

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

Secretary of Labor,

Complainant,

v.

Rusk County Electric Cooperative, Inc.,

Respondent.

OSHRC Docket No. **01-1071**

**Appearances:**

Brian A. Duncan, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Dallas, Texas  
For Complainant

D. Jeffrey Ramin, Esquire  
Law Offices of G. Thomas Allison, III  
Longview, Texas  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

Rusk County Electric Cooperative, Inc., (RCEC), an electric service provider, was repairing extensive damage to its power lines, resulting in major power outages, caused by a severe ice storm in east Texas in December 2000. On December 19, 2000, an employee of Texas Electric Utility Construction, Inc. (TEUC), was fatally electrocuted while he was working on power lines for RCEC near Longview, Texas. A fatality inspection of the worksite was conducted by the Occupational Safety and Health Administration (OSHA) on December 20, 2000. As a result of this inspection, a citation was issued to RCEC on June 12, 2001.

Citation No. 1, item 1, alleges a serious violation of 29 C. F. R. § 1910.269(m)(3)(iv) for failing to use tags to ensure protection of work crews against the re-energizing of the power lines on which they were working; the proposed penalty was \$6,300.00. RCEC timely contested the citation.

A hearing was held in Arlington, Texas, on December 12, 2001. The proposed penalty was amended by the Secretary at the hearing from \$6,300.00 to \$3,500.00 to reflect a 40 percent reduction for size of the employer which was inadvertently omitted in the citation (Tr. 90). RCEC stipulates jurisdiction and coverage. Both parties submitted posthearing briefs.

RCEC denies the alleged violation. RCEC asserts the affirmative defenses of unpreventable employee misconduct, infeasibility, and greater hazard. The infeasibility and greater hazard defenses were alleged in respondent's answer, but appear to have been abandoned since no evidence regarding these defenses was presented at the hearing, and they were not discussed in the posthearing brief. At the hearing, RCEC moved to add vindictive prosecution as another affirmative defense. This motion was denied because RCEC failed to plead this defense in its answer. RCEC further claims that the multi-employer worksite doctrine does not apply to it. Because a RCEC employee, Ronnie Spencer, was exposed to the hazard, it is not necessary to reach the issue of multi-employer worksite liability.

For the reasons that follow, Citation No. 1, item 1, is affirmed and a penalty of \$2,500.00 is assessed.

#### **Joint Stipulations of Fact**

At the hearing, the parties submitted the following Joint Stipulations of Fact:

1. In December 2000, a severe ice storm in east Texas caused extensive damage to power lines resulting in major power outages in that part of the state.
2. As a result of this power outage, respondent asked other electrical service companies in Texas to assist respondent's electrical service employees in restoring power as quickly as possible.
3. Respondent even provided meals to Ronnie Spencer, the Sam Houston crew, Texas Electric crew, and the Brock Contractor crew.
4. This particular line had problems in three different locations, about a quarter mile apart, keeping it from functioning correctly.

5. Ronnie Spencer visually checked the OCR and air gap, which are devices to energize and de-energize the distribution line, to make sure that the electricity to the line had been interrupted.
5. Over the course of approximately one and a half hours, Ronnie Spencer directed the work of Texas Electric, Sam Houston, and Brock Contractor crews while all three problems with the line were repaired.
6. The first problem with the line was about a quarter of a mile from the OCR and air gap, the location where the line had been de-energized. That line had split into two pieces and was laying on the ground.
7. Ronnie Spencer left the six men assigned to work for him to repair the first problem, the separated line, and traveled about two miles further down the line where he located two additional problems.
8. When Ronnie Spencer returned to the men to tell them about the two additional problems, they had already finished splicing the separated line back together.
9. Ronnie Spencer directed the Texas Electric and Brock crews to replace a broken insulator a quarter mile further down the line.
10. Ronnie Spencer traveled with the Sam Houston crew a half mile down the line to remove a tree that had fallen on the power line.
11. The tree on which Ronnie Spencer and the Sam Houston crew were working was leaning on the distribution line in the direction of the paved road.
12. Ronnie Spencer was standing on the edge of the paved road about 22 feet from the distribution line, and the tree was leaning toward him.
13. The first problem affecting the line was a quarter mile from the OCR and air gap, the de-energization source; the second problem was a half mile from the OCR and air gap; and the third problem was three-quarters of a mile from the OCR and air gap.
14. The OCR and air gap could not be seen from the location of the first, second, or third problems with the distribution line.

15. None of the employees working on the second problem, the broken insulator, and the third problem, the downed tree with the distribution line, could see each other while they were working.
16. None of the seven employees, including Ronnie Spencer, working on or near the distribution lines, ever placed a tag at the location of the OCR and the air gap or anywhere else on the line to indicate they were performing work on the line.
17. Ronnie Spencer knew that tags were supposed to be used when multiple crews were working on the same line at different locations.
18. Ronnie Spencer had used tags previously on other jobs where people were working on lines at different points to indicate that people were working on the line for fear that someone else might energize the line.
19. Ronnie Spencer acted as a supervisory employee for respondent on an average of two to three times per year.
20. Ronnie Spencer did not know the location of other Rusk County crews on December 19, 2000.
21. The Texas Electric and Brock crews did not have walkie-talkies at any point on December 19, 2000.
22. Ronnie Spencer never wore rubber electrical gloves while working at FM 349, a quarter mile south of FM 2011, Longview, Texas, on December 19, 2000.
23. The standard 29 C. F. R. § 1910.269(m)(3)(iv) applies to the type of work being performed by respondent at FM 349, a quarter mile south of FM 2011, Longview, Texas, on December 19, 2000.
24. Rusk County Electrical Cooperative, Inc., is a company affecting interstate commerce and is subject to the requirements of the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651.
25. In the process of supervising the examination and repair of the separated electrical line, Ronnie Spencer approached the electrical line that was on the ground and was standing within 5 to 6 feet of the separated line.

26. The other six employees from the various crews either handled the downed line or trimmed trees and branches.
27. The Texas Electric and Brock crews were replacing the broken insulator at a location one-half mile from the OCR and the visible air gap at the same time the Sam Houston Electric Cooperative, Incorporated, employees were removing a fallen tree from the distribution line at a location three-quarters of a mile from the OCR and air gap.
28. There were other Rusk County Electric Cooperative, Inc., crews working on other downed power lines in Rusk County Electric Cooperative, Inc.'s service area on December 19, 2000.
29. Ronnie Spencer re-energized the distribution line by contacting the visible air gap and the OCR with a fiberglass stick.
30. Bryan Hale from the Texas Electric crew was electrocuted and fatally injured when he contacted that energized line.
31. Respondent knew that Ronnie Spencer and the crews of Texas Electric Utility, Sam Houston Electric Company, and Brock Contractors, Inc., were repairing multiple interruptions of the distribution line at FM 349, a quarter mile south of FM 2011, Longview, Texas, on December 19, 2000.
32. If an accident occurred as a result of an unauthorized person energizing the line, there is a substantial probability that death or serious physical harm could result.

**DISCUSSION**  
**Alleged Violation**

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

**Alleged Serious Violation of**  
**29 C. F. R. § 1910.269(m)(3)(iv)**

The Secretary in Citation No. 1, item 1, alleges that:

Tags were not used to prohibit the operation of disconnecting means to indicate that employees are at work:

FM 349, 1/4 mile South of FM 2011, Longview, Texas:

On or about December 19, 2000, tags were not used at work site to ensure the protection of the work crews against the re-energizing of the power lines on which they were working.

The standard at 29 C.F.R. § 1910.269(m)(3)(iv) provides:

*(3) Deenergizing lines and equipment.* (iv) Tags shall prohibit operation of the disconnecting means and shall indicate that employees are at work.

RCEC does not dispute that this standard applies to it but argues that the goal of the standard was complied with even though a tag was not used. RCEC further contends that Hale would have been electrocuted even with the use of a tag and that Hale engaged in employee misconduct.

Contrary to RCEC's argument, the issue in this case is not the death of an employee or the conduct of that employee, unfortunate though it was; the issue is whether RCEC used a tag as required by 29 C.F.R. § 1910.269(m)(3)(iv).

RCEC sent a crew to repair an electrical distribution line that carried 7,200 volts of electric current at FM 349, a quarter mile south of FM 2011, near Longview, Texas. The crew was made up of Spencer from RCEC, who was the supervisor, two employees from Sam Houston Electrical Cooperative, two employees from TEUC, and two employees from Brock Contractors. When he arrived at the line, Spencer looked from inside his truck at the OCR (oil recloser) and air gap line located on the same pole and saw that they were closed, which means the line was de-energized (Tr. 38). Spencer did not tag the line to prevent re-energizing of the line and to indicate that employees were working on the line.

There were three problems on that particular line: the first problem was a separated power line, one quarter mile from the OCR and air gap; the second problem was a broken insulator, one quarter mile from the first; and the third problem was a tree leaning on the line, one quarter mile from the second (Exh. C-3). The OCR and air gap were not visible from the three problem areas, and employees working at the three areas were not visible to each other (Jt. Stip. 15, 16). After the repairs were made, Spencer re-energized the line after he received a confirmation via walkie-talkie from Horn, of Sam Houston Electrical Cooperative, that all employees were clear of the power lines. Bryan Hale of TEUC was fatally electrocuted when he came into contact with the energized line.

“Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for a violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). In the instant case it is undisputed that Spencer, the supervisor of this crew, did not tag the line. At the hearing he admitted that he did not tag the line and his supervisor, Holmes, admitted that the line was not tagged (Tr. 40, 235). Clearly, Spencer’s knowledge is imputed to RCEC.

RCEC’s safety policy required tagging de-energized lines. The RCEC safety handbook, sections 627(a)(2) and (4), states that the person in charge of the lines or equipment and their means of disconnection shall take the following steps: “(4) Tags shall prohibit the operation of the disconnect means and indicate that employees are at work.” (Exh. C-1; Tr. 230-231). RCEC Operational Policy No. 6, section 2(e) states: “All conductors are energized until killed out, grounded and tagged according to our existing policy. This policy shall also apply to any work being done from aerial baskets on lines and/or equipment carrying voltages up to and including 69KV. Direct violation of this safety rule will result in immediate disciplinary action.” (Exh. C-2; Tr. 228). Spencer knew tags were supposed to be used when multiple crews were working in different locations, and he had used tags in the past (Jt. Stip. 18, 19). He testified that nothing prevented him from putting a tag on the line at the closed OCR and air gap, and he did not ask his crew to put up a tag (Tr. 41-42).

RCEC argues it was not necessary that Spencer tag the line because he was not exposed to any danger since he was the only one authorized to energize the line.

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). Reasonable predictability is established by showing “that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger.” *Giles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). “The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.” *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

The standard at 29 C. F. R. § 1910.269(m)(3)(iv) requires tagging of the line regardless of who is authorized to energize it. Without a tag, there was nothing to prevent another crew (who would not be able to see the three problem areas on the line or Spencer’s crew in those locations from the OCR and air gap) from re-energizing the line. On December 19, 2000, there were approximately fifteen to sixteen other RCEC crews (almost 100 employees total) working on downed power lines in RCEC’s service area (Jt. Stip. 29; Tr. 224).

Spencer was aware there were other repair crews working in the service area repairing other lines on that day. He testified that he notified the dispatcher as to his location, so someone with RCEC would not come back and close the OCR or air gap cutout without checking down the line first (Tr. 63). He recognized that re-energizing the line by another crew was a real possibility, but took no action to tag out the line.

Had the line been re-energized, it was reasonably predictable that Spencer would be exposed to danger. It is undisputed that Spencer came within 5 to 6 feet of the separated power line lying on the ground at the first problem area (Jt. Stip 26; Tr. 46). If the line became re-energized, Spencer was aware that he could have been electrocuted either by energy moving out in a gradient method from the broken line on the ground (which was wet from the melted ice) or by being hit



by the re-energized line flailing around (like a water hose) (Tr. 55, 56, 82, 83). It was not necessary for Spencer to hold the line in his hands to be electrocuted (Tr. 81). He was clearly within the zone of danger, had access to the violative condition and, therefore, was exposed to the violative condition.

RCEC further claims that even if a violation is found, it is de minimis. It is well settled that brief exposure to an unsafe condition is no defense to a violation. *Morgan & Culpepper, Inc. v. OSHRC*, 676 F.2d 1065, 1069 (5<sup>th</sup> Cir. 1982). *See also Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991). A violation is de minimis only where it has no direct or immediate relationship to safety and health. 29 U. S. C. § 658(a). Respondent has made no showing that failure to tag has no such relationship to safety and health. Accordingly, this violation is not de minimis.

Therefore, the Secretary has established a violation of 29 C. F. R. § 1910.269(m)(3)(iv).

### **Serious Classification**

A serious violation exists “if there is a substantial probability that death or serious physical harm could result.” 29 U. S. C. § 666(k). RCEC stipulates that there is a substantial probability that death or serious physical harm could result if the power line was energized (Jt. Stip. 33). In this case, an employee was electrocuted by a re-energized line and died. Thus, the violation of 29 C. F. R. § 1910.269(m)(3)(iv) is affirmed as serious.

### **Penalty Assessment**

Section 17(j) of the Occupational Safety and Health Act requires that when assessing penalties, the Commission gives “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

RCEC is a small employer with approximately eighty employees. It has no previous OSHA violations. Credit is given for respondent’s small size and no prior history of violations.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). The RCEC supervisor, Spencer, and six other employees were exposed to the hazard of electrocution for a period of one to one and one-half hours. Electrocution could result in serious injury and possibly death. Thus, the gravity of the violation is moderate.

RCEC was cooperative and demonstrated good faith throughout the investigation.

Based on these factors, the assessed penalty for the violation of 29 C.F.R. §1910.269(m)(3)(iv), is \$2,500.00.

**FINDINGS OF FACT AND**  
**CONCLUSIONS OF LAW**

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

**ORDER**

It is ORDERED:

Citation 1, Item 1, alleging a serious violation of 29 C. F. R. § 1910.269(m)(3)(iv) is affirmed and a penalty of \$2,500.00 is assessed.

/s/

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STEPHEN J. SIMKO, JR.  
Judge

Date: May 6, 2002