

I. Background

As part of the upgrading project, a crew of three journeymen linemen were assigned the task of moving a new non-energized conductor from a dolly to insulator pins attached to the end of the cross arm of a new 40-foot high utility pole. Prior to initiating work, the crew members discussed the job and decided that it was not necessary to insulate or guard the nearest energized conductor, nor to wear rubber protective gloves or sleeves.

Two of the linemen, Messrs. Barkley and Vanover, ascended in an insulated, truck-mounted aerial lift bucket, which was 28 inches wide, 49-1/2 inches long (excluding a two-inch lip around the top), and 41 inches deep. The other lineman, Mr. Frank, who had been designated as working foreman of the crew, stayed on the ground at the truck. When the bucket was positioned at least 30 feet above the ground, Vanover and Barkley began moving a new non-energized conductor weighing 180 pounds from a dolly atop the cross arm of the utility pole to an insulator pin 18 inches away near the end of the cross arm. The insulator pin was 26-1/4 inches from the closest energized conductor, which had been mounted temporarily on a hot arm attached to the end of the cross arm. It is undisputed that the energized conductor was energized at 12,470 volts, phase to phase.

After Barkley removed the new non-energized conductor from the dolly and placed it on the cross arm, he placed insulator boots on the conductor and lifted it onto his left shoulder. After he moved the conductor to a point above the insulator pin, 26-1/4 inches from the energized conductor, he heard a loud boom, felt heat, and fell to the bottom of the bucket. Barkley received minor burns. Vanover, who was behind Barkley in the bucket, was electrocuted. The autopsy report states that there was an entrance wound in the palm of Vanover's left hand and an exit wound on the posterior surface of his left thigh.

No one witnessed the accident. At the time of the accident, working foreman Frank was in the truck preparing cut outs and not observing the work.

II. Discussion of the Merits

Following OSHA's investigation of the accident, PAR was charged with violating the power transmission and distribution construction standard at 29 C.F.R. § 1926.950(c)(1)(i).¹ It is undisputed that, for a conductor energized at 12,470 volts phase to phase, the standard requires employees to keep a distance of at least two feet, or 24 inches.

In his decision, the judge concluded that the Secretary had met her burden of proving the elements of her case.² He found that the elements of noncompliance with the terms of the standard and employee exposure were established. The judge also determined that working foreman Frank could have known of the noncomplying condition with the exercise of reasonable diligence, and his constructive knowledge should be imputed to PAR.³

¹The standard requires:

Subpart V--Power Transmission and Distribution
§ 1926.950 General requirements.

. . . .

(c) *Clearances*. . . .

(1) No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table V-1, unless:

(i) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or

(ii) The energized part is insulated or guarded from him and any other conductive object at a different potential

The referenced Table V-1, entitled "Alternating Current--Minimum Distances," provides that for the applicable voltage range of 2.1 to 15 kilovolts phase to phase a "[m]inimum working and clear hot stick distance" of "2 ft. 0 in." is necessary.

²To make a prima facie showing of a violation of a standard, the Secretary must establish the applicability of the standard, noncompliance with its terms, employee access or exposure to the violative condition, and employer knowledge. *See, e.g., Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1720, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999). The employer may rebut any of these elements. *Id.* The applicability of the standard is not at issue here.

³The judge also had before him PAR's defense of unpreventable employee misconduct, which he rejected. That claim was not included in the briefing notice on review, although

PAR raises issues on review concerning whether the Secretary established that (1) PAR failed to comply with the terms of the standard, (2) its linemen had access, or were exposed, to a hazardous condition, and (3) it had knowledge of the condition.

We find that the evidence clearly shows that PAR did not comply with the terms of the standard and its employees were exposed to the violative condition. The linemen in the bucket were not wearing insulating gloves or sleeves, and the nearest energized conductor was not insulated or guarded. The linemen were required to place the new non-energized conductor weighing 180 pounds into the insulator pin only 2-1/4 inches from the approach distance's outer limit. The record establishes that Barkley was maneuvering the new conductor on his shoulder directly above the insulator pin. By necessity, while in that position, some part of Barkley's body, at least a portion of his arm and shoulder, must have penetrated the two-foot distance. *See Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1118, 1986-87 CCH OSHD ¶ 27,829, p. 36,429 (No. 84-696, 1987) (narrow, dark work area increased likelihood of experienced electrician contacting energized lugs 13-1/2 inches above where he was doing assigned work); *Kansas Power & Light Co.*, 5 BNA OSHC 1202, 1204, 1977-78 CCH OSHD ¶ 21,696, p. 26,057 (No. 11015, 1977) ("circumstantial evidence is persuasive that by [journeyman lineman's] buckling-off in the area" some portion of his body "necessarily was within two feet of an energized line"). These facts establishing noncompliance with the terms of the standard also show that Barkley was exposed to the violative condition.⁴

much of the evidence cited by PAR to support it is considered here in determining employer knowledge. *See generally Donohue Industries, Inc.*, 20 BNA OSHC 1346, 1348-51, 2003 CCH OSHD ¶ 32,679, pp. 51,500-02 (No. 99-0191, 2003).

⁴PAR argues that the judge in effect expanded the permissible approach distance by applying a "zone of danger" test in finding noncompliance. The "zone of danger" is part of the test for proof of the employee exposure element: the Secretary must show that it is reasonably predictable that employees have been, are, or will be in the "zone of danger" during their assigned work duties. *See, e.g., Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 n.6, 2001 CCH OSHD ¶ 32,331, p. 49,553 n.6 (No. 99-707, 2001). Because the cited standard prohibits unprotected entry into an area two-feet from the energized conductor, it has a built-

The record also shows noncompliance with the standard regarding Vanover, because the wounds described in his autopsy report indicate that he, or an uninsulated object held by him, breached the two-foot distance, regardless of how the accident occurred. *See North Landing Line Constr. Co*, 19 BNA OSHC 1465, 1467, 1469, 2001 CCH OSHD ¶ 32,391, p. 49,809, 49,810-11 (No. 96-0721, 2001) (violation not dependent on accident; reasonable inferences from circumstantial evidence). Based on the same facts, Vanover also was clearly exposed to the hazardous condition.

Next we turn to the issue of whether the Secretary proved that PAR had knowledge of the violative condition. To prove knowledge, the Secretary must show that the employer either actually knew of the noncomplying condition, or constructively knew of it--that is, the employer could have known with the exercise of reasonable diligence. *North Landing*, 19 BNA OSHC at 1472, 2001 CCH OSHD at p. 49,813; *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992). The knowledge of a supervisory employee may be imputed to his or her employer. *Id.* The judge found that PAR had constructive knowledge of the condition imputed from working foreman Frank, whose supervisory status is not disputed.

Our inquiry, therefore, is whether the Secretary established that PAR could have known of the cited condition with the exercise of reasonable diligence. *See, e.g., Stahl Roofing, Inc.*, 19 BNA OSHC 2179, 2181, 2003 CCH OSHD ¶ 32,646, p. 51,218 (No. 00-1268, 2003) (consolidated). Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407, 2001 CCH OSHD ¶ 32,331, p. 49,552 (No. 99-707, 2001). These factors are consistent with Eighth Circuit precedent, applicable here under section 11(a) & (b) of the Occupational Safety and Health

in "zone of danger." In light of the language of the cited standard, noncompliance with the terms of the standard here therefore necessarily means entry into the "zone of danger."

Act of 1970 (“the Act”), 29 U.S.C. § 660(a) & (b).⁵ See *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir. 1978) (factors involved in employer knowledge determination in context of serious characterization); *Ames Crane & Rental Service, Inc. v. Dunlop*, 532 F.2d 123, 125 (8th Cir. 1976) (same). See also *Omaha Paper Stock Co. v. Secretary*, 304 F.3d 779, 784-85 (8th Cir. 2002) (same).

Based on the record, we find that the Secretary made a prima facie showing that, with the exercise of reasonable diligence, PAR could have known of the violative condition and taken steps to prevent it. We reject PAR’s argument that the judge incorrectly based his finding of constructive knowledge on the foreman’s “presence at the worksite and his knowledge of the work activities.” The judge properly relied on evidence that working foreman Frank knew that the linemen had to lift the 180-pound non-energized conductor and place it down into the insulator pin, which was only 2-1/4 inches outside the prohibited approach distance. He was aware of these tight conditions resulting from the positioning of the truck and the bucket and should have reasonably anticipated that the two-foot distance from the energized line would be breached by at least one of the linemen, as it was here by Barkley. He knew how the bucket was angled, how the bucket and boom were positioned near the energized conductor, and how tight the work area was inside and outside the bucket. He knew the back side of the bucket was only 18 inches from the energized line, and the tie wires and tools to be used after the new conductor had been placed in the insulator pin were in the “grunt” bag on the outside of the back side of the bucket within the two-foot zone. He knew the two linemen in the bucket were not wearing insulating gloves, although they had the gloves with them.⁶

⁵Under these provisions, any of the parties can appeal this case to the Eighth Circuit because PAR’s principal office and the location of the violation are in Missouri, and any party but the Secretary may appeal to the D.C. Circuit.

⁶Barkley testified that his gloves and sleeves were hung on the backside of the bucket next to the “grunt” bag.

Despite all this, Frank told Vanover and Barkley that they had “plenty of room” to do the work. While PAR had a work rule that, although not completely tracking the standard, prohibited approaching within two feet without wearing high-voltage rubber gloves, Vanover and Barkley could have considered Frank’s instructions on site as overriding the rule. *See Pride Oil Well Service*, 15 BNA OSHC at 1816, 1991-93 CCH OSHD at p. 40,586. *Cf. L.E. Myers Co.*, 16 BNA OSHC 1037, 1041, 1993-95 CCH OSHD ¶ 30,016, p. 41,128 (No. 90-945, 1993) (despite work rule to contrary, foreman did not order that lines be insulated even when crew knew there was little margin for error). In any event, under these circumstances, the foreman’s instructions that they had “plenty of room” were plainly inadequate. For these reasons, we conclude that Frank had constructive knowledge, and we impute that knowledge to PAR.

Additional evidence of constructive knowledge noted by the judge was the testimony of Mark Biernbaum, PAR’s safety director (himself a former journeyman lineman) who testified that under the facts presented here gloves should have been worn. Biernbaum also acknowledged at the hearing that Frank should have ensured their use. The judge also found that PAR’s failure to discover that Frank was not conducting weekly safety meetings shows a lack of internal controls. He further noted that PAR had a history of prior violations of the same standard--final orders for citations issued in 1997 and 1994, which are in evidence--yet PAR still had not adequately enforced its safety program.⁷ *Compare Capital Electric Line Builders v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982) (uncontradicted expert testimony that company program entirely adequate).

PAR did not rebut this prima facie showing of employer knowledge. *See Danco*, 586 F.2d at 1247 & n. 6 (where record contains substantial evidence, not error for Commission to conclude employer must come forward with evidence to rebut). PAR argues that these

⁷In light of the considerable other evidence of PAR’s constructive knowledge, we need not rely on, nor address, PAR’s argument that the judge improperly relied on the opinion testimony of the Secretary’s expert witness that it was “virtually impossible” for the linemen “not to get within the 2-foot distance” and that “it was reasonably foreseeable that workers would be exposed to a hazardous condition.”

employees were both journeymen linemen, who, to achieve that status, underwent years of training and field experience, and so they do not require extensive instruction and supervision. As this case shows, however, employers cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for specific instructions. *See, e.g., CMC Elec., Inc. v. OSHA*, 221 F.3d 861, 865-66 (6th Cir. 2000); *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2009, 1991-93 CCH OSHD ¶ 29,900, p. 40,801-02 (No. 90-1505, 1992), *aff'd without published opinion*, 16 F.3d 1219 (6th Cir. 1994). Based on the above, we affirm the violation of the standard.

III. Characterization

The remaining issue on review is whether the violation was repeated, as alleged, under section 17(a) of the Act, 29 U.S.C. § 666(a). The judge found that the Secretary had met her burden of proving that there was a final order against PAR for a substantially similar violation. A citation issued to PAR in March of 1997 for a worksite in Morrison, Colorado, alleged a violation of the same standard as the one cited here. That citation became a final order of the Commission as a result of a settlement. *See, e.g., Ford Dev. Corp.*, 15 BNA OSHC at 2008, 1991-93 CCH OSHD at p. 40,800 (settlement agreement can form basis for repeat characterization). PAR argues that it rebutted the Secretary's case by showing that the facts and circumstances of the 1997 citation were substantially different. We find that the distinctions PAR points to are not sufficient to rebut the Secretary's showing of substantial similarity. The principal factor in determining if a violation is repeated is whether the two violations involved substantially similar hazards. *E.g., Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661, 1995-97 CCH OSHD ¶ 31,081, p. 43,364 (No. 93-1429, 1996), *aff'd without published opinion*, 117 F.3d 1433 (11th Cir. 1997); *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). As the judge noted, the foreman of the Colorado crew acknowledged in his testimony in this case that the hazard in the 1997 citation was an experienced journeyman lineman not wearing rubber protective gloves and sleeves while he was working within the minimum approach distance. That is the same hazard cited here. We therefore find, based on the evidence, that

the violation was repeated. *See generally Modern Continental Constr. Co. v. OSHRC*, 305 F.3d 43, 52-53 (1st Cir. 2002).

IV. Penalty

Taking into account the judge's decision, the record, and the penalty factors in section 17(j) of the Act, 29 U.S.C. § 666(j), we assess a penalty of \$20,000 for this repeat violation, as the judge did.

IT IS SO ORDERED.⁸

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: February 19, 2004

⁸Because we have decided the case on the basis of the record and submitted briefs before us, we deny PAR's motion for oral argument.

Secretary of Labor,

Complainant,

v.

PAR Electrical Contractors, Inc.,

Respondent,

IBEW, Local Union 53,

Authorized Employee
Representative.

OSHRC Docket No. 99-1520

APPEARANCES

Kathleen Butterfield, Esq.
Office of the Solicitor.
U. S. Department of Labor
Kansas City, Missouri
For Complainant

Eric T. Swanson, Esq.
Knipmeyer, McCann, Smith, Manz & Gotfredson
Kansas City, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION

PAR Electrical Contractors, Inc. (PAR), contracted to upgrade power lines in Warrensburg, Missouri. On April 19, 1999, while moving a new non-energized conductor on a 40-foot utility pole, a journeyman lineman contacted an energized conductor and was fatally electrocuted. Another lineman was burned. As a result of an investigation by the Occupational Safety and Health Administration (OSHA), PAR received a repeat citation on June 28, 1999. PAR timely contested the citation.

The repeated citation alleges that PAR violated 29 C.F.R. § 1926.950(c)(1)(i) by permitting two employees to work in the vicinity of an un-insulated energized conductor without wearing rubber protective gloves. The Secretary asserts that the violation was repeated based on a prior citation issued to PAR on March 6, 1997, involving a fatality in Morrison, Colorado. A penalty of \$25,000 is proposed for the current violation.

A hearing was held in Kansas City, Missouri, on February 16 - 19, 2000. The parties stipulated jurisdiction and coverage (Tr. 8).

PAR denies that it violated § 1926.950(c)(1)(i) because the employees were experienced journeyman linemen and their work did not require them to be within two feet of the energized conductor. PAR argues lack of knowledge and unpreventable employee misconduct that the 2-foot minimum approach distance was breached (Tr. 13-17).

The parties filed post-hearing briefs. For the reasons stated, a violation of § 1926.950(c)(1)(i) is affirmed.

Background

PAR, a utility contractor, is engaged in the construction and maintenance of power transmission and distribution systems in the Midwest. PAR's place of business is Kansas City, Missouri. It employs approximately 400 employees (Tr. 507, 539).

In April, 1999, pursuant to a contract with Missouri Public Service, PAR was replacing eleven power poles along PCA Drive, in Warrensburg, Missouri (Exh. C-1; Tr. 30, 508, 579-580, 604). The new 40-foot poles were erected near the old poles. The energized conductors were moved from the old poles to hot arms temporarily mounted to the cross arms on the new poles. Also, new non-energized conductors were temporarily placed in dollies installed on the cross arms of the new poles (Tr. 32, 40, 251, 471, 508, 522).

On the morning of April 19, 1999, at Pole #2¹ foreman John Frank and journeyman linemen Eugene Barkley and Samuel Vanover parked their truck-mounted aerial bucket along PCA Drive parallel to the pole (Exh. C-1; Tr. 142, 153, 222, 480-481, 573, 606, 622). Three energized conductors (two on one side of the pole and one on the other side) were secured to hot arms attached to the end of the cross arm (Exhs. C-9, C-10; Tr. 174, 471, 487). The three larger new non-energized conductors were in dollies installed on the cross arm (Exhs. C-2, R-2; Tr. 488, 515).

¹ Located one pole south of Fox Drive and Grandview Drive on the east side of PCA Road (Exh. C-1; Tr. 31). This was the third pole worked on that morning (Tr. 509-510, 605, 630).

The crew's job that morning required them to move the new non-energized conductors from the dollies to insulator pins attached at the end of the cross arm. After moving the conductors, the crew was to shoot ampact² (Tr. 32, 497, 511, 515). The first non-energized conductor needed to be moved 18 inches to the insulator pin. The insulator pin was located 26 inches from the nearest energized conductor on the hot arm (Exhs. C-1, C-2; Tr. 242, 519).

The parties agree that the energized conductor carried 7,200 volts phase to ground or 12,470 volts phase to phase. Also, the parties agree that based on the voltage, OSHA requires a minimum approach distance of 24 inches (2 feet) from the energized conductor unless the employee or conductor is insulated, guarded or isolated (Tr. 19, 745).

Prior to initiating work, the crew discussed the job and decided that it was not necessary to insulate or guard the energized conductor. Also, the linemen decided not to wear rubber protective gloves or sleeves (Tr. 265, 497, 502, 605, 612, 628, 635). While foreman Frank remained at the truck preparing cut outs, journeyman linemen Barkley and Vanover moved the aerial bucket up to the cross arm on Pole #2 (Tr. 503-504). Vanover operated the bucket and Barkley was positioned closest to the dolly and insulator pin on the cross arm (Tr. 612).

The aerial bucket was 28 inches wide, 49 ½ inches long³ and 41 inches deep (Exhs. C-15, C-16, C-17, C-18; Tr. 87-89, 228). The distance between the non-energized conductor in the dolly which was being moved and nearest energized conductor (1/0 conductor) was 44 1/4 inches. The insulator pin where the conductor was to be moved was 26 1/4 inches from the energized conductor (Exhs. C-2, R-2; Tr. 34, 41, 52-53, 241).⁴

According to lineman Barkley, he first removed the non-energized conductor from the dolly and placed it on the cross arm. After placing insulator boots on the conductor, Barkley then lifted the new conductor on his left shoulder and moved it to a point above the insulator pin (26 1/4 inches from the energized line). At that point, he heard a loud boom, felt heat and fell to the

² An ampact tool is used to shoot ampact on the line to run a stirrup from one line to another, which energizes one line off of another line (Tr. 42, 46, 497-498). It is a conductive object (Tr. 236).

³ Measurement of bucket does not include the two inch lip which ran around the top of the bucket.

⁴ The measurements were made by Missouri Public Service after the accident (Exh. C-2). The parties do not dispute the measurements (Tr. 14-15).

bottom of the bucket (Exhs. C-2, C-4, C-42; Tr. 613-615, 639). The accident occurred at 9:30 a.m. (Tr. 64, 266). Barkley received minor burns (Tr. 255). Vanover, who was behind Barkley, was electrocuted. According to the autopsy report, there was an entrance wound in the palm of Vanover's left hand and an exit wound on the posterior surface of his left thigh (Exh. C-43; Tr. 181, 233). Neither linemen was wearing rubber gloves and sleeves (Tr. 181, 183-184). The new conductor was found 33 1/4 inches from the energized line (Exh. C-2; Tr. 505).

Safety compliance officer (CO) Brian Drake initiated the investigation on April 20, 1999. When he arrived at the site, the equipment had been moved to another location. CO Drake obtained photographs from the police department, diagrams and measurements from Missouri Public Service, and interviewed the employees and management of PAR (Tr. 28, 266-268). Based on his recommendation, a repeat citation was issued on June 28, 1999.

Discussion

The Secretary has the burden of proving a violation.

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

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation of § 1926.950(c)(1)(i)

The citation alleges that on April 19, 1999, two employees were working from an aerial bucket within the vicinity of an un-insulated energized conductor without rubber protective gloves and sleeves. Section 1926.950(c)(1) provides:

No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table V-1 unless;

- (i) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or
- (ii) The energized part is insulated or guarded from him and any other conductive object at a different potential, or
- (iii) The employee isolated, insulated, or guarded from any other conductive object(s), as during live-line bare-handed work.

According to Table V-1, to § 1926.950(c)(1), the minimum approach distance to an energized conductor with voltage of less than 15,000 phase to phase is two feet (24 inches). PAR does not dispute that at the time of the accident, the phase-to-phase voltage was 12,470 at Pole #2.

Application of § 1926.950(c)(1)(i)

Section 1926.950 applies to the construction of electric transmission and distribution lines and equipment. At the time of the accident, PAR was erecting new poles and installing new power lines for the distribution of electric power to customers of Missouri Public Service (Tr. 745).

The minimum approach distances required by § 1926.950(c)(1) applied to PAR's work at the time of the accident.

Noncompliance With § 1926.950(c)(1)(i)

The parties agree that the applicable minimum approach distance at Pole #2 was 2 feet. If within the minimum approach distance of 2 feet, § 1926.950(c)(1) requires insulating, guarding or isolating the employee or energized conductor. PAR acknowledges that the linemen at the time of the accident were not wearing their rubber protective gloves and sleeves and the nearest energized conductor was not insulated or protected from contact.

PAR argues that the linemen's work did not require them to work within the 2-foot minimum approach distance and neither the energized line nor the employees needed insulation, guarding or isolation. Also, the linemen were working from inside an insulated aerial bucket.

There can, however, be no dispute that Vanover breached the 2-foot minimum approach distance and was electrocuted when he came in contact with an energized line. The autopsy report shows an entrance wound in the palm of Vanover's left hand (Exh. C-43).

No one saw the accident. Foreman Frank was in the truck, not observing the work, and Barkley was holding the non-energized conductor with his back to Vanover.

The Secretary theorizes that Vanover was reaching with his left hand to retrieve the tie wires or the ampact tool from the grunt bag hanging on the backside (closet side to the energized line) of the aerial bucket. When removed from the bag, the ties or tool contacted the energized line. At the same time, Vanover's left posterior thigh contacted the non-energized conductor (Exh. C-3; Tr. 166, 191, 343-344, 363). The ties were found burned and the ampact tool hanging from the energized line after the accident.

PAR disputes the theory. PAR notes that until the non-energized conductor was placed in the insulator pin, the tie wires and ampact tool were not needed. Also, if the non-energized conductor was on Barkley's left shoulder and the depth of the aerial bucket was 41 inches, it was almost impossible for Vanover to contact the un-energized conductor on his left posterior thigh (Tr. 229).

Regardless of how the accident occurred, the fact remains that Vanover or an object held by Vanover came within the 2-foot minimum approach distance of an energized conductor and neither the energized conductor nor Vanover was insulated, guarded or isolated, as required by § 1926.950(c)(1). Vanover was not wearing rubber protective equipment or otherwise protected (Tr. 635).

Employee Exposure

At least a portion of the aerial bucket was positioned within the 2-foot minimum approach distance from the energized line. Foreman Frank told OSHA that the backside of the aerial bucket was approximately 1 1/2 feet from the energized line (Tr. 141, 170). This statement remains unrefuted. The bucket was at an angle with one corner where Barkley was working closest to the cross arm with the dolly and insulator pin (Tr. 492, 503-504, 613, 622). Vanover

was the bucket operator working the controls at the back of the bucket (Tr. 612). The position of the bucket remained the same until the accident (Tr. 493, 613-614).

In order to prove employee exposure, the Secretary must show that employees have been, are, or will be in the “zone of danger” during their assigned working duties. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993). Exposure can be established by actual or foreseeable exposure; is it reasonably predictable that during the course of normal work duties, an employee might be in the “zone of danger” posed by the condition. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1285 (No. 91-862, 1993).

Despite the crew’s plan, Vanover breached the 2-foot minimum approach distance to the energized conductor. Vanover was electrocuted. Actual exposure is established. PAR also recognizes that since both linemen were working from the same aerial bucket, both linemen were exposed even if only one lineman breached the minimum approach distance (Tr. 958).

Employer Knowledge

In order to establish employer knowledge, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition. When a supervisory employee has actual or constructive knowledge of the condition, knowledge is imputed to the employer. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). PAR’s work plan was for the linemen to maintain a 2-foot minimum approach distance from the energized conductor (Tr. 502). The crew was to move a non-energized conductor from a dolly (44 1/4 inches from the energized conductor) to an insulator pin (26 1/4 inches from the insulator pin) (Exh. C-2). According to the plan, the linemen’s work brought them within 3 inches of the 2-foot minimum approach distance.

There is no dispute that John Frank, foreman, was a supervisory employee. Foreman Frank was on site and in part observing the linemen’s activities at the cross arm (Tr. 514). Frank was knowledgeable of the distance of the insulator pin from the nearest energized conductor. He knew that the insulator pin was within 26 1/4 inches of the energized conductor. He observed that at least a portion of the aerial bucket was approximately 18 inches from the energized conductor (Tr. 141, 170). The bucket was at an angle to the cross arm (Tr. 487, 492). Frank also

stated that the linemen's heads and shoulders were above the non-energized conductor (Tr. 141, 289). He saw the linemen approximately 33 inches (location of energized line after the accident) from the energized line (Tr. 505). He also knew the linemen were not wearing rubber protective gloves and sleeves and the energized line was not insulated.

As foreman, it was Frank's responsibility to supervise the work of moving the non-energized conductor (Tr. 469, 480, 514, 519, 521). He had the responsibility to assure the work was safely performed. Frank knew that it was part of his job to assess the work site, including clearances, as well as monitoring the crew's clearance (Tr. 513-514).

Based on Frank's presence at the job site and his knowledge of the work activities, the Secretary has established constructive knowledge. With the exercise of reasonable diligence, Frank should have known that the linemen's work might breach the 2-foot minimum approach distance. Frank's knowledge is imputed to PAR.

The record shows that the linemen's work was not reasonably expected to be done without breaching the minimum approach distance. Reasonable diligence requires adequate supervision of employees and includes the implementation of training programs and work rules designed to ensure that employees perform their work safely. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991). Frank was aware of the physical conditions constituting the violative condition. He need not acknowledge that the physical conditions were hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995).

The intended placement of the non-energized line was only 2 1/4 inches from the 2-foot minimum approach distance. Although Frank knew that the linemen's work was within 2 1/4 inches of the minimum approach distance, he told them that they had "plenty of room" to do the work (Tr. 520-521). As expressed by Johnny Dagenhart, electrical engineer and the Secretary's expert in accident investigation, "it was reasonably foreseeable that the workers would be exposed to a hazardous condition" (Tr. 328). He stated that:

[e]ven though there's 26 1/4-inch distance from the top of that insulator over to the energized conductor that--that's 2 1/4 inches from where you're working, 24 inches or 2 feet, and somehow you have that conductor over the top of that insulator, and in this case they are carrying or moving it with their hands. And it would seem to me that the width, of even 1/5, is going to--or if you're having

this conductor somewhat off-center at your body, your shoulders are going to be penetrating that 2-foot distance, unless you're contorting yourself to some strange manner, that conductor is--it's just--you have to move that conductor in such a way, in my opinion, it's virtually impossible not to get within that 2-foot distance.

(Tr. 332).

Also, the positioning of the aerial bucket put the linemen within the zone of danger. The tie wires, ampact tool and glove bag were placed on the backside of the bucket also within the 2-foot zone (Exh. C-3; Tr. 523-525, 528, 633-634). The tie wires and ampact tool were to be used after the non-energized conductor was placed in the insulator pin (Tr. 635-636).

A concern about encroaching the minimum approach distance was expressed by other journeyman linemen. Although Barkley testified that "we were comfortable with it [positioning of the bucket]), he also stated that "we look it over and were about 8 or 10 inches or so from the hot face being on the boom, on the boom of the bucket" (Tr. 613). Barkley also stated that he was holding the new conductor on his left shoulder directly over the insulator pin (Tr. 613-614). Barkley's shoulder and arm would have encroached the 2-foot minimum approach distance.

Lyle Query, union business manager and journeyman lineman, agreed that it was "fairly close." However, Query concluded that "it's possible to complete that function without -- the bucket in that location -- without breaching the 2-foot rule, yes" (Tr. 561).

Mark Biernbaum, PAR's director of safety, testified that in his opinion, there was clearance enough to do the work (Tr. 867). However, Biernbaum concedes that if the aerial bucket was positioned as theorized by the Secretary, rubber protective equipment should have been worn (Tr. 860-861).

No one saw the contact with the energized line or what Vanover was doing at the time of the contact. The Secretary's reconstruction of the accident, however, is reasonable.

A violation of § 1926.950(c)(1)(i) is found.

Unpreventable Employee Misconduct

Although noncompliance with § 1926.950(c)(1) is found, PAR has asserted as an affirmative defense that the violation was due to unpreventable employee misconduct. In order

to establish employee misconduct, PAR must show that it has (1) established work rules designed to prevent reasonably anticipated violative conditions; (2) adequately communicated the work rules to its employees; (3) taken steps to discover violations of the rules; and (4) effectively enforced the work rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).⁵ In essence, the issue is whether the conduct by the employee was a departure from a uniform and effectively communicated and enforced work rule. PAR asserts that if Vanover had followed its procedure for remaining outside the 2-foot approach distance, the accident would not have occurred. PAR asserts that Vanover's activity was a departure from its work plan and did not comply with its safety rules.

Safety Rule

PAR's safety rule provides that:

When working from an aerial lift truck, pole, structure or ladder in the vicinity of energized conductors or devices, a worker shall not approach closer than 2 feet minimum distance from parts that are energized at 601 volts or more without wearing high voltage rubber gloves as minimum protection.

(Exh. R-10, p. 88; Tr. 747).

In comparison with the requirements of §1926.950(c)(1)(i), PAR's written safety rule is inadequate. PAR's rule does not include the handling of conductive objects such as tools and equipment within the approach distance. It appears limited to employees within the approach distance. PAR's rule also does not provide for the option of insulating or covering the conductor (Exh. R-10, p. 88; Tr. 883-884).

It is noted that this accident occurred most likely when Vanover retrieved a conductive part (tie wires or ampact tool) from the back of the aerial bucket within the 2-foot approach distance. PAR's safety rule as written does not prohibit such activity.

⁵ The parties agree that the 8th. Cir. case law applies which recognizes that unpreventable employee misconduct is an affirmative defense (Tr. 20). See *Danco Construction Company v. OSHRC*, 586 F.2d 1243 (8th Cir. 1978).

Communication

In addition to an inadequate safety rule, PAR also fails to show that the rule was communicated to employees, including Vanover, Barkley, and Frank.

PAR's safety department performs monthly safety meetings for employees (Exh. R-3, R-32; Tr. 749-750, 753, 760). Also, the crew foremen have weekly safety meetings (Exhs. R-4, R-5; Tr. 768-769). According to foreman Frank, he additionally had daily tailgate meetings with his crew which discussed the job and safety topics (Tr. 533-534).

The record, however, does not reflect that employees Frank, Barkley and Vanover were present during a monthly safety meeting when the approach distance was discussed. Also, because Vanover had only been employed by PAR for less than four weeks,⁶ safety director Biernbaum acknowledges that Vanover had not attended any of the monthly safety meetings (Tr. 904). PAR fails to show that Vanover received any training or was even provided a copy of the safety manual.

With regard to the weekly meetings, foreman Frank testified that he did not conduct the weekly meetings because he felt that the topics chosen by the safety department were covered during his daily tailgate meetings (Tr. 533-534). He did not complete the weekly safety meeting forms and return them to PAR's safety department (Tr. 530, 776, 928). PAR's failure to know that Frank was not conducting weekly safety meetings shows a lack of internal controls (Tr. 776). General foreman Clyde Webster testified that he did not pay attention if the weekly safety meeting forms were returned by the foremen (Tr. 598).

The daily tailgate meetings allegedly performed by Frank were not documented. Frank did not testify as to a specific tailgate meeting which emphasized the minimum approach distance. According to lineman Barkley, Frank generally did not participate in all tailgate meetings (Tr. 628-629, 643). Barkley, who is no longer employed by PAR, expressed concern about being blackballed in the industry or other repercussions if he said anything bad about Frank (Tr. 627, 647).

⁶ There is no evidence that Vanover had worked at other times for PAR.

PAR's safety training in safety rules, including the minimum approach distance, relies on the apprenticeship training for linemen provided by the union and the lineman's past experience. PAR argues that the two linemen involved in this accident were very experienced journeyman linemen. As a union member, PAR points to the union's extensive 7,000 hour apprenticeship training program, including its training on the minimum approach distances (Exhs. R-11, R-12, R-13; Tr. 499, 547, 552, 735).

Vanover, 59 years old, was considered to have the most experience (Exh. C-43; Tr. 499). Both foremen Frank and Barkley considered Vanover a good, safe employee (Tr. 499, 605). Clyde Webster, Par's general foreman and a journeyman lineman for 30 years, previously had worked with Vanover for twelve years. He considered Vanover "a qualified man, very good lineman" and "easy to work with" (Tr. 582).

PAR, however, fails to show that Vanover received the apprenticeship training through the union's program. It was not shown what training Vanover did receive to become a journeyman lineman. Although a union member, Vanover was referred to as a tramp⁷ lineman who had worked for PAR less than three weeks (Tr. 605).

Despite an employee's past training and experience by the union or another employer, PAR is not relieved of its responsibility to have adequate safety rules and training. The OSH Act places the ultimate responsibility for compliance with its requirements on the employer, who cannot contract away those duties to another party. *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992).

The standard requires employees to remain outside the minimum approach distance unless otherwise insulated or guarded. The standard does not exempt union or experienced employees from its requirements. An employer cannot rely on an employee's training by former employers or the union in satisfying its responsibility to provide a safe workplace. *Supermason Enterprises, Inc.*, 16 BNA OSHC 1446, 1448 (No. 92-2235, 1993). Unless such safety rules are regularly repeated and reinforced, there is a tendency for employees to forget them and not to take them seriously.

⁷ A tramp is a lineman who regularly moves from one contractor to another for work (Tr. 588).

The record fails to show that PAR communicated its safety rule regarding minimum approach distance to Frank's crew.

Enforcement

PAR asserts that its safety rules were enforced through a progressive discipline program, including verbal and written warnings, lost pay and discharge (Tr. 846). PAR documented its disciplinary actions (Exh. R-31). For the most part, however, the disciplinary action involved DOT standards for drug testing (Tr. 848). The disciplinary records do not reflect any discipline for violating the minimum approach distance rule. General foreman Webster testified that he has given verbal warnings and terminated employees. However, it was usually for insubordination, not for safety infractions (Tr. 596).

REPEAT CLASSIFICATION

The Secretary classified PAR's violation of § 1926.950(c)(1)(i) as repeated. A violation is considered a repeated violation under § 17(a) if, at the time of the alleged violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity by showing that both violations are of the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

A review of the prior citation issued to PAR in Morrison, Colorado, in 1997, shows that it involved the same standard, § 1926.950(c)(1)(i). The citation has become a final order (Exh. C-44; Tr. 194, 196, 565).

In March, 1997, PAR received a citation for a violation of § 1926.950(c)(1)(i) as a result of a journeyman lineman working on an energized line within two feet without insulated rubber gloves. The lineman was fatally electrocuted (Exh. C-44; Tr. 194, 205, 567-568). According to the foreman of the Colorado crew, the employee, an experienced journeyman lineman, was not wearing rubber protective gloves and sleeves and he was working within the minimum approach distance (Tr. 568, 570).

The violation in the present case was properly classified as a repeat violation.

PENALTY CONSIDERATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the employer's size of business, history of previous violations, its good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

PAR is a large employer with 400 employees and does business in several Midwestern states (Tr. 439). PAR has a history of prior violations within three years, including violations of the same standard. The prior citations are final orders (Exhs. C-44, C-53, C-54, C-55).

A penalty of \$20,000 is reasonable for PAR's repeated violation of § 1926.950(c)(1)(i). The gravity is high. Two employees were exposed to 7,200 volts phase to phase. Vanover's position and work was reasonably expected to place him within the minimum approach distance. Rubber protective gloves and sleeves were in the insulated aerial bucket, but not worn. The employees were experienced journeyman linemen.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Item 1, repeated violation of § 1926.950(c)(1)(i), is affirmed and a penalty of \$20,000 is assessed.

Date: August 21, 2000

/s/
KEN S. WELSCH
Judge