Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-0823**
	:	
J.A.M. Builders, Inc.,	:	
Respondent.	:	

Appearances:

Frances B. Schleicher, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Charles S. Caukins, Esquire
Fisher & Phillips, L.L.P.
Fort Lauderdale, Florida
For Respondent

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

DECISION AND ORDER

J.A.M. Builders, Inc. (J.A.M.), is a corporation engaged in construction contracting. The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation of J.A.M.'s jobsite in Miami Beach, Florida, as a result of an incident that occurred on November 7, 1997. As a result of that investigation, respondent was issued a citation. Respondent filed a timely notice contesting the citation and proposed penalty. A hearing was held in Miami, Florida, on November 4, 1998. The parties settled Citation No. 1, items 1, 2 and 3, and Citation No. 3, item 1, and agreed to penalties totaling $2,550.00 for those items. The written settlement agreement submitted after the hearing is hereby approved. The only unresolved alleged violation remaining is Citation No. 2, item 1.

For the reasons that follow, the alleged violation in Citation No. 2, item 1, is affirmed as a willful violation and a penalty of $35,000 is assessed.

Background

J.A.M. was subcontracted by Brodson Construction in 1997 to complete the shell of the building for XS Fitness in Miami Beach, Florida. Steel reinforcing bars (rebar) were incorporated

into the concrete floors and columns. To construct the floors, or decks, a wood frame consisting of a plywood bottom and perimeter edge was built to act as a form into which concrete could be poured after the rebar was tied slightly above the plywood. After the concrete hardened, the wood was removed. The structure was three stories, including a concrete roof deck. During the period November 5 to November 7, 1997, work progressed on what would have been the floor of the third story. On November 7, 1997, one of respondent's employees was electrocuted when rebar that he was holding contacted an energized electric power line. As a result of this incident, OSHA conducted an inspection and investigation of this jobsite.

Discussion

Citation No. 2, Item 1
Alleged Willful Violation of 29 C.F.R. § 1926.416(a)(1)

In Citation No. 2, item 1, the Secretary alleges that:

> Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means:
>
> On or about 11/07/97 employees were not protected against electric chock while they worked in close proximity to a power line energized to 7620 volts.

The standard at 29 C.F.R. § 1926.416(a)(1) provides:

> *(a) Protection of employees.*--(1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

Construction of the floor of the third story of the XS Fitness Center addition during the week of November 3, 1997, primarily involved placing and tying rebar in preparation for pouring a concrete slab. This level was referred to during the hearing as the deck. The east side of the deck was 85 feet long and faced the street. The north side of the deck was 17 feet wide and also faced a street. The south and west sides of the deck abutted walls of existing buildings. The deck was

19 feet 10 inches above the ground level. Energized rubber insulated 120-volt electrical service lines were located 19 inches from the deck at about deck level. These lines ran parallel to the deck along the entire length of the east side. Energized insulated service lines also were located on the north side of the deck. Three energized non-insulated high voltage primary conductor power lines carrying 7,620 volts of electricity were 10 feet directly above and parallel to the entire length of the east edge of the deck. A neutral line ran 7 feet above the deck along the east edge.

On November 5, 1997, respondent's employees were moving rebar from ground level to the working deck through a 4-foot by 4-foot hole on the east side of the plywood floor of the deck. The rebar lengths ranged from 16 feet to 20 feet. Employees angled the rebar away from the power lines as they passed them from the east side ground level through the hole onto the deck. The hole was covered over the next day. After the deck hole was covered on November 6, 1997, Mr. James Stowe, respondent's working foreman, and his crew were passing rebar to the deck through a 19-inch space between the wood at the edge of the east wall and service wires, 10 feet directly below the non-insulated 7,620-volt power lines. An electrician told Mr. Stowe about the voltage of electricity in these lines and warned him that he could be killed. Mr. Stowe testified that he had been told to pass the rebar to the deck in this manner by Carlos Diaz, respondent's job foreman. Mr. Stowe further testified that he stopped all work on the deck when warned by the electrician.

Representatives of respondent's management met with Mr. Stowe and union representatives concerning the work stoppage and methods that might be used to move rebar to the deck from the ground level. All witnesses who were parties to this conversation testified that an agreement was reached regarding the method to be used to move the rebar. The testimony, however, is conflicting as to what method was to be used. Mr. Stowe and Mr. David Gornewicz, president of Ironworkers Local 272, testified that Mr. William Mack, respondent's vice-president and co-owner, agreed to cut a new hole in the rebar. Mr. Mack and Mr. Diaz testified there was no agreement regarding a new hole. They testified that the parties agreed that all steel rebars would be passed from the ground to the deck on the north side of the addition. Mr. Gornewicz testified in rebuttal that there was no such agreement to pass rebar up on the north side. Mr. Stowe was ordered by J.A.M. to finish work on this site on November 6, 1997. He was replaced the next day by another working foreman, Mr. Larry Williams.

On November 7, 1997, Mr. Williams and his crew were passing rebar to the deck from the ground on the east side of the addition. Mr. Williams was on the deck receiving the rebar from below when the 16-foot 9-inch long steel reinforcing bar he was holding contacted the energized line directly above him. Mr. Williams died as a result of thermal burns from electrocution.

The Secretary has the burden of proving the violation:

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

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

The standard is clearly applicable to the working conditions at respondent's construction site. Energized lines were located directly above construction work performed by respondent's employees. Three primary conductor lines 10 feet above the working deck level carried 7,620 volts of electricity. The 120-volt service lines, while insulated, were only 19 inches from the east edge of the deck. Similar service lines were located on the north end of the deck.

Employees had access to the electric power lines while working on the deck. They could easily contact the power circuit in the course of their work from any point on the deck which was only 17 feet wide and 10 feet below the 7,260-volt primary conductors. Respondent's employees lifted 16- to 20-foot long rebars to the deck level on each of the three days discussed above. On November 5, 1997, they lifted rebar through a 4-foot by 4-foot hole east of the center point of the deck. This hole was, therefore, less than 10 feet from the east edge of the deck and less than 12 feet from the 120-volt service lines. Mr. Diaz, J.A.M.'S job foreman, testified that the wires nearest the hole were 16 to 17 feet away. If the hole was 10 feet from the deck edge and the east deck edge was 10 feet directly below the high power line, simple geometry dictates that the hole was less than 15 feet from the three uninsulated primary conductors. Employees were raising 16- to 20-foot rebars to this level. Even though the workers were angling the steel away from the power lines, this alone was insufficient to protect against accidental contact with the nearby electrical circuit.

Respondent failed to comply with the terms of the standard during the three-day period

November 5, 1997, through November 7, 1997. It is undisputed that the 7,620-volt primary conductors were energized and were not insulated. The 120-volt service lines on the east and north sides of the deck were also energized. There is also no dispute that respondent did not attempt to deenergize and ground the lines or effectively guard them by insulation.

On November 5, 1997, respondent directed and permitted its employees to lift the rebar to the 17-foot wide deck through a hole in the deck floor. Its employees raised the rebar to the deck between the east edge and 120-volt service lines on November 6, 1997. Respondent's working foreman, Mr. Stowe, stopped this procedure when warned of the high voltage hazard by an electrician.

Mr. William Mack, respondent's co-owner, testified that after the work stopped on November 6, 1997, the union and management representatives agreed to move the rebar to the deck on the north side of the building. While there is conflicting testimony on this point, allowing employees to use this procedure violates the terms of the standard. Employees handling 16- to 20-foot rebar anywhere on the 17-foot wide deck could contact the electric power circuit 10 feet above the surface of that deck. Respondent's decision to require rebar to be lifted on the north side did not eliminate the hazard. It merely changed the location of the exposure to the violative condition.

It is undisputed that respondent knew its employees used the deck hole to move the rebar to the top level on November 5, 1997. It also knew that its employees were passing rebar between the east deck edge and the electrical service lines on November 6, 1997. Mr. Stowe, the working foreman, testified that the job foreman, Mr. Diaz, told him to pass the rebar in this manner. Union and management representatives met on November 6, 1997, to discuss alternative methods of raising the rebar to the deck in light of Mr. Stowe's concerns about the energized power lines near the deck. Respondent's job foreman and vice-president knew the location of the power lines in relation to the deck, knew the length of the rebar being placed, and knew that the lines were energized and not guarded by insulation or other means. Even after this discussion, respondent allowed employees to handle this rebar on this narrow deck in close proximity to the power lines. It took no action to deenergize, insulate, or otherwise guard the lines from contact by its workers during the three-day period of November 5, 1997, through November 7, 1997. Employees could still contact unguarded energized power lines while raising the rebar to the deck on the north side

as suggested by the testimony of Mr. Mack and Mr. Diaz.

Mr. Mack testified that on November 6, 1997, the union and management representatives agreed to raise the rebar to the deck on November 7, 1997, on the north side of the deck. Respondent characterizes this decision as a safety rule. It argues that Mr. Williams, a replacement working foreman, violated its safety rule on November 7, 1997, by raising rebar to the deck on the east side rather than on the north side. It further argues that this constituted employee misconduct.

To establish its defense of employee misconduct, respondent must prove:

> (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; and (4) it has effectively enforced the rules when violations have been discovered. *Secretary of Labor v. GEM Industrial, Inc.*, 17 OSHC 1861, 1863 (1996).

At no time prior to or during the period from November 5, 1997, through November 7, 1997, did the respondent establish work rules designed to prevent the violation. By allowing employees to raise 16- to 20-foot long rebar to the deck, even on the north side of this narrow deck, respondent permitted its employees to work in such proximity to the electric power lines that they could contact the circuit in the course of their work. There is conflicting testimony as to whether, on November 6, 1997, respondent agreed to cut a new hole in the deck or whether it agreed to raise the rebar on the north side. Respondent asserts that it agreed to, and ordered the steel to be brought, to the deck on the north side. Even if this assertion is accepted, such order does not constitute a safety or work rule designed to prevent the violation. As stated above, such order merely relocates the exposure to the violation. Employees moving the long steel to the deck in this manner would continue to work in such proximity to the high voltage lines that they could contact them with the rebar in the normal course of raising and positioning rebar on the deck level. Prior to the conversation on November 6, 1997, respondent had no work rule that even arguably addressed the violative condition.

J.A.M. has no written safety program. Respondent offered no evidence demonstrating that it had a work rule which specifically prohibited its employees from working in proximity to electric wires. It admitted at the hearing, and in its brief, that prior to November 6, 1997, employees had been instructed to pass rebar through a hole in the deck. Respondent asserts that the ironworkers

were experienced specialists in their trade and that J.A.M. was not required to provide extraordinarily close supervision. While these employees may be experienced ironworkers, they are not necessarily experienced in work near power lines and electricity. Respondent's reliance on the experience of ironworkers to protect themselves from electrical hazards is misplaced. Respondent failed to prove that it had established work rules designed to prevent the violation at any time prior to or during the period from November 5, 1997, through November 7, 1997. There is no need to consider the remaining elements of its employee misconduct defense. I find no employee misconduct that would relieve respondent of its responsibility under the Act.

Willfulness

The Secretary contends that J.A.M.'s violation of § 1926.416(a)(1) was willful.

> A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), is one committed with an "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41,123, 41,132 (*quoting Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). "It is differentiated from other types of violations by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated).

Mr. John Jacob, a claims agent for Florida Power and Light Company, was on J.A.M.'s jobsite on November 7, 1997, investigating the electrocution of Mr. Williams for the electric utility. He was accompanied by the utility's service planner, Mr. Diego Borges. Mr. Jacob and the compliance officer, Mr. Lobean, testified that Mr. Borges stated he had warned respondent about moving these power lines prior to the electrocution on November 7, 1997.

On October 31, 1997, Brian Axelrod, J.A.M.'s project manager, wrote a letter to Barry Brodsky with Brodson Construction Company, the general contractor, which reads as follows:

> Dear Mr. Brodsky,
>
> This is in regards to the power lines behind the building known as XS Fitness Center. An FPL representative has contacted our supervisor on the job and noted to him that the job will be shut down until these lines are moved. It is imperative

that you coordinate with FPL to have these lines moved. It is in our best interest to see this matter rectified as soon as possible.

Please notify my office as soon as arrangements are made. Time is of the essence. (Exh. C-7)

This letter was written seven days before the fatal incident. The Secretary's compliance officer testified that while the project was still at ground level, respondent's officials, Mr. Bullis and Mr. Mack verbally requested the general contractor to reroute the power lines.

At the hearing, John Bullis, one of respondent's owners, testified that he participated in the drafting of the October 31, 1997, letter to Brodson discussed above. He further testified that Florida Power and Light Company (FP&L) had not contacted respondent about the job, but he wanted to include some language to blame FP&L so it would not look like J.A.M. would be stopping the job after the third deck. After reviewing this testimony, observing the witness's demeanor and considering the totality of evidence, I find this testimony lacks credibility. Even if this letter was written for the reasons stated by Mr. Bullis, the fact that it was written seven days before the fatality and five days before the period in question establishes that respondent knew its employees would be working close to energized power lines in the course of their work long before actual exposure.

Mr. Bullis testified that employees worked on the building addition after the letter was written. On November 5, 1997, respondent passed 16- to 20-foot long rebars through a hole in the deck. On November 6, 1997, respondent directed its employees to pass the same length rebar through a 19-inch space between the building and electrical service lines, 10 feet directly below energized, non-insulated power lines carrying 7,620 volts of electricity. This activity stopped only when the working foreman, Mr. Stowe, was warned of possible electrocution by an electrician. Mr. Diaz, J.A.M.'s job foreman, was angry with the working foreman for stopping the work, and demanded that he leave the jobsite. Union and management considered the electrical hazard during a discussion on November 6, 1997. Even after that conversation, respondent took no action to deenergize, reroute, or otherwise guard the power lines to avoid contact. It relied on the experience of ironworkers to avoid this hazard. Considering the testimony of respondent's witnesses in a light most favorable to J.A.M., it is obvious that respondent merely changed the location of the violation

on November 7, 1997, by ordering the steel to be lifted to the deck on the north side rather than the east side of the building.

The deck was only 17 feet wide. The rebar was up to 20 feet long. The high voltage lines were 10 feet above the deck. Electrical service lines were located 19 inches from the east edge of the perimeter at deck level. These lines were also located on the north side. Walls of adjacent buildings abutted the west and south sides of the deck. Rebar lifted to the deck would, of necessity, come close to energized lines. Respondent knew this long before the period of November 5, 1997, through November 7, 1997. It took no action to eliminate the hazard or guard the energized lines. It continued to allow its employees to work in close proximity to this hazardous condition throughout this three-day period until one employee finally contacted the high voltage lines with rebar in the course of his work.

Respondent had a heightened awareness of the hazardous conditions created by high voltage lines close to the activities being performed by its employees in this cramped and confined work area. It showed this awareness by its verbal warnings to the general contractor while the job was at ground level and by its letter five days before the time period at issue. Its working foreman was warned of the hazard of electrocution. He stopped the work and was fired for his efforts. Lengthy discussions regarding these conditions were held between respondent's management and union representatives. Respondent continued to allow its employees to work without adequate protection.

Allowing employees to continue to work from November 5, 1997, through November 7, 1997, with this heightened awareness clearly indicates respondent's conscious disregard for the requirements of the Act and plain indifference to the safety of its employees. Given this ongoing conscious disregard and plain indifference, I conclude that this violation is willful.

Penalty

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

During the period of November 5, 1997, through November 7, 1997, respondent had fewer than ten employees on this jobsite. This violation was of high gravity. If workers contacted the

high voltage power lines with rebar, the likely result would be death or serious physical injury. The classification of the violation mitigates against a finding of good faith. J.A.M. has no history of previous violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

(1) Citation No. 2, item 1, a willful violation of 29 C.F.R. § 1926.416(a)(1), is affirmed and a penalty of $35,000 is assessed.

(2) Pursuant to the settlement agreement between the parties:

(a) Citation No. 1, item 1, a serious violation of 29 C.F.R. § 1926.1053(a)(1)(ii), is affirmed and a penalty of $600 is assessed.

(b) Citation No. 1, item 2, a serious violation of 29 C.F.R. § 1926.501(b)(1), is affirmed and a penalty of $700 is assessed.

(c) Citation No. 3, item 1, an "other" violation of 29 C.F.R. § 1904.8, is affirmed and a penalty of $1,250 is assessed.

STEPHEN J. SIMKO, JR.
Judge

Date: March 29, 1999