United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MASTEC, NORTH AMERICA, INC., SUCCESSOR OF WEEKS CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 99-0252

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

As a result of an inspection of MasTec, North America, Inc.'s ("MasTec") work site, the Occupational Safety and Health Administration ("OSHA") issued a citation alleging that MasTec had committed a serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[1] The Secretary charged MasTec with a violation of 29 C.F.R. § 1926.950(c)(1), which requires employees to observe a minimum working distance from uninsulated energized parts. MasTec contested the citation, and a hearing was held before Administrative Law Judge Ken S. Welsch, who affirmed a serious violation. The Commission directed the judge's decision for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j). For the reasons that follow, we reverse the judge's disposition affirming a serious violation of section 1926.950(c)(1), and remand the case to the judge for consideration of the Secretary's alternative charge

[1] MasTec purchased Weeks Construction Company in January 1999. It is undisputed that MasTec is the successor of Weeks, and that the Commission has jurisdiction over the case.

under section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1).

Background

MasTec is in the business of electrical utility line construction and repair, and at the time of the inspection was under contract with the Central Alabama Electric Cooperative to upgrade existing single-phase power lines to three-phase power lines. The work was conducted with the lines energized. The energized line at issue was 7,200 volts phase to ground, with current ranging from 15 to 32 amperes. On August 24, 1998, a MasTec employee was moving an old phase line to an adjacent new 50-foot pole along New Quarters Road, Tallassee, Alabama when he was fatally electrocuted.[2]

Under MasTec's procedure for upgrading power lines, employees set new utility poles and then move the line from the old pole to the new pole. When the line is transferred to the new pole, there is normally some "slack" in the line that needs to be removed. Working from an insulated bucket, a lineman wearing insulated gloves with sleeves rated for the voltage attaches a hoist with cable grabs to the line. The hoist allows the lineman to jack up the excess line, forming a loop. The lineman then connects a mechanical jumper, a device that allows current to bypass the part of the line being worked on to continue service to customers, to either side of the jacked-up line. The lineman then secures both sides of the loop to the hoist with rope or tape before using insulated cutters to cut one side of the loop within several inches from where it is secured while holding the other side of the loop with the other gloved hand. After cutting out the loop, the lineman splices the line. Finally, the lineman removes the mechanical jumper and the hoist, completing the procedure.

On the morning of August 24, 1998, the deceased employee was working from inside an insulated bucket and wearing insulated gloves with sleeves rated for the voltage

[2] The deceased employee was a member of a four-man crew hired by MasTec in May 1998. MasTec hired the deceased employee as an equipment operator and promoted him to second-class linesman (also known as apprentice linesman) soon thereafter. According to MasTec's vice president, the deceased employee was promoted to first-class linesman on the day of the accident.

involved while working on an energized line. The deceased employee did not attach a mechanical jumper to the energized line and did not secure the sides of the loop to the hoist. After he cut the loop, both ends of the cut line swung loose and made contact with his body. The employee died as a result of the contact.

After investigating the accident, the Secretary issued a citation alleging that MasTec violated 29 C.F.R. § 1926.950(c)(1) because the deceased employee was working within the allowed minimum working distance without adequate protection.[3] Prior to the hearing, the judge granted the Secretary's motion to amend her Complaint to allege in the alternative a violation of section 5(a)(1) of the Act, commonly referred to as the general duty clause. At the hearing, the judge granted the Secretary's motion to amend her Complaint to also allege in the alternative a violation of 29 C.F.R. § 1926.950(c)(2). In his decision and order, the judge affirmed a serious violation of section 1926.950(c)(1), and saw no need to discuss the Secretary's alternative allegations under section 5(a)(1) and section 1926.950(c)(2).[4]

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[3] 29 C.F.R. § 1926.950(c)(1) provides: No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown on Table V-1, unless:

> (i) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or
> (ii) The energized part is insulated or guarded from him and any other conductive object at a different potential, or
> (iii) The employee is isolated, insulated, or guarded from any other conductive object(s), as during live-line bare-hand work.

According to Table V-1, the minimum working and clear hot stick distance in this case was two feet.

[4] The judge did not reach the question of whether there was a violation of 29 C.F.R. § 1926.950(c)(2). However, the Secretary concedes in her brief on review that "§ 1926.950(c)(2) prohibits employees from violating established minimum working distances 'unless other safeguards, specified in § 1926.950(c)(1), are taken,'" citing *Kansas Power & Light Co.*, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶ 21,696 (No.

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Discussion

In affirming a serious violation of section 1926.950(c)(1), the judge concluded that the standard required additional protective equipment – beyond the gloves or gloves with sleeves identified in paragraph (i) of the standard, which MasTec's employees were wearing. The judge relied on the definition of "insulated" as provided in 29 C.F.R. § 1926.960(ff)[5] and an interpretation letter cited by the Secretary to find that compliance with section 1926.950(c)(1) required more than gloves with sleeves. On review, the Secretary argues that the judge "correctly adopted [her] reasonable interpretation of the standard," and "correctly found [that] MasTec was required to provide employees with additional insulation.

We disagree. The parenthetical language in paragraph (i) of section 1926.950(c)(1) is plain: "gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part[.]" Because this language is clear and unambiguous, it is unnecessary to look beyond the standard itself. *See, e.g.*, *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, pp. 41,732-33 (No. 89-1555, 1993); *Kiewit West. Co.*, 16 BNA OSHC 1689, 1693-94, 1993-95 CCH OSHD ¶ 30,396, pp. 41,940-41 (No. 91-2878, 1994). The Secretary argues that the definition of "insulated" requires insulation of an object in a "suitable manner for the conditions . . . Otherwise, it is within the purpose of this subpart,

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11015, 1977). Since we find compliance with the terms of section 1926.950(c)(1), we need not consider the alternative allegation under section 1926.950(c)(2).

[5] Section 1926.960(ff) provides:

> The term means separated from other conducting surfaces by a dielectric substance (including air space) offering a high resistance to the passage of current.
> NOTE: When any object is said to be insulated, it is understood to be insulated in suitable manner for the conditions to which it is subjected. Otherwise, it is within the purpose of this subpart, uninsulated. Insulating covering of conductors is one means of making the conductor insulated.

uninsulated." In light of this definition, she claims that it is unreasonable to interpret the parenthetical to provide that the employee was "insulated" under the circumstances here. The flaw with the Secretary's argument is that it was the Secretary herself who explicitly provided in the parenthetical to the standard that gloves or gloves with sleeves "shall be considered insulation of the employee from the energized part."

The Secretary also cites to a December 12, 1977 interpretation letter to support her argument that the standard requires more than gloves with sleeves. Even if we were to assume *arguendo* that it was necessary to consider the December 12, 1977 interpretation letter, our holding would not change. The letter states: "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." (Emphasis added.) This letter is not only vague, but cannot override the plain meaning of the provision's parenthetical. Because MasTec's employees wore gloves with sleeves, we find that a violation of section 1926.950(c)(1) has not been established. Accordingly, we vacate the citation insofar as it alleges a violation of section 1926.950(c)(1).

At the hearing, the Secretary advanced the alternative claim that MasTec violated the general duty clause, section 5(a)(1) of the Act, which MasTec maintained was preempted by section 1926.950(c)(1). In view of his finding of a violation of the cited standard, the judge held "there was no need to discuss" the section 5(a)(1) claim, and in directing review, the Commission sought briefing on the sole issue on which MasTec petitioned for review, namely, whether the judge erred in finding a violation of the minimum clearance regulation.[6] Thus, in the present posture of the case, there are no

[6] We note that after stating he would not discuss the section 5(a)(1) allegation, the judge inserted a spot cite to 29 C.F.R. § 1910.5 and *McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1993-94 CCH OSHD ¶ 30,506 (No. 90-2337, 1994), *aff'd*, 71 F.3d 208 (6th Cir. 1995). Section 1910.5 sets forth by regulation the general rules governing the preemptive effect given to specific regulations over general regulations. In *McNally*, the Commission held that under the particular circumstances, to avoid the imposition of directly conflicting requirements, a particular standard under Subpart V of Part 1926 (the general electric standards for construction) was preempted by a standard governing

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factual findings or conclusions on the merits of the section 5(a)(1) allegation, nor do we have the benefit of a judge's decision and the parties' briefing on the threshold question of whether under the facts the general duty clause is preempted by section 1926.950(c)(1). Under these circumstances, we believe a remand is warranted.

The parties did devote portions of their briefs before the Commission to the preemption issue. The Secretary urged that the general duty clause is not preempted under the authority of *UAW v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987), a case that examined whether 29 C.F.R. § 1910.1000(a)-(d), governing exposure to specific air contaminants, should be given preemptive effect under the particular facts. In its reply brief, MasTec counters, first, that the issue is not properly before the Commission since the briefing order directing review was limited only to the merits of the alleged section 1926.950(c)(1) violation and, second, that the cited provision does preempt a section 5(a)(1) allegation since the regulation specifically addresses electric shock hazards, citing principally *Sawnee Elec. Member. Corp.*, 5 BNA OSHC 1059, 1977-78 CCH OSHD ¶ 21,560 (No. 10277, 1977).

However, we find that the parties' briefs, in addressing an issue for which the Commission admittedly did not direct specific review, provide an inadequate basis on which to decide the significant question of preemption. The parties are ships passing in

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underground construction. 16 BNA OSHC at 1882-84, 1993-94 CCH OSHD at pp. 41,169-71. By citing these authorities, the judge in a sense was discussing the section 5(a)(1) allegation. He was implicitly indicating that based on his findings that section 1926.950(c)(1) governed the situation and that the employer had violated the section, it logically followed that under existing law the general duty clause was preempted and therefore it was not necessary to rule on the elements of the section 5(a)(1) allegation. However, our determination that, contrary to the judge, section 1926.950(c)(1) was not violated under the circumstances here, revives the issue of the applicability of the general duty clause notwithstanding section 1926.950(c)(1). Under the Secretary's alternative theory, section 5(a)(1) is not preempted but is in fact applicable. She maintains that the particular hazard involved in the instant case – looping the energized wire before cutting it during the slack removal process – is not covered by section 1926.950(c)(1) but does constitute a "recognized hazard" under the general duty clause. Thus, framed in these terms, the preemption issue was not addressed by the judge and remains outstanding.

the night in the sense that neither attempts to distinguish the case authorities cited by the other. In addition, the parties have overlooked other decisions (some intervening) that may have either direct or indirect relevance on the principles governing the preemption of general duty clause claims by specific regulations. *See, e.g.*, *Mississippi Power & Light Co.*, 7 BNA OSHC 2036, 1979 CCH OSHD ¶ 24,146 (No. 76-2044, 1979); *Ted Wilkerson, Inc.*, 9 BNA 2012, 1981 CCH OSHD ¶ 25,551 (No. 13390, 1981) (and cases cited therein); *Daniel Int'l, Inc.*, 10 BNA OSHC 1556, 1982 CCH OSHD ¶ 26,033 (No. 78-4279, 1982) (citing *Mississippi Power & Light Co.*, *supra*); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1993-95 CCH OSHD ¶ 30,048 (No. 88-572, 1993); *New York State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶ 30,745 (No. 91-2897, 1995), *aff'd in relevant part*, 88 F.3d 98 (2d Cir. 1996). A more thorough analysis of the caselaw is required, taking into account whether certain authorities have been impliedly affirmed, narrowed, overruled, or otherwise modified by subsequent decisions. Accordingly, we direct the judge to request briefs from the parties addressing whether under the facts of this case the general duty clause is preempted by section 1926.950(c)(1), and if not, whether the Secretary has established a violation of section 5(a)(1) of the Act.

Our dissenting colleague objects to our remand order on three grounds. First, he claims that we are ignorant of the fact that the entire record, including the judge's decision, is before the Commission for review and therefore, we are in a position to decide the merits of what he considers to be the purely legal question raised by the Secretary's alternative allegation. Second, he argues that the merits of this question are readily resolvable against the Secretary, given his view that the hazard here is "potential electrocution," which he believes is "precisely" the hazard covered by section 1926.950(c)(1). Finally, he chides us for unnecessarily delaying final resolution of this case and committing a disservice to the parties and to the regulated community. We beg to differ on all counts.

Our colleague argues that the Commission should decide without remand whether the general duty clause was violated here, claiming that the question is one "of law and

nothing else." This is an oversimplification. Our remand order calls upon the judge to decide at least one, potentially two, issues – whether the general duty clause is preempted by section 1926.950(c)(1) and, if not, whether the Secretary has established a violation of the general duty clause. While the first issue is primarily a question of law, its resolution also depends upon the nature of the hazard or hazards at issue – a factual question. If reached, the second issue involves both questions of fact and law. The better course is for the judge, who did not consider the merits of the Secretary's alternative theory under the general duty clause, to decide these questions in the first instance, particularly where the issues were not raised in the Commission's briefing notice to the parties as issues to be decided on review. *See Gen. Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 2131, 1991-93 CCH OSHD ¶ 29,952, pp. 40,960-61 (No. 87-1195, 1993) (remand to judge for factual determinations since Commission judge ordinarily resolves factual issues first). While we are quite aware that Commission Rule 92 grants us plenary jurisdiction to review an entire case, this same Rule authorizes the Commission *not* to decide issues that are not directed for review, a point that the dissent overlooks. Commission Rule 92(a) and (c), 29 C.F.R. §§ 2200.92(a) and (c); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992) (consolidated) ("Ordinarily the Commission does not decide issues that are not directed for review."). *Accord Well Solutions, Inc.*, 17 BNA OSHC 1211, 1212 n.1, 1993-95 CCH OSHD ¶ 30,750, p. 42,717 n.1 (No. 91-340, 1995); *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1609 n.1, 1991-93 CCH OSHD ¶ 29,673, p. 40,206 n.1 (No. 87-2007, 1992).[7]

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[7] Our colleague asserts that we fail to recognize that the order directing review was "open-ended" and thereby was sufficient to put the preemption issue before us. The dissent, however, overlooks not only the terms of Rule 92(a) but also the record. Rule 92(a) provides in pertinent part: "The issues to be decided on review are within the discretion of the Commission but ordinarily will be those stated in the direction for review, those raised in the petitions for discretionary review, or those stated in any later order." Plainly, the Rule contemplates three vehicles by which the scope of review is defined. Here, the record shows: (1) the employer's petition for review sought specific

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Our colleague finds that preemption of the general duty claim is compelled by what he describes as the hazard in this case – "potential electrocution" – which he maintains is "precisely" the hazard covered by section 1926.950(c)(1). While it is true that this provision does address, broadly speaking, the hazard of electrocution, the dissent is overly simplistic in its description of the alleged hazard and its discussion of the regulation's coverage. Specifically, our colleague ignores the Secretary's more refined contention that section 1926.950(c)(1) does not completely address the unique conditions over which MasTec had control and under which the work in question here was performed.[8]

Finally, our colleague's notion that it is a "disservice" to remand for a decision on the merits of the general duty clause allegation ignores the Commission's obligation "to

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review of only whether there was a violation of section 1926.950(c)(1); (2) the direction for review specified *no* issues for review but indicated that the issues would be designated in a subsequent briefing order; and (3) the subsequent briefing order tracked only the issue specified by the employer. In none of the foregoing documents identified by Rule 92(a) was the general duty clause preemption issue expressly raised. Thus, in accordance with our procedural rules, we are clearly following the course "ordinarily" taken in deciding the only issue presented by the petitioner and so designated by the Commission for review. In light of the Rule and this record, the dissent's description of the direction for review as "open-ended" is a strange characterization. Under our current practice, such an order is typically the preliminary step taken by the Commission to preserve the case for review within the statutorily prescribed deadline, 29 U.S.C. § 659(c), thus giving the Commission an opportunity to subsequently fashion and issue a briefing order that specifies the issues for review. A nonspecific order directing review thus is not treated as a *carte blanche* authorization to go beyond the issue that was specified in the employer's petition for review and the Commission's later briefing order.

[8] In alleging a violation under section 5(a)(1), the Secretary is required to define the "recognized hazard" in a manner that apprises the cited employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control. *See Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1984 CCH OSHD ¶ 26,852 (No. 77-2350, 1984) (Commission rejects "Secretary's broad, generic definition of the hazard as electrocution caused by a limb touching a high-voltage line" under general duty clause).

avoid injustice [and] ensure that judgment will be rendered in accordance with the law and facts." *See* Rule 92(c).

Order

The judge's decision affirming a serious violation of 29 C.F.R. § 1926.950(c)(1) is reversed, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: August 2, 2004

RAILTON, Chairman, dissenting in part:

I agree with my colleagues that section 1926.950(c)(1) is applicable in this case and that the Respondent complied with the standard. I also agree that the Respondent did not violate section 1926.950(c)(2). I disagree, however, with their decision to remand this case to the judge to determine whether the general duty clause was violated. The issue presented for decision is one of law and nothing else.

They acknowledge that Rule 92 grants the Commission plenary jurisdiction to review the entire case but decided not to review whether section 1926.950(c)(1) was preempted by the general duty clause. They fail to recognize, however, that the order directing review in this case was open-ended and was sufficient to put the issue directly before the Commissioners.

They also state that the parties have failed to adequately brief the issue. They claim that the "parties are ships passing in the night in the sense that neither attempts to distinguish the case authorities cited by the other."[1] However, the Secretary clearly states in her brief that the Respondent should have provided more protection than what the standard actually required in this case. She clearly wants a decision finding that the general duty clause should be used to extend the abatement requirements of section 1926.950(c)(1). She states that the Respondent was obligated "to provide additional insulation because the gloves and sleeves did not adequately protect" employees from the energized lines. What she asks the Commission to do is directly contrary to the legislative history of the Act. In reporting out an earlier version of the general duty clause, the Senate Labor and Public Welfare Committee report stated as follows:

> The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to ensure

[1] I fail to see how that makes it difficult for them to decide the issue they would remand. The fact is that the Commission often receives briefs that are not adequate to the task of properly presenting and arguing the issues for decision. If I take my colleagues seriously, we should often ask for extra briefs and further delay the ultimate resolution of cases on review.

> the protection of employees who are working under special circumstances for which no standard has yet been adopted.

S. Rep. No. 91-1282, 91st Congress, 2d Sess. (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92 Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 150 (1971).[2]

The Secretary's request that the Commission improperly apply the general duty clause is also contrary to a plethora of Commission precedent, originating from the earliest days of enforcement of the Act, to the effect that the general duty clause is not applicable when a standard specifically covers the hazard at issue. *See New York State Electric & Gas Corp.*, 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶ 30,745 (No. 91-2897, 1995), *aff'd in relevant part*, 88 F.3d 98 (2d Cir. 1996); *Copperweld Steel Co.,* 11 BNA OSHC 2235, 1984 CCH OSHD ¶ 27,039 (No. 80-7330, 1984); *Mississippi Power & Light Co.*, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 21,146 (No. 76-2044, 1979); *Sawnee Elec. Member. Corp.*, 5 BNA OSHC 1059, 1977-78 CCH OSHD ¶ 21,560 (No. 10277, 1977); *Sun Shipbuilding & Drydock Co.*, 1 OSHC 1381, 1973 CCH OSHD ¶ 16,725 (No. 161, 1973). In her reply brief, she cites the problem as one of insufficient protective garments for employees exposed to the voltage involved in this case. If more protective gear is required, the Secretary should amend her standards to impose additional requirements.

I note, in this regard, that the issue has been before the Commission since the mid 1970's, and apparently nothing has been done to amend the standard. *See Sawnee Elec. Member. Corp*, *supra*; *Mississippi Power & Light*, *supra*; *Utilities Line Constr. Co*., 4 BNA OSHC 1681, 1976 CCH OSHD ¶ 21,098 (No. 4105, 1976).

The Secretary relies on *UAW v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) and my colleagues mention other

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[2] It is also worth noting that in discussing the conference or final bill as passed by Congress, Representative Stieger of Wisconsin stated that "the general duty requirement should not be used to set ad hoc standards." *Id.* at 1217. That is exactly what the Secretary is trying to do here.

decisions in their opinion in which the general duty clause has been used when a standard did not cover multiple hazards. *General Dynamics* presented both a toxic atmospheric hazard and a confined space hazard. In *Ted Wilkerson, Inc*., 9 BNA OSHC 2012, 1981 CCH OSHD ¶ 15,551 (No. 13390, 1981), an employee was exposed to a crushing hazard as well as the hazard of falling from a height, each of which could have caused death or serious physical harm. In other words, the case law demonstrates the existence of two totally distinct serious recognized hazards in those rare situations where an employer has been found to have violated the general duty clause.

This case is easily distinguished. The hazard is the same regardless of the method the employee used to shorten the energized line. It is a hazard of potential electrocution, and that is precisely the hazard covered by section 1926.950(c)(1).

There is absolutely no need to remand this case to decide an issue that the sitting Commissioners can and should decide. My colleagues' order unnecessarily delays the final resolution of this matter and is a disservice to the parties and the regulated community.

/s/
W. Scott Railton
Chairman

Dated: August 2, 2004

Secretary of Labor,
Complainant,
v.

MasTec North America, Inc.,
successor of Weeks Construction, Inc.,
Respondent.

OSHRC Docket No. **99-252**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

MasTec North America, Inc. (MasTec), a successor of Weeks Construction, Inc., contracted to upgrade a single-phase power line to a new three-phase line in rural central Alabama. On August 24, 1998, an employee was fatally electrocuted while removing slack from an energized primary line. As a result of the accident, the Occupational Safety and Health Administration (OSHA) conducted an investigation and issued a serious citation on January 5, 1999. MasTec timely contested the citation.

The citation alleges that MasTec violated 29 C.F.R. § 1926.950(c)(1) by permitting an employee to approach or take a conductive object closer than two feet of an energized 7,200-volt power line without adequately insulating the employee or all energized parts. The citation proposes a penalty of $7,000. Based on the same factual allegation, the Secretary amends the citation to plead, in the alternative, violations of 29 C.F.R. § 1926.950(c)(2) and the general duty clause at § 5(a)(1) of the Occupational Safety and Health Act (Act).

The parties stipulate jurisdiction and coverage (Tr. 5). The hearing was held in Montgomery, Alabama, over nine days in July and August, 1999. The parties filed post-hearing briefs.

MasTec argues that it complied with the standards and was not in violation of the general duty clause, § 5(a)(1) of the Act, because the employee was wearing insulated gloves and sleeves rated for the voltage. If a violation is found, MasTec alleges that it was due to unpreventable employee misconduct. MasTec asserts that the employee, prior to cutting the line, failed to install a mechanical jumper, secure the loop, and properly cut the loop as required by its work rules.

For the reasons discussed, a violation of § 1926.950(c)(1) is affirmed.

The Accident

Weeks Construction, Inc., was engaged in the business of electrical utility line construction and repair. It employed approximately 2,200 employees. MasTec, also engaged in the business of electrical utility line construction and repair, purchased Weeks in January, 1999. There is no dispute that MasTec is the successor of Weeks Construction (Parties' Stipulations; Tr. 62, 70, 273-275, 1008, 1853).

On June 26, 1997, MasTec[1] contracted with Central Alabama Electric Cooperative to upgrade the existing power lines for its 32,000 customers in central Alabama. The upgrading involved replacing poles and changing from a single-phase line to a new, three-phase line. The contract required that "[A]ll work will be performed with lines energized" (Exh. C-1; Tr. 43-44, 46, 74).

During the performance of the contract, MasTec hired the crew of Dale Mims, foreman, Randy Latham, first-class lineman, and Shannon Beam, equipment operator, on May 4, 1998. Mims, Latham and Beam had been working for a local competitor (Tr. 89, 647, 1151-1152). Beam's employment application showed previous work (7 years) as a foreman for a high-line crew removing overhead tree limbs on or around energized lines (Exh. R-9; Tr. 243, 648, 1411).

Although hired as an equipment operator, Beam immediately began working as an apprentice lineman assisting Latham (Exh. R-6; Tr. 89, 91, 96, 1147, 1292). Beam assisted Latham for approximately 16 weeks (work week ending August 1, 1998) upgrading the power

[1] Although the contract and the incident occurred while Weeks Construction was the employer, MasTec, as the successor, is considered the employer for the purposes of this decision.

lines along Culley Road and Dark Corner Road, Tallassee, Alabama (Exhs. R-2, R-3, R-6; Tr. 1293). Approximately three weeks prior to the accident, Latham moved to another crew and Beam continued the lineman work alone under the supervision of crew foreman Mims (Tr. 1147, 1293).

On August 24, 1998, the crew, consisting of foreman Mims, Beam, Jason Edward, operator, and Bruce Lockhart, groundsman, was working along New Quarters Road, Tallassee, Alabama (Tr. 1320-1321, 1323). The crew was joined by David Webb, superintendent, who was observing the crew for the week because of the crew's low production (Tr. 75-76, 127-128, 1322, 2035). New Quarter Road is a rural two-lane road, and the power lines serve homes, farms, well pumps and barns (Tr. 58-59). The parties stipulate that the energized line was 7,200 volts, phase to ground (Tr. 9). Bruce Baker, vice president of engineering for Central Alabama Electric Cooperative, estimated that the current ranged from 15 to 32 amperes (Tr. 49-51).

The facts surrounding the accident are not in dispute. Shannon Beam, 25 years old, was assigned to move the old phase line from Pole # 8 to the adjacent new 50-foot pole (Exh. R-5; Tr. 144, 1324-1325). The operation required removing slack from the line once it was moved (Tr. 146). After explaining the work assignments, foreman Mims left the site and drove to the power company to obtain other material. Mims asked superintendent Webb to watch Beam (Tr. 1324-1325).

To remove slack from a line, MasTec describes its procedure as the lineman, working from an insulated bucket and wearing insulated gloves and sleeves rated for the voltage, first attaches a hoist or come-along with cable grabs to the line. The come-along permits jacking up the excess line. A mechanical jumper is attached on either side of the jacked-up portion of the line. The mechanical jumper allows current to bypass the area of the line on which the lineman is working in order to continue customer service. When the line is jacked up, the excess line always forms a loop. Based on the tension and nature of # 4 ACSR,[2] the loop's configuration and location are unpredictable (Exh. C-3). After a loop is formed, the sides of the loop are tied to the come-along on both sides. Using insulated cutters, one side of the loop is cut within several

[2] Aluminum conductor, steel-reinforced (ACSR) line has six aluminum wires around one steel wire (Exh. C-3; Tr. 9, 80).

inches of where it is tied. The other side of the loop is held by the lineman to prevent it from swinging loose until it is also cut. After cutting out the loop, the remaining line is sleeved with insulation and spliced. The mechanical jumper and come-along are removed and the procedure is complete (MasTec's Brief, p. 5-6; Exh. C-10; Tr. 590, 1165-1166).

While Shannon Beam was removing slack from the energized line at Pole # 8, Edward and Lockhart were setting poles two spans (approximately 400 feet) away (Tr. 110-111, 1446). Beam was working from inside an insulated aerial bucket, and he was wearing insulated gloves and sleeves rated for the voltage. Beam failed to attach a mechanical jumper to the energized line, tie the sides of the loop to the line, or prevent the cut ends from swinging loosely. Superintendent Webb, who was the only person present during the accident, testified that after the loop was formed, he took his eyes off Beam for five seconds to reach for a telephone when he heard the arcing sound. When he looked back, the loop had been cut and both ends of the cut line had contacted Beam's body. The accident occurred at approximately 8:00 a.m. (Exhs. C-2, C-16; Tr. 9-10, 203, 205, 208, 995, 1421, 1438, 1457). It was reported to OSHA at 4:30 p.m. (Tr. 991).

OSHA Compliance officer David Gilreath initiated the inspection on August 25, 1998 (Tr. 999). As a result of the inspection, MasTec received the serious citation.

Discussion

The Secretary has the burden of proving a violation.

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

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

Alleged Violation of § 1926.950(c)(1)

The citation alleges that on August 24, 1998, an employee who was within two feet of an energized power line (7,200 volts) was fatally injured while removing the slack from the line. Section 1926.950(c)(1) provides that:

> No employee shall be permitted to approach or take any conductive object without an approved insulating handle closer to exposed energized parts than shown in Table V-1 unless;
>
> (i) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or
>
> (ii) The energized part is insulated or guarded from him and any other conductive object at a different potential, or
>
> (iii) The employee is isolated, insulated, or guarded from any other conductive object(s), as during live-line bare-handed work.

Beam was exposed to an electrical hazard of 7,200 volts and his work, which involved removing slack from an energized line, was within the minimum-approach distance requirements of § 1926.950 (Tr. 23, 28). The line voltage,[3] according to Table V-1 in § 1926.950(c)(1), requires in general that the employee remain two feet from exposed energized parts unless the employee or energized part is isolated, insulated or guarded. The parties agree that, as part of MasTec's slack- removing procedure, a loop is always formed (Tr. 30, 251, 1368). The loop is not covered with insulation (Tr. 251). The size of the loop may range from 6 inches to 6 feet, depending upon the amount of line to be removed (Tr. 1450).

The Secretary contends that during MasTec's slack-removing procedure, the employee works within two feet of the loop without being fully protected at the chest and body. The Secretary does not dispute that Beam was wearing insulated gloves and sleeves and was working from inside an insulated aerial bucket. There is no allegation that the insulated gear or equipment

[3] 7,200 volts, phase to ground, is equivalent to a voltage range of 12,470, phase to phase (Tr. 725-726).

was defective or inappropriate for the voltage (Tr. 525, 1104). However, the nature of the loop and its unpredictability, according to the Secretary, exposed the unprotected portions of the employee's body to an electrical hazard within the minimum-approach distance.

Application of § 1926.950(c)(1)

If within the minimum-approach distance, § 1926.950(c)(1) requires isolating, insulating or guarding the employee or the energized part and other conductive objects (Tr. 1984). As an exception, MasTec has the burden of proving that the employee was properly insulated or guarded from the loop during its slack-removing procedure. The party seeking the benefit of an exception has the burden to show that it is in compliance. *Armstrong Steel Erectors, Inc*., 17 BNA OSHC 1385, 1389 (No. 92-262, 1995).

There is no dispute that Beam was working within the two-feet minimum-approach distance when removing the slack. Therefore, the requirements of § 1926.950(c)(1) applied to Beam's work. Having found that § 1926.950(c)(1) applied, there is no need to discuss the alternative alleged violations of § 1926.950(c)(2) or § 5(a)(1) of the Act. *See* 29 C.F.R. § 1910.5; *McNally Construction & Tunneling Co*., 16 BNA OSHC 1879, 1880 (No. 90-2337, 1994).

Noncompliance With § 1926.950(c)(1)

There is no dispute that an employee was electrocuted when the ends of a cut, energized power line contacted uninsulated portions of his body. At the time of the accident, Beam was attempting to remove slack from the line. He was working within the two-foot minimum-approach distance without insulation on the line or protection for the exposed portions of his body. When Beam cut the line, the ends of the line involuntarily recoiled and bounced. One end of the line struck Beam on the chest and the other end struck him on the hip. MasTec does not dispute the facts surrounding the accident (Exh. C-16, MasTec's "Accident Investigation Report").

MasTec asserts that it was in compliance with § 1926.950(c)(1) because Beam was wearing insulated gloves and sleeves, in accordance with subsection (i) of the standard. He was, according to MasTec, insulated from the energized line when removing slack.

The Secretary contends that the parenthetical phrase in subsection (i) of § 1926.950(c)(1), "(gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part)" applies to insulating the employee from the energized part on which the employee is actually performing hands-on work. Gloves and sleeves may be sufficient with respect to some exposures but insufficient under other conditions, such as the energized loop formed during MasTec's slack-removing procedure. In this case, the loop was not controlled and, when cut by Beam, his unprotected body was exposed to the ends of the cut line. The gloves and sleeves did not provide insulation.

"Insulated" is defined in part at § 1926.960(ff) as:

> separated from other conducting surfaces by a dielectric substance (including air space) offering a high resistance to the passage of current.
>
> NOTE: When any object is said to be insulated, it is understood to be insulated in suitable manner for the conditions to which it is subjected. Otherwise, it is within the purpose of this subpart, uninsulated.

The Commission, in applying a standard, interprets its wording in a reasonable manner consistent with a common sense understanding. *Globe Industries, Inc.*, 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982). The words are viewed in context and judged in light of its application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). A safety standard is generally construed liberally to allow broad coverage in providing employees safe and healthful working conditions. A reasonable interpretation by the Secretary is entitled to substantial deference.

In this case, the record is clear that the energized loop was not insulated or guarded prior to cutting (Exh. C-2). MasTec asserts that insulating the line was not feasible (Tr. 252, 1025, 1211, 1522). If insulation of the energized part is not practical, the standard requires insulation or guarding of the employee, not just hands and arms, which come within the minimum-approach distances of the energized part. The parenthetical phrase in subsection (i) must be construed in view of the terms of the statement to which it refers - "The employee is insulated or guarded from the energized part." Implicit in the parenthetical phrase is the understanding that the

potential exposure is limited to the hands and arms. Protective measures, such as insulated gloves, may be sufficient for some exposures but not sufficient in other situations, such as a large energized, uninsulated and uncontrolled loop which is cut.

The Secretary's broader interpretation is reasonable in view of the purpose of the standard. The Secretary has stated in two interpretive letters that "the intent of the standard is to insulate or guard the employee [from] the energized part. . . . The example in the parentheses is one way of complying with the standard on **certain limited exposures**" (emphasis added) (Exhs. C-12, C-13). The purpose of the standard is to protect an employee from exposure to energized parts within the minimum-approach distance. This includes the energized, uncontrolled loop formed by Beam when removing slack. All portions of the employee's body within the minimum-approach distance need to be insulated or guarded from an uncontrolled, cut, energized line. Consistent with the Secretary's interpretation, George Davis, vice president, recognized that wearing properly rated gloves and sleeves would not protect against electrocution if contact with energized parts is made on an uninsulated part of the employee's body (Tr. 313-314). He agreed that exposure to other energized parts necessitated other precautions besides wearing gloves (Tr. 316-317). Superintendent Webb and safety coordinator Robert Reeves similarly recognized the limitation on the use of gloves and sleeves in protecting an employee while performing the slack-removing procedure (Tr. 94-95, 598-600).

The requirements of § 1926.950(c)(1) were not complied with when Beam failed to control the line when it was cut.

Employee Exposure

The # 4 ACSR wire, when formed into a loop, is unpredictable as to its location and configuration as the tension is released (Exh. C-3). Unless insulated or controlled, the loop exposes the employee's body to accidental contact during MasTec's slack-removing procedure.

Randy Latham, lineman, testified that in the past the loop has contacted his body while he was removing slack (Tr. 1211). "When the loop hit his chest at Petty (a prior employer), felt a little static like a spark plug" (Tr. 1273). He recognized that if the aerial bucket is not properly positioned, the loop can contact the employee's stomach and chest (Tr. 1212). In MasTec's

demonstration of its slack-removing operation, the loop appears to be hitting the side of the insulated basket (Exh. C-10; Tr. 709). George Davis, vice president, considered the loop unpredictable and subject to movement (Tr. 323). If not controlled, he agreed that it could contact the lineman's body (Tr. 332). Also, Davis stated that holding the loop at the top did not necessarily control the bottom of the loop (Tr. 334).

Virgil Melton, an experienced journeyman lineman with Southeastern Line Constructors Apprenticeship Training (SELCAT), agreed that in cutting # 4 ACSR wire, the hazard is trying to control it (Tr. 461). When cut, the wire will "spring around" (Tr. 463). Melton demonstrated a slack-removing procedure in which a loop is not formed and the line does not move more than a half-inch (Exh. C-19; Tr. 485, 490). He was not aware that some companies formed a loop as part of their slack-removing procedure. He considered it too unpredictable and too hard to control (Tr. 552). James Tomaseski, international representative of the IBEW, was doubtful that the minimum-approach distance could be maintained because of the unpredictable movement of the loop (Tr. 707).

Although there may be other slack-removing procedures, such as the one demonstrated by Melton, § 1926.950(c)(1) does not require a certain procedure to be used, and there is no showing that MasTec's procedure could not have been used in compliance with the standard.

It is clear, however, that Beam was exposed to an energized line when he cut the loop. He was electrocuted when the ends contacted his uninsulated body.

Knowledge Is Imputed to MasTec

David Webb, superintendent, was on site and observing Beam's activities. He knew or should have known that Beam was working within the minimum-approach distance of the loop without adequate insulation or guarding. He was aware that Beam was going to cut the energized line (Tr. 143, 146, 185, 205, 1421).

When a supervisory employee is in a position to have actual or constructive knowledge of the violative condition, knowledge is imputed to the employer. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986) (the actual or constructive knowledge of an employer's foreman is imputed to the employer).

A violation of § 1926.950(c)(1) is found.

Unpreventable Employee Misconduct

Having found a violation of § 1926.950(c)(1), MasTec asserts the affirmative defense of unpreventable employee misconduct. In order to establish employee misconduct, MasTec must show that it (1) has established work rules designed to prevent reasonably anticipated violative conditions; (2) has adequately communicated the work rules to its employees; (3) has taken steps to discover violations of the rules; and (4) has effectively enforced the work rules when violations have been discovered. *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

MasTec argues that if Beam had followed its procedure for removing slack, the accident would not have occurred. MasTec asserts that Beam violated four of its safety rules by failing to (1) install a mechanical jumper, (2) secure the loop to line, (3) cut the loop near the top, and (4) control the other end of the loop after the cut (Tr. 1914). There is no dispute that Beam did not take these precautions (Exh. C-2; Tr. 1915).

The record, however, fails to show that the rules involved in the slack-removing procedure were work rules which were communicated to employees and enforced by MasTec.

The Lack of Work Rules

MasTec's safety manual restates the same approach distances as § 1926.950(c)(1) (Exh. C-4). However, MasTec's restatement in the safety manual fails to provide that employees or conductive objects are not to come within the approach distances unless the energized line or employee is isolated, insulated or guarded. Also, the safety manual does not address MasTec's slack-removing procedure; the use of the mechanical jumper; the safe procedure for controlling and securing the loop; or where to cut the loop (Exhs. C-4, R-4, Tr. 123).

OSHA safety specialist David Gilreath was shown no written procedures for removing slack (Tr. 1039, 1117). According to Gilreath, foreman Mims told him that basically "we're supposed to know" (Tr. 1117). As far as securing the loop, Mims stated that he might or might not use ties (Tr. 1117). George Davis, vice president, acknowledged the lack of a written rule as

to where to cut the loop. He was sure that employees deviated from the common practice of cutting the loop short on one end (Tr. 396). Davis testified that it was permissible for employees to follow other rules when removing slack (Tr. 408-409). Although routine, James Tomaseski, IBEW, did not consider the slack-removing operation as one of the simplest jobs performed by lineman (Tr. 781).

The procedure for removing slack utilized by Latham in training Beam originated from Latham's prior employer (Tr. 1279). Latham testified that no one from MasTec discussed with him its slack-removing procedure (Tr. 1154, 1211). In his opinion, "everybody does everything differently" (Tr. 1213). Groundsman Bruce Lockhart testified that he observed linemen removing slack in different ways (Tr. 250-251). Regardless of the procedure, Lockhart stated that a loop was always formed and the loop was never insulated (Tr. 251).

Also, even if the use of a mechanical jumper was a rule, it is questionable whether the jumper is a safety device (Exhs. C-37, R-43). MasTec theorizes that if the mechanical jumper had been attached, Beam would have received only 1.35 milliamperes (Exh. R-37; Tr. 1645). According to Dr. George Vachtsevanos, MasTec's expert, if the human body receives less than 5 milliamperes, it feels a slight sensation, a tingling effect, but it retains all capabilities (Tr. 1652). He opined that Beam would still be alive if the mechanical jumper had been used (Tr. 1833). Terry Wilkins, the Secretary's expert, agrees that less than 5 milliamperes has no effect on the human body (Tr. 874). The parties agree, however, that the primary purpose of the mechanical jumper is to provide continued electrical service to customers (Tr. 520, 727, 1016, 1961). The use of the jumper also reduces the amount of current flowing through the bypassed portion of the line. However, there is no showing that the jumper is tested and certified as a safety device. No minimum standards were shown to ensure acceptability (Tr. 1017, 1980). The jumper's effectiveness depends on its resistance,[4] the extent to which the jumper is making contact with the line, and the environmental condition of the line and jumper (corrosion and oxidation) (Tr. 494, 869, 1065, 1724, 1966). Even if the mechanical jumper and line are in good condition and properly installed, some current still flows through the cut line (Exh. C-35; Tr.

[4] Resistance is determined based on the object's make up, length and sectional area (Tr. 1574, 1721).

1983). The amount is unknown to the lineman. Dr. Vachtsevanos, MasTec's expert, agreed (Tr. 1814). A mechanical jumper is not an alternative to insulation such as gloves, sleeves, blankets, hoses and other rubber goods which prevent the flow of current (Tr. 863, 1980-1981).

Latham, a first class lineman, has witnessed instances where the mechanical jumper broke off because of the ends (Tr. 1246). Even with a mechanical jumper on the line, Latham considered the loop still energized (Tr. 1275). He would not grab it. He knew that current still flowed through the loop because he has been shocked when his body contacted it (Tr 1275-1276, 1281). Superintendent Webb described his contact with an energized line as "buzzed," although there was a mechanical jumper on the line (Tr. 214-215).

Therefore, MasTec fails to show that its procedure for removing slack constituted mandated safety rules which employees were required to follow.

The Rules Were Not Communicated

In addition to a lack of rules, the record fails to establish that the slack-removing procedure was communicated to employees or that employees understood the rules. MasTec's safety program consisted of daily tailgate meetings and job site inspections, which included safety meetings (Exhs. R-18, R-19, R-20, R-22, A-E). The records show that personal protective equipment and accident prevention were discussed during the meetings. However, there is no showing that approach distances, slack-removing procedures, or the need for insulation and guarding were addressed when working on an energized line.

A review of MasTec's tailgate meetings also does not show that employees were instructed in the slack-removing procedure to install a mechanical jumper, secure the loop or proper cutting of the loop. In fact, the records fail to show any instruction in the slack-removal procedure prior to the accident (Exhs. R-18, R-20, R-25, R-26; Tr. 1529).

Foreman Dale Mims testified that MasTec never showed him how to remove slack, and he was never told what rules applied to the procedure (Tr. 633, 649). First-class lineman Randy Latham agreed that MasTec never told him the procedure to follow in removing slack (Tr. 1211). Groundsman Bruce Lockhart also testified that the slack-removing procedure was never discussed during the morning tailgate meetings (Tr. 254-255). Lockhart observed that there were

variations as to when the mechanical jumper was installed, and he never observed linemen tying off the loop (Tr. 251-252).

At the time of the accident, Beam had only worked on power lines for approximately three months, two months as an apprentice under the supervision of lineman Latham. He had progressed from an apprentice to lineman first class. The record suggests that typically a person works two years as an apprentice (Tr. 665, 1207, 1331). According to James Tomaseski, IBEW, it is impossible to be trained as a lineman in four months (Tr. 698). It is a highly skilled and hazardous job (Tr. 698). However, there is no citation for lack of training or that Beam was not properly classified to do the job.

Foreman Mims acknowledged that Beam had to learn a lot of different tasks (Tr. 1361). Mims agreed that Beam still needed "close supervision" after his promotion to lineman (Tr. 1354). Mims still considered Beam as an apprentice. According to Mims, after Latham left the crew, "he [Beam] would still be doing the work by himself, but I was going to be there watching him do it" (Tr. 1352). "He had not developed to where he could be doing work by himself without supervision" (Tr. 1355). George Davis, vice president of the central division, agreed that Beam needed continued supervision as a lineman (Tr. 376, 404-405).

The record reflects that Latham and Beam, during approximately two months working together, had removed slack while transferring lines on at least 10 poles (Tr. 1164-1165, 1169, 1172, 1181, 1182-1183, 1189, 1195, 1202). Also, with foreman Mims observing from the ground after Latham left the crew, Beam removed slack from at least four more poles prior to the accident (Tr. 1301-1302, 1304, 1318).

In Latham's description of removing slack at the various poles, it was not shown how many times, if any, Beam had actually removed slack by himself. Latham described his training as showing Beam the equipment, protective equipment and the normal everyday procedures. He trained him in work procedures by first doing the job himself, then doing the job together with Beam, and finally allowing Beam to do it by himself while Latham watched (Tr. 1154, 1160). Latham instructed Beam in his procedure for removing slack (Tr. 1166, 1170). However, it is not shown that his instruction also included the hazards associated with failing to perform each step of the procedure. In fact, Latham had to stop Beam prior to the accident from cutting a line

without a mechanical jumper. Latham never reported the incident (Tr. 1263-1264). He also did not recall telling anyone else about the incident. Further, he did not remember being asked by MasTec whether Beam had any problems with the slack-removing procedure (Tr. 1265, 1282).

Unlike Latham, who trained Beam from another aerial bucket, Mims supervised Beam from the ground during the month prior to the accident (Tr. 1364). However, from the ground, Mims agreed that it is hard to observe precisely what is being done 40 feet in the air. Also, it is hard to hear because of the noisy equipment (Tr. 382, 1364, 1366, 1373-1374). Mims defined his constant observation as approximately 90 percent of the time. It was "most of the time" (Tr. 1365). Foreman Mims could not recall anyone in MasTec's management observing Beam removing slack to make sure he did it in accordance with company procedure (Tr. 1362).

Unfortunately for Beam, on the day of the accident, superintendent Webb viewed his role not as a supervisor, but as an observer and helper if Beam needed something (Tr. 1459). Webb was at the site to observe the crew's work because of MasTec's concern over the crew's low production, labor cost, or length of time on the job was exceeding the amount of money made (Tr. 75-76, 368-369, 2035). Webb was watching from the ground while Beam was working on his own (Tr. 184, 1418). According to Webb, "I didn't figure he (Beam) needed any direct supervision. I was just there to try and observe and see what else that I could help him with" (Tr. 1459). Also, Webb was watching the operator and groundsman working approximately 400 feet away setting new poles (Tr. 1445-1446).

Although the procedure was repeated during the three months he worked as a lineman, there is no showing that Beam understood the procedure and the associated hazards. The record is unclear how many times Beam had removed slack by himself other than the four times while Mims was observing from the ground. Beam's lack of understanding on the day of the accident is demonstrated by his failure to take **four** separate precautions in removing the slack. Beam (1) failed to apply the mechanical jumper, (2) secure the loop to the line, (3) cut the loop on one side within six inches of the top, and (4) hold onto the other side of the loop after cutting. One failure may be considered a mistake or oversight, but four failures show a complete lack of communication of the rules.

Safety Rules Were Not Enforced

To show enforcement of its safety program, MasTec offered its records of employee discipline (Exhs. R-23, R-24). MasTec's safety violation policy was adopted in June, 1998 (Exh. R-27; Tr. 1856-1857).

A review of the records, however, fails to show that any of the safety rules allegedly violated by Beam were enforced. The discipline records do not show any employee disciplined for failing to install a mechanical jumper, secure the loop, control the loop, or for improperly cutting the loop (Exh. R-23; Tr. 1870-1871).

Also, Mastec's enforcement of its safety rules was not shown to be consistent and in adherence with its own safety program. The records show that MasTec's disciplinary procedure is not strictly followed. For example, an employee on July 22, 1998, received only a warning for not wearing rubber gloves. However, MasTec's discipline program directs that he should have been suspended for three days for the offense (Exh. R-23; Tr. 1868; *also see* another record for July 22, 1998).

To prove that its disciplinary system is more than a paper program, an employer must show evidence of having actually administered the discipline outlined in its policies and procedures. *Pace Construction Corp*., 14 BNA OSHC 2216, 2220 (No 86-758, 1991).

SERIOUS CLASSIFICATION

The Secretary classified the violation as serious. A serious violation is established if the violative condition creates a substantial probability of death or serious physical harm, and the employer knew or should have known of the violative condition, §17(k) of the Act (29 U.S.C. § 666(k)). In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. W*hiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

There is no dispute that the employee was working on 7,200-volt power lines, clearly sufficient to cause death or serious injury. MasTec was aware that the work required removing slack from the line, which necessitated cutting the energized line. If the slack-removing

procedure was not properly performed, electrocution, causing serious injury or death, such as in this case, was the likely outcome.

PENALTY CONSIDERATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the employer's size of business, history of previous violations, its good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

MasTec is a large employer with 7,000 employees and does business in most states and some countries (Tr. 272-273). However, Weeks Construction was the company at the time of the violation. Weeks employed 2,200 employees and is considered a large employer (Tr. 275, 1008). Also, Weeks had a history of prior violations. In 1990, Weeks received a willful citation, which included an alleged violation of § 1926.950(c)(1) (Exh. C-26). According to Reeves, Weeks had also received prior citations, including fatalities from electrocutions (Exhs. C-17, C-23, C-24, C-27; Tr. 612-613, 1012, 1517-1518). Since 1985, Weeks had seven fatalities that resulted in OSHA citations (Tr. 1048-1049).

A penalty of $7,000 is reasonable for serious violation of § 1926.950(c)(1). The violation is considered as high severity and greater hazard. The employee was exposed to 7,200 volts without adequate, insulated protection to perform the job. The employee was inexperienced, having performed lineman work for less than three months. He was also inadequately supervised and trained in the proper procedure for removing the slack.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

CITATION NO 1.

1. Item 1, serious violation of § 1926.950(c)(1), is affirmed and a penalty in the amount of $7,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: April 10, 2000