

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

Secretary of Labor,

Complainant,

v.

Davis H. Elliot Construction Company, Inc.,

Respondent.

OSHRC Docket No. **04-0836**

Appearances:

Joseph B. Lockett, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee
For Complainant

Carl B. Carruth, Esq., McNair Law Firm, P.A, Columbia, South Carolina
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Davis H. Elliot Construction Co., Inc. (DHE), contests a one-item citation issued by the Secretary on April 23, 2004. The citation resulted from an investigation of an employee fatality at DHE's worksite in Athens, Alabama, by Occupational Safety and Health Administration (OSHA) compliance officer Michelle Sotak on October 30, 2003. A DHE crew was installing new power lines along Highway 251 on that date, when one of its four-man crew members made contact with an energized line and was electrocuted.

The Secretary alleges that DHE committed a serious violation of 29 CFR § 1926.950(c)(1), which requires that no employee be permitted to approach exposed energized parts with any conductive object closer than the minimum approach distances set out in Table V-1, unless one of three exceptions applies.

DHE concedes jurisdiction and coverage. A hearing was held in this matter on December 2, 2004, in Decatur, Alabama. DHE argues that the violation resulted from unpreventable employee misconduct.

For the reasons discussed below, it is determined that the Secretary failed to establish that DHE knew of the violative condition. Accordingly, item one of the citation is vacated.

Background

On October 30, 2003, DHE was installing new power lines along Highway 251 in Athens, Alabama. DHE had been at the site for approximately six months prior to that date. Its four-man crew consisted of foreman Sam Haskins, groundsman/operator Jerry Wagnon, groundsman Richard Wright, and lineman Wade Casey (Tr. 11-12).

The crew had begun work, as usual, at 6:00 that morning (Tr. 74). The crew worked in pairs. Lineman Casey worked with Wagnon as his groundsman, and Haskins worked as a lineman with groundsman Wright. The linemen were clipping and tying in new power lines that were not yet energized. Casey was working from an aerial bucket elevated approximately 45 feet (Tr. 14, 103). The old energized lines were located on a fiberglass hot arm approximately 25 to 28 inches from where Casey was working (Tr. 15-16).

By 9:30 that morning, Casey and Wright had completed three poles. As Casey began work on the fourth pole, Haskins and Wright were working on a pole approximately 1000 feet down the road (Tr. 27, 74). Casey was holding a pre-form tie, which is used to hold the conductor in place on the insulator (Tr. 16). The pre-form tie is conductive and measures 21 inches doubled over (Tr. 23).

No one observed the accident, but the evidence indicates that Casey was holding the pre-form tie when it made contact with the energized 7200 volt line. Casey was not wearing rubber gloves or sleeves, and he had not covered the energized lines with insulating blankets or hoses. Casey had all of these items available for use in the aerial lift with him. He had used the protective equipment when working on the first three poles. Casey was wearing leather work gloves at the time of the accident (Tr. 27-30).

Wagnon was tidying up the truck when he heard Casey yell. Wagnon looked up and could not see Casey, but he observed that there was no protective cover on the energized lines, as there had been previously. Wagnon tried to radio Casey but got no response. Wagnon attracted the attention of Haskins and Wright, who immediately came over and lowered the aerial bucket. The crew administered CPR to Casey and called for emergency medical assistance, which arrived by helicopter a short time later (Tr. 196). Casey was dead by electrocution.

Compliance officer Sotak arrived at the scene at approximately 6:00 that night (Tr. 9). She had investigated DHE six months earlier for another employee fatality in Athens, Alabama, under strikingly similar circumstances. On April 16, 2003, DHE's five-man crew, working on the same project, was engaged in the same type of work. Three members of the crew working when the October 30 fatality occurred were also working when the April 16 fatality occurred: Sam Haskins was working as general foreman, Richard Wright was a groundsman and Wade Casey was a lineman. Foreman Danny Parsons and groundsman Chris Weems completed the April crew.

In that instance, Parsons was electrocuted as he worked from an aerial bucket when a copper wire he was holding made contact with an energized 7,200 volt line. Parsons was not wearing rubber gloves or sleeves, or using protective cover on the energized lines.

As a result of the first fatality, the Secretary issued a citation containing two sub-items to DHE on July 14, 2003, charging DHE with serious violations of §§ 1926.950(c)(1)(i) and 955(c)(3) (this last item was withdrawn by the Secretary at the hearing). The case went to hearing on May 25 and 26, 2003. Despite finding a violation of § 1926.950(c)(1)(i), in a decision issued on December 6, 2004, Administrative Law Judge Ken S. Welsch vacated the item based on his determination that the violation resulted from Parsons's unpreventable employee misconduct.

On October 30, 2003, Sotak conducted an investigation of the second fatality. She examined the scene, took photographs, and interviewed employees. As a result of her investigation, the Secretary issued the instant citation on April 23, 2004.

Item 1: Alleged Serious Violation of § 1926.950(c)(1)

The Secretary alleges that DHE committed a serious violation of § 1926.950(c)(1), which provides:

No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energizing 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-handed work.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions.

Southwestern Bell Telephone Co., 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

At the hearing and in its post-hearing brief, DHE focused only on its affirmative defense of employee misconduct and did not dispute the Secretary's claim that Casey's conduct violated § 1926.950(c)(1). Neither, however, did it concede that it had violated § 1926.950(c)(1). It is the Secretary's burden to prove each and every element of the alleged violation. The undersigned concludes that the Secretary failed to establish the element of knowledge. Accordingly, her case must fail.

Applicability

Section 1926.950 applies to the construction of electric transmission and distribution lines and equipment. DHE was installing new power lines for the distribution of electric power. The minimum approach distances required by § 1926.950(c)(1) apply to DHE's work.

The energized line Casey contacted was 7,200 volts. Table V-1 of § 1926.950 requires a minimum approach distance of 2 feet for an energized line with voltage of less than 15,000 volts phase to phase. The 2-foot minimum approach distance applies to Casey's work.

Terms of the Standard Not Met

If an employee or a conductive object held by an employee comes closer than the minimum approach distance to the energized part, § 1926.950(c)(1)(i), (ii), and (iii) require insulation of the employee (gloves and sleeves), insulation of the energized part (insulating blankets or hoses), or isolation of the employee from conductive objects. Casey was not wearing rubber gloves or sleeves and the adjacent energized line was not insulated or protected. The conductive pre-form tie was 21 inches long, folded over. Counsel for DHE raised the possibility that it was Casey's hand, and not the pre-form tie, that made contact with the energized line (Tr. 50-51); however contact was made, the Secretary established that the minimum approach distance was transgressed, and the terms of the standard were not met.

Employee Exposure

Casey's tragic death establishes employee exposure.

Knowledge

The Secretary does not contend that DHE had actual knowledge that Casey was in violation of § 1926.950(c)(1). Wagnon testified Casey had used rubber gloves, sleeves, and insulating blankets on the previous three poles he had worked on that day (Tr. 92). Haskins and Wright were approximately 1000 feet away and Haskins's back was turned towards Casey as he worked on the fourth pole (Tr. 196). None of the crew was aware that Casey was not using appropriate protective equipment until after he was electrocuted.

Employer knowledge can be established by showing constructive knowledge. Constructive knowledge is shown if the employer could have known of the violative condition with the exercise of reasonable diligence. 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, and to take measures to prevent the occurrence of the violation. *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992).

The evidence needed to establish constructive knowledge overlaps the evidence needed for the employer to establish an affirmative defense of employee misconduct. The primary difference between establishing constructive knowledge and establishing employee misconduct is which party bears the burden of proof. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

DHE has a written "Safety Handbook and Work Process Manual" that contains its work safety rules. Three of its rules (Rule 1.29, Rule 3.03, and Rule 3.43) address the minimum approach distance, the use of personal protective equipment (PPE) in the form of rubber gloves and sleeves, and the use of insulated covers. These rules meet or exceed the requirements set out in subpart V (Power Transmission and Distribution) of OSHA's construction standards (Exh. R-8).

DHE's employees receive a copy of the safety handbook and undergo safety training during their orientation (Tr. 97, 111-112). New hires are required to attend lectures, videos, and power point presentations covering various safety topics. At the end of the training, employees are given a written examination and must attain a passing score before they are allowed to work for DHE (Tr. 113). Keith Simpson, DHE's manager for the southern region, spoke individually with all of the crew members following Parsons's death. He reviewed the safety rules with them and found that each of them understood the rules and was committed to following them. Simpson did not believe retraining was necessary based upon his conversations with the crew members (Tr. 170-171, 179).

Haskins held daily morning safety meetings with his crew, where he frequently discussed minimum approach distances and the use of PPE (Tr. 86-89). As a working foreman, Haskins took several breaks in the morning and the afternoon to check on the other team. Wagon testified that, "If we were on a pole that Wade was on and had quite a bit of stuff on it, Sam would, you know, come down and come over and check to make sure everything was going like it was supposed to" (Tr. 100). Haskins was known within the company for being a stickler for safety rules, requiring his crew members to go beyond the requirements set out in the safety manual (Tr. 138-139).

The Secretary argues that because Haskins was on the site and because he knew that Casey would be in proximity to energized lines, the exercise of reasonable diligence would have prevented his accident. A supervisor, however, is not required to monitor his or her employees 100% of the time. Casey was an experienced lineman performing routine lineman work. "[T]he employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A. C. A., Inc.*, 17 BNA OSHC 1048, 1051 (No. 91-3467, 1995) (emphasis in original).

The undersigned is not unmindful that the occurrence of two fatalities to the same crew working on the same project under nearly identical circumstances only six months apart merits close scrutiny. The fatalities raise a red flag regarding DHE's safety program. The record, however, yields insufficient evidence establishing specific inadequacies of DHE's program.

It is noted that Casey was one of the crew members at the site in April 2003 when Danny Parsons was electrocuted. As such, Casey had a heightened awareness of the dangers of working

near the energized lines without appropriate protective equipment. Nothing in his previous work on the project indicated that he might forgo the use of PPE and cover in the manner that he did. The testimony of Wagon, who was working as Casey's groundsman, conveys a sense of how inexplicable Casey's actions appeared to his partner (Tr. 91-93):

Q: Okay, when did you first learn that he was not using his gloves and sleeves or using line cover on that particular pole?

A: When I finally looked up. I mean, because he had been doing it on the three previous poles, you know, had everything covered up, but just for some reason or another, I guess when I was cleaning the truck up, I didn't, you know, I didn't look up until I heard him yell.

Q: Were you surprised?

A: Yes

Q: Why?

A: Because everything was done different than what had been done before.

Q: Okay. What else was done different?

A: Well, usually he would -- he would go to where our old wire was laid out at. He would clip it in and work his way back and just lay from the road back to the field. And for some reason or another on that fourth pole, I don't know why, he started at the field and worked his way in. That is what sort of got to me. Then I seen no line up there and --

Q: The way you described first, is that the way it is normally done?

A: Well, most of the lineman that I ever been around usually start at where you have your old wire laid out and your new conductor and start there and work their way back. You know, just --

Q: That is the way he had always done it previously?

A: Yeah.

Q: Do you know why he all of sudden changed on this particular pole?

A: No, I don't.

Q: Do you know why, on this particular pole, all of a sudden he didn't wear his gloves and sleeves and didn't use line cover?

A: No, I don't.

Casey's decision to work without the proper precautions on the fourth pole was unforeseeable. Neither Haskins nor the rest of the crew could have anticipated such behavior on Casey's part. While it is undeniably troubling that one crew should suffer two fatalities in such a short span of time, no evidence was adduced showing that, with the exercise of reasonable diligence, DHE could have known of Casey's violative conduct. The Secretary has failed to establish that Haskins or DHE had constructive knowledge of Casey's violative conduct.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1 of the citation, alleging a serious violation of 29 CFR § 1926.950(c)(1), is vacated, and no penalty is assessed.

/s/
NANCY J. SPIES
Judge

Date: April 22, 2005