard was not a regular employee of Myers but rather had been hired out of the hiring hall of Local 245 of the International Brotherhood of Electrical Workers. Charles Shealey, a regular Myers employee who had been with the company for twenty-four years, was the pole truck operator and mechanic. His function was to dig the holes and set the poles. The final member of the crew was Dennis Basinger, a third-step apprentice lineman. His job was to put a cable around the pole so Shealey could raise it with the boom on the truck.

On September 11, 1989, the crew began work to replace a pole on the crest of a bank that was leaning away from the road. The hole dug for the new pole was 10 feet 6 inches from the edge of the road. Although the work was proceeding at a steady rate, it was not going as fast as had been anticipated. The slowdown was created when the crew found it necessary to insulate the existing lines before working on a previous pole, a task which added 50 percent more time to the job. Also, some problems with the boom truck delayed the crew an additional one to one and one half hours.

Before hoisting the new pole into position, the crew examined the position of the new pole in relation to the existing and still energized lines. Nye decided that a 3-foot distance from the old pole could be maintained. Therefore, he did not order that the existing energized lines be insulated with rubber sleeves. Moreover, the boom truck was not grounded, and Basinger was not wearing insulated gloves. Although Shealey realized that the clearance was "close," nobody initially voiced any concerns.

A steel cable, coming from the boom, was to be tied around the new pole so that it could be lifted into place. This cable replaced a nonconductive nylon rope which snapped about a week before. Nye replaced the nylon rope with the steel cable because of steel's greater strength. Both Basinger and Shealey expressed concern to Beard over the use of the steel cable because of the proximity to the energized lines. Beard testified that he relayed these concerns to Nye, who shrugged his shoulders and walked away. Nye, however, denied ever having received a complaint about the cable.

Basinger proceeded to wrap the cable around the pole so Shealey could pick it up with the boom. He asked for more wire, but before Shealey could comply, Basinger pulled on the cable to get additional slack. At the time, the boom was extended about 15 to 20 feet into the air and had about a foot of play in either direction.

Nye, who was directing traffic at the time, testified that Shealey moved the boom and came dangerously close to the energized lines just prior to a flash. Shealey, on the other hand, testified that after Basinger pulled on the cable, he saw a flash and then immediately moved the boom to the right. He thought that the cable hit the wire. In either event, a flash was seen as either the boom or the cable struck an energized line. The voltage then passed down the steel cable and electrocuted Basinger.

As a result of the OSHA inspection that followed the accident, Myers was issued a citation alleging four willful violations of the Act.¹

Item 1 alleged a violation of 29 C.F.R. § 1926.950(c)(2)(i)² on the grounds that employees were moving and setting poles in a way which required them to work within the two-foot minimum clearance for 12,000-volt energized electrical conductors.

¹ A second citation, alleging various serious violations was not contested and is not before the Commission.

² The standard provides:

§ 1926.950 General requirements.

.....

(c) *Clearances.*

.....

(2)(i) The minimum working distance and minimum clear hot stick distances stated in Table V-1 shall not be violated. The minimum hot stick distance is that for the use of live-line tools, held by linemen when performing live-line work.

Table V-1 requires a two-foot minimum working distance while working adjacent to energized conductors up to 15,000 volts.

Item 2 of the willful citation alleged a failure to comply with 29 C.F.R. § 1926.955(a)(5)(i)³ because employees were required to set poles directly under energized lines using mechanical equipment. The setting of those poles required the use of a boom truck whose boom length permitted contact with energized lines, and precautions were not taken to prevent that contact.

Item 3 of the willful citation alleged a violation of 29 C.F.R. § 1926.955(a)(6)(i).⁴ The gravamen of the item alleges that employees were required to handle lifting equipment such as the steel cable, while working directly under and adjacent to the energized lines. These employees were not required to wear gloves, sleeves, or other clothing insulated against the voltage involved.

Finally, item 4 of the citation alleged a violation of 29 C.F.R. § 1926.955(a)(6)(ii)⁵ on the grounds that the derrick truck was not bonded or barricaded while being used to set poles near the energized lines.

A penalty of \$10,000 was proposed for each item.

³ The standard provides:

§ 1926.955 Overhead lines.

(a) *Overhead lines.*

....

(5)

(i) When setting, moving, or removing poles using cranes, derricks, gin poles, A-frames, or other mechanized equipment near energized lines or equipment, precautions shall be taken to avoid contact with energized lines or equipment, except in barehand live-line work, or where barriers or protective devices are used.

⁴ The standard states:

(a) *Overhead lines.*

....

(6)

(i) Unless using suitable protective equipment for the voltage involved, employees standing on the ground shall avoid contacting equipment or machinery working adjacent to energized lines or equipment.

⁵ The standard provides:

(a) *Overhead lines.*

....

(6)

(ii) Lifting equipment shall be bonded to an effective ground or it shall be considered energized and barricaded when utilized near energized equipment or lines.

Judge Brady's decision affirming all four items as willful and assessing a penalty of \$10,000 per item was directed for review by Commissioner Donald Wiseman. On review Myers advances on five arguments. It contends that (1) the violations were the result of unpreventable employee misconduct, (2) it complied with the standards cited in items 2 to 4 of the citation, (3) the standards are vague, (4) section 1926.955(a)(6) is inapplicable, and (5) the violations were not shown to be willful.

II. Unpreventable Employee Misconduct

A. Myers' Arguments

Myers argues that the accident was caused by the inadvertent actions of boom operator Shealey, a normally skillful operator. It points out that before beginning work to set the new pole, the crew examined the site and all agreed that there was sufficient clearance. Myers also notes Shealey's acknowledgment that he somehow got closer to the wires than he intended.

Myers further contends that its safety rules clearly prohibit operating a boom near energized lines without protection if safe clearance cannot be maintained. It relies on the lengthy experience of the crew, which was staffed with two supervisory journeyman linemen with more than a half century experience on the job, and on the spotless safety records of all members of the crew. Myers also points out that no one on the crew testified that they felt pressure to speed up the job at the expense of safety.

B. Analysis

For the reasons set forth below, we find no merit in respondent's contentions.

To establish the affirmative defense of unpreventable employee misconduct the employer must show that it had a thorough safety program which was adequately enforced and communicated and that the violative conduct of the employee was idiosyncratic and unforeseeable.⁶ *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*,

⁶ The circuit courts are split with respect to the burden of proof when there is a claim of employee misconduct. Several circuits have held that an allegation of unforeseeable employee misconduct constitutes an affirmative defense to be pleaded and proved by the employer. *See, e.g., Forging Indus. Assn. v. Secretary of Labor*, 773 F.2d 1436, 1450 (4th Cir. 1985)(en banc)(unforeseeable employee misconduct constitutes an affirmative defense); *Daniel Intl. Corp. v. OSHRC*, 683 F.2d 361, 363 (11th Cir. 1982)(same); *H.B. Zachry Co.* (continued...)

484 U.S. 989 (1987). To prevail in the defense, the employer must present evidence concerning the manner in which it enforces its safety rules. *Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366, 1369, 1981 CCH OSHD ¶ 25,216, p. 31,140 (No. 77-3021, 1981).

Respondent's attempt to place the blame for the accident on the "unpreventable" actions of Shealey is without merit. We find that Shealey had no responsibility for the failure of Basinger to wear gloves or for the failure to ground or barricade the truck. These were matters in the province of the supervisors. Similarly, it should have been up to the foremen to take steps to ensure that the truck did not contact the line as alleged in item 2.

The only item over which Shealey arguably had control was the failure to maintain clearance, due to his immediate control over the boom. Nye, however, was the only agent of Myers with authority to authorize that the lines be insulated. Yet, the testimony of foreman Beard and operator Shealey established that the members of the crew not only knowingly gambled⁷ that they could maintain the proper clearance, but that they also

⁶(...continued)

v. *OSHRC*, 638 F.2d 812, 818-19 (5th Cir. 1981)(same); *General Dynamics Corp v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979)(same); *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246 (8th Cir. 1978)(same). Other circuits place the burden of disproving unforeseeable employee misconduct on the Secretary. See *Capital Elec. Line Builders of Kansas v. Marshall*, 678 F.2d 128 (10th Cir. 1982); *Pennsylvania Powr. & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1984). (Secretary bears the burden of proving that supervisor's failure to comply with standard was foreseeable.)

The Commission has treated the issue as an affirmative defense to be pleaded and proved by the employer. See, e.g., *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1992 CCH OSHD ¶ 29,807, p. 40,585-86 (No. 87-692, 1992). Moreover, the United States Court of Appeals for the Sixth Circuit, the circuit in which this case arose, views employee disobedience as an affirmative defense. *Brock v. L. E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir. 1987), cert. denied, 484 U.S. 989 (1987).

⁷ For example, during the Secretary's examination of Beard, the following exchange took place:

Q. During the course of this job, when you were setting poles in close proximity to the wires--for example, a foot or two feet--were you giving yourself any margin for error when you didn't insulate?

A. No. No, not very much.

Similarly, Shealey testified as follows:

Q. Let me ask you, in your experience on those two jobs, if the crew's estimate was that the pole would come within two feet of the overhead line, was there any standard procedure followed on those jobs as far as safety and safety precautions were concerned?

A. Yes.

(continued...)

occasionally violated the clearance requirements without taking the precautions mandated by section 1926.950(c).⁸

Moreover, contrary to Myers' assertions, there was evidence that the crew was both shorthanded and under time pressure. Foreman Beard testified that, although the clearance during the process of setting the pole which led to the fatality was close, the crew chose not to insulate the lines because "it would have taken forever to build the line if we covered everything up We were shorthanded on men. We didn't have enough people to work with." This evidence shows that the violations were substantially caused by field decisions made by respondent's foremen rather than by Shealey's departure from any workrule.

Similarly untenable is Myers' claim that the violations were caused by the unforeseeable failure of the foremen to follow proper procedures. When the alleged misconduct is that of a supervisory employee, the employer must establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. *Daniel Constr.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Brock v. L.E. Myers Co., id. Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-0351, 1991). Therefore, where a supervisory employee is involved, the proof of unpreventable employee

⁷(...continued)

From my observation from standing on the ground, if we thought it would come close to that man, we would decide that we would rubber it up.

Sometimes if it was a little close and we didn't think it would be over, we would take a chance and go ahead and set the pole after we got the hole dug. We would kind of analyze where it would be sitting, and we would take a chance and set the pole in there.

⁸ Shealey, for example, clearly testified that the lines were not always insulated when apparently required:

Q. In the last set of questions by L.E. Myers' attorney, you responded to Mr. McCarthy's question that on those occasions when you knew you were coming into or in some situations when you knew you were going to be within two feet of the wire with the boom, those were times when these wires were insulated?

A. Yes, some of the time.

Q. Not all of the time?

A. Not all the time, no.

misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Id.*

The evidence shows that foreman Nye ordered that the overhead wires be insulated only when there was no doubt that the pole could not be erected without violating the clearance limits. Where there was doubt whether the limits would be violated, the crew would gamble that it could maintain the proper clearance and erect the pole without insulating the lines. Moreover, although the crew insulated lines before erecting a pole earlier on the day of the accident, Nye had wanted to press ahead in erecting the pole in question without taking the proper precautions. Foreman Beard insisted on taking necessary precautions and insulated the lines. It turned out that the precautions were required because the crew ended up working directly into the wire. Nye's exhibited penchant for taking chances under these circumstances leads us to find supervisory misconduct regarding item 1, section 1926.950(c).⁹

Regarding item 2, Myers' safety manual at section 205(m) prohibits the use of lifting equipment where "any part of it can come closer to energized lines than the absolute minimum distances allowed" unless, among other things, the equipment is insulated or grounded. Nevertheless, in relation to item 1, the crew frequently operated close to the lines, often gambling that it could maintain clearances, without insulating the lines or taking other precautionary measures. Despite their workrule, the foremen often did not order that the lines be insulated even when they knew that they had little margin for error. According to Beard, they would not insulate when close to the clearance because "it would have taken forever to build the line if we covered everything up."

⁹ Myers also contends that the judge erred by finding that section 1926.950(c)(2) can be violated even where the employer had no intent of coming within the minimum clearances. The argument is without merit. The standard is designed to prohibit an event (coming too close to an energized line) not an intent. The maintenance of proper clearance is an absolute requirement, the violation of which can only be excused upon the establishment of an affirmative defense such as "unpreventable employee misconduct."

Turning to item 3, the evidence does show that Myers' safety rule, section 310(d)(2)¹⁰, requires that employees wear safety equipment. Despite this rule, the entire crew, including Beard, knew that Basinger never wore gloves. Indeed, Beard testified that he knew that Basinger should have worn gloves because they were working close to the lines. Notwithstanding this knowledge, Basinger had not been disciplined for not wearing the proper safety equipment before the accident and Beard testified that he never instructed Basinger to put on his gloves, despite the fact that Beard was wearing his own gloves.

The undisputed evidence also shows that, as alleged in item 4, Nye never required that the truck be barricaded or grounded, even when the work was sufficiently close to the lines that the foremen found it necessary to insulate the overhead lines.

Given the widespread violation of both OSHA and Myers' own rules, the question becomes whether the failure of Beard and Nye to comply with the applicable standards occurred despite a vigorous program of safety education and enforcement. The evidence does show that, at least on paper, the company had a significant safety program. It conducted tailgate safety meetings, prepared and distributed safety manuals, and has disciplined employees for safety violations. On the other hand, one of the factors considered in determining whether an employer effectively enforced its safety rules are the efforts it took to monitor adherence to those safety rules by supervisory employees. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991). While there was evidence that the company does undertake periodic unannounced onsite safety inspections, the record also shows that during the month or more that the crew was at the Napoleon, Ohio worksite, Myers' safety officials never undertook an impromptu safety visit or conducted a safety meeting with the crew.

Another element of the affirmative defense of unpreventable employee misconduct requires a showing that the employer effectively disciplines employee misconduct. *L.E. Myers*, 818 F.2d at 1277. At the hearing, Myers attempted to introduce evidence that it disciplined employees for noncompliance with its safety rules. However, the judge excluded

¹⁰ The rule states that:

Employees handling the butt of the pole shall wear rubber gloves with leather protectors and rubber sleeves whether or not cant hooks or slings are used.

evidence of seven separate disciplinary notices that Myers sought to introduce into evidence. Myers argues that the judge's refusal to admit this evidence substantially prejudiced the company from establishing its defense of unpreventable employee misconduct as well as its ability to counter the willful allegations.

We agree with respondent that this evidence was relevant to its attempt to establish that it had an effectively enforced safety program and that it should have been admitted. Although we find that the judge improperly excluded the evidence, we find no merit in Myers' claim of prejudice. Myers proffered the rejected exhibits. They were placed in the official file and are available to this Commission on review. We have examined the disciplinary notices. They generally involve situations such as a failure to wear hard hats, unsafe use of a bucket, and unsafe driving. Only one of the of the seven notices was similar to the violative conditions for which Myers was cited in this case. It involved an employee who received a contact burn. That notice involved employee violation of company workrules that are not in the current Myers safety manual.

Although these notices, which date back to 1974, suggest that in approximately seventeen years the respondent found reason to discipline employees on only seven occasions, they do show that the company has reprimanded employees for safety violations. However, this evidence alone falls short of establishing the existence of an active and effective program directed at ensuring that, insofar as possible, supervisors follow all OSHA and company rules regarding work around energized lines.

Moreover, at the hearing, the Secretary introduced evidence showing that over that same period, Myers received at least four OSHA citations resulting in final orders that involved fatalities dealing with clearance limits. These incidents suggest that, over the years, Myers has had problems regarding employee failure to maintain adequate clearance from energized lines. Given this history, we can only conclude that Myers' efforts to enforce its safety rules have not been as effective as they could have been with greater diligence.

III. Meaning of the Terms "Near" and "Adjacent"

A. Myers' Arguments

Myers argues that it was not operating "near" or "adjacent" to the overhead lines within the meaning of section 1926.955(a)(5)(i) and (a)(6)(i)-(ii) and, therefore, items 2-4

of the citation, which alleged violations of standards applicable only where operating “near” or “adjacent” to energized lines, should be vacated.

Myers notes that the judge based his affirmance of the section 1926.955(a) violations on his finding that the company was using machinery or equipment “near” or “adjacent” to energized lines without taking specified safety precautions. Myers points out that there is no violation of that standard if equipment comes up to that limit. However, since the terms “near” and “adjacent” are not defined in section 1926.955, Myers argues that there can be no violation of the standards at section 1926.955 unless the 2-foot clearance under section 1926.950(c) is violated.¹¹ In short, Myers contends that the terms “near” and “adjacent” refer to the distance between the line and the minimum allowable clearance. Myers argues that, under the judge’s interpretation of the terms, there would be a violation of the standard whenever any portion of the equipment could come into contact with the lines, even if they would normally maintain a clearance greater than that required by 29 C.F.R. § 1926.950(c). Thus, it contends that “near” and “adjacent” would mean “far” and “removed”. Because there was no allegation that the employees ever intended to come closer to the energized lines than the permissible two-foot clearance, Myers concludes that the employees did not work “near” or “adjacent” to the energized lines, and contends that items 2-4 should be vacated.

B. Analysis

We find that Myers’ arguments are without merit. The Commission has interpreted section 1926.955 to be more restrictive than section 1926.950(c) and has held that the term “near” as used in section 1926.955 requires safety precautions at a distance from energized lines greater than that permitted by section 1926.950(c). *Pennsylvania Pwr. & Light Co.*, 11 BNA OSHC 1321, 1326, 1983-84 CCH OSHD ¶ 26,518, p. 33,757 (No. 79-5194, 1983), *rev’d*

¹¹ The standard provides:

§ 1926.950 General requirements.

(c) *Clearances.*

.....

(2) With the exception of equipment certified for work on the proper voltage, mechanical equipment shall not be operated closer to any energized line or equipment than the clearances set forth in § 1926.950(c)

on other grounds, 737 F.2d 350 (3d Cir. 1984); see *Wisconsin Elec. Pwr. Co. v. OSHRC*, 567 F.2d 735 (7th Cir. 1977)¹². As we noted in *Pennsylvania Power*, the Secretary intended the term “near” to mean within the reaching distance of an energized line. 11 BNA OSHC at 1326, 1983-84 CCH OSHD at p. 33,757. This interpretation is more practical and more likely to prevent accidental electrocutions than the interpretation offered by Myers. By requiring that safety precautions be taken when operating equipment comes within reaching distance of an energized line, accidents like the one that occurred here can more readily be prevented.¹³ In any event, as will be discussed later, Myers was found to be working within the 2-foot clearance. Therefore, even if Myers’ interpretation of “near” and “adjacent” is correct, it was, by its own definition, working “near” or “adjacent” to the energized lines.

IV. Vagueness

A. Myers’ Arguments

Myers contends that, if the judge properly interpreted the terms “near” and “adjacent,” the items must be vacated because the standard at 29 C.F.R. § 1926.955, (items 2-4), is too vague to have provided sufficient notice of the conduct required.

Myers correctly observes that section 1926.955 can be violated even when a crew is not working and has no intent to work within the minimum allowable clearances. However, Myers asserts, the terms “near” and “adjacent” are not defined with any degree of clarity, but are triggered at some undefined point greater than the minimum clearance limits. Therefore, Myers concludes, its industry has not been fairly apprised of the requirements of section 1926.955. Myers points out that in *Wisconsin Electric*, the Seventh Circuit, though it did not find the standards vague, opined that they were not drafted with clarity. In a dissenting opinion, however, Judge Pell found that the standards “were so impossibly vague, indefinite, and confusingly juxtaposed as to deprive the petitioner of its constitutional rights of due process.” 567 F.2d at 740. Myers also calls the Commission’s attention to *Pennsyl-*

¹² Actually, the Commission held that § 1926.955 was intended to be more restrictive than the provisions of § 1926.952(c)(2). However, the terms of that standard refer to and are substantially taken from § 1926.950(c).

¹³ The same rationale would apply to the term “adjacent.”

vania Power, where the court expressed sympathy with an employer's task of gauging its responsibility under section 1926.955. 737 F.2d at 359-60.

B. *Analysis*

Vagueness challenges are not measured against the facial text of the standard, but are rather considered in light of the conduct to which they are applied. *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 897 (1st Cir. 1981). Examining the claim of vagueness in light of the crew's actual conduct, we find that Myers' contention is without merit.

In *Pennsylvania Power*, the court sympathized with the employer because it had adequately enforced safety rules that contained clearances more stringent than those found at Table V-1. Nonetheless, the Secretary cited the employer for working near energized power lines without taking the precautions required by section 1926.955. Pennsylvania Power defended partially on the grounds that its employees were in compliance with the company rules. Because those rules required clearances greater than those of the Secretary's standards, the company claimed that they were not operating "near" the energized lines.

Although the court found that the clearances required by section 1926.955 were more stringent than those required by section 1926.950(c), it also found that Pennsylvania Power's workrules represented a valid attempt to define the term "near" as used in the standard. In reversing the Commission and vacating the citation, the court stated:

PP&L made every effort to interpret the governing regulations reasonably and to implement them among its employees. We can understand the company's confusion when confronted with the task of transforming the applicable OSHA regulations into useful safety rules for its working linemen and supervisors. We have previously reminded the Secretary of his statutory 'responsibility to promulgate clear and unambiguous standards.' The Secretary has the option of promulgating specific standards defining the term 'near' in various contexts if he is dissatisfied with the reasonable efforts of employers to enforce the current regulations.

737 F.2d at 359-60 (citations omitted).

Applying *Pennsylvania Power* to this case, the inquiry is whether Myers made a reasonable attempt to interpret the terms "near" or "adjacent" and, if so, whether those standards were adequately enforced.

Myers has two safety rules that are particularly applicable.

Myers' Safety Manual states:

§ 303 LINE HOSE, INSULATOR HOODS, BLANKETS, LINE GUARDS

(a) Before work begins on or near energized circuits or apparatus, all live or grounded conductors and surfaces with which an employee can possibly come in contact (except that portion of the conductor on which work is to be done) shall be covered with approved protective equipment.

.....
§ 310 POLES-SETTING AND REMOVING

.....
 (d) While setting or removing poles between or near conductors energized above 300 volts:

1. If safe clearance cannot be maintained, the conductors shall be de-energized, covered with protective devices, spread, or a pole guard used to minimize accidental contact.

2. Employees handling the butt of the pole shall wear rubber gloves with leather protectors and rubber sleeves whether or not cant hooks or slings are used.

Under section 303(a), even where adequate clearance is maintained, if an employee "can possibly come in contact" with energized equipment, safety precautions commensurate with those mandated by 29 C.F.R. § 1926.955(a)(6) are required. Similarly, under section 310(d), it is not enough that the crew begins work beyond clearance limits. Rather, the crew is under a duty to determine if proper clearances can be maintained and, if not, to take various safety precautions. This would appear to be a valid attempt to implement 29 C.F.R. § 1926.955(a)(5)(i). Thus, these rules would certainly appear to constitute an adequate attempt to effectuate the meaning of the terms "near" and "adjacent." In fact, nowhere does the Secretary argue that, had these rules been adequately enforced, the relevant standards would have been violated. We therefore reject the allegation of vagueness.

V. Item 2, section 1926.955(a)(5)(i)

A. Myers' Arguments

Myers argues that the judge erred in affirming item 2 (section 1926.955(a)(5)(i)) because he ignored measures Myers took to prevent contact with the energized lines. First, Myers claims that its employees carefully planned the erection of each pole and thoroughly studied where the pole was to be erected in relation to the overhead lines. It also points out

that two experienced supervisors were assigned to watch the boom, pole, and overhead line in an attempt to avoid contact.

The record, however, contradicts Myers' assertion that it took measures to prevent contact with the energized lines. First, its assertion that it had two foremen on the job whose task it was to watch the boom, pole, and overhead line in an attempt to avoid contact is contrary to the record. The record shows that Nye, the crew leader, was across the road directing traffic. This activity is hardly compatible with watching the position of the boom in relation to the overhead lines. Similarly, foreman Beard was on the other end of the pole getting ready to, in his words, "help guide it out across the mess that we were working in there." Based on these facts, we conclude that neither of the supervisors was in a position to devote their attention to the proximity of the boom to the overhead lines.

Moreover, the "survey" by the crew to determine whether the pole could be hoisted without the boom contacting the lines was certainly not designed to prevent accidental contact. Rather, the evidence establishes that the crew knew that they were going to be very close to the lines. Nonetheless, it proceeded under the presumption that they could maintain a safe distance. We therefore conclude that because the crew failed to take measures to ensure that there would be no contact with the lines, Myers' argument is without merit.

VI. *Items 3 and 4*

Myers argues that section 1926.955(a)(6) was inapplicable to its work and, therefore, that items 3 and 4, which alleged violations of subparts of that standard, must be vacated. Myers relies on *Wisconsin Electric*, 567 F.2d at 738, in which the court held that "when the work is not on overhead lines, and lifting equipment is operated near any energized line or equipment," only the requirements of section 1926.952 are applicable. According to Myers, the evidence is undisputed that, at the time of the accident, the job did not involve any work on overhead lines.

We find the argument to be without merit. In *Wisconsin Electric*, the court held that, while section 1926.952(c)(2)¹⁴ applies to trucks and lifting equipment whenever operated “for any purpose” within a specified distance of any energized lines, the standards at section 1926.955¹⁵ apply “when working on or with overhead lines.” *Id.* Here it is clear that the Myers’ employees were working “with overhead lines.” Thus, Myers was required to comply with the requirements of section 1926.955(a)(2)-(8). This includes the two cited standards in question: section 1926.955(a)(5)(i), *see supra* note 3 and section 1926.955(a)(6)(i), *see supra* note 4.

VII. Willfulness

A. Background

In concluding that the violations were willful, the judge found that Nye and his crew repeatedly disregarded the requirements of the Act while working on the project. Poles were frequently set up within 2 feet of energized lines but no precautionary measures were taken. In fact, the judge found that an additional hazard was created by Nye when he ordered the nylon line replaced with a conductive steel cable over the protests of Shealey and Basinger. The judge also found that no effort was made either to get Basinger to wear insulated gloves or to ground the truck. He concluded that Nye chose to ignore safe

¹⁴ The standard states:

§ 1926.952 Mechanical equipment.

.....

(c) *Derrick trucks, cranes and other lifting equipment.*

.....

(2) With the exception of equipment certified for work on the proper voltage, mechanical equipment shall not be operated closer to any energized line or equipment than the clearances set forth in § 1926.950(c) unless:

- (i) An insulated barrier is installed between the energized part and the mechanical equipment, or
- (ii) The mechanical equipment is grounded, or
- (iii) The mechanical equipment is insulated, or
- (iv) The mechanical equipment is considered as energized.

¹⁵ **§ 1926.955 Overhead lines.**

(a) *Overhead lines.* (1) When working on or with overhead lines the provisions of paragraphs (a)(2) through (8) of this section shall be complied with in addition to other applicable provisions of this subpart.

practices despite his knowledge of the rules. The judge imputed Nye's behavior to Myers and found that Myers was plainly indifferent to employee safety.

B. *Myers' Arguments*

Myers argues that the violations should not be characterized as willful. First, it observes that the evidence established that the accident was inadvertent. Moreover, Myers contends that there was no evidence of any actions by the crew that could be characterized as either a careless disregard or plain indifference to employee safety. According to Myers, the crew took measures to determine whether it could work safely without insulating the lines by maintaining the necessary clearance. In those instances where the crew believed that it could not maintain the proper clearances, it took all precautions necessary to ensure that the work could proceed safely. Myers points out that the crew insulated the lines while setting six or seven of the twenty-seven to twenty-nine poles that had been erected prior to the accident, including one pole erected earlier on the day of the accident. Furthermore, Myers argues that the judge incorrectly found that it was common practice for the boom and new poles to come within 2 feet of uninsulated overhead lines. Rather, it asserts that there is no evidence of any specific instance where the crew worked closer than 2 feet to the energized lines without insulating the lines. Myers states that the only evidence that lines were not properly insulated came from Beard and was contradicted by Nye and Shealey.

C. *Analysis*

We find that the evidence supports the judge's conclusion that the violations were willful.¹⁶ Having already found that respondent's affirmative defense of unpreventable supervisory misconduct is without foundation, we find that the conduct of the foremen is imputable to Myers. *Dover Elevator.*, 15 BNA OSHC at 1382, 1991 CCH OSHD at p. 39,849; *Consolidated Freightways*, 15 BNA at 1321, 1991 CCH OSHD at p. 39,809. The issue, then, is whether the conduct of Nye and Beard rose to a level of willfulness.

A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams*

¹⁶ The record establishes that the accident was caused when either the boom or the steel cable from the boom approached within two feet of the energized line. This is sufficient to establish a prima facie violation of the standard, regardless of whether the clearance was violated on other occasions. Nonetheless, whether the crew repeatedly violated the minimum clearance is relevant to our determination of whether the foremen carelessly disregarded or were plainly indifferent to employee safety.

Enterp., 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987); *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063, 1984-85 CCH OSHD ¶ 27,101, p. 34,948 (No. 79-383, 1984). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated); *Williams*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,509.

The record amply demonstrates that the crew frequently set poles within the 2-foot clearance limits of section 1926.950(c). However, as Myers correctly argues, except for the accident, there is no hard evidence of any specifically identifiable instance where the crew violated the clearance limits without first insulating the wires. Nonetheless, contrary to Myers' assertion that the only evidence that the crew operated within 2 feet of uninsulated lines came from Beard, operator Shealey testified that there were occasions where the crew violated the clearance limits without taking appropriate protective measures:

Q. In the last set of questions by L.E. Myers attorney, you responded to Mr. McCarthy's question that on those occasions when you knew you were coming into or in some situations when you knew you were going to be within two feet of the wire with the boom, those were times when these wires were insulated.

A. Yes, some of the time.

Q. Not all of the time?

A. Not all the time, no.

Moreover, as shown by the testimony quoted in notes 7-8, *supra*, the foremen gambled that they could maintain adequate distances and thereby avoid insulating the lines, even when they knew that they were operating very close to those lines.

Therefore, while the record does not establish any particular incident where the crew violated the minimum clearance without first insulating the lines, it does show not only that such activity was a regular practice, but also that the foremen engaged in such activities with

the full knowledge that any misjudgment could result in the crane coming dangerously close to, or actually making contact with, the energized overhead lines.¹⁷

The foremen's overall lack of concern about safety is further revealed by two separate lines of evidence. The first line involves the replacement of the nonconductive nylon rope with the steel cable. When the original nylon rope broke, Nye was apparently irritated by the time lost in obtaining a replacement. Despite the heightened danger, he chose a steel replacement because, unlike a nylon line, the steel cable would not break. When Shealey and Basinger learned that the nylon line was to be replaced by steel, they told foreman Beard that they were concerned about the hazard it posed because they were working so close to energized lines. Beard testified that he relayed the employees' concerns to Nye who just shrugged and walked away. According to Beard, "[h]e didn't seem to care what they

¹⁷ Myers also argues that the judge erroneously credited Beard's testimony that the pole in question was to be set 8 to 12 inches from the outside energized line. Myers points out that Nye testified that the line was over 3 feet from where the new pole was to be set. The judge gave no reason for accepting the testimony of Beard over that of Nye. If accepting the testimony of Beard over that of Nye constituted a credibility determination, the Commission would generally defer to the judge because it is the judge who has lived with the case, heard the witnesses, and observed their demeanor. *Kent Nowlin Constr.*, 8 BNA OSHC 1286, 1289, 1980 CCH OSHD ¶ 24,459, p. 29,865 (No. 76-191)(consolidated). However, a valid credibility determination requires some support. See *P & Z Co.*, 6 BNA OSHC 1189, 1192, 1976-77 CCH OSHD ¶ 20,728, p. 24,854 (No. 76-431, 1977). Not only did the judge fail to give any reason for rejecting this evidence, but, in his decision, the judge appears to have totally ignored all of Nye's testimony. Therefore, the judge's finding cannot be considered a credibility determination to which the Commission must defer.

We agree with Myers that the weight of the evidence does not support the judge's finding that, at the time of the accident, the new pole was to be erected within 2 feet of the energized lines. The testimony of the surviving crew members would indicate that they would insulate the lines when it was clear that they would be well within the clearance limits. Therefore, had the poles been only 8 to 12 inches apart, it is likely that the crew would have insisted on insulating the energized lines. Moreover, Shealey's testimony indicates that, while he estimated that they had a 1.5 to 2-foot clearance, he was too far away to be sure of the clearance and, in any event, the distance was close enough to the 2-foot limit that they were willing to take a chance. Finally, the strongest support for Nye's undisputed assertion that there was a 3-foot clearance comes from his testimony that, when finally erected, the new pole was 3.5 feet away from the old pole.

Although we find that the judge erred in finding that the new pole was to be set within 8 to 12 inches of the energized lines, we find the error to be harmless. First, reversing the judge on this point has no real effect on the validity of any of the charges. Regardless of the intended distance between the old and new poles involved in the accident, the relevant fact is that either the boom or the cable attached to the boom came within the minimum clearance, resulting in the death of an employee. Moreover, while the proximity of the new pole to the energized lines is relevant to the state of mind of the foremen, and therefore the characterization of the violation, the evidence, as previously noted, does establish that on other occasions the crew knowingly operated either within the 2-foot clearance or in dangerously close proximity to the clearance limit without taking proper protective measures.

thought." Nye, however, denied ever being told about the employees' fears and testified that he didn't consider steel cables to present a hazard.

Although the judge found that Beard told Nye about the employee complaints, he did not couch the finding in terms of a credibility determination. We note, however, that Nye's testimony, in general, appears to be noncredible. Throughout his testimony, Nye denies any facts that would either place blame on himself or weaken Myers' case. For example, Nye denied that the crew was under any time pressures. He further testified, contrary to the clear testimony of Shealey and Beard, that the crew would insulate the lines whenever they would come within 3 feet of the lines. We also note that, unlike Nye, Beard gave testimony against his own interest by indicating that he failed to enforce the relevant work rules that would have required Basinger to wear insulated gloves. This, by itself, lends credibility to Beard's testimony on this point.

Even were the Commission to consider Nye's testimony about the cable to be truthful, there is other evidence about this incident that demonstrates a disregard for employee safety. It is undisputed that not only was Basinger not wearing gloves at the time of the accident, but also that he never wore gloves. Foreman Beard knew that Basinger was not wearing gloves. Moreover, both Basinger and Shealey had expressed to Beard their concern about working with a steel cable in close proximity to the energized lines. Nonetheless, Beard made no effort to get Basinger to wear gloves and later admitted that, had he been wearing them, they probably would have saved his life. Furthermore, Nye testified that he saw Basinger at the time of the accident, and that he was aware that Basinger had the steel cable in his hand. Nonetheless, he made no effort to stop the work to insist that Basinger put on the appropriate protection. This failure to insist that Basinger don his gloves plainly constituted no less than a conscious disregard for employee safety.

Other evidence also establishes that the attitude of the foremen towards insulating the lines disregarded employee safety. As discussed earlier, Shealey and Beard both testified that the crew, in essence, gambled that it could maintain proper clearance without insulating the lines. As Beard testified, they did not give themselves much of a margin for error. Myers correctly points out that the crew insulated six to seven poles before the fatal accident. However, the evidence shows that the decision to insulate was made only when the work would require the crew to work so close to the lines that there was no question

that a failure to insulate would present a grave risk. In fact, in regard to the much touted insulating of the lines on a pole earlier in the day, the evidence shows that Nye resisted the precautions, finally submitting only when Beard insisted that the lines be insulated. As it turned out, when erecting the pole in that instance, the crew was working directly in the energized wire.

This willingness to gamble with the safety of the crew demonstrates a conscious, if not reckless, disregard for employee safety. Similarly, the willingness of Nye to gamble with the proximity to the lines and his failure to order the grounding or barricading of the truck also constitute a conscious disregard of employee safety.

In short, the record amply supports the Judge's conclusion that all the violations were properly classified by the Secretary as willful.

VIII. Penalties

Judge Brady assessed the maximum¹⁸ penalty of \$10,000 for each of the four willful violations of the Act. Myers argues that, given its demonstrated safety program, and the measures it took to ensure that the work proceeded safely, the penalties assessed by the judge were too high and that, at most, a minimal penalty should be imposed. We disagree.

The evidence relevant to the four factors in section 17(j) of the Act, 29 U.S.C. § 666(j), strongly supports the imposition of a sizeable penalty. Myers is a large company with approximately 800 employees. Moreover, as recounted earlier, not only does Myers have a substantial history of OSHA violations, but it also has suffered several fatalities in incidents similar to the accident here. This history shows that despite the appearance of a substantial safety program on paper, in reality the program is substantially deficient in establishing the safeguards necessary for the protection of its employees. Moreover, the entire attitude demonstrated by its foremen displayed a notable lack of good faith toward employee safety.

However, although we would affirm penalties of \$10,000 each for items 3 and 4 of the citation, it appears that item 1, which alleges a failure to maintain minimum clearances

¹⁸ We note that under an amendment to the Act since this citation was issued, the maximum penalties have been raised to \$70,000 for each willful violation of the Act. Section 17 of the Act, 29 U.S.C. § 666, *amended by Omnibus Reconciliation Act of 1990*, Pub. L. No. 101-508, § 3101 (1990).

from energized lines, and item 2, which alleges a failure to take steps to ensure that minimum clearance is maintained from energized lines, are substantially similar violations, both of which could be abated by a single action. The Commission has wide discretion in the assessment of penalties for distinct but overlapping violations and we have held that it is appropriate to assess a single penalty for such related violations. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991); *Wright & Lopez, Inc.*, 10 BNA OSHC 1108, 1112, 1981 CCH OSHD ¶ 25,728, p. 32,077 (No. 76-256, 1981); *H.H. Hall Constr.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981). Therefore, we will assess a combined penalty of \$10,000 for items 1 and 2.

IX. Order

Accordingly, the judge's decision is affirmed. Items 1-4 of the willful citation are affirmed, and a total penalty of \$30,000 is assessed.


Edwin G. Foulke, Jr.
Chairman


Donald G. Wiseman
Commissioner


Velma Montoya
Commissioner

Dated: March 31, 1993



UNITED STATES OF AMERICA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET, N.W.
 4TH FLOOR
 WASHINGTON, DC 20004-1246

FAX
 COM (202) 634-4008
 FTS (202) 634-4008

SECRETARY OF LABOR,

Complainant,

v.

L. E. Myers Company,

Respondent.

Docket No. 90-945

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on March 31, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
 Executive Secretary

March 31, 1993
 Date

Docket No. 90-945

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloepfer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Timothy C. McCarthy, Esq.
Shumaker, Loop & Kendrick
North Courthouse Square
1000 Jackson
Toledo, OH 43624

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET N.W.
 4TH FLOOR
 WASHINGTON D.C. 20006-1246

FAX:
 COM (202) 634-4008
 FTS 634-4008

Secretary of Labor,
 Complainant,

 v.

 The L. E. Myers Company,
 Respondent.

Docket No. 90-945

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 2, 1991. The decision of the Judge will become a final order of the Commission on September 3, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before **August 22, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
 Occupational Safety and Health
 Review Commission
 1825 K St., N.W., Room 401
 Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
 Counsel for Regional Trial Litigation
 Office of the Solicitor, U.S. DOL
 Room S4004
 200 Constitution Avenue, N.W.
 Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

August 2, 1991
 Date

Ray H. Darling, Jr.
 Ray H. Darling, Jr.
 Executive Secretary

Docket No. 90-0945

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William S. Kloefer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Timothy C. McCarthy, Esq.
Shumaker, Loop & Kendrick
North Courthouse Square
1000 Jackson
Toledo, OH 43624

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E. SUITE 240
ATLANTA, GEORGIA 30309 3119

PHONE
COM (404) 347-4197
FTS 257-4086

FAX
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,)
)
Complainant,)
)
v.) OSHRC Docket No. 90-945
)
THE L. E. MYERS COMPANY,)
)
Respondent.)

APPEARANCES:

Christopher J. Carney, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Timothy C. McCarthy, Esquire, Shumaker, Loop and Kendrick, Toledo, Ohio, on behalf of respondent.

DECISION AND ORDER

BRADY, Judge: On February 28, 1990, the L. E. Myers Company (Myers) was issued three citations for alleged violations discovered during the course of an inspection by Bill Wiggins, a compliance officer for OSHA. The inspection was conducted pursuant to a fatality that occurred on September 11, 1989.

Prior to the hearing, the parties resolved Citations No. 1 and No. 3. Citation No. 2 alleges four separate willful violations of standards found in Subpart V ("Power

Transmission and Distribution") of Part 1926. Item 1 alleges a willful violation of 29 C.F.R. § 1926.950(c)(2)(i) for violating minimum working distances adjacent to energized lines as specified by the standard. Item 2 alleges a willful violation of 29 C.F.R. § 1926.955(a)(5)(i) for failing to take precautions to avoid contact with energized lines when setting poles, using a boom truck. Item 3 alleges a willful violation of 29 C.F.R. § 1926.955(a)(6)(i) for failing to ensure that employees standing on the ground and contacting equipment adjacent to energized lines were using suitable protective equipment. Item 4 alleges a willful violation of 29 C.F.R. § 1926.955(a)(6)(ii) for failing to ground or barricade the boom truck when used near energized lines.

Myers is an electrical contractor employing approximately 800 employees (Tr. 200.). In September of 1989, it was under contract with the City of Napoleon, Ohio, to upgrade and rebuild an electrical transmission and distribution line along a five and one-half mile stretch on State Route 424 in Napoleon. The project required the replacement of all of the wires and almost all of the utility poles (Tr. 13-14). Under the terms of the contract, the electrical wires were to remain energized so as not to interrupt electrical service to customers in the area (Tr. 14).

Myers' crew on the project consisted of Dennis Bassinger, a third step apprentice, Chuck Shealey, a mechanic-operator,

Jack Beard, a working foreman, and Eldon Nye, the general foreman (Tr. 44, 333). This crew was shorthanded (Tr. 46, 79-80).

The existing lines were 17 feet to 20 feet high, and were mounted on poles 30 to 35 feet tall (Ex. C-6, Tr. 16-17, 146, 150). The new poles were to be higher, ranging from 35 to 45 feet (Tr. 16). The existing line was a three-phase line on eight-foot crossarms, with the three wires spaced approximately four feet apart (Tr. 18). Both before and after the project, the lines were to carry 12,470 volts (Tr. 17). By design, the new poles were set close to the existing wires (Tr. 18). A number of poles were set within two feet of the existing wires (Tr. 48, 71). The poles were hoisted into place by way of a pole truck. The truck had a hydraulic extension boom with a steel claw attachment (Tr. 19).

On Monday, September 11, 1989, Dennis Bassinger was electrocuted while in the process of setting a new pole. At the time of the accident, Bassinger was holding onto the steel wench cable (Tr. 50-52). Bassinger was in the process of wrapping the cable around a pole that was to be hoisted into the set position (Tr. 50-53). The pole was to be set between 8 to 12 inches from the phase nearest the road (Tr. 78). The phase had not been insulated (Tr. 78-82).

The steel wench Bassinger was holding at the time of the accident had been installed on the Thursday prior to the Monday accident (Tr. 49, 72-74). Prior to that time, the

employees had used a non-conductive nylon sling (Tr. 49, 72-74). The nylon sling had broken three days before the accident and had been replaced with the steel wench (Tr. 74). Bassinger and Shealey expressed reservations about working with the steel wench to Beard, and requested that the job be shut down (Tr. 50-51, 74). Beard related these concerns to Eldon Nye, who shrugged his shoulders and walked away (Tr. 74-75).

At the time of the accident, Shealey was operating the pole truck, Nye was flagging oncoming traffic and Beard was positioning himself to help set the pole. The boom was extended so that it had approximately one foot of "play" to the left and to the right of center (Tr. 52-53). When he was electrocuted, Bassinger was pulling on the steel wench in order to get more cable (Tr. 53-54).

Myers had set approximately 30 poles prior to the accident. Bassinger never wore rubber gloves during this time (Tr. 57, 60, 82). The pole truck was never grounded or barricaded during the Napoleon job (Tr. 56, 84, 124-125). The boom and the new poles occasionally came within two feet of the energized wires but the wires were not always insulated on those occasions (Tr. 52, 71, 76, 78).

Beard testified that the crew insulated wires only when it was obvious to them that they would contact the energized wires during the pole setting process. He stated it would have taken too long to insulate all the wires since the truck

needed for that purpose had been parked farther down the road to warn oncoming traffic of work in the area (Tr. 76, 79).

ITEM 1: 29 C.F.R. § 1926.950(c)(2)(i)

29 C.F.R. § 1926.950(c)(2)(i) provides:

The minimum working distance and minimum clear hot stick distances stated in Table V-1 shall not be violated. The minimum clear hot stick distance is that for the use of live-line tools held by linemen when performing live-line work.

Table V-1 ("Alternating Current -- Minimum Distances") requires a two-foot minimum working distance while working adjacent to energized conductors up to 15,000 volts.

Dennis Bassinger was electrocuted while holding a steel wench that was attached to the boom of the pole truck (Tr. 50-52). The boom contacted a 12,470 volt energized phase while Bassinger was in the process of wrapping the cable around a pole that was to be set (Tr. 50-52). Bassinger was not wearing his rubber insulated gloves nor was he otherwise insulated from the energized lines (Tr. 57, 60, 78-82).

Bassinger never wore insulated gloves while working on the Napoleon project (Tr. 52).

Myers argues that its crew was not working on the overhead lines, nor was it working within two feet of those lines. The crew was erecting poles near the lines, but according to its "work plan", the truck's boom was not to come within more than three feet of the energized lines. Myers

argues that § 1926.950(c)(2)(i) was not violated because the crew did not intend to get closer than three feet to the energized lines and that the work did not require them to get any closer.

This argument is specious and without merit. There is nothing in the standard that speaks to the "intent" of the work crew in performing its work. The standard specifically states that, for the voltage of the lines in question, a minimum of two feet of clearance must be maintained. Furthermore, the record establishes that it was not uncommon for the crew to come within two feet of the energized lines when setting the poles. Whatever Myers' "intent" at the commencement of the project, it was clear by the day of the fatality that the boom was coming within the two-foot minimum distance for the setting of many poles.

The Secretary has established that Myers was in violation of § 1926.950(c)(2)(i).

ITEM 2: 29 C.F.R. § 1926.955(a)(5)(i)

29 C.F.R. § 1926.955(a)(5)(i) provides:

When setting, moving, or removing poles using cranes, derricks, gin poles, A-frames, or other mechanized equipment near energized lines or equipment, precautions shall be taken to avoid contact with energized lines or equipment, except in barehand live-line work, or where barriers or protective devices are used.

Myers was required to set poles near existing energized lines. At times, poles were being set inside existing wires (Tr. 18). Other poles were set within two feet of the existing phases (Tr. 48). Dennis Bassinger, whose job it was to help set the poles, never wore gloves on the project (Tr. 57, 59, 82). The energized lines were only occasionally insulated. Beard testified that the pole that the crew was setting at the time of Bassinger's electrocution was "within eight inches to a foot" away from the energized line, yet the line was not insulated (Tr. 78).

Myers argues that it took precautions in compliance with § 1926.955(a)(5)(i). Myers argues that its work crew made a thorough study of the location where the pole was to be erected in relation to the overhead line. This argument is not borne out by the record. The evidence establishes that the decision to insulate the lines when setting any given pole was more a hit-or-miss proposition. In fact, for the setting of the pole previous to the one on which Bassinger was electrocuted, Nye, the man in charge of the crew, had not wanted to insulate the wire. It was insulated only at the insistence of Beard, who stated, "I was glad we did because as it turned out, we were right directly in the wire" (Tr. 77). Beard testified that because the crew was shorthanded and that it would have "taken forever" to insulate the lines for every pole, the crew was not giving itself any margin for error (Tr. 79).

Myers also argues that it had stationed "two very experienced, safety conscious supervisors to watch the boom, pole and overhead line in an attempt to avoid contact" (Myers brief, p. 22). Again, the record does not reflect this. Nye, the man who shrugged his shoulders and walked away when told of employee concerns regarding the steel wench, does not appear to have been greatly concerned with the possibility of contact with the energized lines. Nye was flagging traffic at the time of the electrocution, and was not monitoring the boom, the poles, or the overhead lines (Tr. 80, 95).

The Secretary has established that Myers was in violation of § 1926.955(a)(5)(i).

ITEM 3: 29 C.F.R. § 1926.955(a)(6)(i)

29 C.F.R. § 1926.955(a)(6)(i) provides:

Unless using suitable protective equipment for the voltage involved, employees standing on the ground shall avoid contacting equipment or machinery working adjacent to energized lines or equipment.

Bassinger's job was to prepare the pole to be set in the ground. This required him to wrap the steel wench around the conductive pole. Yet, Bassinger never wore protective gloves on the project. Beard, the working foreman on the crew, was aware that Bassinger was not wearing gloves but never told him to wear them. Beard stated, "I didn't pay no attention as to whether he had his gloves on or not. I had my gloves on." (Tr. 96).

Myers was in violation of § 1926.955(a)(6)(i).

ITEM 4: 29 C.F.R. § 1926.955(a)(6)(ii)

29 C.F.R. § 1926.955(a)(6)(ii) provides:

Lifting equipment shall be bonded to an effective ground or it shall be considered energized and barricaded when utilized near energized equipment or lines.

The evidence was undisputed that the truck was not grounded or barricaded at any time during the course of the Napoleon project (Tr. 55, 84).

The Secretary has established that Myers was in violation of § 1926.955(a)(6)(ii).

MYERS' DEFENSE

Myers argues that it did not violate any of the standards under § 1926.955 for which it has been cited. First, Myers argues that because it was not working directly on the energized lines, but was only setting new poles near the existing lines, § 1926.955 does not apply. This argument is rejected. Section 1926.955(a)(5)(i) provides that "[w]hen setting ... poles using ... derricks ... near energized lines ..." (emphasis added) that precautions shall be taken. There is nothing vague or confusing about that standard. In the present case, Myers was unquestionably setting poles near energized lines. Section 1926.955(a)(6)(i) requires that

suitable protective equipment be used by employees standing on the ground and contacting equipment or machinery "adjacent to energized lines." It is clear in the present case that the crew was continually working adjacent to energized lines. Section 1926.955(a)(6)(ii) requires that lifting equipment be grounded or barricaded "when utilized near energized ... lines." Again, the boom truck was used near adjacent energized lines. Under the circumstances of the project, the words "near" and "adjacent" clearly applied.

Myers also argues that any violation of the standards was the result of unpreventable employee error on the part of the pole truck operator who brought the boom within the two-foot minimum distance of the energized lines. This argument ignores the abundant evidence that it was common practice for the crew, including the foreman and the general foreman, to set up poles within two feet of the energized lines. Furthermore, the attribution of employee error in making contact between the boom and the line has no bearing on Myers' violation of § 1926.955(a)(6)(i) and (ii). Even if contact between the boom and the wire had never taken place, Myers still did not require suitable protective equipment for its employees on the ground, nor did it ground or barricade the boom truck.

Finally, Myers argues that any violations of the cited standards were the result of unpreventable misconduct by its supervisors, and that the acts of its supervisors are not

imputable to Myers. "[W]here a supervisory employee is involved in the violation, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." Daniel Construction Co., 82 OSAHRC 23/A2, 10 BNA OSHC 1549, 1982 CCH OSHD ¶26,027, p. 32,672 (No. 16265, 1982).

Myers argues that its supervisors are given special safety training sessions and that each foreman is issued a safety kit that includes Myers' Safety Manual (Ex. R-8). To prove the defense of unpreventable employee misconduct, the employer must show that "it had work rules that were intended to prevent the violation, that those rules were adequately communicated to its employees, and that the rules were effectively enforced." Ormet Corp., _____ OSAHRC_____, 14 BNA OSHC 2134, 2138, 1991 CCH OSHD ¶29,254 (No. 85-531, 1991).

Effective enforcement of work rules requires that some disciplinary action be taken by the employer when a violation of the work rules occurs. He stated that he had never received any discipline for any violation of Myers' safety rules or procedures (Tr. 393). If Myers believed that the violations at issue were the result of supervisory misconduct, it did not take any steps to enforce its work rules that it claims were violated. It must be concluded that the actions of the supervisory personnel on the Napoleon crew

were responsible for the violations and are imputable to Myers.

WILLFULNESS DETERMINATION

The Secretary has alleged that Myers was in willful violation of the cited standards. Willfulness is a state of mind.

A violation of the Act is willful if "it was committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety." Simplex time Recorder Co., 12 BNA OSHC 1591, 1595, 1984-85 CCH OSHC ¶27,456, p. 35,571 (No. 82-12, 1985). Trial of the issue of willfulness focuses on the employer's state of mind and general attitude toward employee safety to a greater extent than would trial of a nonwillful violation. Seward Motor Freight, 13 BNA OSHC 2230, 2234, 1989 CCH OSHD ¶28,509, p. 37,787 (No. 86-691, 1989).

E. L. Jones and Son, Inc., ___ OSAHRC ___, 14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶29,264 (No. 87-8, 1991).

The record establishes that Nye and his crew repeatedly disregarded the requirements of the Act while working on the Napoleon project. Poles were set up within two feet of energized lines without first insulating the lines. No precautionary measures were taken on many occasions when the poles were being set. In fact, an additional hazard was introduced when Nye replaced the broken nylon sling with a steel wench, over the protests of Shealey and Bassinger. No effort was made to require Bassinger to wear his gloves or to

ground the truck, even though either one of these precautions may well have prevented Bassinger's death.

Nye has worked for Myers since 1965 (Tr. 337). He was aware of the requirements of the Act, as well as Myers' own safety rules. That he chose to ignore safe practices despite his knowledge and experience shows his, and by imputation, Myers' plain indifference to employee safety. Myers was in willful violation of the cited standards in Items 1, 2, 3 and 4 of Citation No. 2.

PENALTIES

The Commission is the final arbiter of penalties in all contested cases. Secretary v. OSAHRC and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Co., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-1973 CCH OSHD ¶15,032 (No. 4, 1972).

Upon due consideration of the above-mentioned factors, it is determined that the following proposed penalties are appropriate:

Item 1	\$10,000.00
Item 2	10,000.00
Item 3	10,000.00
Item 4	10,000.00

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of facts 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 hereby ORDERED:

1. That items contained within Citation Nos. 1 and 3 be disposed of in accordance with the settlement agreement entered into by the parties,

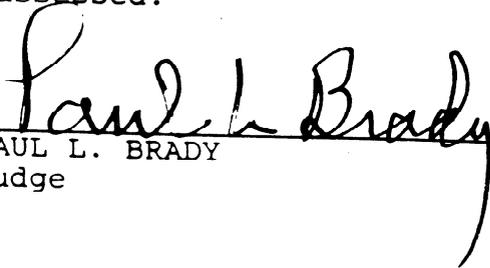
2. That Item 1 of Citation No. 2 for violation of 29 C.F.R. § 1926.950(c)(2)(i) is affirmed and a penalty in the amount of \$10,000.00 is hereby assessed,

3. That Item 2 of Citation No. 2 for violation of 29 C.F.R. § 1926.955(a)(5)(i) is affirmed and a penalty in the amount of \$10,000.00 is hereby assessed,

4. That Item 3 of Citation No. 2 for violation of 29 C.F.R. § 1926.955(a)(6)(i) is affirmed and a penalty in the amount of \$10,000.00 is hereby assessed, and

5. That Item 4 of Citation No. 2 for violation of 29

C.F.R. § 1926.955(a)(6)(ii) is affirmed and a penalty in the amount of \$10,000.00 is hereby assessed.


PAUL L. BRADY
Judge

Date: July 15, 1991