

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

CMC ELECTRIC, INC. ,

Respondent,

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 673,

Authorized Employee
Representative.

OSHRC Docket No. 96-169

DECISION

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

Following an employee fatality on August 15, 1995, the Occupational Safety and Health Administration (“OSHA”) inspected Respondent, CMC Electric, Inc’s (“CMC’s”) worksite. As a result of the inspection, the Secretary of Labor cited CMC in part for several serious violations of the construction standards involving employee training, availability of prompt medical attention, use of hard hats, and employee exposure to an energized power line. Judge Michael Schoenfeld affirmed the training, medical attention, and hard hat citation

items, but vacated the employee exposure items. For the reasons that follow, we affirm all the citation items on review.¹

I. Background

CMC, an industrial electrical contractor, was a subcontractor at a worksite near Andover, Ohio where a pre-fabricated equipment building and antenna tower were being built for Northern Ohio Cellular Telephone Company (“Cellular One”). Under the contract, CMC was to install a grounding system and run underground electrical service wiring from the building to a utility pole provided by Ohio Edison, attach a conduit to the pole, pull the wiring up through the conduit, and leave 36 inches of wire out of the top of the conduit for Ohio Edison to connect to a transformer located towards the top of the pole. The top of the conduit was to be no higher than 6 inches below the neutral or secondary power line. A 7,200-volt energized line was located 8 feet, 8 inches above the neutral line.

On Thursday, August 10, CMC Superintendent John Smith went to the site and received the Ohio Edison schematic for the conduit wiring project from the representative of an engineering company that worked for Cellular One. On Friday, August 11, Smith took employees Rory Breedlove and Robert Biacofsky to the worksite to install the grounding system around the building. They would be joined by employee Robert Taylor on Tuesday, August 15. CMC did not assign a foreman to the site. Breedlove, Biacofsky and Taylor had all been foremen on previous CMC jobs. Biacofsky testified that if a problem arose during work, it was to be discussed among themselves. Smith gave the employees the schematic but did not tell them anything at all about it and did not tell them whether or not they would be working near energized lines.

On Tuesday, August 15, Taylor and Breedlove worked on attaching the conduit to the utility pole until approximately 1:30 p.m. The Ohio Edison schematic clearly shows that the conduit should terminate 6 inches below the neutral or secondary position, and warns against

¹The Commission also directed for review two other-than-serious items, but they were later withdrawn by the Secretary. These withdrawals were acknowledged by the Commission in its September 29, 1997 order.

extending the “conduit above the secondary or neutral position at any time” because it “may result in severe electric shock.” However, the top of the conduit as installed was actually 2 feet, 9 ¾ inches above the neutral line. The conduit had a rope through it that would be used to pull the wire through once the conduit was attached to the pole. The employees were going to use a 60 to 70-pound electric winch called a “chugger” to pull the wire through the conduit. Biacofsky testified that he and Taylor disagreed about whether to mount the chugger above the conduit and that Taylor climbed up the 24-foot extension ladder that was against the pole to see if he could mount a pulley above the conduit instead. After reaching the top of the ladder, Taylor used the bolts on the pole as footholds and climbed approximately 8 or 10 feet further up the pole where he contacted the 7,200-volt power line and was electrocuted. The schematic does not show the location of this energized line. According to Biacofsky, neither he nor Taylor thought that there should be an energized line present because it was their understanding that power would not be brought to the pole until after they had completed their work.

The following citation items resulted from OSHA’s inspection of the worksite.

II. Serious Citation 1, Item 1

The Secretary alleges that CMC violated 29 C.F.R. § 1926.21(b)(2) by failing to instruct its employees in the recognition of the hazard of working in close proximity to energized high voltage lines and the regulations applicable to the worksite. The standard requires that “[t]he 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.” The Commission has held that such instructions must address matters specific to the worksite about which a reasonably prudent employer would have instructed its employees. *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,902, p. 40,810-11 (No. 90-2668, 1992). The only evidence of instruction by CMC was testimony by CMC Vice-President and Safety Officer Christopher Corfias that there was general training on “electric shock,” “tag-out procedures,” and “hazard recognition” at weekly “Tool Box Talks.” He testified that the Tool

Box Talks were “not so much to be a training device to teach someone how to handle a particular hazard” but instead were based on “little synopses or stories about unsafe conditions or hazard recognition.” There was no evidence of instruction in the recognition of the hazards involved in working in close proximity to the energized high voltage line present at this worksite.² The Ohio Edison schematic, the only detailed information CMC’s employees were given about the worksite, did not even show the energized line. Although employees Breedlove and Biacofsky testified that part of their training as journeymen wiremen was to treat an unknown line as energized, this general admonition falls short of the standard’s requirement that employees be trained on the regulations applicable to their work environment and be told what hazards are present at a particular worksite. For example, the record does not show that CMC had instructed its employees in the requirements of 29 C.F.R. § 1926.416, cited in items 4(a), (b), and (c). Indeed, CMC did not even respond to the Secretary’s argument that it failed to instruct its employees in these regulations. Yet section 1926.416, which requires deenergization in certain circumstances and ten feet clearance from 7,200-volt lines for unqualified persons and two feet for qualified persons in other circumstances, restricts an employee’s actions substantially more than the admonition to assume that a line is energized.

CMC argued that the violation was the result of unpreventable employee misconduct. It bases this argument on its claim that it could not have foreseen that Taylor would climb to the top of the utility pole. However, this citation item is not based on Taylor’s climbing up the pole but on CMC’s failure to instruct. For CMC to succeed in its affirmative defense of unpreventable employee misconduct, it would, as a threshold matter, have to show that the person assigned to instruct failed to give the instruction. Because CMC makes no such claim, the defense fails.

²CMC cites to employee Breedlove’s testimony to support its argument that it had work rules designed to prevent violations of this standard. However, Breedlove testified that he did not recall any meetings dealing with working in close proximity to high voltage.

We therefore find that the Secretary established a violation of 29 C.F.R. § 1926.21(b)(2) for CMC's failure to train its employees regarding the hazard of working in close proximity to energized high-voltage lines. Because CMC did not contest the penalty amount proposed by the Secretary and assessed by the judge, and because the penalty assessed is supported by the record, we affirm the proposed penalty amount of \$4,200.

III. Serious Citation 1, Item 2(a)

The Secretary alleges that CMC violated section 1926.50(b), which requires that “[p]rovisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.” The term “medical attention” is clarified by section 1926.50(c)³, which states that “[i]n the absence of an infirmary, clinic, hospital or physician, that is reasonably accessible in terms of time and distance to the worksite,” there shall be available “a person who has a valid certificate in first-aid training.” Under this definition, an employer can comply with section 1926.50(b) by making provisions for prompt medical attention by a medical services provider reasonably accessible to the worksite prior to commencement of the project. An employer can comply with section 1926.50(c) by having available at the worksite a person with a valid certificate in first aid training. The record shows that after the accident occurred, an unidentified “operating engineer” drove down the 2 to 3 mile gravel road leading from the worksite, then down a country road to a farmer’s house and had him call 911. The Andover Volunteer Fire Department received the operating engineer’s call at 2:20 p.m. and responded to the accident within sixteen minutes. The first seven to eight minutes of the sixteen minutes was spent at the station trying to get the first vehicle to start and the final eight minutes was the time needed to reach the worksite approximately ten miles away in a back-up vehicle.⁴ The judge affirmed the serious citation

³CMC had been cited for violations of both sections 1926.50(b) and (c). The judge found that CMC had violated both standards but that they involved “substantially the same conduct.” He found a single violation and assessed the proposed penalty of \$3,000 based on the penalty factors discussed for Serious Citation 1, Item 1.

⁴The Secretary claims that the sixteen minutes it took for the rescue squad to respond did not
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based on CMC's failure to comply with either the prompt medical attention or first aid requirements. For the reasons that follow, we affirm the judge.

There is no evidence in the record that CMC made provisions prior to commencement of the project for prompt medical attention.⁵ Moreover, the medical attention that was available through the Andover Fire Department cannot be characterized as prompt in view of its distance from the worksite. CMC calculates that under a best-case scenario, it would take five minutes for the Andover volunteers to assemble and that it took "five or six minutes" for the volunteers to reach the worksite. Even if we were to agree with CMC's calculations, this would leave a minimum of ten minutes response time. Under our holding in *Love Box Co.*, 4 BNA OSHC 1138, 1142, 1975-76 CCH OSHD ¶ 20,588, p. 24,630 (No. 6286, 1976), this would be too long.

In addition, there was no one with a valid first-aid certificate available at the worksite for the first two days CMC employees were working there. All three of the CMC employees assigned to the site had received first-aid certification upon finishing their apprenticeship. The CPR portion was valid for a year and the remainder of the certification was valid for two years. Breedlove and Biacofsky, who completed their apprenticeships in 1987, had not had valid first-aid certification for several years. Taylor, who had completed his apprenticeship

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include the five minutes to get the squad together. However, the five minutes to assemble the squad must have been included in the sixteen minutes because the record shows that the call was received at 2:20 p.m. and that the rescue squad arrived at the worksite at 2:36 p.m. Although CMC claims that "ten or eleven minutes" were due to difficulties on the part of the Andover Fire Department, the transcript pages it cites shows that 8 minutes were due to their difficulties with the equipment.

⁵CMC argues that it complied with the standard because it provided the employees with a cellular phone with which they could call 911. However, giving employees a cellular phone clearly does not amount to a provision for the "prompt medical attention" required by the standard, particularly when the response time for the fire company to reach the worksite was too long.

in mid-1994, was current except for his CPR component. However, he was not at the worksite for the first two days of the job.⁶

We therefore find that the Secretary established a serious violation of 29 C.F.R. § 1926.50(b) for CMC's failure to provide for prompt medical attention in case of serious injury. CMC did not contest the \$3,000 penalty proposed by the Secretary and assessed by the judge, and the penalty assessed is supported by the record. We therefore affirm the penalty amount of \$3,000.

IV. Serious Citation 1, Item 3

The Secretary alleges that CMC violated 29 C.F.R. § 1926.100(a) by failing to ensure that its employees were wearing hard hats. The standard requires that “[e]mployees working in areas where there is a possible danger of head injury from . . . electrical shock and burns, shall be protected by protective helmets.” Although CMC requires that employees wear hard hats on the construction site at all times, the record shows that employees did not wear hard hats on several occasions. Taylor was not wearing a hard hat when he was electrocuted. Biacofsky and Breedlove both had worked on this site without a hard hat. The judge based his finding of a violation of the standard on his determination that the three employees had not worn their hard hats, that the record indicates that this was one of a number of instances in which CMC's employees did not comply with the hard hat requirement, and that the employees were never disciplined for not wearing their hard hats. For the reasons that follow, we affirm the judge.

In order to prove a violation of the standard, the Secretary must show that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had

⁶CMC argued in its petition for discretionary review (but not in its brief before the Commission) that the Secretary failed to prove a violation of the standard because she failed to prove that “other persons on the site did not have a valid Red Cross Certificate.” Because CMC did not make this argument in its brief we consider it to have been abandoned. *See StanBest, Inc.*, 11 BNA OSHC 1222, 1224 n.4, 1983-84 CCH OSHD ¶ 26,455, p. 33,618 n.4 (No. 76-4355, 1983).

access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). It is undisputed that the standard applies and that CMC violated the standard by its employees' failure to wear their hard hats at this site. The Secretary also must prove that CMC knew or could have known, with the exercise of reasonable diligence, of the existence of the violative conditions. *E.g.*, *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p.39,449 (No. 86-1087, 1991).

To show knowledge, the Secretary need not show that a supervisor actually saw the violative condition. She may show constructive knowledge if CMC could have discovered the violative conditions with the exercise of reasonable diligence. *Hackney, Inc.*, 16 BNA OSHC 1806, 1994 CCH OSHD ¶ 30,486 (No. 91-2490, 1994). Here, there was no foreman on the site and Superintendent Smith was only present on occasion. Although Smith testified that he had not seen any of the employees at this site without a hard hat, he acknowledged that on at least four occasions from January to August of 1995 he had seen employees without hard hats. When Smith saw employees without a hard hat, he told them to put one on.

The fact that there was no supervisor on this site to monitor for safety violations does not establish, by itself, a lack of reasonable diligence. However, we note that Smith had observed at least four previous failures to wear hard hats over the preceding months and that he never did more than tell people to put on hard hats. More importantly, all three employees had not worn them on this site, and all three were CMC supervisors on other projects. Therefore, we conclude here that CMC's safety program was lax, *see Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982), and that CMC was not reasonably diligent. CMC's reliance on *Standard Glass Co.*, 1 BNA OSHC 1045, 1971-73 CCH OSHD ¶ 15,146 (No. 259, 1972) is misplaced. In that case, the

Commission vacated a citation under this standard where two employees failed to wear hard hats because the period of violation was “isolated and brief” (less than five minutes), the employer “made an earnest effort to assure that the hard hats would be worn,” and that “employees could expect reprimand if the instructions of respondent that hard hats be worn were violated.” 1 BNA OSHC at 1046, 1971-73 CCH OSHD at p. 20,219. Here, all three CMC employees at this site failed to wear hard hats and there was evidence of a number of occasions at other sites where CMC’s employees failed to wear hard hats. Yet, unlike *Standard Glass*, there was little evidence of an earnest effort to ensure compliance or that employees could expect reprimand if they failed to wear hard hats.

Accordingly, we find that the Secretary has established a serious violation of 29 C.F.R. § 1926.100(a) based on CMC’s failure to ensure that its employees wore hard hats. CMC did not contest the penalty amount proposed by the Secretary and assessed by the judge, and the penalty is supported by the record. We therefore affirm the penalty amount of \$3,000.

V. Serious Citation 1, Items 4(a), 4(b), and 4(c)

These citations, all of which arise from the circumstances of the accident, allege that CMC permitted its employees to work in close proximity to an energized power line in violation of 29 C.F.R. § 1926.416(a)(1), failed to determine whether the power line was energized in violation of 29 C.F.R. § 1926.416(a)(3), and allowed unqualified employees to work within ten feet of an unguarded energized power line in violation of 29 C.F.R. § 1926.416(g)(2)(i)(A)⁷. The judge vacated all three items. He apparently believed that these three violations would not have occurred if CMC had properly instructed its employees. We reverse the judge and affirm all three items.

Item 4(a) alleged a violation of section 1926.416(a)(1) because CMC allowed its employees to work in close proximity to the energized line. CMC defends on the basis that

⁷Section 1926.416 has been amended and no longer includes subsection (g). *See* 61 Fed. Reg. 41738, August 12, 1996.

no one “permitted” or required Taylor to be in the area and Taylor did not tell anyone that he intended to go towards the energized line. These contentions are without merit. Taylor was near the energized line because his job required him to find a location above the conduit to mount the pulley. He might not have needed to go that far up the pole, but climbing up the pole was within the scope of his work and it did not violate any CMC work rule.⁸ Moreover, as we discussed in Item 1, CMC did not have any work rules or other instructions for this site, let alone one that would have met the requirements of this standard and prevented an employee from working in such proximity to the power line that the employee could contact it in the course of his work. CMC had not even taken the preliminary step of inspecting the worksite to determine whether such hazards were present.

Item 4(b) alleged a violation of section 1926.416(a)(3) because CMC did not check to see before work began whether an energized line was so located that the performance of work may bring a “person, tool, or machine” into contact with it. The record does not show that anyone from CMC checked the worksite⁹ and the Ohio Edison schematic provided to the employees did not show the energized line. CMC argues that “performance of the work in question should not have brought Taylor closer than eight or nine feet from the line,”¹⁰ but

⁸CMC’s argument that Taylor’s actions constituted unpreventable employee misconduct fails because of its lack of a work rule to eliminate employee exposure to the energized line. *See, e.g., Gary Concrete* (unpreventable employee misconduct defense rejected where employer failed to prove that it had established “work rules designed to prevent the cited violation”; Gary’s instructions “too general” to inform the employee of “how to prevent the violation of the standard which resulted in his death.”)

⁹CMC’s safety manual states that “the Safety Officer and the Job Foreman will schedule and conduct regular safety inspections of the job site,” but there was no foreman on this site and the safety officer did not testify about this item.

¹⁰Corporate Secretary and Project Manager Emanuel Corfias testified that an inspection of the lines was “not required” and that “it was immaterial to us whether that overhead line was energized or de-energized” because there would not have been a hazard “[h]ad the work been installed per the drawing, and done in the fashion in which we normally do our work.” As
(continued...)

the language of the standard requires the employer to “ascertain by inquiry or direct observation, or by instruments” whether an energized circuit is so located that an employee might contact it.¹¹ CMC did none of these things.

Item 4(c) alleged a violation of 1926.416(g)(2)(i)(a) because CMC’s “unqualified” employees worked within ten feet of the energized line. The judge vacated this item because he found that the employees were “qualified” within the meaning of the standard, even though he found that the employees at the site did not understand the Ohio Edison schematic or realize that working above the conduit as it was incorrectly installed was an electrocution hazard. The judge based his finding that the employees were “qualified” not on their specific knowledge of this worksite and its hazards but on their being journeymen wiremen.¹² However, the Preamble to the Final Rule on Electrical Standards for Construction, 51 Fed. Reg. 25,294 (July 11, 1986) at p. 25,307 states that “[f]or the purposes of Subpart K,

¹⁰(...continued)

constructed, the conduit’s opening was 5 feet, 10 1/4 inches away from the energized line. Had the conduit been constructed as shown in the Ohio Edison schematic, the distance would have been closer to nine feet. The fact that the conduit was installed closer to the energized line than it should have been would not absolve CMC of the violations of the standards cited in these subitems. While it might have made it less likely that Taylor would have approached the energized line had the conduit opening been further away from it, Taylor still would have had to find a position somewhere above the conduit opening to attach the pulley, and it would still be foreseeable for an employee to approach the energized line while looking for a location to mount the pulley, especially in the absence of any rule not to do so.

¹¹The preamble is evidence of a regulation’s intent. *See American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1991-93 CCH OSHD ¶ 29,575, pp. 40,015-16 (No. 86-1179, 1992) (preamble as “best and most authoritative statement of the Secretary’s legislative intent” for standard susceptible to different interpretations). The Preamble to the Final Rule on Electrical Standards for Construction, 51 Fed. Reg. 25,294 (July 11, 1986) at p. 25,315 states that section 1926.416(a)(3) requires “that action must be taken to determine the location of and to protect employees from energized circuits.”

¹²The judge found that the employees were qualified because “a journeyman wireman who was aware of the presence of a high-voltage line would also be aware of the hazards of working in proximity to it.”

knowledge of the installation in question is necessary before a person can be considered ‘qualified’” and that the knowledge must be “specific” to the installation in question.¹³ Under this interpretation, the employees would not be considered qualified within the meaning of the standard because they did not know of the energized line. If the employees were not qualified under the standard cited in item 4(c), 29 C.F.R. § 1926.416(a)(1), they could come no closer than ten feet from the energized line. Because the conduit would have been within ten feet of the energized line even if it was constructed properly, a violation of that standard is shown.

Having found that the Secretary established that the three standards applied and that CMC’s employees had access to the violations committed by CMC, we also conclude that CMC had knowledge of the violations. It is clear that reasonable diligence required that CMC determine whether an energized line was present on this worksite and where its employees were going to be working in relation to that line. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387-8, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No.76-5089,

¹³The preamble gives the following example of a “qualified person”:

[R]evised § 1926.405(a)(2)(iii) prohibits access of other than qualified persons to temporary installations of equipment over 600 volts. It is clear from the proposed definition of “qualified person” that an individual would need to be familiar with the construction and operation of those installations, and with the associated hazards, in order to be allowed access to them. This would not necessarily require a person with an advanced degree or certificate; indeed, the mere fact that a person possessed such a degree or certificate would not automatically make him or her “qualified” in a particular situation under Subpart K. Based on the proposed definition, an electrical engineer who was not familiar with the installation would not be considered qualified for the purposes of § 1926.405(a)(2)(iii), despite having an engineering degree. . . . For the purposes of Subpart K, knowledge of the installation in question is necessary before a person can be considered “qualified;” such specific knowledge is not an absolute requirement under the general construction definition. . . . in § 1926.32(l).

1980); *See also Mosser Constr. Co.*, 15 BNA OSHC 1408, 1414, 1991-93 CCH OSHD ¶ 29,546, p. 39,907 (No. 89-1027, 1991)(reasonable diligence requires adequate supervision of employees and the formulation and implementation of adequate training programs and work rules). CMC had ample opportunity to discover the energized line, but failed to do so.

We therefore find that the Secretary established that CMC violated 29 C.F.R. § 1926.416(a)(1) because it permitted its employees to work in close proximity to an energized power line, 29 C.F.R. § 1926.416(a)(3) because it failed to determine whether the power line was energized, and 29 C.F.R. § 1926.416(g)(2)(i)(A) because CMC allowed unqualified employees to work within 10 feet of an unguarded energized power line. The Secretary proposed a combined penalty of \$4,200 for the three subitems. CMC did not contest the proposed penalty amount and the penalty is supported by the record. Therefore, we affirm the penalty of \$4,200.

VI. Order

Accordingly, Serious Citation 1, Items 1, 2(a), 3, 4(a), 4(b) and 4(c) are affirmed. A total penalty of \$14,400 is assessed.

/s/ _____
Stuart E. Weisberg
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: April 26, 1999