



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

Phone: (202) 606-5100  
Fax: (202) 606-5050

SECRETARY OF LABOR

Complainant,

v.

WILLIAMS CONSTRUCTION CO.,  
INC.,

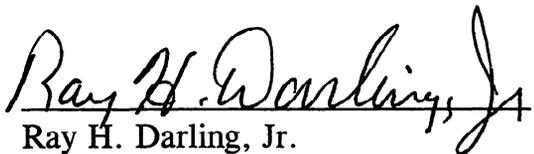
Respondent.

Docket No. 93-1190

**ORDER**

The parties stipulation and settlement agreement is approved.

BY DIRECTION OF THE COMMISSION

  
Ray H. Darling, Jr.  
Executive Secretary

Dated: August 1, 1995

1995 OSHRC No. 41

Docket No. 93-1190

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
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Benjamin R. Loye  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Room 250  
1244 North Speer Boulevard  
Denver, CO 80204-3582

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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ROBERT B. REICH, SECRETARY OF LABOR,

Complainant,

v.

WILLIAMS CONSTRUCTION CO., INC.,

Respondent.

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: OSHRC Docket No. 93-1190  
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**STIPULATION AND SETTLEMENT AGREEMENT**

**I**

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which is currently pending before the Commission.

**II**

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, Williams Construction Co., Inc., that:

1. Complainant hereby dismisses and withdraws with prejudice item 1a of Citation 1, alleging a violation of 29 C.F.R. §1926.950(c)(1), the only citation item remaining in this case, and the notification of proposed penalty for that item.

2. Complainant hereby agrees to pay \$80,000 to respondent for attorney's fees and expenses in this proceeding in full settlement of respondent's application for attorney's fees and expenses under the Equal Access to Justice Act.

3. Respondent hereby dismisses and withdraws with prejudice its petition for attorney's fees and expenses.

4. No employee or authorized representative of employees elected party status in this case.

5. Respondent certifies that a copy of this Stipulation and Settlement Agreement was served on affected employees by posting on the 19<sup>th</sup> day of July, 1995, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

6. This stipulation is effective upon approval of an order of dismissal with prejudice of Docket No. 93-1190 by the Commission.

Dated this 19<sup>th</sup> day of July, 1995.

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.  
Solicitor

JOSEPH M. WOODWARD  
Associate Solicitor for  
Occupational Safety and Health

DANIEL J. MICK  
Counsel for Regional  
Trial Litigation



IRIS H. BASTA  
Attorney for Respondent  
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U.S. Department of Labor  
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SECRETARY OF LABOR  
Complainant,

v.

WILLIAMS CONSTRUCTION COMPANY, INC.  
Respondent.

OSHR DOCKET  
NO. 93-1190

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 8, 1994. The decision of the Judge will become a final order of the Commission on January 9, 1995 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 December 28, 1994 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  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: December 8, 1994

DOCKET NO. 93-1190

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,  
Complainant,

v.

WILLIAMS CONSTRUCTION  
COMPANY, INC.,  
Respondent.

OSHRC DOCKET  
NO. 93-1190

**APPEARANCES:**

Tobias B. Fritz, Esq., Office of the Solicitor, United States Department of Labor,  
Kansas City, Missouri

Iris H. Basta, Esq., David L. Jackson, Esq., Jackson, Murdo, Grant & McFarland, P.C.,  
Helena, Montana

Before: Administrative Law Judge Benjamin R. Loye

**DECISION AND ORDER**

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

Respondent, Williams Construction Company, Inc. (Williams), at all times relevant to this action maintained a worksite on property owned by the Ravalli Electric Cooperative, near Hamilton, Montana, where it was engaged in electrical power line construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 29, 1993 pursuant to an investigation of a September 30, 1992 accident at Williams' Ravalli worksite, the Occupational Safety and Health Administration (OSHA) issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 25-28, 1994 a hearing was held in Helena, Montana. During the hearing the parties stipulated to the withdrawal of all but "serious" citation 1, item 1a, alleging violation of §1926.950(c)(1). The parties have submitted briefs on the issues and this matter is ready for disposition.

### Alleged Violations

Serious citation 1, item 1a alleges:

29 CFR 1926.950(c)(1): An employee was permitted to approach and take conductive object without an approved insulating handle closer to exposed energized parts than shown in Table V-1:

(a) 3 Miles East of Hamilton, Montana on the Bitterroot Stock Farm on or about September 30, 1992.

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 is isolated, insulated, or guarded from any other conductive object(s), as during live-line bare-hand work.

Table V-1 prescribes a minimum working and clear hot stick distance of 2 feet for voltages of 2.1 to 15 kilovolts.

Stipulated Facts

The parties stipulate that Craig Cleaves, an apprentice lineman, was electrocuted on September 30, 1992 while employed by Williams. Immediately prior to the accident, Cleaves was outside of, but able to reach past the allowable approach distance, into the two foot protective zone mandated for a voltage of 7.2 kv under Table V-1.

The parties further stipulate that Williams has an adequate safety program which is effectively communicated and enforced. Cleaves was trained, consistent with Williams' safety policy not to reach into the safety zone mandated under Table V-1. Williams had no work rule, however, prohibiting linemen from working from a position from which they could reach within the safety zone, and Cleaves' positioning was consistent with Williams' training and normal operating procedures.

The parties agree that Cleaves was electrocuted when, contrary to his training, he hung a handline on an unguarded energized conductor. Cleaves' action, reaching inside the two foot protective zone with a conductive object, was an isolated incident of misconduct, contrary to Williams' work rules. [Tr. Vol. 4, Exh. A]

Issues

The parties agree that the only matter at issue is the Secretary's interpretation of the cited standard. The witnesses agree that a violation of the standard is established here, and any time any part of an employee's body enters the two foot limit imposed by the standard. The Secretary maintains, however, that in order to ensure compliance with the standard the employer must adopt and enforce a policy prohibiting employees from positioning themselves within reach plus two feet of the energized line.

Discussion

Section 1926.950(c)(1) requires that the employer keep employees from entering the hot stick area established by table V-1. The standard does not, however, prescribe the manner in which this is to be accomplished. Complainant here seeks to enlarge the scope of the standard, requiring the employer to employ a specific means of securing compliance. The Complainant argues that its interpretation is consistent with the purposes of the Act in that it affords greater protection for employees. Complainant

maintains that its interpretation is reasonable and is, therefore, entitled to deference. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991).

The undersigned finds, however, that Complainant's interpretation of the standard is inconsistent with the evidence in the record, which establishes the Secretary's intent regarding the purpose of minimum approach distances. Complainant's interpretation must, therefore, be rejected.

The Commission has held that the preamble to the final rule is the most authoritative statement of the Secretary's intent. *Secretary of Labor v. American Sterilizer Co.*, 15 BNA OSHC 1476, 1992 CCH OSHD ¶29,575 (No. 86-1179, 1992). The cited standard was originally adopted as a consent standard without hearing and comment; however, new electrical power generation, transmission and distribution standards were promulgated in January 1994, along with detailed commentary. In regards to §1910.269, which is based on §1926.950 and adopts the clearance values from Table V-1 the preamble states:

[E]ach of these distances, was intended to provide a sufficient gap between the worker and the line so that the current could not arc to the employee under the most adverse transient voltage that could be imposed on the line plus an amount for inadvertent movement on the part of the employee.

59 Fed.Reg. 4320, 4381 (January 31, 1994)

. . . OSHA must first determine the size of the air gap that must be present so that an arc does not occur during the most severe over voltage on the system. This has been referred to as the electrical component of the minimum approach distance. To determine the minimum safe approach distance, OSHA must then add an extra distance to account for ergonomic considerations or human error.

*Id.* at 4383.

The ergonomic data in the record are limited. The relevant data from the record include a typical arm's reach of about two feet and a reaction time to a stimulus of .2 to more than 1.0 second. To prevent an employee from breaching the air gap required for the electrical component, the ergonomic distance must be sufficient for the employee to be able to recognize a hazardous approach to an energized line and withdraw to a safe position.

\* \* \*

It should be noted that the ergonomic component of the minimum approach distance is only considered a safety factor that protects employees in case of errors in judging and maintaining the full movement approach distance. The actual working position selected must account for the range of movements that could normally be anticipated while an employee is working. Otherwise, the employee would violate the minimum approach distance while he or she is working.

*Id.* at 4384

If the interpretation advanced here by Complainant were adopted, the cited comments would be meaningless, as Complainant's interpretation is designed to make inadvertent movement into the hot stick zone impossible. It is clear from the preamble that the intent of the drafters was, rather, to establish a performance standard, building in enough latitude to allow employees to select a working position which would not bring them into the standard's clearance zones, based on their range of *anticipated*, not possible, movements. Complainant's position is inconsistent with that intent, as it would establish a strict specifications standard, eliminating any exercise of judgment.

The undersigned recognizes that the preamble to §1910.269 is not directly applicable to §1926.950. However, to ignore the document would lead to an absurd result. Employers cited for violation of §1910.269(1)(2) could be held to a *less* stringent standard than those cited under the parallel standard 1926.950, without any evidence that the Secretary intended to establish less rigorous requirements. In the absence of any evidence that OSHA issued interpretive rules, or agency enforcement guidelines addressing its reach plus two interpretation, this judge cannot find that the Secretary intended such a result.

This judge finds that Complainant's suggested means of compliance, though a good way to satisfy the employer's obligation, is not the only means allowed under the standard. Based on the stipulated facts indicating that employee Cleaves' action in reaching past the minimum approach distance was an act of isolated employee misconduct, the citation in this matter will be dismissed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 1a, alleging violation of §1926.950(c)(1) is VACATED.



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Benjamin R. Loye  
Judge, OSHRC

Dated: December 2, 1994