Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. NEW RIVER ELECTRICAL CORPORATION, Respondent.	OSHRC Docket Nos. 18-0523

Appearances:

For Complainant: Stephanie Adams, Esq., U.S. Department of Labor, Office of the Solicitor, 11240 East 9th Street, Suite 881, Cleveland, OH

For Respondent: Keith Louis Pryatel, Esq., and Travis Teare, Esq., Kastner Westman & Wilkins, LLC, 3550 West Market Street, Suite 100, Akron, OH

JUDGE: Judge Christopher D. Helms, U.S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

This case is before the Occupational Safety and Health Review Commission ("Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On November 6, 2017, [redacted], an employee of Respondent, was injured when he and other employees were preparing an electrical cable for the installation of an insulator, also known as a "pothead." (Tr. 53, 77-78). The victim received an electrical shock causing second-degree burns to "his left hand and forearm and third-degree burns to his right knee and inner thigh area." (Tr. 91; *see also* Stip. ¶ 9, Exs. C-1, C-6, R-1).

In response to the accident, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite. As a result of that inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent, alleging three serious violations of the Act, with a total proposed penalty of $38,802. Complainant alleges Respondent failed to protect against multiple electrical hazards, including failing to disconnect electrical lines and equipment, to tag the lines and equipment as properly disconnected, and to ensure proper grounding of the lines and equipment.

The trial of this matter commenced on October 15, 2019, in Columbus, Ohio, and continued thereafter through October 18, 2019. The following witnesses testified:

- Compliance Safety and Health Officer ("CSHO") Michael Stowell,
- Zackery Howard (formerly, a foreman for Respondent),
- Mark Bail (formerly, a foreman for Respondent),
- Dennis Dawsey (Complainant's expert),
- Wayne Evans (employee for Respondent),
- Tanner Reynolds (employee serving as groundman for Respondent), and
- Nick Barnhart (Respondent's superintendent).

For the reasons that follow, Item 1, Item 2, and Item 3 of the Citation are grouped and affirmed as one citation-item, and a penalty of $12,934 is assessed for the grouped citation-item.

II. Stipulations and Jurisdiction

On October 7, 2019, the parties filed an *Agreed Prehearing Statement*. The parties stipulated the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5)

of the Act, 29 U.S.C. § 652(5). (Tr. 25). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). In the *Agreed Prehearing Statement*, the parties also agreed to several basic jurisdictional and violation-related facts. In lieu of reproducing all twenty-one stipulations in their entirety, the Court shall refer to individual stipulations as necessary, and in the following form: ("Stip. No. __"). In addition, the stipulations were read into the record. (Tr. 10–12).

III. Factual Background

A. Respondent's crews

On November 6, 2017, a planned outage was scheduled to take place between 9:00 a.m. and 3:00 p.m. to complete the final stages of a three-phase underground cable replacement project for the Madison Mills subdivision, Columbus, Ohio ("worksite" or "site").[1] (Ex. C-2; Tr. 671-672). Respondent's crews were to perform the re-cabling of at least 30 transformers that fed power to residences in the worksite. (Tr. 198, 200-201; Ex. C-2 at 1).[2] Some of the cabling in the ground that was to be replaced was several decades old. (Tr. 152, 897-898).

Respondent had three crews working at the site on November 6, 2017: two Underground Residential Division ("URD") crews and one Overhead Riser crew ("Riser crew). (Tr. 201; Stip. 10). Zack Howard ("Foreman Howard") was the foreman of one URD crew, and his apprentice was Wayne Evans. (Tr. 201; Stip. 11). For the second URD crew, Mark Bail ("Foreman Bail") served as the foreman, and his apprentice was James Wright. (Tr. 201; Stip. 11). The Riser crew

[1] As noted in the Citations, the inspection site was 3887 Marsha Drive, Columbus, Ohio.

[2] The evidence differed on the exact number of transformers that needed new cabling. OSHA noted that 35 transformers needed new cabling (Ex. C-2 at 1), while certain witness testimony claimed that 39 needed new cabling (Tr. 501), and other testimony claimed that 65 transformers needed new cabling, (Tr. 203). Accordingly, for purposes of this decision, the number of transformers needing new cabling will be referenced as "at least 30 transformers."

was comprised of Jim Castle ("Foreman Castle"), who was the foreman, Tanner Reynolds as the groundman, and [redacted] as the apprentice. (Tr. 201, 256; Stip. 11; Ex. R-1).

The project required the URD crews to switch out old primary cable to new primary cable in at least 30 transformers. (Exs. C-2, C-6).[3] The new primary cable had already been installed underground but had not yet been connected. (Ex. C-2 at 1). The Riser crew's work was to "wreck out" (i.e. dismantle) two riser poles and build two new riser poles, one on the southside of the project and one on the northside of the project. (Exs. C-2, C-6; Tr. 47). This work required a power outage from 9:00 a.m. to 3:00 p.m. at the subdivision. (Stip. 17; Exs. C-2, C-6; Tr. 202, 369). The power outage was accomplished through communication between the URD foreman, Zack Howard, and American Electric Power ("AEP"), the owner of the electrical lines. (Tr. 67, 335-336, 368-369).

AEP de-energized the lines and equipment through DDC, the central dispatch arm of AEP, and the outage was scheduled to last from 9:00 a.m. to 3:00 p.m. (Tr. 96, 202, 278, 879-880). Outages of six hours in length are common and is the maximum length that AEP can schedule an outage. (Tr. 878). However, outage lengths are unpredictable, and it is possible to request an extension of the outage time. (Tr. 879-880).

After AEP de-energized the lines and equipment, the two URD crew foremen (Zack Howard and Mark Bail) and the Riser crew foreman (Jim Castle) went over the work to be performed. (Tr. 203). After the three foremen met, the crews prepared a Job Site Assessment ("JSA") and a Job Hazard Analysis ("JHA"). (Tr. 203-204, 357, 854-855; R-21). In the JSA, the crew typically assesses all the risks, assesses what can be done to prevent those risks, reduces

[3] Both Complainant and Respondent reference Exhibit R-1 in their posttrial briefs. (*See* Comp. Brief at 4; Resp. Brief at 2). However, Exhibit R-1 was never admitted into evidence. (Tr. 796). Based upon a colloquy by counsel at trial, it appears that this exhibit (Ex. R-1), however, is a duplicate of Exhibit C-6. (Tr.796-797).

those risks and assessments to writing, and reviews and signs the JSA. (Tr. 203-204; R-21). Among other things, the JSA and JHA identified "flashes" and "electrical shock" as potential risks. (Ex. C-6 at 1). In addition, the JSA and JHA identified "preventative measures" to address the potential risks, including "use all proper PPE, tools, and rubber gloves." (Ex. C-6 at 1).

Foreman Howard testified he informed Superintendent Barnhart that he was not going to be able to complete the work during the six hours of outage time. (Tr. 208). Foreman Howard further testified that two weeks into the job the "heat was kind of turned up" on the crew to complete the job. (Tr. 199). Thus, he felt that the crew was under pressure to complete the job. (Tr. 293).

Foreman Howard acknowledged that whether he oversaw all the crews on the site was a "gray area." (Tr. 207). He understood that he was taking the lead on the other URD crew in which Mark Bail was the foreman, but that it "was never really relayed to [him]" whether his supervision extended to the Riser crew. (Tr. 207). However, Foreman Howard understood that he was "over the job", so he surmised that "maybe [he] was over all the crews working on it." (Tr. 206-207). Still, based on Respondent's own incident report, it appears Foreman Howard was only in charge of the 2 URD crews, and that Jim Castle oversaw the Riser crew. (Ex. C-6 at 1-2).

B. <u>Work at the site</u>

On November 6, 2017, Respondent's work at the site began with de-energization of riser pole 270/996 ("south riser" or "south riser pole"). (Tr. 133; Ex. C-6 at 2). First, Foreman Castle "pulled the doors" (i.e. removed the fuses) from the north side riser and stapled the fuses to the pole. (Tr. 133-134, 214, 366-367). Foreman Howard then grounded each of the three cable

phases (A phase, B phase, and C phase) at the first transformer from riser pole 644/221 ("north riser" or "north riser pole"). (Tr. 134-135, 139-140, 362-364; Exs. C-2 at 1, C-6 at 2). Then, Foreman Howard went to the south riser and removed the fuses, stapled the fuses to the pole, and then put a yellow band around it to secure it. (Tr. 134, 214-215, 366) (*see also* Ex. R-6 at 13).

It was Foreman Howard's responsibility to bring tags, testers, and grounds for the URD crews, and he testified that he brought those items. (Tr. 209-210). However, it was not Foreman Howard's responsibility to bring these same items for the Riser crew. (Tr. 210). Foreman Howard testified that, while he provided tags to Foreman Bail and Foreman Castle, he did not know whether they used any tags on the date of the accident. (Tr. 265). Foreman Howard did not visually verify any tags or grounds that Foreman Castle put in place at the site. (Tr. 211-212). Foreman Bail did not see any tags on the date of the accident, and he did not use any tags or grounds. (Tr. 514).

The two URD crews started at approximately ten transformers down the line from the north riser pole. (Tr. 213). Here, they began working their way south by testing, cutting out, and plugging in new cable. (Tr. 213). The Riser crew started on the south side of the project at the south riser pole. (Ex. C-6 at 2). The old south riser pole was dismantled, a new south riser pole was built, and all three phases of the new south riser pole were energized sometime between approximately 11:00 a.m. and 1:00 p.m. (Ex. C-6 at 2; Tr. 232-233). This energization of the south riser pole served to energize a portion of the loop at the Madison Mills project. (Tr. 380). Foreman Howard testified he was informed AEP wanted to re-energize half of the development so residents were not without power during the winter. (Tr. 239). Thus, after the Riser crew completed its works at the south riser pole, Foreman Howard called Foreman Castle with the Riser crew and gave the instruction to "stand clear" as the fuses for each phase were being closed

thereby supplying power to half of the development. (Tr. 232-234). At that time, Foreman Howard had not visually verified any tags or grounds put in place by Foreman Castle. (Tr. 211-212).

The initial scope of work only required the URD crew to remove the old cable and install new cable for the various transformers. (Tr. 509). During their work, sometime around 12:00 noon to 12:30 p.m., however, the URD crew discovered a transformer needed replacing. (Tr. 380). The URD crew found three additional transformers that needed to be completely replaced. (Tr. 509-510). Foreman Howard contacted Superintendent Barnhart via cellular telephone to inform him new transformers would be needed. (Tr. 380-381). New transformers would be transferred to the project from AEP. (Tr. 381). It generally takes between two to three hours to replace a transformer. (Tr. 702-703).

Foreman Howard and his apprentice, Wayne Evans ("Apprentice Evans"), then began re-cabling the second transformer ("Transformer No. 2") from the north riser pole, which was located in the backyard of a house in the subdivision. (Tr. 402; Exs. R-24A, C-6 at 257). Testimony regarding whether this transformer was tested for voltage varied. Foreman Howard testified that he tested to see if Transformer No. 2 was energized, whereas Foreman Bail testified that Transformer No. 2 off the north riser pole was not tested. (Tr. 402, 515). While Foreman Howard testified that he could not recall whether the replacement transformer was grounded, he acknowledged that neither he nor Apprentice Evans tagged the replacement transformer. (Tr. 402, 515).

Foreman Howard was aware that the crew should have grounded and tagged the replacement transformer. (Tr. 230, 257, 263). Respondent's Safety Manual includes an Electrical Grounding Policy that notes the need to tag and ground electrical equipment. (Ex. R-8

at 591-593). In addition, Foreman Howard had been trained on the necessity for tagging electrical equipment. (Ex. R-13 at 567).

After the re-energization, both URD crews relocated to the first transformer off the north riser pole ("Transformer No. 1"). (Tr. 396-397, 563). Here, Foreman Howard used a trackhoe to clean some brush from the area and to bring the replacement transformer to the location. (Tr. 397; 564). Only Foreman Bail and Apprentice Evans worked on Transformer No. 1. (Tr. 397). A rubber protective blanket had been placed on the primary side of the transformer as a safety device. (Tr. 397-398; Ex. R-3A).

Foreman Bail testified that the only way he and Foreman Howard were going to finish the job within the allotted outage time without additional people was to do "hot-swaps." (Tr. 515-516). A "hot-swap" is when at least one of the cables in a transformer is energized and the employees isolate it to remove the case. (Tr. 243). When hot-swapping, the employees wear personal protective equipment, including rubber gloves and sleeves. (Tr. 557). Until the URD crews discovered they had to replace four transformers, there was no need to "hot-swap." (Tr. 557). Due to the perceived time-constraints, however, they proceeded to conduct a "hot-swap" for Transformer No. 1. (Tr 519). Without testing or placing grounds, they placed one of the new electrical cables in the transformer's feed-through on Transformer No. 1, which then induced electrical current back to the north riser, where the victim ([redacted]) was stripping back new cabling to be installed. (Tr. 399-400, 403, 518-519).

The government's expert, Dennis Dawsey, testified that the Riser crew would have been expected to place a ground and tag at the riser pole and at Transformer No. 1 when the riser pole was de-energized. (Tr. 683-684). Here, the Riser crew had not grounded and tagged Transformer No. 1. (Tr. 256; 683-684).

Instead, after the re-energization, the Riser crew began working on the north riser pole. At that time, Transformer No. 1 was being fed power from Transformer No. 2. The URD crews were unaware of where the Riser crew was located relative to the line and were unaware that, when the URD crews began to work on Transformer No. 1, it was energized and transferring power to the lines where the Riser crew was working. (Tr. 256; Ex. C-6 at 261-262). [redacted] was installing an insulator (known as a "pothead") when he picked up an energized line insulator and was shocked with 7,650 volts of electricity, causing second-degree and third-degree burns. (Exs. C-1, C-6, Tr. 91). OSHA's expert, Dennis Dawsey, testified that the URD crew moved the cable in Transformer No. 1 from the bushing[4] position to the feed-through position, which energized the cable that [redacted] was holding. (Tr. 706).

Foreman Bail called Foreman Howard and informed him that [redacted] had been electrocuted and injured. (Tr. 251, 519; Ex. C-6 at 257). Foreman Howard then told the URD crew at Transformer No. 1 to put everything back the way it was (thus, to undo everything that had been done) and he went to the north riser pole area where the accident occurred. (Ex. C-6 at 257-258; 404).

C. Manipulation/Alteration of evidence after the accident

At the north riser pole area, Foreman Howard told Foreman Bail (who is also Foreman Howard's brother-in-law) to "get in" the truck with him, and they both then left the north riser pole area and traveled to Transformer No. 2. (Tr. 405-406). The remainder of the URD crew was left at Transformer No. 1. At Transformer No. 2, Foreman Howard and Foreman Bail

[4] A "bushing" is "[a]n insulating structure that includes a through conductor or that provides passageway for such a conductor, and that, when mounted on a barrier, insulates the conductor from the barrier for the purpose of conducting current from one side of the barrier to the other." 29 C.F.R. § 1926.968.

opened the transformer box. (Tr. 406-407). They could see immediately that it was not grounded. (Tr. 407, 576-578). Foreman Howard then used a "shotgun stick" to unplug the primary feeds from Transformer No. 2 and "stood it off", thus preventing the transfer of electricity to Transformer No. 1. (Tr. 407-478, 578). Foreman Howard also placed a red-colored hold tag on Transformer No. 2. (Tr. 408). Foreman Howard tested and grounded Transformer No. 2, and then he closed the transformer cabinet. (Tr. 408). Foreman Howard provided a statement to Respondent during its investigation in which he stated that the URD crew tested Transformer No. 1 before beginning the process of replacement. (Tr. 413-414). However, as discussed above, this statement was inaccurate. (Tr. 414).

Superintendent Barnhart and Mike Bell from AEP went to the site to participate in the post-accident investigation. (Tr. 409, 892-894). Foreman Howard did not tell Superintendent Barnhart or anyone at the scene that he had altered the setup of Transformer No. 2. (Tr. 409-410). During the course of the post-accident investigation by Respondent, someone suggested that perhaps the accident occurred due to a "back-feed." (Tr. 416-417).[5] Foreman Howard supported the "back-feed" theory. (Tr 417).

Apprentice Evans testified he informed Foreman Howard that Transformer No. 1 must have been energized because when he plugged the bushing into the feed-through, it energized back to [redacted]'s location. (Tr. 833). In response, Foreman Howard told him: "you keep that to yourself." (Tr. 833-834). Eventually, Respondent's president, John Ney, asked Foreman

[5] The CSHO explained that a "back-feed" can occur when a residential owner wires a generator into an outlet so it feeds the entire house. (Tr. 137). At that point, electricity is feeding into the whole house through the circuit breaker box and back to the transformer. (Tr. 137). The government's expert explained that a "back-feed" can occur when you have "only one phase of [a] transformer bank de-energized, the other two phases can still support energy and feed back into that other phase that is damaged." (Tr. 631).

Howard specifically whether he had done anything with respect to Transformer No. 2. (Tr. 425). Foreman Howard told him "no," which Foreman Howard admitted at trial was a lie. (Tr. 426).

As part of its investigation of the accident, OSHA also interviewed Foreman Howard and Foreman Bail. The CSHO met with Foreman Howard at a restaurant and interviewed him. (Tr. 111). During this interview, Foreman Howard did not tell the CSHO that he and Foreman Bail altered the scene, and specifically did not tell the CSHO that they went back to Transformer No. 2 after the accident, opened the transformer cabinet, and placed grounds on the transformer. (Tr. 112). He also did not tell the CSHO during that interview that he had put tags on Transformer No. 2 after the accident. (Tr. 112). However, after this meeting, Foreman Howard informed the CSHO of his manipulation of the evidence. (Tr. 113-114).

Foreman Bail lied to Respondent during its investigation by stating the cable at Transformer No. 2 was in "stand off." (Tr. 522-523).[6] He explained he had the opportunity to discuss the matter with Foreman Howard, who informed him what actually occurred. Thus, Foreman Bail testified that "I made my story match his." (Tr. 523). Both Foreman Howard and Foreman Bail were terminated from their positions with Respondent. (Tr. 418, 420; Exs. R-4, R-5).

IV. Discussion

A. Applicable Law

To establish a violation of an OSHA standard pursuant to 5(a)(2), Complainant must establish (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or

[6] Placing a transformer in "stand off" would prevent current from going into the cabling that fed to the north riser. (Tr. 404-405; 496-497).

constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

B. Citation 1, Item 1 (29 C.F.R. § 1926.961(b)(4)(ii))

1. The Standard Applies

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1926.961(b)(4)(ii): Each crew shall independently comply with this section and, if there is no system operator in charge of the lines or equipment, shall have separate tags and coordinate deenergizing and reenergizing the lines and equipment with the other crews:
>
> a. On or before November 6, 2017, where employees were preparing an electrical cable for the installation of a pothead, the riser crew and the underground residential distribution crew did not independently ground and tag the cable when deenergizing and reenergizing the system, resulting in the hospitalization of an employee due to the resulting shock.

(*See Citation and Notification of Penalty* at 6).

The application subparagraph of this section identifies under what circumstances the standard applies:

> Application. This section applies to the deenergizing of transmission and distribution lines and equipment for the purpose of protecting employees. Conductors and parts of electric equipment that have been deenergized under procedures other than those required by this section shall be treated as energized.

29 C.F.R. § 1926.961(a).

The record establishes Respondent was engaged in the deenergizing of transmission and distribution lines and equipment. (*See* Tr. 68-69, 133-134, 161). Thus, 29 C.F.R. § 1926.961 applies to the work conducted by Respondent at the site. The specific subparagraph (b)(4)(ii) simply notes the manner in which a party must comply when there is "no system operator." Thus, while the standard applies, the central question is whether Respondent complied with subparagraph (b)(4)(ii).

2. Violation of the standard

The parties have cited to no cases interpreting 29 C.F.R. § 1926.961 generally or its subparagraphs specifically, and the Court has located no cases addressing the standard. Based on a plain reading of the standard, two requirements for compliance exist within subparagraph (b)(4)(ii). First, an employer's crews must "independently comply with [the] section." 29 C.F.R. § 1926.961(b)(4)(ii). This general requirement must be met by any employer irrespective of whether there exists a "system operator in charge of the lines and equipment."

Second, if there is no "system operator," each crew of an employer must "have separate tags and coordinate deenergizing and reenergizing the lines and equipment with the other crews." *Id*. Thus, this second requirement for compliance is needed only when there is no "system operator." Conversely, if there is a "system operator," although an employer must comply with subparagraph (b)(4)(ii), in particular the general obligation to "independently comply with this section," compliance can be achieved without the secondary requirement. A "system operator" is defined as "[a] qualified person designated to operate the system or its parts." 29 C.F.R. § 1926.968.

a. Each crew shall independently comply with the section

Neither party has presented arguments on whether Respondent met the first part of this standard for each crew to "independently comply with this section." Based on the citation-items issued in this case, the government suggests such a violation, as it cited Respondent for a violation of a subsection of § 1926.961 in Item 2 of the Citations. That is, since the government cited Respondent for an alleged violation of 29 C.F.R. § 1926.961(c)(2) in Item 2, if such violation is affirmed, a violation of § 1926.961(b)(4)(ii) in Item 1 would necessarily follow as it would mean a crew did not independently comply with § 1926.961.

Moreover, even absent a violation of Item 2, the violation cited in Item 1 is clear. The crews started work as two independent crews: that is, the two URD crews served as one unit and the Riser crew served as another unit. (Tr. 684). The Riser crew had the responsibility to ground from the riser pole to Transformer No. 1, yet it failed to identify grounds and tags within the work zone before the start of work. (*Id*.). The two URD crews were responsible for grounding the transformers as they proceeded through the day. (*Id*.). Indeed, Superintendent Barnhart admitted that it was the responsibility of every employee to verify that protected grounds are in place. (Tr. 934). It was the responsibility of the two URD crews and the Riser crew to ground or to verify grounds were in place. (*Id*.). Thus, one of the two independent crews would place grounds while the other independent crew would visually verify the grounds were placed. (Tr. 934-935). Unquestionably, 29 C.F.R. § 1926.961 requires an employer to install protective grounds. *See* 29 C.F.R. § 1926.962(c)(7). As the crews onsite failed to ground, and failed to verify that grounds were placed, the crews failed to independently comply with § 1926.961.

b. System operator

In its posttrial brief, the government argues that "the record is devoid of any evidence of a system operator." (Comp. Brief at 19). It further argues that, even if AEP was the system operator, Respondent "failed to identify the person it placed in charge of the clearance and compliance with testing, grounding and tagging as referenced in 29 [C.F.R.] 1926.961[(c)](5-7)." (*Id*.).

However, contrary to the government's assertion, the evidence at trial demonstrates that AEP was at least considered the system operator by the foreman on site at the accident (Foreman Howard) and Superintendent Barnhart. Foreman Howard agreed that AEP was the system operator on direct and cross-examination. (Tr. 335-336, 355, 465). Likewise, Superintendent Barnhart testified that AEP was the system operator. (Tr. 899).

Dennis Dawsey, the government's retained expert witness, likewise acknowledged that Respondent's investigation report (Ex. C-6) noted AEP as the system operator. (Tr. 671: "It identifies AEP, American Electric Power as the customer and system operator."). Further, in his direct examination, the government's expert witness again referred to AEP as the system operator when being questioned on how to switch cables and energize safely:

> Q. How are you allowed to safely switch? How is it performed?
>
> A. The first step is, you know, re-energize the scenario is to communicate with all crew members out there that were about to start energizing equipment. So communication is first. Second is to go in reverse order and remove your grounds, remove your tags in your work zone. **And then you communicate with the operator -- system operator, which would have been AEP,** and inform them that you're ready to re-energize and work through the conversation of how that will occur so they're aware of your re-energizing process.

(Tr. 693-694) (emphasis added).

The government argues that it is undisputed that there were multiple crews working on the same equipment and power lines at the subdivision on November 6, 2017, and that this establishes the standard at issue applies. (Comp. Brief at 20). By the plain language in subparagraph (b)(4)(ii), a violation of the second requirement in 29 C.F.R. § 1926.961(b)(4)(ii) only occurs when "there is no system operator in charge of the lines or equipment" and the employer's crew do not have separate tags and coordinate deenergizing and reenergizing the lines and equipment with the other crews. While Respondent's foremen considered AEP as the system operator, and although the government's expert witness referred to AEP as the system operator, those statements alone do not establish that AEP was a "system operator" under the standard.

The preamble to 29 C.F.R. § 1926.961 explains the difference between a system under control of a system operator and a system that is not under centralized control:

> Some systems are under the direction of a central system operator who controls all switching operations. Other systems (mostly distribution installations) are not under any centralized control. Electric utilities energize and deenergize these systems in the field without the direct intervention of a system operator. Paragraph (b)(1) of the final rule states that employers must designate one employee in the crew as being in charge of the clearance and must comply with all of the requirements of paragraph (c) if a system operator is in charge of the lines and equipment and of their means of disconnection. (Paragraph (c), which OSHA discusses in detail later, sets procedures that employers must follow when deenergizing lines and equipment.) OSHA is adopting final paragraph (b)(1) as proposed with one clarification. This provision in the final rule makes clear that the employer must designate the employee in charge of the clearance. Final paragraph (c)(1) requires the "designated" employee in charge to request the clearance, and final paragraph (b)(2) (described in the next paragraph in this preamble) requires the employer to designate the employee in charge when there is no system operator. OSHA included an explicit requirement in final paragraph (b)(1) that the employer designate the employee in charge when there is a system operator to clarify that designating the employee in charge is the employer's responsibility whether or not there is a system operator.
>
> . . . .

> Final paragraph (b)(4)(ii) provides for the situation in which more than one independent crew is working on the same line or equipment. Under the final rule, in such circumstances: (1) Each crew must follow separately the steps outlined in final paragraph (c); and, (2) if there is no system operator in charge of the lines or equipment, each crew must have separate tags and coordinate deenergizing and reenergizing the lines and equipment with the other crews. The purpose of the provision is to ensure that a group of workers does not make faulty assumptions about what steps another group took or will take to deenergize and reenergize lines or equipment.

79 Fed. Reg. 20316, 20503 (Apr. 11, 2014). Certainly, here, Respondent's foremen considered AEP as the system operator. Similarly, the government's expert referred to AEP as a system operator during a portion of his testimony. However, the evidence shows that AEP was not in control of "all switching operations," and that Respondent would "energize and deenergize these systems in the field without the direct intervention" of AEP. The preamble makes clear that the purpose of the standard is to ensure coordinated deenergizing and reenergizing of lines and equipment when there are multiple crews and there is no system operator controlling all switching operations. *See* 79 Fed. Reg. 20316, 20503 (Apr. 11, 2014). The condition that the standard seeks to avoid is precisely the scenario in this case: multiple crews deenergizing and energizing equipment and lines without the direct intervention of a system operator in control of all switching operations.

Accordingly, the Court finds that the government has met its burden of establishing that Respondent violated this standard.

3. Employee exposure to the violative condition

The evidence in this case establishes Respondent's employees were exposed to electrical hazards from the failure to comply with the requirements in § 1926.961. The employees were required to test, ground, and tag equipment. These measures were required because of the

electrical hazards present and the employees' proximity to the hazards. Moreover, the injury sustained in this case by [redacted] evinces the exposure to Respondent's employees. Accordingly, the Court finds that the employees were exposed to the hazard identified in this citation-item.

4. Employer knowledge of the violative condition

The Secretary maintains that Respondent had actual knowledge of the violative condition through the knowledge of its foremen on site. (Comp. Brief at 22). As support for this contention, the government notes Foreman Howard knew that the URD crew was supposed to test, ground, and tag the transformers the crews worked on, but that he was taught by other foremen that deviating from safety standards when in a rush was acceptable. (Comp. Brief at 22-23). The Secretary further argues that Foreman Castle also failed to test, tag, and ground.

In addition, the Secretary argues that even if the company did not have actual knowledge of the violative condition, Respondent could have known of the failure to ground due to the company's own safety policy requiring a grounding plan. (Comp. Brief at 24). Specifically, the Secretary states that, since there was no approved grounding plan for the work at the site and as the employees were pressured to rush to complete the work, it was reasonably expected that employees would deviate from Respondent's safety policy and violate the standard. (Comp. Brief at 23-24).

The question of whether a supervisor's own misconduct can be imputed to an employer is one fraught with contention. The Commission has held that a supervisor's knowledge of their own malfeasance constitutes knowledge that is imputable to the employer. *Dover Elevator Co*., 16 O.S.H. Cas. (BNA) 1281, 1993 O.S.H. Dec. (CCH) P 30148, 1993 WL 275823 (OSHRC

1993). *Accord, Dana Container, Inc*., 25 O.S.H. Cas. (BNA) 1776, 2015 WL 7459426 (OSHRC 2015). However, several circuit courts of appeal have taken contrary positions.

Respondent points out that it may appeal to one of three circuit courts under the Act: the circuit in which the violation occurred, the circuit in which Respondent's principal office is located, and the District of Columbia Circuit. (Resp. Brief at 19 n.25). Thus, Respondent suggests that this Court should apply the Fourth Circuit's precedent as Respondent is headquartered in Cloverdale, Virginia. (*Id*.).

In the Fourth Circuit, a supervisor's misconduct must be foreseeable for a violation to be imputed to the employer. *Ocean Elec. Corp. v. Sec. of Labor*, 594 F.2d 396 (4th Cir. 1979). In contrast, the Sixth Circuit, in agreeing with the Commission's decision, has found that a supervisor's own violation may be imputed to the employer. *Danis-Shook Joint Venture XXV v. Sec. of Labor*, 319 F.3d 805, 812 (6th Cir. 2003). The District of Columbia Circuit has not yet issued an opinion on the issue. Thus, Respondent argues that the law to apply is dependent on the circuit to which the case may be appealed. (Resp. Brief at 19 n.25). "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied that circuit's precedent in deciding a case, even though it may differ from the Commission's precedent.". *Kerns Bros. Tree Srvc.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000), 2000 WL 294514 at *4.

However, here, unlike in *Kerns Bros. Tree Srvc*., *supra*, there is no clear indication to where any appeal would be taken. While Respondent suggests an appeal would be made in the Fourth Circuit, Respondent of course does not speak for the government, which may bring an appeal elsewhere, such as in either the Sixth Circuit or the District of Columbia Circuit.

When differences in the law exist between relevant circuits, the Commission may apply its own precedent. *See Bethlehem Steel Corp.*, 9 BNA OSHC 1346, 1349n.12 (No. 76-3444, 1981) (consolidated); *Raybestos Friction Materials Co.*, 9 BNA OSHC 1141,1143 (No. 80-2793, 1980). Based on Commission precedent, a supervisor's knowledge of their own malfeasance is imputable to the employer. *Dover Elevator Co*., 16 O.S.H. Cas. (BNA) 1281, 1993 O.S.H. Dec. (CCH) P 30148, 1993 WL 275823. The foremen of the crews in this case failed to independently comply with § 1926.961. The foremen were certainly aware of their own conduct and their failure to take these necessary steps. In addition, Respondent directed its crews to the worksite and thus was aware that multiple crews were working on equipment and lines. Further, although Respondent's foremen considered AEP as a system operator, the foremen knew that their respective crews were energizing and deenergizing the systems in the field without the direct intervention of AEP. Accordingly, Respondent had actual knowledge of the violations as imputed by the knowledge of the foremen.

In addition, even if the Court applied Fourth Circuit precedent to this issue, the Court finds that the violations by Respondent's foremen were foreseeable. Foreman Bail had been in his position as a foreman for only one day prior to the accident. In addition, the crews were under time constraints, were behind schedule, needed additional help to complete the project in the allotted time, and were aware that the superintendent was dissatisfied with the delay.

The company's primary method for supervising foremen was through safety audits. (Tr. 908). However, the company only conducted site safety audits once per month. There was testimony on the duration of the safety audits. Foreman Howard indicated the safety audits lasted from one to three hours, and Superintendent Barnhart stated that they could last up to five

hours. (Tr. 351-352, 909). However, Foreman Bail testified that the safety audits lasted only minutes. (Tr. 531).

Superintendent Barnhart indicated that the company disciplined employees for safety policy violations, (Tr. 873), and he specifically testified that employees are disciplined for not testing if equipment is energized and for not grounding, (Tr. 874). However, despite working for Respondent for fifteen years, including serving as a foreman, general foreman, and superintendent, he later testified that he was unaware of any incident in which employees or foremen did not test or ground. (Tr. 948). Moreover, he admitted that he had never disciplined an employee for failing to test, tag, or ground equipment. (Tr. 933-934).

The Court finds that Respondent's safety program was lacking. There is a dearth of formal disciplinary records for work rule violations pertaining to electrical hazards. Most of the disciplinary records for the years 2015 through 2018 (prior to the accident) concerned drug and/or alcohol offenses, tardiness and absenteeism, or violations discovered after an accident or damage to property. (*See generally* Exs. R-9, R-10, R-11, R-12). Of the approximately 238 pages of disciplinary records admitted into evidence, only approximately 16 pages related to safety violations discovered without an apparent accident or property damage. (*See* Exs. R-9 at 2, 49; R-10 at 98, 103-104, 106, 111, 144-145; R-11 at 183, 187, 191, 212, 222, 225-226). Of these, only three concerned work rule violations related to electrical hazards. (*See* Ex. R-10 at 103, 106, 144-145).

The adequacy of a safety program is dependent on a variety of factors, including the amount of job-training received by supervisors, employee competence and experience, safety records, practicality of supervision, and degree of dangerous and hazardous work. Here, the electrical work being conducted was highly dangerous, and one of the supervisors onsite had

been a supervisor for only one day. In addition, Foreman Bail was only vaguely familiar with the grounding policy, did not receive any additional training once he became a foreman, and was not aware of the tagging policy. (Tr. 512-513). Further, no grounding plan existed for the job on the site and the JSA/JHA did not mention grounding or tagging to eliminate hazards. (Tr. 211; Ex. R-21). In consideration of this evidence, the Court finds that Respondent's safety program was inadequate and that Respondent knew or could have known of the violative condition through the exercise of reasonable diligence. Accordingly, Citation 1, Item 1 is affirmed.

C. Citation 1, Item 2 (29 C.F.R. § 1926.961(c)(2)

1. The Standard Applies

For Citation 1, Item 2, Complainant alleges a serious violation of the Act as follows:

> 29 CFR 1926.962(c)(2): Open disconnecting means. The employer shall ensure that all switches, disconnectors, jumpers, taps, and other means through which known sources of electric energy may be supplied to the particular lines and equipment to be deenergized are open. The employer shall render such means inoperable, unless its design does not so permit, and then ensure that such means are tagged to indicate that employees are at work:
>
> a. On or before November 6, 2017, where employees were preparing an electrical cable for the installation of a pothead, the disconnecting means in the loop were not open, had not been made inoperable, and were not tagged, which resulted in serious injuries and hospitalization of an employee from electrical shock.

(*See Citation and Notification of Penalty* at 7).

Respondent argues that the specific subparagraph cited, 29 C.F.R. § 1926.962(c)(2), does not apply as the cabling was not "particular lines and equipment to be deenergized." (Resp. Brief at 15). Respondent maintains that the AVD in the citation identifies the "cable for the installation of a pothead," but that this is not actually "particular lines and equipment to be deenergized." (Resp. Brief at 15).

Respondent further argues that the standard applies only for "known sources of electrical energy [that] may be supplied to the particular lines and equipment." (*Id*.). Thus, Respondent reasons that the standard does not apply, as Respondent claims the two URD crews and the Riser crew were unaware that there were any sources of electricity that could run from Transformer No. 1 to the cabling that [redacted] was stripping. (*Id*. at 15-16).

However, Respondent's arguments relate to whether a violation exists, not whether the standard itself applies. As explained in section IV(B), *supra*, the requirements under 29 C.F.R. § 1926.621 apply "to the deenergizing of transmission and distribution lines and equipment for the purpose of protecting employees." 29 C.F.R. § 1926.621(a). Here, the evidence demonstrates Respondent was engaged in the deenergizing of transmission and distribution lines and equipment. (*See* Tr. 68-69, 133-134, 161). Thus, 29 C.F.R. § 1926.621 applies to the work conducted by Respondent at the site. The specific subparagraph (c)(2) simply notes additional requirements for compliance placed on an employer under the section as it relates to deenergizing lines and equipment.

Thus, here, the Court finds that the standard applies. However, the question of whether there was a "known source of electrical energy" is still a crucial one as it relates to whether Respondent violated the standard.

2. Violation of the standard

a. *"Known sources of electric energy"*

The standard at issue is under the construction standards. Neither party has cited to any case interpreting this standard and the Court has been unable to locate any such case. However, a similar standard exists under the general industry standards, specifically 29 C.F.R. §

1910.269(m)(3)(ii), which has been addressed in other trials before the Commission. That general industry standard provides as follows:

> The employer shall ensure that all switches, disconnectors, jumpers, taps, and other means through which known sources of electric energy may be supplied to the particular lines and equipment to be deenergized are open. The employer shall render such means inoperable, unless its design does not so permit, and then ensure that such means are tagged to indicate that employees are at work.

29 C.F.R. § 1910.269(m)(3)(ii). In *Pike Electric, Inc.*, the administrative law judge determined that the salient question of whether there was a violation rested on whether the generator at issue was a "known" source of energy. *Pike Electric, Inc.*, 21 O.S.H. Cas. (BNA) 2153, 2007 O.S.H.D. (CCH) P 32917, 2008 WL 962965 at *6. While the Court is not bound by the rationale in this decision, the Court finds the reasoning persuasive.

Respondent argues the URD crews and the Riser crew were unaware of any sources of electricity that could run from Transformer No. 1 to the cabling [redacted] had stripped. (Comp. Brief 15-16). Respondent contends Complainant must prove it had actual knowledge of sources of electric energy for there to be a violation. This is a narrow view of the word "known." While the employees may not have had specific knowledge that sources of electricity could run from Transformer No. 1, the employees (including the foremen) certainly should have known of the potential for such electric energy.[7]

Indeed, Respondent's safety policy requires testing, tagging, and grounding. These measures are in place to address such potentialities. Further, Foreman Castle has previously energized the south riser pole, and thus he was aware part of the system was energized. (Ex. C-4

[7] The preamble to the standard explains that lines and equipment are subject to reenergization through means other than normal energy sources. "For example, lightning can strike a line and energize a deenergized conductor, or unknown cogeneration sources not under the control of the employer can energize a line. Additionally, some deenergized transmission and distribution lines are subject to reenergization by induced voltage from nearby energized conductors or by contact with other energized sources of electrical energy." 79 Fed. Reg. 20316, 20502 (Apr. 11, 2014).

at 3; Tr. 687). Thus, there was the potential for a "back-feed," in which a home portable generator connected to a house could feed electricity back through the cables. (*Id*.; Tr. 136-137, 770-772, 892-893,).[8] Moreover, Respondent prepared a JHA, which identified risks including "electrical shocks." (Ex. R-21).

Given the work being performed, Respondent should have known of the sources of electric energy for purposes of compliance with the standard. While the Court finds that the sources of electric energy were "known" as it relates to compliance with the standard, this does not remove the government of its obligation to establish knowledge by Respondent of the hazardous conditions cited.

b. "*Particular lines and equipment to be deenergized"*

Even if there were "known sources of electric energy," Respondent argues that the AVD in the citation identifies the "cable for the installation of a pothead" (i.e. an insulator), but that this is not actually "particular lines and equipment to be deenergized." (Resp. Brief at 15). Thus, Respondent argues that the specific subparagraph cited, 29 C.F.R. § 1926.962(c)(2), does not apply as the cabling was not "particular lines and equipment to be deenergized." (Resp. Brief at 15).

The term "equipment" as it pertains to electric equipment is "[a] general term including material, fittings, devices, appliance, fixtures, apparatus, and the like used as part of or in connection with an electrical installation." 29 C.F.R. § 1926.968. The cable for the installation of the insulator/pothead fits within this broad definition of "equipment." Thus, in part, the

[8] While the government's expert witness testified that there was no evidence in OSHA's file that a back-feed occurred, the expert witness did note there was such a risk.

question is whether the cable for the installation of the insulator was to be deenergized.[9] Respondent argues that the cable had never been energized, and thus could not be deenergized.

According to Foreman Bail, the cable had never been energized:

> Q. Was the cable that [redacted] was holding one of the new cables that had been bored into the earth and was ready to be affixed to the north riser?
>
> A. That's correct.
>
> Q. So that was a cable that had never before been energized, correct?
>
> A. Correct.
>
> Q. It was a cable that eventually, as the work had progressed, was going to be energized, correct?
>
> A. Correct.

(Tr. 597). In addition, Tanner Reynold's testimony reflects that the first time the cable that [redacted] held became energized was at the time of the accident. (Tr. 848). Superintendent Barnhart also testified that the cables that [redacted] had been working on throughout the day were not energized prior to the accident. (Tr. 898-899).

The CSHO likewise acknowledged that the cabling that was held by [redacted] at the time of the accident had never been energized:

> Q. Now, the cabling that was being held by [redacted] back at the riser area, that was new cabling, correct?
>
> A. That's correct.
>
> Q. That cabling had never been energized before the event that happened here?
> A. That's correct.
>
> Q. It was cabling that in the future, hopefully, was going to be energized once it got hooked at the riser, correct?

[9] "Deenergized" means "[f]ree from an electrical connection to a source of potential difference and from electric charge; not having a potential that is different from the potential of the earth." 29 C.F.R. § 1926.968. In addition, as a note to the definition of "deenergized," the section states that "[t]he term applies only to current-carrying parts, which are sometimes energized (alive)." *Id*.

A. That's correct.

Q. Now, there came a point in time, once the south riser had been wrecked out and rebuilt and recabled up, that part of the Madison Mills loop was energized, correct?

A. That's correct.

(Tr. 152-154). Similarly, the government's expert witness testified that the cable that was held by [redacted] at the riser pole at the time of the accident was newly laid cable, had never been energized, and was to be energized in the future. (Tr. 786).

Certainly, the AVD of the citation notes that employees were preparing an electrical cable for installation of a pothead. However, irrespective of whether the specific cable [redacted] held had never been energized, a violation exists as it pertains to the citation-item if any equipment or other means (not just the cable being worked on by [redacted]) through which known sources of electricity could be supplied to lines and equipment to be deenergized. If so, a violation of the standard would be shown, although the question of employee exposure to the hazard would remain.

The government's brief is silent on the issue of whether the equipment identified in the citation-item and the AVD was to be deenergized. Rather, the government summarily argues that "[i]n the process of confirming that active power lines are de-energized the crews would need to confirm the power source was inoperable by testing it, grounding it and placing a tag to alert others there was work going on in the area." (Comp. Brief at 26).

There is no question that the cable that [redacted] worked on was energized, resulting in his injury. However, upon review of the record, it is equally clear that the cable he worked on was not "to be deenergized" as it was new cable that had never been energized before the time of the accident. This finding is supported by the testimony of numerous witnesses, including the

testimony of Foreman Bail, Superintendent Barnhart, the CSHO, and the government's own testifying expert witness.

However, insisting that the "new cable" being worked on by [redacted] was somehow distinct from all other equipment to which it was attached strains the purpose of the standard and the Act. While the AVD in the Citation notes that "employees were preparing an electrical cable," the AVD further explains that the violative condition as "the disconnecting means in the loop were not open, had not been made inoperable, and were not tagged." Thus, the AVD does not isolate the violative condition to merely the cable being handled by [redacted] at the time.

Foreman Howard provided the following explanation of the URD crews' work relating to the transformers:

> So this is a transformer after the old cable has been removed. So our job to switch over, as we call it, is you go to each span of cable, the old cable that is before and after, say, this transformer -- so the transformer before this and the transformer after this -- and you unplug the cable, test it, ground it, make sure that it is not -- there's no energy in this transformer whatsoever.
>
> After you do so, you go back to this transformer, you pull off each individual – you know, you pull off H1A, you put it in the feed-through, and then you test it with a TAG 200 test to make sure there's no voltage present, and then you plug the ground into it to take it to ground potential, zero volts.
>
> And then once that is at ground potential, you can take a pair of cable cutters down at the very bottom of the transformer, at the base of the ground, and you can ratchet-cut the cable in two, unplug it, discard it.
>
> And then the cable that's due to replace it, the brand-new cable, jacket and concentric cable, you plug it into the transformer itself to replace that span that you just cut out.

(Tr. 221-222) (referencing Ex. R-3A).

Thus, the new cable itself is being plugged into equipment that needs to be deenergized. Here, as the new cable that [redacted] held was clearly energized, the equipment to which it was attached was likewise energized. Respondent's argument that new cable was separate from other

"particular lines and equipment to be deenergized" fails. This new cable was part of a whole. Whether viewed as new cabling attached to energized sources that should have been deenergized or whether viewed as part of the energized source itself is an abstract discussion that misses the salient point. Employees working with such cabling must also work with the equipment to which it is attached, and as that equipment must be deenergized, it constitutes "particular lines and equipment to be deenergized."

Further, Respondent found during its internal investigation that the only tags placed on the site were placed on Transformer No. 2 by Foreman Howard after the injury. (Tr. 936-937). Foreman Howard assumed that the URD crews had placed tags, but he never verified the placement of tags on the jobsite. (Tr. 367, 402). Foreman Bail likewise did not use tags. (Tr. 514). Moreover, the Riser crew did not place tags on the site, and Foreman Castle did not personally test or verify grounds. (Tr. 259, 300-301, Ex. R-1).

In view of the foregoing, the Court finds that the government has met its burden of showing that Respondent has violated the standard at issue.

3. Employee exposure to the violative condition

Given the failure to tag lines and equipment in violation of the standard, Respondent's employees were exposed to an electrical hazard. The employees were working in proximity to electrical equipment that should have been deenergized. Yet, the crews failed to deenergize means through which known sources of electrical energy could be supplied and failed to ensure that such means were tagged to indicate that employees were at work. Further, [redacted]'s injury demonstrates the exposure to Respondent's employees. Accordingly, the Court finds that the employees were exposed to the hazard identified in this citation-item.

4. Employer knowledge of the violative condition

As discussed in part IV(B)(4), *supra*, the government has met its burden of showing that Respondent had knowledge of the violative condition. Respondent's foremen were aware of their own actions and inactions, and thus had knowledge that the equipment and other means through which electricity could be supplied were not rendered inoperable, and were aware that such means were not tagged. Indeed, the foremen knew that no tags were placed on the jobsite. The only tags used were placed on Transformer No. 2 by Foreman Howard *after* the injury to [redacted]. (Tr. 936-937). Foreman Bail and Foreman Castle likewise did not place tags. (Tr. 259, 300-301, 514, Ex. R-1.

Moreover, even absent actual knowledge of the condition, Respondent had constructive knowledge of the condition. *See generally* part IV(B)(4), *supra*. Accordingly, the government has met its burden of establishing Respondent's knowledge of the violative condition.

D. Citation 1, Item 3 (29 C.F.R. § 1926.962(b))

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

> General. For any employee to work transmission and distribution lines or equipment as deenergized, the employer shall ensure that the lines or equipment are deenergized under the provisions of § 1926.961 and shall ensure proper grounding of the lines or equipment as specified in paragraphs (c) through (h) of this section. However, if the employer can demonstrate that installation of a ground is impracticable or that the conditions resulting from the installation of a ground would present greater hazards to employees than working without grounds, the lines and equipment may be treated as deenergized provided that the employer establishes that all of the following conditions apply:
>
> a. On or before November 6, 2017, where employees were preparing electrical cables for the installation of potheads, the ends of the cables were not grounded at the transformer, resulting in the connection of the cable at the transformer, resulting in the hospitalization of an employee as a result of the electrical shock.

(*See Citation and Notification of Penalty* at 8).

1. The Standard Applies

This standard's application section states that "[t]his section applies to grounding of transmission and distribution lines and equipment for the purpose of protecting employees." 29 C.F.R. § 1962.962(a). The evidence establishes that Respondent was engaged in the deenergizing of transmission and distribution lines and equipment. (*See* Tr. 68-69, 133-134, 161). Further, the evidence reflects that AEP deenergized the lines and equipment, and then both URD crews and the Riser crew went over the work to be performed. (Tr. 203). As part of this process, Respondent's crews must ground and tag the lines. Foreman Howard acknowledged that the crews were required to tag, ground, and test all the transformers on which the crews were working. (Tr. 230).

While this standard provides that an employer may demonstrate that installation of grounds is impracticable or would pose a greater hazard, Respondent has neither asserted nor made such a showing. Accordingly, the standard applies.

2. Alleged violation of the standard

As proof of Respondent's noncompliance with the standard, the government argues that Respondent had a policy requiring grounding but failed to comply with it. (Comp. Brief at 30-31). However, a failure to follow the company's policy does not establish a violation of the standard here. Rather, the government must show that, for employees working transmission and distribution lines or equipment as deenergized, Respondent failed to ensure that the lines or equipment are deenergized and grounded. *See* 29 C.F.R. § 1926.962(b).

Neither Foreman Howard nor Foreman Bail used grounds. Foreman Howard acknowledged he was responsible for and brought grounds for the URD crews, (Tr. 209-210, 334), but that he never placed grounds on the lines or equipment before work began. (Tr. 363).

Similarly, Foreman Bail testified that he did not use grounds on the date of the accident. (Tr. 514). Respondent's internal investigation of the incident also found that no grounds were used. (Ex. C-6 at 260-261). Superintendent Barnhart acknowledged that it was the responsibility of both URD crews and the Riser crew to ground or verify grounds at the jobsite. (Tr. 934-935). In view of this evidence, the Court finds that the government has shown that the standard was violated.

3. Employee exposure to the violative condition

The evidence in this case establishes Respondent's employees were exposed to electrical hazards because they failed to ensure lines and equipment were deenergized and grounded. The employees were required to test, ground, and tag equipment, and to use the necessary personal protective equipment such as rubber gloves and blankets. These measures were required because of the electrical hazards present and the employees' proximity to the hazards. Accordingly, the Court finds that the employees were exposed to the hazard identified in this citation-item.

4. Employer knowledge of the violative condition

The Secretary maintains that Respondent had actual knowledge of the violative condition through the knowledge of its foremen on site. (Comp. Brief at 32). As support for this contention, the government notes that the foremen failed to test, ground, and tag equipment, and that each foreman's own knowledge is imputed to Respondent. (*Id*.).

In addition, the Secretary argues that even if the company did not have actual knowledge of the violative condition, Respondent could have known of the failure to ground due to the company's own safety policy requiring a grounding plan. (Comp. Brief at 32).

Specifically, the Secretary states, since there was no approved grounding plan for the work at the site and as the employees were pressured to rush to complete the work, it was expected that employees "might take a shortcut" and thus violate the standard. (Comp. Brief at 32-33).

For the reasons discussed in part IV(B)(4), *supra*, irrespective of whether precedent from the Fourth Circuit or the Sixth Circuit is applied, the knowledge of the foremen in this case is imputed to Respondent. Accordingly, the Court finds that Respondent knew or could have known of the presence of the violation through the exercise of reasonable diligence.

E. The violations were serious

Under section 17(k) of the Act, for a violation to be properly classified as "serious," there must be "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; rather, the government needs only to show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993). Here, the violations at issue resulted in the victim receiving a significant electrical shock, which caused both second-degree and third-degree burns. The violations are properly classified as serious.

F. Affirmative Defense of Employee Misconduct

Respondent contends that the citations should be vacated due to the employee misconduct defense. (Resp. Brief at 21-31). In order to prevail on a claim of unpreventable employee

misconduct, Respondent must show: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations of the rules; and (4) it must effectively enforce the rules when violations are detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic]." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

1. Established work rules and adequate communication of the rules

a. Work rules

Respondent has electrical safety rules in place. (*See* Ex. R-8). Foremen Howard acknowledged the work rules pertaining to testing, grounding, and tagging electrical equipment. (Tr. 317, 391, 436). Indeed, the government's expert witness testified that Respondent had work rules and that he was not critical of them:

> Q. Have you had an opportunity to review the New River safety manual?
>
> A. Yes.
>
> Q. You will agree with me you reviewed that before October 23, 2018?
>
> A. Correct.
>
> Q. Did you use that manual in reaching any of your conclusions that we're discussing today?
>
> A. Yes.
>
> Q. Are you critical of the safety manual at all?
>
> A. I am not critical of the safety manual.

(Tr. 676-677).

Accordingly, the Court finds that Respondent has met its burden of showing that it has established work rules designed to prevent the pertinent violation.

b. Communication of work rules

The evidence presented demonstrates that Respondent's work rules were adequately communicated to its employees. Foreman Howard testified to his knowledge of the work rules. (Tr. 317, 391, 436). He was educated on these rules through the American Line Builders Apprenticeship Training Program ("ALBAT"), the OSHA 10 training, and electrical transmission and distribution ("ET&D") training. (Tr. 316-318; Ex. R-13 at 322-323). In the ET&D training, he was taught the importance of grounding, where to ground and when to ground. (Tr. 317). In addition, Foreman Howard received training from AEP regarding testing and grounding, and specifically that if equipment has not been tested or grounded then it is to be considered energized. (Tr. 319-320). He received training from Respondent on transformers, and had to demonstrate use of proper PPE, use proper tools for outer insulations, and could ensure that grounds and neutrals were terminated properly. (Tr. 324; Ex. R-13 at 565-566). Foreman Howard also received training on switching, tagging, and grounding. (Tr. 325-326; Ex. R-13 at 567, 569). He additionally testified that he received a copy of Respondent's safety policy, that he understood the policy, and that equipment is to be treated as energized if it is not tested and grounded. (Tr. 328-333; *see also* Ex. R-8). Foreman Howard further testified that if a conductor is not first tested and then grounded, it is to be treated as energized:

> Q. In writing the policy of New River, with respect to electrical grounding, was that "All previously energized conductors shall be considered energized until confirmed to be de-energized by meter testing and proper NREC grounds are installed as prescribed in Item F below."

Do you see that?

A. Yes.

Q. And you understood that was New River's policy with respect to testing and grounding?

A. Yes.

Q. And that is just a verbatim reiteration, if it's not tested, if it's not grounded, it's considered live?

A. Correct.

Q. And at the Madison Mills project, the URD crews, including your crew, had TAG 200 meters to test, correct?

A. Yes, sir.

Q. And at the Madison Mills project on November 6, 2017, the URD crews had grounds to apply, correct?

A. Yes.

(Tr. 333-334).

Foreman Bail also received training on the work rules. (*See* Ex. R-14). He testified that he received a copy of Respondent's safety policy, reviewed it, and was trained on it. (Tr. 487-488). He testified that he was aware of the rule that if something is not tested and grounded, then it should be considered energized. (*See* Tr. 541-542). Further, he testified that his brother-in-law, Foreman Howard, instructed him on Respondent's "way of doing things," and that he understood that they were not allowed to disregard any safety protocols. (Tr. 536-537).

Superintendent Barnhart also chronicled the safety training that he received and reiterated that equipment should be considered energized if it is not tested and grounded. (Tr. 873). He explained that he had received ALBAT training, OSHA 10 and OSHA 20 training, ET&D training, and annual training from AEP on switching and tagging. (Tr. 868-869).

In addition, alteration of the evidence after the accident by Foreman Howard and Foreman Bail, as referenced in part III(C), *supra*, demonstrates their awareness of and understanding of Respondent's safety policies. Indeed, OSHA's expert witness acknowledged that the fact that the two foremen went back to Transformer No. 2 shows that they knew when to ground. (Tr. 790-792).

Certainly, the training provided to the employees was not solely provided by Respondent. As the government notes an employer may not rely on an employee's prior training and experience as the sole means of protecting its employees. (*See* Comp. Brief at 36, citing *Pride Oil Well Serv*., 15 BNA OSHC 1809, 1815 (No. 87-692, 1992). However, as shown herein, training by other entities was in addition to, not in substitution for, training provided by Respondent. Accordingly, the Court finds that Respondent has met its burden of showing that its work rules were adequately communicated to its employees.

2. Ineffective steps to discover violations of work rules

The Secretary argues that the widespread instances of misconduct by multiple foremen is a strong indication that Respondent had a lax safety policy. (Comp. Brief at 34). Further, the government expert witness testified to what he perceived as the lapse in safety culture at the company. Supervisory misconduct is strong evidence of a lax safety program, as supervisors are responsible for the protection of the employees. *Archer-Western Contractors, Ltd*., 15 BNA OSHA 1013, 1017 (O.S.H.R.C.), 1991 O.S.H.D. (CCH) P 29317, 1991 WL 81020 at *5 (1993). See also *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1865, 1995-97CCH OSHD ¶ 31,197, p. 43,690 (No. 93-1122, 1996) ("Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective

enforcement of the work rule."), *aff'd*, 149 F.3d 1183 (6th Cir. 1998); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1480, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979) ("[A] supervisor's breach [of] a company safety policy is strong evidence that the implementation of the policy is lax."). Here, multiple foremen failed to ensure that the lines or equipment were deenergized and to ensure proper grounding.

According to Superintendent Barnhart, the primary method of supervising foremen is through "job site audits." (Tr. 908). Respondent had a safety team from the company that would conduct "safety audits" in which random and unannounced safety checks would be performed. (Tr. 350). During these safety audits, the person conducting the review would see whether employees were complying with Respondent's policies and safety procedures. (Tr. 350-351; *see also* Ex. R-25 (Respondent's jobsite evaluations in 2017)). This safety team would show up at a site approximately once per month, observe all the employees, and would be on-site for one to five hours.[10] (Tr. 351-352, 909). The safety personnel would inspect the site and the work, point out if there was a safety violation, and pursue disciplinary measures if there was a serious offense. (Tr. 279). However, as discussed in part IV(E)(3), *infra*, nearly all the safety violations found by Respondent were discovered only after an accident or property damage. (*See generally* Exs. R-9, R-10, R-11, R-12). Moreover, the evidence was lacking on what the company did with the safety audits. (*See* Tr. 932).

[10] Respondent points out that the government's expert witness testified that when he previously performed job site safety audits, he would usually spend one to two hours at a worksite, and at that time, he personally conducted safety audits only approximately once per month. (Tr. 781-782). However, Respondent neglected to acknowledge that the expert also stated that for other positions, the audits were more frequent: "[w]e had requirements where they were done so many per month, so many per quarter. So I guess it averages to about, per supervisor, once a week; per manager, twice a month; for me, once a month." (Tr. 781). Further, in contrast to Foreman Howard's and Superintendent Barnhart's testimony, Foreman Bail testified that the safety audits would only last "[u]sually just a couple of minutes. Not very long." (Tr. 531).

In *Thomas Industrial Coatings, Inc.*, the Commission held that an employer in a scaffolding case had failed to take reasonable steps to discover violations of its work rules when the two supervisors inspected the scaffolding only twice within 12 workdays. *Thomas Industrial Coatings, Inc.*, 23 O.S.H. Cas. (BNA) 1521 (O.S.H.R.C.A.L.J.), 2010 O.S.H.D. (CCH) P 33111, 2010 WL 5128947 at *10. The Commission further held that it was not reasonable to rely on the two supervisors to inspect the conditions, because the supervisors were the same employees who supervised the unsafe installation of the scaffold in the first place. *Id*. In the instant matter, no evidence was presented on whether the worksite had been inspected by Respondent prior to the accident. Further, Respondent was aware, through Superintendent Barnhart, that the scope of the job had changed as the crews discovered that four transformers needed to be replaced. The government's expert witness explained that a new JSA/JHA should have been prepared at that point. (Tr. 695-696). Notwithstanding the change in scope of the work and the time constraints imposed on the crews, no one from Respondent other than the foremen responsible for the crews inspected the work.

Given the gravity of potential harm, the violations by multiple supervisors/foremen here, the change in the scope of the work, and that most of the safety violations found by Respondent were identified only after an accident or property damage, the Court considers safety inspections of only once per month inadequate. Accordingly, Respondent has failed to prove that it has taken effective steps to discover violations of its work rules.

3. Ineffective enforcement of work rules

In part, Respondent relies on its termination of Foreman Howard and Foreman Bail as support for its position that it maintains effective enforcement of work rules. (Resp. Brief at 30).

Although post-accident discipline in this case shows some effort was made to enforce work rules, this after-the-fact disciplinary measure does not establish that Respondent took any attempt to enforce its work rules prior to the accident. "An effective safety program cannot wait until an accident has occurred to enforce a work rule designed to prevent that type of accident. 'One purpose of the Act is to prevent the first accident.'" *Western Massachusetts Electric Co*., 9 O.S.H. Cas. (BNA) 1940 (O.S.H.R.C.), 1981 O.S.H.D. (CCH) P 25470, 1981 WL 18785 at *7 (1981) (citing *Lee Way Motor Freight, Inc. v. Secretary of Labor*, 511 F.2d 864, 870 (10th Cir. 1975).

Superintendent Barnhart testified that Respondent's safety policy is enforced. (Tr. 873). He has worked for Respondent for fifteen years, and served in several positions including foreman, general foreman, and superintendent during that time. (Tr. 869). He testified that employees are disciplined if they fail to test whether a piece of equipment is energized and for not grounding lines and equipment. (Tr. 874). However, although he has worked for the company for fifteen years, Superintendent Barnhart acknowledged that he had never disciplined an employee for failing to test, tag, or ground equipment. (Tr. 933-934). Moreover, even though he testified that employees are disciplined for not testing and grounding, (Tr. 874), he later testified that he was unaware of any incident in which employees or foremen did not test or ground:

> THE COURT: And during, I guess -- well, your tenure as the general foreman and also as a superintendent, are you aware of any incidents where employees -- other than this incident. I don't mean the accident that occurred here. But are you aware of any other incidents where employees or foremen didn't ground?
>
> THE WITNESS: I am not aware of it, no.
>
> THE COURT: Okay. Or didn't test?
>
> THE WITNESS: I'm not aware of it.

THE COURT: Or didn't place tags?

THE WITNESS: I'm not aware of it, no.

(Tr. 948).

Foreman Howard explained that during his four years with the company there had been safety audits that discovered failure to ground equipment and the employees responsible were disciplined. (Tr. 292-293). He testified that during his tenure at the company, there had been two or three incidents where employees were caught not using grounds and were suspended. (Tr. 292-293). Indeed, the company's record for the years preceding the accident shows that the company disciplined employees for violations of certain work rule violations. (*See* Exs. R-9, R-10, R-11, R-12). However, overwhelmingly, the disciplinary actions taken were for:

1. drug/alcohol offenses (*see* Exs. R-9 (2016 disciplinary records) at 10, 17, 29, 72; R-10 (2016 disciplinary records) at 123, 130; R-11 (2017 disciplinary records) at 197).

2. tardiness and absenteeism (*see* Exs. R-9 at 15, 22, 24-26, 30, 36, 40-41, 48, 54-56, 63, 66, 70, 74; R-10 at 81-82, 84, 96, 110, 117-118, 120, 129, 131-137, 142, 146, 148, 152-153, 155-156, 159, 169; R-11 at 185, 188-189, 194, 198-200, 207-209, 220-221, 224, 227, 229; and R-12 at 235, 240).

3. violations discovered after an accident or damage to property or equipment (*see* Exs. R-9 at 7, 9, 12, 14, 16, 19-21, 37-39, 43, 44, 46, 52, 57-60, 65, 72-73; R-10 at 77, 80, 83, 85-86, 87-94, 99, 104, 109, 114-115, 119, 124-126, 128, 149-151, 154, 157-158, 160-163, 170-172; R-11 at 174-181, 190, 192-193, 201-202, 204-206, 213, 223, 230, 232-233, 238-239; R-12 at 236, 241-242).

In total, Respondent's disciplinary records for the years 2015 through 2018 (prior to the accident) totaled approximately 238 pages of materials. There were few documented disciplinary actions for work rule violations without an apparent accident or property damage. Indeed, only approximately 16 pages of the 238 pages of material related to safety violations discovered without an apparent accident or property damage. (*See* Exs. R-9 at 2, 49; R-10 at 98, 103-104,

106, 111, 144-145; R-11 at 183, 187, 191, 212, 222, 225-226). Of these, only three concerned work rule violations related to electrical hazards and all three occurred in 2016:

1. a second offense resulting in an eight-day suspension for cutting energized control cable in station without checking for voltage (Ex. R-10 at 103);
2. a first offense resulting in demotion for working on ungrounded equipment/line (Ex. R-10 at 106); and
3. a suspension for failing to wear proper PPE when entering a primary zone. (Ex. R-10 at 144-145).

Thus, while Foreman Howard testified that employees had been disciplined for failure to ground equipment, (Tr. 292-293), the documentary evidence of such discipline is scant. *See e.g. Broan-Nutone Storage Solutions, LP*, 3 O.S.H. Cas. (BNA) 1954 (O.S.H.R.C.A.L.J.), 2011 O.S.H.D. (CCH) P 33163, 2011 WL 4634271, at *8 (2011) (ALJ finding disciplinary records focusing primarily on employees damaging products, rather than safety concerns, insufficient to show attempts to monitor compliance or enforce safety policies).

The government's expert witness testified to "blind spots" in Respondent's audits. (Tr. 816-817). Mr. Dawsey testified that based on the audit records, it appeared that the company was not looking at grounds, tags, and deenergized zones, because there were many references to "n/a" on audit forms concerning these issues. (*Id*.).

In order to have an effective safety program, an employer must make "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981). In the absence of such evidence, the Commission has held that the employer "could not have enforced its work rules effectively." *Am. Sterilizer Co.*, 18 BNA OSHC 1082 (No. 91-2494, 1997) (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC

1533, 1539 (No. 86-360, 1992)). As discussed herein, Respondent's efforts in this regard were deficient and it has failed to meet its burden of showing effective enforcement of work rules. Accordingly, Respondent's affirmative defense of unpreventable employee misconduct fails.

G. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of $12,934 for each of the three citation-items at issue. Thus, Complainant proposed a total penalty of $38,802. As discussed herein, the Court affirms all three citation-items. However, the Commission has held that violations may be found duplicative when the standard cited required the same abatement measures, or where the abatement of one citation item will necessarily result in the abatement of the other item as well. *Rawson Contractors, Inc*., 20 O.S.H. Cas. (BNA) 1078 (O.S.H.R.C.), 2002 O.S.H.D. (CCH) P 32657, 2003 WL 1889143 at *5 n.5. In the instant case, the CSHO stated that all the citation-items were related violations, contributed to the same hazard, and that the abatement was no

different for any of the violations. (Tr. 92). The CSHO further testified that grounding and tagging would have abated all the hazards identified in the citation-items. (Tr. 89-90). The government did not provide evidence refuting these representations. In view of this testimony and the record as whole, the Court finds that the three citation-items should be grouped as one citation-item. Complainant had proposed a penalty of $12,934 for each item, because failure to follow the standards could result in bodily injury or death. (Tr. 89). [redacted] received an electrical shock causing second-degree burns to "his left hand and forearm and third-degree burns to his right knee and inner thigh area." (Tr. 91; *see also* Stip. ¶ 9, Exs. C-1, C-6, R-1). Complainant proposed no discounts to Respondent given the company's size (over 250 employees), lack of positive or negative inspection history in the past five years, and the gravity of the violation. (Ex. C-2; Tr. 79). Upon consideration of the proposed penalty, other than grouping Item, 1, Item 2 and Item 3, the Court sees no reason to depart from Complainant's assessment. As such, Complainant's proposed penalty of $12,934 is appropriate and shall be assessed for the grouped items (Item 1, Item 2, and Item 3).

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1, Item 2, and Item 3 of Citation 1 are GROUPED;
2. Grouped Item 1, Item 2, and Item 3 of Citation 1 is AFFIRMED, and a total penalty of $12,934 is ASSESSED.

SO ORDERED.

/s/ Christopher D. Helms
Christopher D. Helms

Date: September 11, 2020
Denver, Colorado