

Secretary of Labor,

Complainant,

v.

Davis H. Elliott Company,

Respondent.

OSHRC Docket No. 03-1362

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 Ken S. Welsch

DECISION AND ORDER

Davis H. Elliot Company (DHE) was upgrading electric power lines in Athens, Alabama, on April 16, 2003, when the crew's foreman/lineman was electrocuted while attempting to bond the ground wire to a neutral line. The foreman, who was not wearing rubber gloves and sleeves, was working on a newly constructed pole which had no energized lines. He was electrocuted when the 6 foot, 4-inch piece of ground wire contacted an energized line approximately 52 inches away on the existing pole.

As a result of an investigation by the Occupational Safety and Health Administration (OSHA), DHE received a serious citation on July 14, 2003. The citation alleges that DHE violated 29 C.F.R. § 1926.950(c)(1)(i) (item 1a) for permitting the employee to approach an exposed energized part closer than 2 feet with a conductive object without appropriate insulation or guarding, and 29 C.F.R. § 1926.955(c)(3) (item 1b) for failing to insulate or isolate the employee or to ground a conductor being installed where there was a possibility of the conductor accidentally contacting an energized circuit. The citation proposes a penalty of \$6,300.00. DHE timely contested the citation.

The hearing was held in Decatur, Alabama, on May 25-26, 2004. The parties stipulated jurisdiction and coverage (Tr. 5). The Secretary withdrew the alleged violation of § 1926.955(c)(3) (item 1b) (Tr. 3). The parties filed post-hearing briefs.

DHE denies that it violated § 1926.950(c)(1)(i) (item 1a). DHE argues that its foreman/lineman was not working within the minimum approach distance because the power pole, hardware, and all lines where he was working were not energized. DHE asserts that it was unexpected and not reasonably anticipated for the ground wire to contact the energized line approximately 52 inches away on an adjacent, existing pole. DHE argues that it lacked knowledge of the hazard and if a violation is found, it was due to unpreventable employee misconduct.

For the reasons discussed, the alleged violation of 29 C.F.R. § 1926.950(c)(1)(i) is vacated.

Background

DHE is engaged in the construction of power transmission and distribution systems primarily in the southeastern United States. DHE's corporate place of business is Roanoke, Virginia, and its operations are handled from Lexington, Kentucky. DHE employs approximately 800 employees. The company's safety manager is Dave Summers (Tr. 10, 41, 246-247).

In April 2003, pursuant to a contract with Athens Utilities, DHE was engaged in constructing and upgrading new electric power lines and poles adjacent to the existing power lines in Athens, Alabama (Tr. 60, 186). DHE contracted to set new poles in the ground, install anchors, pull in new conductors, and take out the existing lines (Tr. 333). DHE utilized two crews to perform the work which had been going on for approximately two months (Tr. 60). General foreman Sam Haskins oversaw the work of the two crews (Tr. 10, 53).

The crew foremen were linemen Danny Parsons and Joe Boose (Tr. 11, 106, 331). The crews worked 10-hour days, 4-day weeks, Monday through Thursday (Tr. 70, 75). Their normal work hours were 6:00 a.m. to 4:30 p.m. (Tr. 357). Crew foreman Parsons had been employed by DHE for approximately six months (Tr. 250).

On April 16, 2003, Parsons's crew was engaged in attaching new conductor lines and a neutral line on two new power poles at the corner of Browns Ferry and Reid Road, Athens, Alabama (Exhs. C-1, R-12; Tr. 10, 62, 333). The crew was trimming, clipping, and tying the lines at the conductors (Tr. 62). Parsons's crew consisted of lineman, Wade Casey, operator/groundsman Richard Wright, and groundsman Chris Weems (Tr. 11, 62). Foreman Parsons and groundsman Wright worked at one pole while lineman Casey and groundsman Weems worked at the other pole (Tr. 69). Nothing on the new poles, including the conductor lines and hardware, were energized

(Tr. 43, 48). However, the existing poles and lines, which were adjacent to the new poles, remained energized (Exhs. C-4, C-6; Tr. 23, 31). During the morning's work, Parsons wore rubber gloves with sleeves and laid rubber hoses across the adjacent energized lines (Tr. 31-32, 50, 337). He worked from an insulated bucket (Exh. C-4).

General foreman Haskins, who oversaw the work of the two crews, was present throughout the morning with Parsons's crew (Tr. 53, 338). At the time of the accident, he had left the site to get materials from the warehouse (Tr. 53, 339). Haskins went to the warehouse at approximately 2:00 p.m. (Tr. 340).

At approximately 3:40 p.m., foreman Parsons removed the rubber hoses from the adjacent energized lines and returned the bucket to the ground, apparently thinking that he was finished. Once on the ground, he realized that the ground wire had not been bonded to the neutral line (Tr. 51, 92, 190). The contract specifications required three ground wire connections, one to the neutral line on either side of the pole and one to the guy wire (Tr. 186-187, 350). According to DHE, this is a routine job which takes approximately 10 minutes (Tr. 253, 351).

To do the job, Parsons obtained a 4-foot piece of copper wire, some connectors, and raised the aerial bucket up to the new pole. He positioned the bucket approximately one foot below the neutral line and on the opposite side of the pole from the adjacent energized lines (Exhs. C-2, C-5, R-13; Tr. 190, 241, 262). Parsons was approximately 25 feet above the ground (Tr. 241). To bond the neutral on one side of the new pole, Parsons uncoiled the ground wire, which is a continuous piece of copper wire stapled to the pole before it is set into the ground. The coiled ground wire near the top of the pole was 6 feet 4 inches long (Exhs. C-7, R-11, R-19; Tr. 191, 205, 214, 225, 253). Although rubber gloves and sleeves were in the aerial bucket, Parsons did not wear them (Tr. 31, 51, 85). He also did not place rubber hoses over the adjacent energized lines. When Parsons uncoiled the ground wire to attach it to the neutral line, the ground wire contacted the adjacent energized line, approximately 52 inches away¹ (Exh. R-11; Tr. 23, 29, 34, 47, 179, 182-183, 191, 261). The

¹ The closest energized line was 42 inches vertically lower than the new neutral line to which Parsons was attempting to bond the ground wire and 32 inches horizontally out from the pole where Parsons was working (Tr. 176). Thus, by the application of basic geometry ($C^2 = A^2 + B^2$), the nearest energized line was 52.8 inches from the neutral conductor.

energized line was 7,200 volts (Tr. 42, 176). Parsons was in the aerial bucket for a “very few minutes before the accident happened” (Tr. 51). No one saw the accident (Tr. 23, 240).²

On April 17, 2004, at approximately 12 noon, Compliance Safety and Health Officer Michelle Sotak initiated an investigation of the accident. DHE’s field safety director Donald Adkins had the accident site recreated by having the aerial bucket moved into the same position on the new pole. The only difference was that the copper wire had been removed from the energized line and re-coiled (Tr. 12, 63-64, 262). Compliance Officer Sotak took photographs, interviewed employees, and used the measurements provided by DHE (Tr. 11, 42-43). Based on her recommendation, a serious violation of 29 C.F.R. § 1926.950(c)(1)(i) was cited on July 13, 2003.

Discussion
Alleged Violation of 29 C.F.R. § 1926.950(c)(1)(i)

The citation alleges that on April 16, 2003, the foreman/lineman, while working in an aerial bucket without rubber gloves and sleeves, allowed the grounding wire to approach an exposed energized conductor line.³ Section 1926.950(c)(1) provides that:

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.

² DHE’s proffered that Parsons may have been in a hurry because he wanted to get home early to mow his lawn (Tr. 318). Also, DHE speculated that Parsons may have been stung by a bee or had a heart attack (Tr. 216). Such testimony was not allowed based on hearsay and speculation.

³ 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).

Section 1926.950 applies to the construction of electric transmission and distribution lines and equipment. At the time of the incident, DHE was erecting new poles and installing new power lines for the distribution of electric power for Athens Utilities. The minimum approach distances required by § 1926.950(c)(1) applied to DHE's work.

According to Table V-1, in § 1926.950(c)(1), the minimum approach distance to an energized line with voltage of less than 15,000 volts phase-to-phase is 2 feet (24 inches). DHE does not dispute that the energized line which was contacted, carried 7,200 volts (Tr. 29, 179). There is no disagreement that Parsons's minimum approach distance to an energized line was 2 feet (Tr. 59, 145, 217).

If within the minimum approach distance of 2 feet, § 1926.950(c)(1) requires insulating, guarding or isolating the employee or energized line. DHE acknowledges that Parsons was not wearing rubber protective gloves and sleeves and the adjacent energized line was not insulated or protected from accidental contact at the time of the accident (Tr. 167). Also, the ground wire which Parsons uncoiled was 6 feet 4 inches and was approximately 52 inches from the energized line.

DHE's argument that Parsons's work on the new pole did not violate the 2-foot minimum approach distance because nothing on the new pole was energized which required isolation, insulation, or guarding, is rejected. In addition to an employee working within the minimum approach distance, the standard also does not permit conductive objects, such as the uncoiled ground wire, to be within the minimum approach distance of exposed energized parts. The uncoiled ground wire, which was in excess of 6 feet long, was only 52 inches from the exposed energized line. Parsons' uncoiling of the ground wire breached the 2-foot minimum approach distance and he was electrocuted when the ground wire came in contact with an adjacent energized line. Such a breach of the minimum approach distance was reasonably predictable. The uncoiled ground wire created approximately 4 feet of wire which could reach into the minimum approach distance. Based on the elevated position of the work, the close proximity of the energized line, the ground wire's flexibility by being held only at one end by a staple, the location of the staple on the side of the pole, the uncoiling of the wire by the lineman, and the outdoor conditions including wind made the possible contact of the ground wire with the energized line reasonably predictable. DHE's field safety director Donald Adkins agreed that Parsons should have anticipated the wire coming within the

minimum approach distance of the energized line once he uncoiled the ground wire and recognized the length (Tr. 240-241). Adkins testified that due to the length of the wire, reaching the energized line has to be considered possible (Tr. 369). Adkins' report of his investigation into the accident found that:

The extension of Danny's body (as defined in the minimum approach standards) caused by handling a piece of the copper on the pole ground and the actual pole ground put Danny in direct violation of the minimum approach distance. The failure to use (total isolation), protective cover is also a direct violation of OSHA and Company standards. (Exh. C-9; Tr. 243-244).

Regardless of how the accident occurred, the ground wire held by Parsons came within the 2-foot minimum approach distance of an energized line and neither the energized line nor Parsons was insulated, guarded or isolated as required by § 1926.950(c)(1).

DHE's argument that it lacked knowledge of a violative condition is rejected (Tr. 215, 240, 348). In order to establish employer's knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of the violative condition. Employer knowledge may also be shown when its supervisory employee has actual or constructive knowledge of the condition. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

There is no dispute that foreman Danny Parsons was a supervisory employee and was in charge of the crew. He supervised the crews' work and provided safety training to employees each morning (Tr. 330, 335). His knowledge of the closeness of the energized line and the lack of protective equipment may be imputable to DHE.⁴ Parsons was aware of the physical conditions

⁴ DHE's home office is in Roanoke, Virginia, within the Fourth Circuit Court of Appeals. In the Fourth Circuit, the acts and knowledge of a supervisory employee is not imputed to the employer unless the Secretary shows that the supervisory employee's acts were foreseeable or preventable. *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235 (4th Cir., 1998) *cert. denied* 142 L.Ed.2d 328 (1998). As discussed under unpreventable employee misconduct, Parsons's conduct was not foreseeable or preventable.

constituting the violative condition and recognized the potential hazard by taking appropriate precautions earlier in the day by wearing rubber gloves with sleeves and placing rubber hoses over the adjacent energized lines (Tr. 337).

DHE agrees that Parsons's lack of protection violated its safety rules and OSHA standards (Tr. 348, 368-369). DHE was aware of the possible hazard from the existing energized lines. DHE's general foreman Haskins, who oversaw the crew's work, testified that the work Parsons was doing required him to wear rubber gloves and sleeves (Tr. 358). DHE's safety director Donald Adkins investigated the accident and concluded the "the failure to use (total isolation), protective cover is also a direct violation of OSHA and Company standards" (Exh. C-9; Tr. 243, 376).

Unpreventable Employee Misconduct

Although noncompliance with § 1926.950(c)(1) is found, DHE asserts that a violation was due to unpreventable employee misconduct. In order to establish employee misconduct, DHE has the burden to 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).

DHE agrees that the accident would not have occurred if Parsons had followed the company's safety procedures for remaining outside the 2-foot approach distance unless wearing rubber gloves with sleeves and placing insulating hoses on the adjacent energized conductors. DHE asserts that Parsons's activity was a departure from its work plan and did not comply with its safety rules (Tr. 167, 358).⁵

⁵ The Secretary's proffer regarding a similar accident to lineman Wade Casey, the other lineman on Parsons's crew which occurred in October 2003, was rejected because it occurred after the issuance of the citation in this case and is the subject of another contested citation (Docket No. 04-0836) (Tr. 37).

1. DHE's Safety Rules

DHE has a written "Safety Handbook and Work Process Manual" which contains the company's safety work rules (Exh. R-5). A copy of the manual is given to all linemen and employees including Parsons who received a copy on December 9, 2002 (Exh. R-16; Tr. 1421, 297).

DHE's safety manual contains three written safety rules (Rules 1.29(b), 3.03 and 3.43) which address minimum approach distance and the use of personal protective equipment (Exhs. R-5, C-8). The rules require an employee to wear protective gloves with sleeves if he can reach or the object in his hands can reach into the minimum approach distance (Tr. 54). This includes the handling of conductive objects, such as tools and equipment, within the approach distance and identifies the minimum approach distances. In comparison with the requirements of § 1926.950(c)(1), DHE's written safety rules require the same levels of protection and are adequate to protect an employee against the hazard of electrocution.

DHE's Safety Rule 1.29: provides:

Wear properly-rated gloves and sleeves according to Table L3.03 and at the following times:

- (a) When working within the approach distance of any conductor (covered or uncovered) energized at 50 volts or more.
- (b) When using conductive tools or applying material which could violate the minimum approach distance of any conductor energized at 50 volts or more.
- (c) When working on or near vehicles or equipment which are not grounded and are being treated as energized.

DHE's Safety Rule 3.03 provides:

Unless properly protected by an approved method, workers shall not go or take any conductive object within the following approach distances from any exposed energized conductor or equipment:

With a voltage of 7,200 volts, DHE's minimum approach distance is 2 feet, 2 inches (Table L 3.03) as opposed to the 2-foot requirement in § 1926.950(c)(1). DHE explained that its minimum approach distance is based on OSHA's general industry standard for "Electric power generation, transmission, and distribution" at § 1910.269 which is more encompassing (Tr. 168).

DHE's Safety Rule 3.43 provides:

When working within reach of lines and equipment energized at from 50 to 34,500 volts, each worker shall use insulating protective equipment as specified in L 3.05 or suitable barriers shall be installed to prevent accidental contact.

Although he would not have anticipated the grounding wire to contact the energized conductor, general foreman Haskins testified that “our rules state that if you or anything that you have in your hand will reach inside that approach distance, then, we use three lines of protection. We've got the bucket truck, you cover it up with your rubber hoses, and your rubber gloves and sleeves” (Tr. 348). DHE agrees that Parsons, by not wearing protective gloves with sleeves and by not covering the energized lines, violated its safety rules (Tr. 167, 240). Compliance Officer Sotak agreed that Parsons had violated DHE’s safety rules (Tr. 54). Her testimony that DHE’s rules were deficient because there was no specific procedure for grounding the neutral to the pole is rejected (Tr. 38). If Parsons had complied with DHE’s safety rules, he would not have been exposed to a hazard and would have complied with the requirements of § 1926.950(c)(1).

The record, therefore, establishes that DHE has appropriate safety rules to address the hazard and conditions present on April 16, 2003.

2. DHE’s Communication of the Safety Rules

In addition to written safety rules, DHE also shows that its safety rules were communicated to employees including Parsons. Prior to being hired, all potential new employees receive orientation (Tr. 90). The orientation takes between six to eight hours and includes a discussion of the minimum approach distance (Tr. 145, 247). After the orientation, the potential new hires are given a written examination on the material covered during the orientation. The written examination must be passed in order to be considered for hire (Tr. 143). Additionally, for linemen and apprentices, DHE has an accredited apprenticeship course for lineman training (Tr. 248-249).

Parsons, an experienced lineman, had previously worked as a lineman for another company (Tr. 250-251). He still had to take DHE’s orientation class and pass the written examination before being hired by DHE (Tr. 294). His class covered the minimum approach distance and protective equipment (Tr. 294). Parsons’ series of written tests included one on minimum approach distance which he scored 100% (Tr. 147, 296).

After orientation, Parsons attended a quarterly foremen’s safety meeting in January 2003, for four hours. The meeting discussed safety issues including the minimum approach distance and the proper cover up by use of rubber gloves and sleeves (Tr. 306-307). Also as foremen, Parsons conducted regular job safety meetings in the morning for the crew (Exh R-15; Tr. 335). During his

employment with DHE, Parsons participated in 41 job safety meetings (Exh. R-15). It is noted that on the morning of April 16, 2003, the safety meeting identified the safety equipment including gloves, sleeves, and hoses necessary for the job and stated “use plenty of cover up” (Exh. R-15).

Groundsman Weems testified that DHE conducted “tailgate meetings every once in a while” (Tr. 85). He also stated that he was not familiar with the specific minimum approach distances (Tr. 86). The record shows that prior to the accident, Weems attended four job safety meetings during April 2003 (Exh. R-2). It is noted that although his job as groundsman did not require him to work close to energized conductors, he knew the meaning of minimum approach distance. Also, he testified that he wore rubber gloves whenever setting poles (Tr. 92, 114).

The record shows that DHE adequately communicated its safety rules to Parsons.

3. Steps to Discover Violations of Safety Rules

Field safety director Adkins testified that he conducts surprise job site visits when he inspects the crews for safety compliance and proper work procedures (Tr. 146). Safety inspections are also conducted by the general foreman, job superintendent, upper management, and the field safety department (Tr. 148).

The record shows that Parsons’s crew was audited for safety 16 times during the approximate six months he was employed by DHE (Exh. R-14). None of the safety audits found any violations. Adkins inspected Parsons’s job site on March 26, 2003, while the crew was changing out junction poles with transformers. He found no violations (Exh. R-3; Tr. 149). Similarly, safety director John Morris found no violations with Parsons’s crew on January 15, 2003 (Exh. R-17).

General foreman Sam Haskins, who oversaw the crews’ work on the project, had been on site until approximately 2:00 p.m. on the day of the accident observing Parsons (Tr. 337, 340). Haskins saw that Parsons worked with rubber gloves with sleeves and the adjacent energized lines were covered with rubber hoses (Tr. 337). He also testified that he never saw Parsons or the crew violate the company’s safety rules (Tr. 355).

The record shows that DHE took steps to discover safety violations and there is no history of safety violations by Parsons.

4. DHE's Enforcement of Safety Rules

DHE maintains a graduated disciplinary program with verbal warnings, written warnings, suspensions and terminations. The disciplinary program is used to enforce employees' compliance with company safety requirements.

According to DHE, if a foreman fails to enforce safety rules, he will be reprimanded (Tr. 147). DHE has issued 37 written notices of safety violations from 1998 to 2002 to employees, including foremen, for failing to use gloves and sleeves, failing to properly cover up and minimum approach infractions (Exh. R-4; Tr. 153, 154, 156, 157, 159, 160, 162, 166, 285, 288-289, 301, 310-316).

Although groundsman Weems testified that he was not familiar with DHE's disciplinary program, there is no evidence that anyone in Parsons's crew received any reprimands (Tr. 86, 320). Also, the Secretary's argument that there is no showing of disciplinary action in Alabama is rejected. DHE had been working on the Athens utility project for a "couple of months" and there is no showing that DHE had any other projects in Alameda (Tr. 11, 293).

Unpreventable employee misconduct has been established. DHE has shown that it has appropriate work rules, which it communicated to Parsons, and monitored and enforced compliance. Parsons's action of not putting on his rubber gloves with sleeves, which were in the aerial bucket and not re-placing the rubber hoses over the adjacent energized lines while he performed a 10-minute job, was unforeseeable and not anticipated by DHE.

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:

1. Item 1a, serious violation of 29 C.F.R. § 1926.950(c)(1)(i) is vacated.
2. Item 1b, serious violation of 29 C.F.R. § 1926.955(c)(3) is withdrawn by the Secretary.

/s/ Ken S. Welsch
KEN. S. WELSCH
Judge

Date: December 16, 2004