
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 02-1444
	:	
NEW RIVER ELECTRICAL CORP.,	:	
	:	
Respondent.	:	

APPEARANCES:

Janice L. Thompson, Esquire
U.S. Department of Labor
Cleveland, Ohio
For the Complainant.

Keith L. Pryatel
Kastner Westman & Wilkins, LLC
Akron, Ohio
For the Respondent.

BEFORE: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, New River Electrical Corporation (“New River”), after an accident on June 12, 2002, in which an employee of New River was electrocuted; the site was located in Canal Winchester, Ohio, and, on the day of the accident, New River had a three-member crew at the site that was engaged in installing new utility lines. Pursuant to the inspection, OSHA issued to New River a Citation and Notification of Penalty alleging serious violations of 29 C.F.R. § 1926.950(c)(1) and 29 C.F.R. § 1926.950(c)(2)(i). New River contested the citation, and the hearing in this matter was held in Columbus, Ohio, on April 30, May 1, May 2 and May 20, 2003. Both parties have filed post-hearing briefs and reply briefs.

Jurisdiction

In its answer, New River admits that it is engaged in a business affecting interstate commerce and that it is subject to the Act. *See* Complaint ¶¶ II(a) and III(a); Answer ¶¶ 3 and 6. I conclude, accordingly, that Respondent New River is engaged in a business affecting interstate commerce and that the Commission has jurisdiction over this action and the parties.

Background

New River is an electrical contractor engaged in overhead distribution and transmission, substation and underground electrical work. New River works in various states and had about 367 employees at the time of the inspection. South Central Power Company (“SCPC”), a non-profit rural electric cooperative, contracted with New River to perform work under a distribution line extension contract; SCAP supplied the materials for the work, while New River supplied the labor and safety equipment.¹ One of the jobs pursuant to the contract involved putting in new poles and lines and relocating existing lines on Hill and Dilley Roads in Canal Winchester, Ohio, because of the construction of a new bypass for State Route 33.² The contract required New River to perform the work on energized lines. The lines at the site were energized with 12,470 volts phase-to-phase and 7,200 volts phase-to-neutral.³ (Tr. 20-23, 44-49, 54, 61, 102-04, 141-43, 371, 480).

On June 12, 2002, the New River crew at the Hill and Dilley Roads site had already been working there for four to six weeks. The crew consisted of Foreman Jerry Brown, Journeyman Lineman Wayne Lane, and “Ground man” Thomas White; Mr. Brown had been with New River for 15 years and a foreman for nine, Mr. Lane had been on Mr. Brown’s crew for seven years, and Mr. White had been with the crew since November 2001. The work that day involved putting three new to-be-energized lines or wires between the pole on which the accident occurred (“the fatality pole”) and a transformer bank pole (“the transformer pole”) located about 75 feet northwest.⁴ Mr. Brown and Mr. Lane began work that morning in separate bucket trucks at the transformer pole, putting its energized lines onto temporary fiberglass arms so the new lines could be anchored to the transformer pole’s existing cross arms. Once the transformer pole’s lines were spread onto the fiberglass arms, Mr. Brown and Mr. Lane descended from their positions at the pole. Mr. Brown moved his bucket

¹New River performed about 50 projects for SCPC between 1995 and 2002. (Tr. 94-95).

²The new poles were 40 feet high, while the existing poles were 35 feet high. (Tr. 144, 558).

³The upper and lower cross arms on the poles at the site each had three “hot” or energized phases, or lines or wires, and one neutral phase. (Tr. 145-46).

⁴The fatality pole and the transformer pole were both new poles. (Tr. 59). On June 11, 2002, new lines were put on the top cross arm of the fatality pole. The work on June 12, 2002, was to put three new “hot” lines on the lower cross arm. The neutral line from an old pole that was to be removed was used on the lower cross arm. (Tr. 149-51, 576-81; C-9-14).

truck to the fatality pole, in order to attach the new lines, and Mr. Lane and Mr. White worked on the ground and bolted metal “shoes” to the ends of the new lines.⁵ The new wire was pulled over the cross arms of the fatality pole with rope and then strung back to Mr. Lane, who had gone back up in his bucket truck at the transformer pole. Mr. Brown and Mr. Lane next put temporary jumpers, also called MAC’s, on power lines across the street, which resulted in the new lines being energized. Mr. Brown and Mr. Lane then went back to the transformer pole and attached the transformers to the new lines. (Tr. 72-77, 140-42, 147-52, 530, 538, 542-48, 553-57, 563; C-9-14; R-SS-1).

After lunch, the crew went across the street and five poles north for the purpose of removing some MAC’s that were energizing the lines that went from an old pole 10 feet away from the fatality pole (“the old pole”) that ran parallel to the new lines and back to the fiberglass arms on the transformer pole. Mr. Lane went up in his bucket and removed the MAC’s, and, once that was done, the old lines were de-energized. Mr. Lane next drove his bucket truck in between the old pole and the fatality pole and positioned it so that he could reach the cross arms of both poles by swinging the boom of his truck. Mr. Brown went to the transformer pole in his truck and began releasing the de-energized lines to Mr. Lane, and, after this was accomplished, Mr. Brown removed the fiberglass arms from the transformer pole. Mr. Lane began untying and cutting the old de-energized lines, and Mr. White dragged the lines from the road as they fell. Mr. Brown then walked across the road to the next pole to be worked on, and, as there was a pickup truck parked where he needed to be, he proceeded to look for the truck’s owner so he could have it moved. In the meantime, Mr. White drove Mr. Brown’s bucket truck across the street to where they would next be working, and Mr. Lane moved his bucket under the fatality pole’s lower cross arm in order to clamp together and join the neutral line and to remove the MAC from the neutral line. Mr. White and Mr. Brown were across the street and not facing the fatality pole when there was a loud arcing sound, and the truck owner Mr. Brown was talking to said that something was wrong. Mr. Brown and Mr. White ran across the street, and Mr. Brown lowered the bucket, pulled Mr. Lane out, and cut off his rubber sleeves and

⁵A “shoe” is a part of a dead-end device that clamps onto the wire so that it can be pulled up into the air and then attached to the cross arm of a pole. The device consists of the shoe itself and a yoke, which are both metal, followed by a 6-inch insulator and then a 2-inch metal base that is bolted into the cross arm. (Tr. 62-63, 130-32, 256-61, 545; C-9, C-20, R-SS-2).

lanyard. Mr. White and others tried resuscitation, but Mr. Lane expired at the scene. (Tr. 160-66, 209, 255, 352-53, 356, 443-44, 558-68; C-9-10, C-14, C-20, C-41, R-KK).

After the accident, it was determined that the fatality pole was properly grounded and that there were no problems with the insulated bucket truck in which Mr. Lane had been working. It was further determined that although Mr. Lane was wearing his rubber sleeves he was not wearing his rubber gloves when the accident took place.⁶ To clamp together and join the neutral line and to remove the MAC, Mr. Lane had moved the bucket below the lower cross arm so that he was positioned between the grounded neutral line and the energized line shown in photos C-19 and C-20. An insulated hose had been put over the energized line, but the dead-end device that clamped onto the line and was bolted into the cross arm was not covered; the shoe/yoke area of the device was metal and thus had the same potential as the line. Mr. Lane had his back to the shoe and yoke and was holding onto the neutral line with his bare hand when his left upper back or shoulder contacted the shoe/yoke area; the current went through his left arm to the grounded neutral line, causing his electrocution.⁷ At the hearing, both Mr. Brown and Mr. White testified that Mr. Lane had been wearing his protective equipment, including his rubber gloves, while he was working near the lines that day; Mr. Brown also testified that when he went across the street to have the pickup moved, Mr. Lane had not yet moved his bucket to the fatality pole. (Tr. 161-67, 170-71, 252-64, 308, 350-51, 357-58, 383, 436, 442-43, 448, 502-03, 544, 547, 557, 560, 566-67, 587-96; 667; C-47, R-KK).

The Expert Witnesses

Alexander Saharic, the Secretary's expert, and John Doering, New River's expert, both submitted reports and testified at the hearing.⁸ (C-47, R-PP). They essentially agreed about how the

⁶While attending to Mr. Lane after the accident, Mr. Brown noted that Mr. Lane was not wearing his rubber gloves and that they were in the bottom of the bucket. (Tr. 161-62; C-21-22). It is undisputed that the gloves were high-voltage gloves rated for the voltage at the site, that they had been tested as required, and that the gloves had no visible defects. (Tr. 381-82).

⁷That this occurred is indicated by the fact that Mr. Lane was wearing a watch on his left wrist and that the current going to ground severed that hand. (Tr. 161, 171; C-47, R-KK).

⁸To reach their opinions, both experts reviewed the OSHA citation, photos of the site, discovery materials and witness statements, and, at the hearing, both experts discussed R-SS-2, the

(continued...)

accident occurred, and they also agreed that Mr. Lane's left upper back or shoulder most likely had contacted the yoke because it protruded out further than the other parts of the dead-end device. (Tr. 252-64, 658-60, 667). However, Mr. Saharic testified that it was possible that Mr. Lane's back or shoulder had contacted not only the yoke but also the 2-inch metal base, located on the other side of the insulator, that was bolted into the cross arm. Mr. Saharic said the current could have traveled from the yoke through Mr. Lane's back and then to the metal base and the grounded cross arm to which the base was bolted; he also said that in that case there would have been two paths to ground and that rubber gloves would not have protected Mr. Lane except that he would not have lost his hand. Mr. Saharic noted that there were two burn holes in Mr. Lane's shirt, as shown in photos C-23 and C-24, which indicated that there could have been two contact points. (Tr. 263-69; 275). Mr. Doering disagreed. He testified that Mr. Lane contacting both the yoke and base at the same time was unlikely, as the yoke stuck out further than the base and it would have been difficult for Mr. Lane to get himself into the "notch" of where the base and the cross arm met, and that even if he had the wooden cross arm would have provided sufficient resistance such that only a minimal amount of current would have flowed and nothing would have happened. He further testified that he would not conclude, on the mere fact of two burn holes in the shirt, that there were two contact points; an arc or a spark, for example, could have caused the second hole. Mr. Doering said that Mr. Lane could have prevented the accident by wearing rubber gloves, but he agreed that the dead-end device should have had a rubber blanket over it in any case. (Tr. 642-44, 650-68).

The Cited Standards

29 C.F.R. §§ 1926.950(c)(1) and (c)(2)(i) state as follows:

(c) *Clearances.* The provisions of paragraph (c)(1) or (2) of this section shall be observed.

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

⁸(...continued)

type of dead-end device used on the fatality pole. Mr. Saharic also visited the site, in February 2003, and he reviewed other materials such as the coroner's report and New River's accident report; further, he was present for the entire hearing. (Tr. 6, 252-53, 258-60, 650-54; C-47, R-PP).

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

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

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

(2) (i) The minimum working distance and minimum clear hot stick distances stated in Table V-1 shall not be violated. The minimum clear hot stick distance is that for the use of live-line tools held by linemen when performing live-line work.

The Parties' Contentions

The Secretary contends that New River violated both of the cited standards. She notes that the lines at the site were energized at 12,470 volts phase-to-phase and 7,200 volts phase-to-neutral, which, according to Table V-1 set out in the standard, requires a 2-foot minimum clearance distance.⁹ She also notes that Mr. Lane clearly did not maintain the required 2-foot clearance distance in this case and that he likewise did not use appropriate protection, *i.e.*, rubber gloves for his work on the neutral line and a rubber blanket to cover the dead-end device.¹⁰ The Secretary asserts that she has established the knowledge element of the alleged violations because the evidence of record demonstrates that New River failed to properly train and supervise its employees in the necessary safety precautions to take when working on or around energized lines; she further asserts that the testimony of Mr. Brown that he did not know that Mr. Lane was working without gloves at the time of the accident was not credible.

New River contends that the Secretary's citing it pursuant to both sections 1926.950(c)(1) and (c)(2)(i) was inappropriate as the clear language of the standard states that “[t]he provisions of paragraph (c) (1) or (2) of this section shall be observed.” (Emphasis added). Similarly, New River contends that the Secretary's suggestion that it was required to comply with more than one subpart of 1926.950(c)(1) is incorrect since each subpart is separated by the word “or” rather than the word

⁹Table V-1 requires a 2-foot clearance distance for voltages ranging from 2,100 to 15,000.

¹⁰David Robinett, SCPC's superintendent of operations, testified that the distance between the energized line and the neutral line was 31 to 36 inches. His testimony is credited because of his familiarity with the site and the plans for the job. (Tr. 42-43, 58). In any case, as the Secretary notes, it is clear Mr. Lane contacted the shoe/yoke area and did not maintain the requisite 2-foot distance.

“and.” New River asserts that its linemen were required to wear protective equipment, including rubber gloves and sleeves, for work on or near live conductors, and that the Secretary cannot demonstrate that it had either actual or constructive knowledge that Mr. Lane was working without gloves at the time of the fatal accident. New River also asserts that its requirement that linemen wear rubber gloves and sleeves, together with the clear language of subpart 1926.950(c)(1)(i), establishes that it was in compliance with that subpart and that, consequently, the alternative requirement set out in 1926.950(c)(2)(i) need not be addressed.

The Secretary’s Interpretation of the Cited Standards

The Secretary urges that New River has no legal authority to support its assertion that it cannot be cited under both 1926.950(c)(1) and 1926.950(c)(2). She notes that none of the means set out in 1926.950(c)(1) were used, that it is clear that Mr. Lane was within 2 feet of the energized shoe/yoke area, and that the Commission has long held that citations are not duplicative if each requires different abatement measures. (S. Reply Brief, pp. 21-23). However, the Secretary herself notes the plain language of the standard, which states that “[t]he provisions of paragraph (c) (1) or (2) of this section shall be observed.” (Emphasis added). Moreover, as New River points out, “no deference is due to agency interpretations at odds with the plain language of the statute itself.” *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). The Secretary’s argument is rejected, based on the standard’s unambiguous terms, and I agree with New River that, if it was in compliance with 1926.950(c)(1)(i), then 1926.950(c)(2)(i) need not be addressed.

The Secretary next urges that 1926.950(c)(1) requires the employer to eliminate each specific exposure to the employee, and she points to the testimony of Mr. Saharic, her expert, that there could have been two contact points and two paths to ground. (S. Brief, pp. 22-23). I have considered carefully the opinions of both of the experts, summarized *supra*, and I have also considered each expert’s education and experience, as follows.

Mr. Saharic worked for Jersey Central Power and Light (“JCPL”) for 37 years, progressing through the ranks to become a journeyman lineman; his later positions with JCPL included safety supervisor, safety coordinator, and, finally, safety manager of the entire company.¹¹ After retiring,

¹¹Mr. Saharic, a high school graduate, became a journeyman by attending JCPL’s own (continued...)

Mr. Saharic formed his own company, Power Train Associates, which has performed accident investigations and training in a number of states.¹² Mr. Saharic has been an authorized OSHA instructor for about ten years, and he and his partner have conducted electrical safety training at the OSHA National Institute in Chicago; he has also taught electrical safety at Princeton University, and he is a certified safety utility administrator with the National Safety Council. (Tr. 233-49; C-46).

John Doering has an M.S. degree in electrical engineering. He worked for 38 years for Ohio Edison, where he began as an engineer in training and ended as a senior consultant; other titles he held were distribution engineer, planning engineer, division engineer, transmission and distribution (“T&D”) superintendent, and manager of distribution practices, and his duties included serving on the union management safety committee and developing safe work practices for and providing training to linemen.¹³ During his tenure with Ohio Edison, Mr. Doering became a member of the Edison Electric Institute (“EEI”), a trade association of investor-owned utilities, and served on its T&D committee as well as on the safety and health subcommittee and the OSHA Coordinating Task Force; the OSHA Coordinating Task Force developed a proposed standard that was the general industry counterpart to 29 C.F.R. 1926.950, and the proposed standard was presented to OSHA and ultimately went into effect in 1994. Mr. Doering was also a member of the Institute of Electrical and Electronic Engineers, the National Electric Safety Code and the National Fire Protection Association, and he served on committees in those organizations.¹⁴ After retiring from Ohio Edison, Mr. Doering in 1989 started his own business, J.F. Doering and Associates, which provides safety advice and other services relating to electrical work; in particular, Mr. Doering has given engineering and

¹¹(...continued)

lineman school; he was also a member of the IBEW. (Tr. 238-41).

¹²Before and after retiring, Mr. Saharic served as an expert on several occasions on behalf of JCPL in regard to electrical contacts; he testified at a trial once, and the other times he aided discovery by being deposed or by assisting with interrogatories. (Tr. 244-45, 249-50).

¹³While working for Ohio Edison in Youngstown, Ohio, Mr. Doering taught night courses in electrical engineering at Youngstown College for approximately five years. (Tr. 609).

¹⁴Mr. Doering still belongs to these three organizations. (Tr. 631-33).

litigation support to a number of companies, including Ohio Edison and other utility companies, in cases involving accidents and fatalities resulting from electrical work.¹⁵ (Tr. 606-35; R-PP).

I observed the demeanor of the above experts as they testified, and I found both to be sincere and believable witnesses. Moreover, each has many years of experience in his respective area of expertise. As set out *supra*, both experts basically agreed about how the accident happened, with the exception of the possibility of two contacts and the result if such had occurred. In this regard, I have noted Mr. Doering's engineering degree and his substantially greater breadth of experience. In light of his education and experience, I credit Mr. Doering's opinion over that of Mr. Saharic to the extent their opinions differ.¹⁶ Specifically, I credit Mr. Doering's opinion that it would have been unlikely that Mr. Lane would have contacted the yoke and the base of the dead-end device at the same time because the yoke protruded out further and it would have been difficult for Mr. Lane to have gotten himself into the area where the base and the arm met. I also credit his opinion that, even if the second contact had occurred, the wooden cross arm would have provided sufficient resistance such that only a small amount of current would have flowed and nothing would have happened. (Tr. 650-68). Based on the foregoing, I find that Mr. Lane was exposed to one energized part, *i.e.*, the shoe/yoke area, and the Secretary's suggestion that there were two contact points is rejected.

Turning to the parties' dispute as to the interpretation of 1926.950(c)(1), New River notes that 1926.950(c)(1)(i) explicitly states that "gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part." New River also notes that subparts 1926.950(c)(1)(i), (ii) and (iii) are separated by "or." New River asserts, accordingly, that compliance with one subpart is all that is required and that compliance with 1926.950(c)(1)(i) is met by the employee wearing rubber gloves and sleeves. (R. Brief, pp. 29-30, 36-38). The Secretary does not really argue that compliance with more than one subpart is required,

¹⁵In many of these cases, some of which have involved OSHA citations, Mr. Doering has furnished opinions, reports, evaluations or analyses in preparation for trial. However, none of the cases he has worked on has actually gone to trial. (Tr. 621-24, 636; R-PP).

¹⁶In crediting Mr. Doering's opinion over that of Mr. Saharic, I have noted the Secretary's assertion that Mr. Doering "was not privy to much of the information in this case." (S. Brief, p. 23, n.5). In my view, however, Mr. Doering had sufficient information on which to base his opinion.

and I find, based on the fact the subparts are separated by “or,” that compliance with 1926.950(c)(1) is achieved by meeting any one of the three subparts. The Secretary does, however, dispute New River’s interpretation of 1926.950(c)(1)(i). She interprets the subpart to require more than just “gloves or gloves with sleeves,” in this case, a rubber blanket in addition to gloves and sleeves, and she asserts that gloves or gloves with sleeves are considered insulation of the employee only in regard to the energized part being worked on. She further asserts that her interpretation is entitled to deference. (S. Brief, p. 11; S. Reply Brief, pp. 11-18). I disagree, for the following reasons.

First, I note the plain terms of 1926.950(c)(1)(i). The standard requires the employee to be “insulated or guarded from the energized part” and then states, in parentheses, that “gloves or gloves with sleeves rated for the voltage involved *shall* be considered insulation of the employee from the energized part.” (Emphasis added). The Secretary cites to various cases and offers a number of reasons as to why her interpretation should be accepted. (S. Reply Brief, pp. 11-18). However, the terms of the standard are clear, in my opinion, and, as New River points out, no deference is due to the Secretary’s interpretation where “an alternative reading is compelled by the regulation’s plain language.” *Reich v. General Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996) (citation omitted).

Second, although OSHA issued an interpretative letter with respect to 1926.950(c)(1)(i), dated December 12, 1977, that letter does not persuade me of the Secretary’s position. C-44, the interpretive letter, states in pertinent part as follows:

The intent of the subject standard is to insulate or guard the employee for the energized part. The example in parenthesis is one way of complying with the standard on certain limited exposures. There may be other personal protective equipment used and other exposures to the employee.

As New River observes, the foregoing does not support the Secretary’s assertion that other equipment in addition to gloves and sleeves is required, especially in light of the use of the word “may” in the final sentence. As New River further observes, even if it did, the Commission has noted that “[i]t is a generally accepted proposition that an agency may not substantively amend regulations through an interpretation.” *Simpson, Gumpertz & Hager*, 15 BNA OSHC 1851, 1865 (No. 89-1300, 1992) (citations omitted).

Third, 29 C.F.R. 1910.269(l)(2), the general industry counterpart to the standard cited here, provides as follows:

(2) *Minimum approach distances.* The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10, unless:

- (i) The employee is insulated from the energized part (insulating gloves or insulating gloves and sleeves worn in accordance with paragraph (l)(3) of this section are considered insulation of the employee only with regard to the energized part upon which work is being performed), or
- (ii) The energized part is insulated from the employee and from any other conductive object at a different potential, or
- (iii) The employee is insulated from any other exposed conductive object, as during live-line bare-hand work.

29 C.F.R. 1910.269 was published in the Federal Register in January of 1994 and became fully effective in January of 1995. *See* 59 Fed Reg. 4320 (1994). The preamble to the standard is lengthy and discusses many aspects of the rule. In regard to 1910.269(l)(2)(i), OSHA stated that:

[T]he accident data in the record show that the overriding hazard to employees is posed by other energized conductors in the work area, to which the minimum approach distances still apply. The rubber gloves, of course, provide protection only for the line on which work is being performed.

Id. at 4386.

The language of 1910.269(l)(2)(i) makes clear the Secretary's intent in the general industry standard that gloves or gloves and sleeves were to be considered insulation of the employee only in regard to the energized part being worked on, and that intent is emphasized in the foregoing excerpt from the preamble. However, the Secretary failed to express that intent in the cited standard.¹⁷ Moreover, she has not amended that standard to rectify the situation, despite her indication she would do. The preamble to 29 C.F.R. 1910.269 stated the concerns of industry representatives that work operations could be covered under the 1972 construction standard or the new standard, depending on the circumstances, and that compliance could be confusing and put workers at more risk, especially in situations where the two standards addressed equivalent hazards but did not have identical requirements. OSHA conceded these problems but noted that it could not alter the 1972 standard without further rule making. OSHA said that it intended to develop a proposal to revise the

¹⁷The construction standards that include 29 C.F.R. 1926.950 were published in the Federal Register and made effective in December 1972. *See* 37 Fed Reg. 27,503 (1972). The preamble to the construction standards is very brief and contains no comments about any of the specific standards.

1972 standard to incorporate the improvements in the new standard and provide for consistency in the two standards, but that, in the meantime, it expected that employers would choose to comply with the new rule as it provided greater protection than the 1972 rule. *See* 59 Fed Reg. 4336-37 (1994). Despite these statements in 1994, OSHA has not revised the 1972 construction standard, and, as New River indicates, OSHA cannot enforce rules that have yet to be issued.¹⁸

Fourth, the Commission in 1976 issued a decision which, as I read it, agrees with New River's position. *Utilities Line Constr. Co.*, 4 BNA OSHC 1681 (No. 4105, 1976). There, a lineman working on overhead lines in an insulated bucket was evidently having some difficulty in trying to throw a rope lead over a cross arm. He stepped out of the bucket, stood with one foot on a secondary line, and took hold of a primary line he thought was not energized. The line was in fact energized, and the lineman, who was wearing only cotton gloves, was electrocuted; however, the lineman earlier had been wearing rubber gloves. In deciding the case, the Commission stated as follows:

[H]ad Martin worn his rubber gloves when he stepped out of the insulated bucket, the standard would not have been violated. [29 C.F.R. 1926.950(c)(1)(i)] explicitly provides that “gloves...shall be considered insulation of the employee from the energized part.” By requiring linemen both to wear rubber gloves *and* to stay in insulated buckets, Respondent has established partially redundant safety rules. Either rule, had it been followed, would have prevented the violation under the circumstances of this case. Thus, even assuming that Respondent did not adequately enforce its rule against stepping out of the insulated buckets, if its rule requiring the wearing of rubber gloves was adequately enforced, it did not violate the standard.

Id. at 1684-85 (emphasis in original) (footnote omitted). The Commission decided that the company had adequately enforced the rule requiring the wearing of rubber gloves and therefore vacated the alleged violation of 1926.950(c)(1)(i).¹⁹

¹⁸ As New River notes, OSHA has recently issued a draft proposal that “would bring the construction industry up to the level of safety already required for general industry employers involved with electrical power generation, transmission, and distribution.” *See* BNA Daily Labor Report, No. 78, p. A-7, April 23, 2003. However, the account in the Daily Labor Report does not mention the cited standard; thus, it is not clear that the cited standard will in fact be amended.

¹⁹ In *Sawnee Elec. Member. Corp.*, No. 10277 (1975 OSAHRC LEXIS 341), a Commission Judge vacated an alleged violation of 1926.950(c)(1) because the lineman who was electrocuted had been wearing gloves and sleeves rated for the voltage at the site; the lineman was electrocuted when

(continued...)

There is a final reason for not accepting the Secretary's interpretation of the standard. The record shows that in April of 2001, another lineman of New River was electrocuted; the lineman was hanging a guy wire on a pole, and, although he was wearing gloves, he was electrocuted when his back contacted an energized conductor.²⁰ OSHA cited New River under the same standard cited here but withdrew the citation after New River presented the same legal argument made in this case, that is, that the employee was wearing gloves, that that was all that the standard required, and that the employee was therefore protected according to the standard. (Tr. 32-33, 332-33, 383-85). The CO who recommended the 2001 citation is the same CO who recommended the citation in this case. She testified that at her deposition in the 2001 case, she stated that she thought it had been a mistake to issue the citation. She further testified that she then researched the issue, found C-44, and went to the area director, but the citation was already withdrawn. The CO admitted that she had never told New River or its counsel about C-44 or her change in position. (Tr. 332, 383-89).

New River contends that the foregoing demonstrates that it did not have fair notice of the Secretary's interpretation of the standard and that this alone is sufficient to vacate the alleged violation. I do not agree with New River on this point because, as the Secretary notes, there is no evidence that New River relied on OSHA's prior acceptance of the company's legal argument. *See Interstate Brands Corp.*, 20 BNA OSHC 1102, 1106-07 (No. 00-1077, 2003). In fact, as set out in the next section of this decision, New River's own work rules explicitly require, for work on or near energized lines, the use of protective equipment such as rubber gloves, sleeves, overshoes, hoses and blankets. However, the foregoing does demonstrate that OSHA's interpretation of the standard has not been consistent. It further demonstrates that the language of the standard is such that not only

¹⁹(...continued)

the right side of his neck and ear contacted an uncovered metal clamp. In a more recent case, a Commission Judge agreed with the Secretary's interpretation and affirmed the alleged violation of 1926.950(c)(1); there, the lineman was wearing proper gloves and sleeves and was working in an insulated bucket but was electrocuted when a line from which he was removing slack contacted his body. *Mastec N. Am., Inc.*, 2000 CCH OSHD ¶32,098 (No. 99-252, 2000). The Judge in *Mastec* did not address the above Commission decision. *Mastec* is currently on review before the Commission.

²⁰The 2001 accident involved a different crew and a different location in Ohio. (Tr. 466).

employers but also OSHA itself and attorneys litigating on OSHA's behalf can conclude that compliance with the cited standard is met by the use of "gloves or gloves with sleeves."

In rejecting the Secretary's interpretation, I am well aware of the fatality that occurred in this case. I am also aware of the 2001 fatality, noted above, in which the employee was wearing gloves and was nonetheless electrocuted when his back contacted an energized conductor. Finally, I am aware of the testimony of Mr. Doering that although gloves would have prevented Mr. Lane's accident, many accidents have occurred when employees wearing gloves have contacted energized conductors with other parts of their bodies; Mr. Doering also testified that a rubber blanket should have been put over the shoe/yoke area.²¹ (Tr. 642-44, 662-63). Regardless, the standard says what it says, and I conclude, for all of the reasons set out *supra*, that compliance with 1926.950(c)(1)(i) is achieved by the employee wearing gloves or gloves and sleeves.

Whether New River was in Violation of 29 C.F.R. 1926.950(c)(1)(i)

To prove a violation, the Secretary must show that (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or in the exercise of reasonable diligence could have known, of the violative condition. *See, e.g., Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1386 (No. 92-262, 1995), and cases cited therein. There is no dispute that the first three elements have been established in this case; however, as indicated above, the parties do dispute the knowledge element. In the Sixth Circuit, where this case arose, "the Secretary makes out a *prima facie* case of the employer's awareness of a potentially preventable hazard upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions." *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987) (citations omitted).

The Secretary contends that Mr. Brown, the foreman, had actual knowledge that Mr. Lane was working without gloves and that his testimony to the contrary was not credible. The record shows that Mr. Brown had been in the electrical trade for 36 years and that of his 15 years with New

²¹David Robinett, SCPC's supervisor of operations, agreed with Mr. Doering that no shock would have occurred if Mr. Lane had been wearing his gloves, as long as the gloves were not defective and there was no path to ground. He also agreed, however, that a rubber blanket should have been put over the shoe/yoke area, and, further, that rubber gloves would not protect a lineman if another body part contacted an energized line that had a path to ground. (Tr. 113, 128, 133).

River he had been a foreman for nine; as foreman, Mr. Brown had the authority to require crew members to follow safety rules. The record further shows that Mr. Lane was an experienced journeyman lineman who had been on Mr. Brown's crew for seven years. (Tr. 40, 137-41, 522). The background portion of this decision that describes the work the crew was doing on the day of the accident is based primarily on the testimony of Mr. Brown. According to his testimony, he and Mr. Lane were within sight of each other for much of their work that day, and, whenever Mr. Brown saw him working on or around the lines, Mr. Lane was wearing his protective equipment, that is, rubber gloves and sleeves, safety glasses and a hard hat. Mr. Brown further testified that he and Mr. Lane both wore their protective equipment even when working on or around lines that were not energized that day because there is always the possibility of getting into a live line. Mr. Brown said that the last time he saw him before going across the road, Mr. Lane was removing the last wire from the old pole and he was wearing his protective equipment then. Mr. Brown indicated that there was no reason for Mr. Lane to remove his gloves to join together the neutral line and to remove the MAC, as both tasks can be done with gloves. (Tr. 163-64, 536, 544, 547-50, 555-57, 560-68, 587-96).

The Secretary asserts that Mr. Brown's testimony, that after finishing his work on the transformer pole he did not look up at either Mr. Lane or the fatality pole before crossing the road to see about having the pickup truck moved, was not credible. However, as Mr. Brown explained, he was concentrating on the next pole they would be going to and on getting the truck moved; as he further explained, it simply did not take him that long to lower his bucket truck, walk by the fatality pole, and cross the road. (Tr. 587-96). I observed the demeanor of Mr. Brown as he testified, and, based on his facial expressions, body language and overall bearing, I found him to be a very sincere and believable witness. His testimony is accordingly credited, and I find that he did not in fact look up at Mr. Lane or at the fatality pole after he finished his work at the transformer pole.

The Secretary also asserts that Mr. Brown's testimony that he had not seen the hose and the exposed shoe on the energized line before the accident was not credible. (Tr. 566, 587-88). She points to the testimony of the CO that Mr. Brown told her in one interview that the "hose was put on when process started," which she took to mean the start of the day. The CO further testified that Mr. Brown told her in a later interview that the hose was put on "as he went up," which she took to mean Mr. Lane; during this same interview, Mr. Brown also told the CO that a blanket (in addition

to the hose) should have been used. (Tr. 348, 353-55; C-35-36). At the hearing, Mr. Brown testified he could not remember what he told the CO, and he agreed that at his deposition he had said he did not know who put the hose on the line. He noted, however, that the hose could not have been put on at the start of the day because the line had not yet been installed. He also noted that it was more likely that Mr. Lane had put the hose on the line when he went up because the line was energized then and had not been when he (Mr. Brown) had worked there earlier. (Tr. 156-59, 551-53). Based on the foregoing, I conclude that Mr. Lane put the hose on the line when he went up to join together the neutral line and to remove the MAC. I further conclude, based on my findings in the preceding paragraph, that Mr. Brown was unaware of the hose and exposed shoe until after the accident.²²

The Secretary next urges that Mr. Brown's testimony was not credible because of a statement he made to the CO that Mr. Lane had had "gloves and sleeves off and on all a.m." (Tr. 349-52; C-35, p. 2). Mr. Brown agreed he had made such a statement to the CO. (Tr. 159). However, the complete statement that Mr. Brown gave the CO in this regard, as set down in her notes, is as follows:

When we started, I put on gloves and sleeves. He put on the gloves as sitting in cradle. Did see him put them gloves on and sleeves. Did not see him remove gloves. Working bank pole had on gloves and sleeves off and on all morning.

See C-35, p. 2. The foregoing, as I read it, is far from an admission of Mr. Brown that he knew that Mr. Lane was working around energized lines without gloves that day. Moreover, the CO in essence agreed that neither Mr. Brown nor anyone else told her that Mr. Lane had worked around energized lines without gloves before the time of accident; she also agreed, as did Mr. Saharic, that having gloves off while working on the ground away from energized lines was acceptable. (Tr. 319, 402, 420-21). It is clear from the record that Mr. Lane worked on the ground on the day of the accident. (Tr. 449). It is also clear that that day was warm, sunny, and around 80 degrees. (Tr. 383, 545). Thus, the conclusion I reach, in light of the evidence, is that Mr. Lane removed his gloves while working on the ground and that no one saw him near energized lines without his gloves before the accident

²²I reject the Secretary's suggestion that Mr. Brown's statements to the CO show that he was aware of the hose and exposed shoe on the line before the accident; in my view, these were after-the-fact statements that do not establish what he knew prior to the accident. For the same reason, I also reject the Secretary's similar suggestion in regard to the statement of Thomas White to the CO that he knew that there was a hose on the line. (Tr. 357; C-38, p. 2).

occurred.²³ Mr. Brown and Mr. White both specifically testified that they at no time saw Mr. Lane near energized lines without his gloves that day, and Mr. White also testified that Mr. Lane “always” wore gloves to move lines. (Tr. 435-36, 442-43, 566-67). The Secretary’s assertion is rejected.

The Secretary makes two final arguments with respect to Mr. Brown’s testimony. The first is that it is inconsistent with the fact that, as shown in photos C-21-22, the wire cutters Mr. Lane had utilized to cut the lines from the old pole were lying on top of the gloves in the bucket of Mr. Lane’s truck. According to the Secretary, if Mr. Lane had had gloves on when cutting the de-energized lines from the old pole, as Mr. Brown testified, the gloves would have been on top of the wire cutters. In this regard, the Secretary notes the testimony of Mr. Brown that he disturbed nothing in the bucket when he pulled Mr. Lane out and the testimony establishing that New River personnel stayed at the site until the OSHA inspection the next day to ensure it would remain unchanged. (Tr. 167, 458-59). I find the Secretary’s argument unpersuasive. First, it is entirely possible that Mr. Lane put the wire cutters down in the bucket after he finished using them, and then, after moving his bucket to the fatality pole and putting the hose on the line, removed his gloves and put the cutters on top of the gloves. Second, despite Mr. Brown’s testimony, it seems likely that the very act of pulling Mr. Lane out of the bucket would have disturbed items inside the bucket, even though Mr. Brown may not have moved anything intentionally, and other persons at the scene of the accident could also have disturbed items in the bucket. (Tr. 167). In any case, the Secretary’s argument is rejected.

The Secretary’s last argument relates to a statement Mr. Brown gave to a detective from the local sheriff’s office who was at the scene right after the accident. The detective testified she spoke to both Mr. Brown and Mr. White. (Tr. 204-08). She also testified that when she asked him if it was customary for employees to not wear rubber gloves, Mr. Brown said it was not and that while he knew they should not do so employees sometimes took off their gloves to do work such as adjusting small screws in small areas. (Tr. 208-11, 218-21; C-41). Mr. Brown testified that he could not recall what the detective had asked or what he had said, and he explained that he had been very upset then

²³He also took off his gloves, as did Mr. Brown, to move his bucket truck. (449-50, 545).

as he had just lost not only a co-worker but a good friend.²⁴ He also testified that he would consider work in a meter box at the base of a pole as work in a small area that would involve small screws and wires. He said that most of that work was done de-energized; he then said, in response to a specific question by the Secretary, that if it was done energized an employee might take off a glove just to put a screw in but would then put the glove back on to finish the work. (Tr. 176-78).

The Secretary apparently interprets the foregoing as evidence that Mr. Brown knew that Mr. Lane worked around energized lines without gloves. However, the detective herself admitted that she did not take Mr. Brown's statement to her to refer to the work that Mr. Lane was doing that day, and she also admitted that she did not ask Mr. Brown if he had seen Mr. Lane or other employees remove their gloves when near energized lines. (Tr. 211, 219). Moreover, it is clear from the record that work on overhead lines does not involve adjusting small screws in small areas and that all of the work Mr. Lane did on or near lines that day, including his work at the time of the accident, could be done with gloves. (Tr. 109-12, 120, 177-78, 286-87, 314-18, 473, 536, 547, 555, 593). Finally, I interpreted Mr. Brown's response to the Secretary's question about working in an energized meter box essentially as an answer to a hypothetical, particularly since he said most of such work was done de-energized. This interpretation is supported by the testimony of Frank Miller, New River's vice-president of overhead distribution and transmission operations, who also indicated such work was done de-energized.²⁵ (Tr. 474). Regardless, even if Mr. Brown did mean that employees sometimes took off gloves to work in energized boxes, the Secretary has not shown the circumstances of any such instances, what voltages might have been involved, and whether gloves would have been required in any particular instance. In any case, the Secretary's assertion that Mr. Brown knew that Mr. Lane worked around energized lines without gloves is rejected.

Unable to prove actual knowledge, the Secretary contends that New River had constructive knowledge of the violation, which, as noted above, requires her to show that the employer failed to provide adequate safety equipment or to properly instruct its employees on necessary safety

²⁴Mr. White was also a close friend of Mr. Lane, and the detective's testimony verifies that both were very upset when she talked to them. (Tr. 226-27, 434-35, 450).

²⁵Mr. Miller agreed that work in meter boxes, such as on a pole or at a home, would involve small screws. (Tr. 473-75).

precautions.²⁶ The record establishes that Mr. Lane began working for New River as an apprentice lineman in 1995. He progressed from an apprentice to a journeyman lineman by completing the American Line Builders Association Training (“ALBAT”) program, which requires 7,000 hours of on-the-job training as well as classroom instruction and written testing at specified intervals.²⁷ The ALBAT program emphasizes the requirement to wear rubber gloves when one is working around energized lines. Mr. Lane completed all of his on-the-job training under the supervision of Mr. Brown. (Tr. 189-92, 295-96, 522, 532-33; R-EE-JJ).

The record also establishes that when Mr. Lane began working for New River, he received, like all new hires, New River’s safety manual (“Manual”), its statement of policy (“Statement”), and the joint American Line Builders Association and IBEW safety rules (“Safety Rules”). (Tr. 179-80, 195-97, 444-45, 467, 488-90, 523-24, R-I-N). The Manual sets out the same minimum approach distances specified in the OSHA standard, and it requires rubber gloves to be worn when around energized circuits of 260 volts or more and rubber sleeves to be worn when around energized circuits of 750 volts or more; the Manual also states that when protective equipment is used it shall be put on before coming within reach of energized equipment and removed only when out of reach of such equipment. (R-I, pp. 17-19). The Safety Rules state that for work on or near live equipment above 300 volts, the use of rubber protective equipment is positively required.²⁸ (R-K, p. 3). The Safety Rules also require that rubber protective equipment be worn at all times when working on or near energized primary equipment and that, for work requiring protective gloves and sleeves, the employee put on the gloves and sleeves before coming within falling or reaching distance of

²⁶There is no dispute that New River’s employees had the protective equipment they needed at the site, including the rubber gloves and rubber blanket that Mr. Lane should have used at the time of the accident. (Tr. 167-68, 380-83, 505, 540-42).

²⁷ALBAT is a program of the IBEW and the National Electrical Contractors Association; the ALBAT training that an employee receives is paid for by both organizations. (Tr. 189).

²⁸The protective equipment set out in the Safety Rules includes, among other things, hard hats, rubber gloves and sleeves, and rubber blankets and line hoses. See R-K, pp. 3-5.

energized circuits and not remove them until he is out of such distance of such circuits.²⁹ (R-K, p. 5). The Statement requires employees to wear prescribed safety equipment and to follow prescribed work practices and procedures. (R-M, p. 5).

New River requires its foremen to hold weekly toolbox safety meetings at their work sites. Mr. Brown testified that he was provided written safety materials to present to the crew each week; the crew members would sign off on a sheet to acknowledge that they had read and understood the materials, and if anyone had any questions Mr. Brown would answer them.³⁰ (Tr. 172-73, 194-95, 445-46, 484-85, 526-29). New River also has inspections of its job sites. Frank Miller, New River's vice-president of overhead distribution and transmission operations, makes visits to job sites, and he was at the subject site a day or two before the accident. (Tr. 23-24, 461-63). Barry Murray, New River's safety director, and Jeffrey Lawler, the safety supervisor, both make periodic, unannounced site visits in order to audit and report on compliance with safety rules. (Tr. 454-55, 491-93). Mr. Lawler went to the subject site on May 21, 2002, and R-DD, his report of the visit, states as follows:

All the new poles have been placed and the crew was pulling new conductor. All the vehicles were grounded. The new conductor was grounded as it was being pulled and rubber gloves and blankets were being used. Existing energized distribution line were covered with rubber hoses hoods and blankets.

General foremen also visit sites to ensure compliance with safety rules, and Mr. Brown testified that Matt Gibeaut, his general foreman, visits his job sites unannounced every week or two. (Tr. 139-40, 490-93, 534). In addition, SCPC makes visits to New River work sites. David Robinett, SCPC's superintendent of operations, testified that he occasionally visits sites, that he had visited the subject site a month or two before the accident, and that at that time no energized work was taking place; however, if he had observed anything unsafe, he would have reported it. Mr. Robinett

²⁹Besides the above, New River's bucket trucks have signs on them that state, *inter alia*, that “[o]perators must use proper protective equipment such as insulating rubber gloves and sleeves, hot sticks, conductor cover up, and platform liners.” (Tr. 503-04, R-LL).

³⁰R-O through R-Z are materials and sign-off sheets for 2001 and 2002 meetings involving electrical safety, protective equipment and general safety; R-O sets out OSHA's minimum approach distances, and several of the exhibits mention the need to wear rubber gloves. New River's safety director provides the materials and sign-off sheets for safety meetings; after meetings are held, the sign-off sheets are sent to the safety director, who keeps them in his office. (Tr. 484-85).

further testified that SCPC's area supervisor, Jim Snyder, oversaw the subject site and visited it unannounced at least every other day to see if there were any problems with the job; if Mr. Snyder had seen workers near energized lines without their gloves on he would have reported it, and he (Mr. Robinett) never received such a report from Mr. Snyder. (Tr. 95-100, 120, 124-25). Mr. Brown testified similarly about Mr. Snyder's visits to the site. (Tr. 534-35).

New River has a progressive discipline policy for violations of company rules that includes verbal and written warnings, suspension and termination.³¹ Supervisors report safety rules violations on forms that are sent to Mr. Murray; the incident is then investigated, on site if the incident was serious, after which it is determined what discipline is appropriate.³² New River also has an accident investigation and reporting policy. Supervisors report accidents and "near misses" by phone to Mr. Murray right after they happen, and these incidents are also reported on forms that are sent to Mr. Murray. Accidents and "near misses" are investigated, on site if the incidents were serious, and a determination is then made as to what disciplinary action, if any, should be taken; near miss incidents are also communicated to employees to deter the recurrence of such incidents. Mr. Murray discussed safety violation forms from 1997 through 2002 that were on file; R-MM are forms relating to glove and/or sleeve violations, while R-NN and R-OO are forms and memos relating to failure to properly ground equipment and other safety infractions.³³ These exhibits demonstrate that New River has in fact followed its policy and has disciplined employees for safety violations; it has issued numerous verbal and written warnings, it has suspended employees without pay, and it has fired employees for very serious infractions. Mr. Brown testified about his issuance of verbal warnings, and Mr. Miller

³¹The record shows that all foremen have a binder containing New River's safety policies and procedures, which includes a discipline policy, an electrical grounding safety policy, a rubber goods safety policy, and an accident investigation and reporting policy. New River had these policies previously; however, they were reissued to foremen in early 2002 after a consultant reviewed them and he and Mr. Murray agreed on the revisions. (Tr. 168-71, 482-83; 486-87; C-25-27, R-CC).

³²The employee and supervisor each retain a copy of the form, and a copy is also maintained in the employee's personnel file. (Tr. 480).

³³Mr. Murray said that about half of the forms in R-MM were for gloves being out of date, and he discussed New River's policy of having all gloves tested every 60 days. (Tr. 513, 518).

testified about several infractions with which he was personally familiar that had resulted in the employee's termination. (Tr. 168-70, 468-70, 478-82, 486-88, 494-99, C-25, R-CC).

Before Mr. Lane's accident, New River's policy required linemen to put on gloves and sleeves when they were 5 feet from energized lines or equipment. However, after the accident, New River revised its policy to require that linemen, when working on lines that are or could become energized, wear gloves and sleeves from the time they leave the ground until they return to the ground. As a further response to the accident, New River arranged a "Safety Stand Down Day," which involved all of the overhead crews attending a safety meeting in Columbus, Ohio.³⁴ The meeting included a talk given by Earl Windsor, a former lineman who had worked for a power company and who had been seriously burned in an on-the-job accident; Mr. Windsor discussed how the accident had occurred and how it had affected his life and the life of his family. The meeting also included safety training put on by ALBAT. (Tr. 39-40, 173-74, 464-65; C-27, p. 3, C-29).

In view of the foregoing, I conclude that the Secretary has not met her burden of showing that New River failed to properly instruct its employees on necessary safety precautions.³⁵ In reaching this conclusion, I am very cognizant of the fatality in this case and the fatality in April 2001, and they have been discussed at length in this decision. I am also cognizant of another contact incident in 1995 that involved an employee whose hands and arm were burned because he was not wearing rubber gloves.³⁶ (Tr. 38, 50-51; C-6). As New River points out, however, its lost work day injury and illness ("LWDII") rate for 1999, 2000 and 2001 was below that of other companies in the industry,

³⁴New River had planned a similar meeting the year before after the April 2001 fatality, but the meeting was canceled due to the events of September 11, 2001. New River did, however, hire a consultant to review its safety policies, as noted above, and it also hired Mr. Murray and Mr. Lawler; previously, the company had had only a safety auditor. It also reissued the Manual, Statement and Safety Rules to employees. (Tr. 466-67, 471-72, 517; R-J, R-L, R-N).

³⁵In so concluding, I have noted that on August 26, 1997, Mr. Brown and Mr. Lane were issued safety rule violation notices because they had been working on secondary lines without wearing rubber gloves. (Tr. 34-35, 168-70; C-3-4). However, the record shows that the secondary lines in that incident involved only 110 volts. (Tr. 470-72). As New River indicates, there is nothing in the OSHA standard that would require gloves for work on lines of such voltage, and even New River's more stringent rules, set out *supra*, would not require gloves for such work.

³⁶This incident did not involve Mr. Brown or his crew. (Tr. 92).

and Mr. Saharic, the Secretary's expert, testified that the LWDII rate is reflective of a company's safety.³⁷ (Tr. 320-21). Further, I have noted all of the evidence set out above demonstrating that New River did, in fact, properly instruct its employees on necessary safety precautions; I have also noted the actions that it took after the 2001 accident and the one in this case. Finally, I have noted the evidence in the record indicating that, other than the above-mentioned 1997 incident, no one on Mr. Brown's crew had ever been observed working on or near energized lines without gloves. Besides the evidence in this regard set out *supra*, Mark Thompson, the lineman who began working on the crew after Mr. Lane's fatality, testified that he had never seen a worker on the crew remove his gloves around energized lines, and Mr. Robinett, SCPC's superintendent of operations, testified that he had visited a number of sites on which Mr. Brown had been the foreman and had never seen anyone on the crew working near energized lines without having gloves on. (Tr. 101-02, 194). Based on the record, and for all of the reasons stated above, New River did not violate 29 C.F.R. 1926.950(c)(1)(i). Items 1 and 2 of Serious Citation 1 are vacated.³⁸

Findings of Fact

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent, New River Electrical Corporation, was, at all times pertinent hereto, an employer within the meaning of the Act.
2. The Commission has jurisdiction over the parties and the subject matter of this case.

³⁷New River's post-hearing brief includes a chart showing that its LWDII rate was lower than the industry average LWDII rate for 1999, 2000 and 2001. At the hearing, the CO provided New River's LWDII rates for 1999 and 2000, and she agreed with New River's summary about how to calculate the LWDII. (Tr. 392-95). New River's brief has a lengthy explanation of how it arrived at its 2001 LWDII rate and how it obtained its industry's yearly average LWDII rates. (R. Brief, p. 4, n.6). The Secretary does not dispute any of this information in her reply brief.

³⁸Earlier in my decision, I agreed with New River that compliance with 1926.950(c)(1) is achieved by meeting any one of subparts (c)(1)(i)-(iii). I also agreed with New River that if it was in compliance with 1926.950(c)(1)(i), then 1926.950(c)(2)(i) need not be addressed. As the alleged violation of 1926.950(c)(1)(i) is vacated, the alleged violation of 1926.950(c)(2)(i) is also vacated.

3. Respondent was not in violation of either 29 C.F.R. § 1926.950(c)(1) or 29 C.F.R. § 1926.950(c)(2)(i).

Order

1. Citation 1, Items 1 and 2, alleging violations of 29 C.F.R. §§ 1926.950(c)(1) and 1926.950(c)(2)(i), respectively, are VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: September 29, 2003
Washington, D.C.