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. Davis H. Elliot Construction Company, Inc., Respondent.	OSHRC Docket No. **07-0097**

Appearances:

Linda M. Hastings, Esquire, Cleveland, Ohio
For the Complainant

Carl B. Carruth, Esquire, Columbus, South Carolina
For Respondent

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

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review citations issued by the Secretary of Labor ("Secretary") to Respondent, Davis H. Elliot Construction Company, Inc. ("DHE")

In 2003, an ice storm devastated the electric power distribution system owned by Buckeye Rural Electric Cooperative in southeastern Ohio. After obtaining a FEMA grant to rebuild the system, Buckeye contracted with DHE to tear down the old system and construct a new one. In all, the project would encompass 4000 poles, extending over 226 miles (Exh. C-1).

Under the project, DHE installed new poles and strung new lines. To keep service interruptions to a minimum, the old energized lines were transferred from the old poles to hot rollers on the new poles while still energized. The old poles were then torn down and new lines strung. This required DHE to clean off everything attached to the old lines and reconnect customer connections with temporary jumpers that could be easily removed when the new lines were pulled into place. By June 13, 2006, DHE was ready to remove the old lines and string new lines.

On June 13, 2006, a DHE crew, led by foreman Howard Hall, was working on a section of the system which extended from poles numbered 42 to 64. Because Hall had only two apprentice linemen and one groundsman on his crew, he arranged to have his crew combined with the crew of Randy Wood, which consisted of Wood, one linesman and two groundsmen. All supervisory functions were vested in Hall. Although Wood was a foreman, he did not exercise any supervisory control over this job. Only Hall had the authority to direct the work or order that a line be energized or deenergized. Moreover, the crew was aware that Hall was fully in charge.

The crew removed the old phase and neutral wires and strung and then sagged the new phase and neutral wires. After sagging, the conductor had to be tied or clipped to the insulators. This could be accomplished either from a lift bucket or, where the poles were set away from the road, by climbing the pole. Late in the day, Hall, who was with part of the crew at Pole 64, sent Victor Morris and Matthew Angel to work on Poles 50 and 51. Hall instructed them to find the groundman, Dana Dixon and take him to Poles 50 and 51. They were also instructed to inform Wood of their assignment, so Wood would be able to inform Hall when Morris, Angel and Dixon were clear of the lines prior to energization. Angel and Morris got Dixon at Pole 42 and proceeded to Poles 50 and 51. However, contrary to Hall's orders, they failed to inform Wood of their assignment.

When Wood's group finished their work, Wood radioed Hall to report that everyone was clear at his end. However, when Wood gave Hall the all-clear, he was unaware that Hall assumed that the all-clear signal implicitly included Angel, Morris and Dixon. Hall told Wood to remove the ground at Pole 42, install a jumper and energize the line. Unknown to Hall, Morris was still working on Pole 50 and, when the lines were energized, he was electrocuted.

Because he failed to ensure that all employees were clear of the lines before ordering that they be energized, Hall was demoted and reclassified as a lineman. However, his salary was not reduced.

As a result of the accident, OSHA conducted a safety inspection on June 15, 2006. Pursuant to that inspection, OSHA issued to respondent two citations, one for several serious violations of the Act and one for a single willful violation. A total penalty of $88,200 was proposed for all violations.

Respondent filed a timely notice of contest. A hearing was held on January 9-11, 2008 in Cincinnati, Ohio. Both parties have filed briefs and this matter is now ready for disposition.

DISCUSSION

Citation 1, Item 1a

Citation I, Item 1a alleges that DHE failed to comply with 29 CFR §1926.21(b)(2)[1] on the grounds that: "At the jobsite, the employer did not ensure that employees performing a stringing operation were trained in procedures, such as but not limited to: placing grounds at all job locations, placing tags on deenergized lines, and accounting for all workers prior to re-energizing lines, thereby exposing employees to an electrical hazard."

The Secretary asserts that employees were not instructed to place grounds at the point of work, as required by DHE's Safety Handbook Rule L 4.09 and 29 CFR §1926.954(f), and were not trained to place tags on the deenergized lines as required by 29 §1926.950(d)(1)(ii)(b) and (d)(1)(vi). Also, the Secretary asserts that DHE failed to instruct its employees on the manner in which they would be accounted for prior to reenergizing the lines.

DHE argues that, contrary to the Secretary's assertions, point of work grounding was not required. Moreover, it asserts that employees were instructed regarding the use of tags when the requirement was applicable. Here, Respondent asserts that tags were not required. Finally, DHE contends that it was the foreman's responsibility to ensure that all employees were clear of the lines before energization and that employees were instructed on the need to be clear of the lines.

The record establishes that the employees were trained in procedures regarding the placement of tags and the grounding of lines. (Exhs. C-16-C-20) The Secretary's allegations presume that DHE's failure to use required point of work grounding and tagging was the result of inadequate training. However, as will be discussed, *infra*, I find that neither point of work grounding nor tagging were required at this site.

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[1] 1926.21 **Safety training and education**.

(b) *Employer responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Nonetheless, the evidence establishes that Respondent's instructions on accounting for all employees during the energization of lines were deficient. DHE admits that it had no formal procedures for ensuring that all employees were accounted for prior to the reenergization of the lines. Rather, foremen were simply instructed to make sure that all employees were clear before reenergization.

Because §1926.21(b)(2) does not specify exactly what instructions the employees must be given, the Commission has held that an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware. *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992)

Accordingly, the question here is whether a reasonably prudent employer would instruct its foremen in methods to ensure that employees were clear of the lines prior to energization or, as here, simply allow its foremen to determine for themselves, on a case-by-case basis, the method of ensuring all employees were clear.

The evidence establishes that a hazardous condition occurred because the foreman expected that the employees strictly followed his instruction and informed Wood of their assignment. Thus, when Wood informed him that all the employees were clear, Hall, DHE's foreman, assumed that Wood was including Morris, Angel and Dixon. Had the foreman been trained to avoid the hazards inherent in making such an assumption, the hazardous condition would likely have been avoided. I find that a reasonably prudent employer would have included such training and, accordingly, that the violation was established.

Citation 1, Item 1b

Citation I, Item 1b alleges a violation of 29 CFR. §1926.20(b)(1)[2] on the grounds that "The employer's accident prevention program(s) did not address: the requirement that when two independent crews were working on the same line that prominent tags for each crew would be placed at the locations where the line was deenergized; and procedures to insure that all personnel are clear of the line prior to removing ground(s)."

[2] 1926.20(b)(1) **General safety and health provisions.**

(b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

The first part of this sub-item presumes that there were two separate crews on the job that required that prominent tags be placed where the lines were deenergized. For reasons discussed under item 2b, I find that there was only one crew. Therefore, I find no basis for this part of the sub-item.

I also find that the Secretary failed to establish that DHE's accident prevention program failed to require that all personnel are clear of the lines prior to the removal of grounds. Respondent's safety handbook, at rule 4.14 states that "All affected workers shall be notified that the clearance is to be released and shall be in the clear." The Secretary asserts that the rule violated the standard by not stating who is responsible for the notification. However, the evidence establishes that, under its safety program, it is the foreman who is responsible for insuring that the lines are clear of employees.

The evidence establishes that DHE's safety program properly required that all workers be notified when energization is about to take place. However, no rule can cover all contingencies. That is the responsibility of a training program. The standard at 29 CFR §1926.20(b)(1) requires a safety program, while §1926.21(b)(2) focuses on training designed to implement that program. I find that Respondent's safety program contained the rules necessary to protect its employees. As I have already found, DHE's training regime to implement that program was deficient.

Therefore, Item 1b is vacated.

The Secretary proposed a combined penalty for items 1a and 1b of $6300.When considering the propriety of a 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. *R.G. Friday Masonry Inc.*, 1070, 1075 (No. 91-2027, 1995) I find that the failure to properly train the foreman in methods to ensure that employees were clear of the lines prior to energization was properly characterized as serious. Energizing the lines while employees are in contact with them is, as demonstrated here, likely to cause death or serious physical harm. I also find that the violation was of high gravity. Moreover, I find that the Secretary properly considered Respondent's size, safety history and good-faith when proposing the penalty. However, the penalty represents two items, one of which is vacated. Although item 1a is affirmed on the basis of only one of the three grounds alleged by the Secretary, this basis is, in my view, the most serious of the three and therefore deserving of a substantial penalty. Accordingly, I find that a penalty of $5000 is appropriate for item 1a.

Citation 1, Item 2a

Citation 1, Item 2a alleges that DHE committed a serious violation of 29 CFR §1926.950(d)(1)(ii)(b)[3] on the grounds that, "At line section 15D6Y, pole 42, where a mechanical jumper was removed as part of the de-energization process, no tags were placed indicating that men were working on the line section."

A combined penalty of $6300 was proposed for items 2a and 2b.

It is undisputed that the disconnect at Pole 42 was not tagged. However, the jumper had been removed and there was a large visible gap between the energized line on one side of the pole and the deenergized line on the other. The pole was visible from Poles 43 and 44, but not beyond. Hall testified that there was no place to hang a tag, but that he would have hung one if there was a place to do so. On the other hand, Wood testified that when a jumper is removed, there is no reason to place a tag since nobody would be working at that pole.

The Secretary argues that because the pole was largely not visible to the crew, it was not visibly open or locked out within the meaning of the standard. Therefore, she contends, the standard applied and the pole was required to be tagged.

I find that tagging on Pole 42 was not required. The standard clearly requires tagging only when "the means of disconnecting from electric energy is not visibly open or visibly locked out." Here, the means of disconnect was visibly open and, therefore, tagging was not required. The purpose of the standard is to prevent an employee from accidently turning the switch or disconnector. If the means of disconnect is not visibly open or locked out, an employee could erroneously turn the switch. The logical conclusion is that the means of disconnect must be visibly open to someone looking at the pole. There is nothing in the standard to suggest that the opening must be visible from a remote location. In fact, since no circuit can ever be seen from a remote location, the Secretary's interpretation would write the condition out of the standard whenever employees are working at a distance from a pole. Accordingly, I find the Secretary's interpretation of the standard to be unreasonable.

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[3]

1926.950 **General requirements.**

(d) *Deenergizing lines and equipment.*

(1) When deenergizing lines and equipment operated in excess of 600 volts, and the means of disconnecting from electric energy is not visibly open or visibly locked out, the provisions of paragraphs (d)(1)(i) through (vii) of this section shall be complied with:

(ii)) Notification and assurance from the designated employee shall be obtained that:

(b) All switches and disconnectors are plainly tagged indicating that men are at work)

Respondent also argues that the standard does not require that poles be tagged. Rather, it clearly states that "switches and disconnectors be plainly tagged..." Here, there were no switches or disconnectors and, therefore, there was nothing to tag.

Again, I find Respondent's argument well-taken. The standard explicitly requires that the tag be placed on the switch or disconnector. A switch or disconnector is a device designed to be operated so that a circuit can be easily opened and closed to turn the power on and off. Without switches or disconnectors, there was no way that an employee could have inadvertently energized the line. Also, with neither on the pole, there was nothing to tag. Indeed, contrary to the Secretary's contention that a tag could have been hung on the pole, there is nothing in the standard to suggest that is a permissible alternative to placing the tag on the switch or disconnector.

Accordingly, item 2a is vacated.

Citation 1, Item 2b

Citation 1, Item 2b alleges that DHE seriously violated 29 CFR §1926.950(d)(1)(vi)[4]. According to the citation, at line section 15D6Y, pole 42, where two independent crews required the line to be deenergized, a prominent tag for each crew was not placed on the line.

The Secretary argues that there should have been two tags on Pole 42 because, when Morris broke away from Hall, he created an independent crew. According to the Secretary, a crew is deemed "independent" because the workers were without any visual or verbal communication with the other employees while working approximately half a mile away. The Secretary points out that under its interpretive letter of June 9, 2000 (Exh. R-6) to qualify as a single crew, there must be "effective visual or verbal (e.g. radio), communications with all crew members." Here, the Secretary asserts, there was no communication between Hall and Morris. Therefore, Morris, Angel and Dixon constituted an independent crew.

[4]
1926.950 (d)(1)

(vi) When more than one independent crew requires the same line or equipment to be deenergized, a prominent tag for each such independent crew shall be placed on the line or equipment by the designated employee in charge.

Respondent's argument centers on two points. First it notes that the requirements of 29 CFR §1910.269(m)(3)(viii) are similar to §1926.950(d)(1)(vi) and, while not controlling, the interpretation of "independent crews" for purposes of §1910.269(m) are instructive to its meaning under §1926.950(d)(1). The Preamble to 29 CFR §1910.269(m) states that "a group of employees who are working under the direction of a single employee and who are working in a coordinated manner to accomplish a task on the same lines or equipment are considered to be a single crew, rather than as multiple independent crews for the purposes of (m)(2)(iii)." 59 Fed. Reg. 4391 (Jan. 31, 1994). DHE asserts that the entire crew was under the exclusive direction of Hall, that the other requirements were met and, therefore, that they constituted a single crew.

Second, Respondent asserts that the Interpretive Letter of June 9, 2000 sets out six criteria to be considered when determining if there is a single crew under §1910.269(m):

1. The employee in charge of the single crew must have sole control of the work;.
2. That employee must coordinate the activities of all employees;
3. The employee in charge must be responsible for the clearance for the entire job;
4. The employee in charge must be the only person communicating with the system operator;
5. Procedures must include effective visual or verbal (radio) communications with all crew members; and
6. The employee in charge must conduct a single briefing with all the employees before the start of the job.

Again, Respondent contends that these criteria were met. Accordingly, there was only a single crew at the site and, therefore, the standard did not apply. I agree.

As DHE notes, §1910.269(m) is instructive in determining what the Secretary considers to constitute a single crew. The evidence demonstrates that, under that general industry standard, Hall's employees did not break up into independent crews.

The evidence establishes that Hall had full control over the employees at the worksite. Although Wood was a foreman, on this job he was assigned to work for Hall. Wood recognized that he had no supervisory authority and that Hall was in total charge. Hall coordinated all employee activities, was responsible for the clearances, and was the only person authorized to have the lines reenergized. Moreover, Hall held a job briefing with the entire crew every day. Under §1910.269(m), there was clearly only one crew.

The only questionable issue, as set forth in the Interpretive Letter[5], is whether Morris, Angel and Dixon were in radio contact with the rest of the crew when they went to their assignment. DHE's safety manager, Donald Adkins, Jr., testified that Morris, Angel and Dixon had radio ability at points, and that their truck, with an outside speaker was located about 100 yards away. However, he didn't know whether they had their outside speakers on, and speculated that, while working on Poles 50 and 51, they were out of radio contact. However, he pointed out that, if necessary, they could have walked back to the truck to contact Hall.

Had Morris obeyed the directive from Hall and informed Wood of their assignment, Wood would not have given Hall the all-clear until he contacted Morris. He could have informed them to keep their radio on, with the speakers turned up, so they would be able to be contacted. Moreover, I note that Adkins was not at the site at the time of the accident and, in his own words, could only express his belief that the radio was turned off. Therefore, the evidence produced by the Secretary to establish that their radio was turned off is, at best, speculative and not sufficient for the Secretary to meet her burden of establishing a violation by a preponderance of the evidence.

However, assuming *arguendo* that the radio was off, the issue is whether Respondent should have known that Morris would disobey his orders, thereby creating a second crew that was required to tag a line that was not otherwise required to be tagged. The record here reveals nothing that should have led Hall to anticipate that his employees would disobey his direct orders[6].

I find that, under the facts as established here, there was only one crew under the criteria set forth both under §1910.269(m) and in the Interpretive Letter of June 9, 2000. An independent crew is not defined under the Construction Industry Standards, and the Secretary offers no reason why the criteria under §1910.269(m) should not apply to the related standards under Part 1926. Accordingly, I hold that the cited standard did not apply and the item is vacated.

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[5] I note that the Secretary does not dispute the relevance of the Interpretive Letter, which applies specifically to §1910.269(m), in determining the meaning of "independent crew" under §1926.950(d)(1).

[6] That is not to excuse Respondent from implementing procedures to ensure that all employees are accounted for prior to reenergizing the lines, as set forth in item 1a. In that regard, proper training and procedures would have accounted for the occurrence of unanticipated events, such as employees disobeying orders.

Citation 1, Item 3

Citation 1, Item 3 alleges that Respondent committed a serious violation of, 29 CFR §1926.950(d)(1)(vii)[7] on the grounds that, "At line section 15D6Y, from pole 42 to pole 64, the designated employee(s) in charge did not ensure that all employees were clear of the line prior to removing any protective ground(s) and re-energizing the line."

The Secretary asserts that both Wood and Hall were each responsible for their own crews and, therefore, that both foremen had a responsibility to verify the status of Dixon, Angel and Morris before the lines were energized. The Secretary points out that each completed and signed a time sheet for their respective linemen and groundmen (Exhs. C-24 & C-25). Moreover, at the opening conference and during initial interviews, Adkins, Hall and Wood all referred to two crews, that being Hall's and Wood's. Finally, the Secretary moves to amend the citation to conform to the evidence by reclassifying this violation as willful.

DHE argues that the provisions of the standard are not applicable because the lines were not deenergized. To be "deenergized" presupposes that the lines had been energized. Rather, it contends that this was "new construction" and, as such, the lines had never been energized. Respondent also raises the affirmative defense" of "unpreventable employee misconduct." It points out that it has a workrule (Rule 4.14-blue) that provides that "All affected workers shall be notified that the clearance is to be released and shall be in the clear...." Respondent argues that Hall understood his responsibility under the rule and that his failure to comply was the result of unpreventable misconduct for which he was disciplined.

For reasons given, *supra*, I find that there was only one independent crew involved here[8]. In any event, applicability of this standard does not depend on the existence of multiple crews. Rather,

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[7]
1926.950(d)(1)

(vii) Upon completion of work on the de-energized lines or equipment, each designated employee in charge shall determine that all employees in his crew are clear, that protective grounds installed by his crew have been removed, and he shall report to the designated authority that all tags protecting his crew may be removed.

[8]That Wood and Hall each signed the time sheets for the employees normally in their crews does not suggest a different result. The evidence establishes that Respondent had Wood and his crew join Hall on this job, with the clear understanding that Hall would be in total and complete control. That Hall and Wood later signed the time sheets for the employees normally in their crew is a formality unrelated to control of a crew's activities and does not alter the fact that Hall was in complete charge of the job.

a violation is established upon a showing that each designated person in charge failed to determine that all employees in his crew were clear of the lines. The facts establish the violation since the evidence is undisputed that Hall failed to determine that all employees in his crew were clear of the lines.

DHE's other arguments are not persuasive. The argument that new lines that were never energized cannot have been deenergized places form over substance. The term "deenergized" can be read to imply either that the lines had been energized and had the energy turned off, or that the lines that were simply never energized. In the latter, it refers to a power line that, regardless of its previous state, does not carry energy but is designed to do so. So viewed, a line that has never been energized can still be a deenergized line. Indeed this view is supported elsewhere in the standards. For example, §1926.954(b), which specifically applies to "new construction," states that new lines that have never carried energy can be considered "deenergized" when certain safety precautions are taken. Clearly, a newly installed line, by definition, has never been energized. Yet, the standard refers to it as "deenergized." While either interpretation of the term may be reasonable, The Commission must defer to the Secretary's reasonable interpretation of a standard. *Martin v. OSHRC (CF & I)*, 499 U.S. 144, 150 (1991) Accordingly, I must defer to the Secretary and accept her interpretation of the standard.

The record also does not support Respondent's contention that Hall's failure to ensure that all employees were clear was the result of "unpreventable employee misconduct." To establish the affirmative defense of unpreventable employee misconduct, the employer must show that it had a thorough safety program which was adequately enforced and communicated and that the violative conduct was idiosyncratic and unforeseeable. The employer must also present evidence concerning the manner in which it enforces its safety rules. When the alleged misconduct is that of a supervisor, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Archer-Western Contractors Lt.* 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *petition for review denied,* 978 F.2d 744 (D.C. Cir. 1992). In such an instance, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its supervisory employee. *Id.*

Here the record demonstrates that DHE allowed its foremen to determine for themselves the appropriate method of ensuring that all employees were clear. As noted in my discussion of Citation No. 1, Item 1a, Respondent's training of its foremen in this regard was insufficient. Accordingly, the defense fails.

Finally, I deny the Secretary's motion to amend the item to allege a willful violation. The motion, first made and denied at the conclusion of the hearing introduces new questions of fact that DHE was not prepared to address. To assert, as the Secretary does, that the record establishes the facts necessary to find willfulness, overlooks the fact that Respondent might have been able to introduce convincing countervailing evidence, had it been given the opportunity to properly prepare its defense.

The Secretary proposed a $6300 penalty. The record demonstrates that the results of this violation can be death or serious physical harm. Moreover, I find that the failure to ensure that all employees are clear of the lines has a high probability of resulting in an accident. Therefore, the violation was of high gravity. Finally, as noted *supra*, I find that in proposing the penalty, the Secretary appropriately considered the statutory factors of size, history, good-faith. Accordingly, I find that the proposed penalty is appropriate.

Citation 1, Item 4

Citation 1, Item 4 alleges that Respondent committed a serious violation of 29 CFR §1926.955(c)(2)[9] on the grounds that "A job briefing was not held which specified: how the line was to be tagged indicating that two crews were working on the line; required grounding procedures at each work location for protection of employees; and clearance authorization, including how to account for each crew member prior to re-energizing the line."

The Secretary proposed a penalty of $6300.

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[9]

1926.955 **Overhead lines.**

(c) *Stringing or removing deenergized conductors.*

(2) Prior to stringing operations a briefing shall be held setting forth the plan of operation and specifying the type of equipment to be used, grounding devices and procedures to be followed, crossover methods to be employed, and the clearance authorization.

Respondent asserts that because tagging was not required, it was not necessary to discuss tagging during the job briefing. It also contends that point of work grounding was not required. Rather, only perimeter grounding was required and that matter was discussed. Finally, Respondent contends that the standard does not state that the briefing must include a discussion of the procedure for accounting for all crew members prior to energization of the new line. Rather, the term "clearance authorization" refers to the authorization to work on or near a deenergized line and nothing more. Respondent points out that Hall instructed the crew that he would give the authorization to deenergize the old line and that when he did, Sheets was to disconnect and remove the jumper.

Respondent correctly states that the requirement that the pre-job briefing include "clearance authorization" refers only to authorization to work on or near deenergized lines. Although the standards do not define the term, its meaning can be discerned by examining the context in which it appears elsewhere. Section 1926.955(c)(4)(i) states

> If the existing line is deenergized, proper clearance authorization shall be secured and the line grounded on both sides of the crossover or, the line being strung or removed shall be considered and worked as energized.

Clearly, as used here, the term refers to ensuring that the lines are deenergized before employees are cleared to work on them. The Secretary cites nothing to suggest that, as used in the cited standard, the term has a different meaning. Furthermore, Hall testified that he told the crew how the wire was going to be deenergized, what was required, that Sheets would perform the deenergization, and that he was the only person on the crew with authority to order deenergization. Thus, Hall did discuss "clearance authorization" with the crew.

The record also establishes that Hall discussed grounding at the briefing. The citation specifically asserts that Respondent failed to discuss the grounding procedures at each work location. However, as discussed, *infra,* DHE was not required to conduct point of work grounding. Rather, it was sufficient that the employees worked between the grounds. In this regard, Hall testified that he discussed that the wire was going to be pulled from each end of the line, and that they were going to ground the rollers on each end. Therefore, grounding was discussed.

Finally, the citation alleges that DHE failed to discuss "how the line was to be tagged indicating that two crews were working on the line." However, as discussed *supra*, I find that there was only one crew on the job. Hall's crew never broke up into multiple crews and there never was an intent to have the employees break into multiple crews. Accordingly, there was no basis for Hall to discuss how the line was to be tagged to indicate that two crews were working on the lines.

Accordingly, the item is vacated.

Citation 2, Item 1

Citation 2, Item 1 alleges that Respondent willfully violated 29 CFR §1926.954(f)[10] because, at line section 15D6Y, from pole 42 to pole 64, work was performed at more than one location on the line without grounds being installed at each work location. On or about June 13, 2006, an employee was electrocuted while working on Pole 50 without a ground being placed at the work location. The Secretary proposes a penalty of $63,000 for this violation.

The evidence is undisputed that Respondent did not install point of work grounding. Rather, it set grounds at each end of the line. At all times, employees were working between these grounds.

DHE defends this citation on two grounds. First, it contends that this project qualified as "new construction." It points out that the project involved the construction of new lines and equipment and, therefore, that §1926.954(b)[11] applies. That standard, entitled "New Construction" specifically applies to "new lines or equipment." Under §1910.954(b), grounding is not required where the hazard of induced voltage is not present and adequate means are used to prevent contact with energized lines or equipment and the "new lines and equipment." Here, there was no hazard of induced voltage.

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[10] 1926.954 **Grounding for protection of employees.**

(f) Grounds shall be placed between work location and all sources of energy and as close as practicable to the work location, or grounds shall be placed at the work location. If work is to be performed at more than one location in a line section, the line section must be grounded and short circuited at one location in the line section and the conductor to be worked on shall be grounded at each work location. The minimum distance shown in Table V-1 shall be maintained from the ungrounded conductors at the work location. Where the making of a ground is impracticable, or the conditions resulting therefrom would be more hazardous than working on the lines or equipment without grounding, the grounds may be omitted and the line or equipment worked as energized.

[11] §1926.954 **Grounding for protection of employees**

(b) *New construction.* New lines or equipment may be considered deenergized and worked as such where:

(1) The lines or equipment are grounded, or

(2) The hazard of induced voltages is not present, and adequate clearances or other means are implemented to prevent contact with energized lines or equipment and the new lines or equipment.

Respondent argues that as the specifically applicable standard, it preempts the cited standard. Therefore, Respondent contends that it was not required to install a ground.

The Secretary does not dispute that, if this were "new construction", the cited standard would not apply. However, she argues that this was not new construction, but an improvement or rebuild of current construction. The Secretary asserts the mere fact that the job entailed the use of new lines and equipment is not sufficient to qualify the project as "new construction". Rather, it is the novelty of the location and the lack of any prior service in the area that defines "new".

Buckeye Rural Electric operations manager, Marvin Ours, testified that he considered this to be a rebuild or improvement of an existing line. He suggested that this view was also shared by FEMA. Indeed, this view was shared by consulting engineer Johnny Dagenhart. Moreover, the Certificate of Liability Insurance, described the operation as a"Line strengthening and rebuild." (Exh. C-1)

There are clear delineations between a rebuild and new construction. In new construction there are no existing lines to deenergize or move. There are no old poles to remove or jumpers to install or remove. In this project all these things were present. In short, the hazard of contact with an energized line that exists in a rebuild simply does not exist where new lines are erected in locations where none existed before.

DHE's assertion that the use of new lines and equipment qualifies the job as "new construction" does not withstand scrutiny. Under Respondent's theory, any job that requires that a new line be strung or new equipment be used would qualify as "new construction." This would include, for example, new equipment or lines used for a simple storm repair. Clearly, this is not what the standard means by "new construction." Accordingly, I find that the job was a rebuild rather than "new construction" and, therefore, that §1926.954(b) does not apply.

Second, Respondent asserts that the cited standard was preempted by the standards at 29 CFR §§1926.955(c) and (d), which are specifically applicable to stringing operations. It points out that §1926.955(c)(10)[12] provides that a transmission clipping crew shall work "between grounds" when

[12]

1926.955 **Overhead lines**

* **

(c) *Stringing or removing deenergized conductors.*

* * *

(10) A transmission clipping crew shall have a minimum of two structures clipped in between the

working on bare conductors. Respondent observes that §1926.955(d)(9) requires grounding at every work location only when there is a possibility of "dangerous induced voltage." Here, it argues, there was no danger of induced voltage.

The Secretary contends that §1926.955(c) does not preempt the cited standard. She notes that neither §1926.955(c) nor (d) specifies how or where to place grounds. These matters are covered under §1926.954. The Secretary points out that even though specific standards preempt standards of general applicability, general standards remain applicable where they provide meaningful protection to employees beyond the protection afforded by the specific standards. *Quinlan t/a Quinlan Ent.*, 15 BNA OSHC 1780, (No. 91-2131, 1992).

I agree with Respondent that, in this instance, the cited standard is preempted by §1926.955(c). Section 1926.955(c) and (d) set forth when and what type of grounding is required during "stringing operations." This was the type of operation being performed by Respondent at the time of the inspection. As DHE points out, §1926.955(c)(10) requires that when working on bare conductors, clipping and tying crews "shall work between grounds at all times." Respondent's employees were working between grounds. Moreover, §1926.955(d)(9) requires point of work grounding during stringing operations only when there is a possibility of dangerous induced voltage. As Respondent properly observes, there is no evidence that such a possibility existed at the site. These two standards, read together, clearly support DHE's assertion that the "stringing standards" did not require that it conduct point of work grounding.

The Secretary's argument is not persuasive. In brief, the Secretary is arguing that, §1926.955(c)(10) which specifically makes point of work grounding inapplicable to Respondent's worksite, is preempted by §1926.954 because the latter places specific 'requirements on grounding not found in §1926.955. This defies logic because, under the Secretary's theory, a standard that exempts an activity would be preempted by another standard that specifies how that activity should be conducted.

Finding that the cited standard was preempted by §1926.955(c)(10) and that Respondent was in compliance with that standard, the citation is VACATED.

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crew and the conductor being sagged. When working on bare conductors, clipping and tying crews shall work between the grounds at all times. The grounds shall remain intact until the conductors are clipped in, except on dead end structures.

ORDER

Accordingly it is **ORDERED** that:

Citation 1, item 1a for a serious violation of 29 CFR §1926.21(b)(2) is **AFFIRMED** and a penalty of $5000 is **ASSESSED.**

Citation 1, item 1b for a serious violation of 29 CFR §1926.20(b)(1) is **VACATED,**

Citation 1, item 2a for a serious violation of 29 CFR §1926.950(d)(1)(ii)(b) is **VACATED**

Citation 1, item 2b for a serious violation of 29 CFR §1926.950(d)(1)(vi) is **VACATED**

Citation 1, item 3 for a serious violation of 29 CFR §1926.950(d)(1)(vii) is **AFFIRMED** and a penalty of $6300 is **ASSESSED.**

Citation 1, item 4 for a serious violation of 29 CFR §1926.955(c)(2) is **VACATED**

Citation 2, item 1 for a willful violation of 29 CFR §1926.954(f) is **VACATED**

SO ORDERED

/s/_____
STEPHEN J. SIMKO, JR.
Judge

Date: December 18, 2008