



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

CF & T AVAILABLE CONCRETE
 PUMPING, INC.,

Respondent.

OSHRC Docket No. 90-329

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTROYA, Commissioners.

BY THE COMMISSION:

At issue is whether a Commission Administrative Law Judge erred in vacating a citation issued by the Secretary of Labor's Occupational Safety and Health Administration ("OSHA") to CF & T Available Concrete Pumping, Inc. ("CF & T"). Specifically, on review is whether the judge erred in holding that the Secretary: (1) bears the burden of proving that CF & T had actual or constructive knowledge of the violative conditions; and (2) failed to prove such knowledge. For the reasons discussed below, we reverse the judge's decision on the factual issue, and we affirm the citation.

I

CF & T supplied concrete to a construction site on Portofino Drive in San Carlos, California. On December 1, 1989, an OSHA area director, Marsha Gruber, inspected CF & T's operations there. She observed its pump truck operator, Gerald Glennon, setting up the truck's boom, which is used to pump concrete to the desired location. Based on her visual observations, Ms. Gruber estimated that the boom came within about 7 feet of

overhead power lines, the first time Glennon set up. She then heard Glennon tell other employees in the general vicinity that he thought that he was “too close to the wires,” and saw him move the truck and set up again. The second time that Glennon raised the boom, Gruber estimated visually that it still came within 8 or 9 feet of the same wires before Glennon moved it further away.

As a result of Gruber’s inspection, CF & T was cited under section 1926.600(a)(6)¹ for failure to comply with the 10-foot clearance requirement for work around power lines, contained in section 1926.550(a)(15)(i).² The judge, rejecting CF & T’s claims, found that (1) OSHA had enforcement jurisdiction over California worksites on December 1, 1989; (2) under the cited standard, the Secretary does not bear the burden of proving that the electrical transmission lines were energized at the time of the alleged violation; and (3) the Secretary proved that the truck’s boom was within 10 feet of the power lines. However, as mentioned above, the judge vacated the citation for lack of proof that CF & T had knowledge of the violation.

¹The standard provides:

Subpart O -- Motor Vehicles, Mechanized Equipment, and Marine Operations

§ 1926.600 Equipment.

(a) *General requirements.*

....

(6) All equipment covered by this subpart shall comply with the requirements of § 1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

²The standard provides:

§ 1926.550 Cranes and derricks.

(a) *General requirements.*

....

(15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet[.]

The Secretary petitioned for discretionary review on the issue of whether the judge erred in allocating to her the burden of proof of employer knowledge. Review was directed on that issue, and on the factual issue of whether the evidence shows the requisite knowledge on CF & T's part. CF & T did not file a petition regarding any aspect of the judge's decision, and it has not filed a brief.³

The Commission has reviewed the record regarding the factual issue directed for review. For the reasons discussed below, we find that the evidence, though quite limited, establishes that CF & T could have known, with the exercise of reasonable diligence, that its safety program was inadequate, and that a violation such as Glennon's would occur.⁴

All the other elements of a violation have been established. We affirm the judge's findings that the cited standard applied to CF & T's operations at the time of the alleged violation, and that the clearance between the truck's boom and the power line failed to comply with the standard. We further find that sufficient employee access to the resulting hazards was shown. There were employees in the general area to whom Glennon spoke while the boom was within 10 feet of the power lines. They had access to the hazards, and even Glennon would have been exposed to the hazards if he had left the insulation of the rubber-tired boom truck for any reason. CF & T stipulated that a violation of the clearance rule would have created serious dangers.

Thus, the evidence shows employee access to the hazards. Because all the necessary elements of a violation have been established, we affirm the citation. *See, e.g., Trumid Constr. Co.*, 14 BNA OSHC 1784, 1788, 1987-90 CCH OSHD ¶ 29,078, p. 38,859 (No. 86-1139, 1990) (explaining essential elements of violation under Commission precedent).

³CF & T's brief was due on June 22, 1992, because the Secretary served her brief on CF & T by mail on May 19, 1992. See Commission Rules 4, 93(b). CF & T received the Commission's briefing notice by certified mail on March 10, 1992. CF & T has not explained its failure to file a brief.

⁴The Secretary states that her "appeal is directed to the legal issue of the burden allocation rather than the factual issue; accordingly, the Secretary accepts the judge's [factual] finding for the purposes of this brief." However, because the preponderance of the evidence, though thin, affirmatively establishes the requisite knowledge, we conclude that we need not revisit longstanding Commission precedent concerning the burden allocation issue here.

II

The Secretary bears the burden of proving that the employer knew or could have known, with the exercise of reasonable diligence, of the existence of the violative conditions. *E.g., Milliken & Co.*, 14 BNA OSHC 2079, 2082, 1991 CCH OSHD ¶ 29,243, p. 39,176 (No. 84-767, 1991), *aff'd on other grounds sub nom. Martin v. OSHRC*, 947 F.2d 1483 (11th Cir. 1991). As one means to discharge this burden, the Secretary may show that: (1) conditions prohibited by an OSHA standard could occur unless its employees followed certain safety rules; and (2) the employer failed to take adequate steps to obtain their compliance with the necessary safety rules. *See, e.g., Gary Concrete Prods.*, 15 BNA OSHC 1051, 1054-55, 1991 CCH OSHD ¶ 29,344, pp. 39,451-52 (No. 86-1087, 1991) (employer failed to use reasonable diligence to discover improper stacking of concrete pilings, because it failed to ensure adequate supervision of employee responsible for stacking, and failed to train employees effectively in avoiding the hazards).

The Secretary presented evidence to show that CF & T did not take adequate steps to obtain compliance by its operators with the 10-foot clearance requirement incorporated by reference in the cited standard. The Commission has consistently held that an adequate effort to obtain employee compliance with the necessary work rules includes effective communication of those rules to the employees and effective enforcement of the rules. *E.g., Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979) (cited in *Gary Concrete Prods.*, 15 BNA OSHC at 1055, 1991 CCH OSHD at p. 39,452). *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1538, 1992 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (to rebut Secretary's prima facie evidence that employer should be held responsible for its supervisors' knowledge of violative conditions, employer must offer evidence that it had established the necessary safety rules, and adequately communicated and enforced them). *See also Standard Glass Co.*, 1 BNA OSHC 1045, 1046, 1971-73 CCH OSHD ¶ 15,146, p. 20,219 (No. 259, 1972) ("An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has

uniformly enforced does not necessarily constitute a violation of section 5(a)(2) of the Act by the employer.”).

The scant evidence on this record does not establish any inadequacy in CF & T’s safety rules or in its communication of those rules to employees. Glennon testified that “[w]e’ve had PG & E [Pacific Gas & Electric Co.] come in and give lectures,” during which he was told to “stay away from wires completely,” and “probably” was told the required distance in feet. Glennon testified that he actually thought the required clearance was 17 feet, because there were warnings to that effect on the pumps.

However, the Secretary did submit evidence tending to show that CF & T had no enforcement program for its rules and instructions. Glennon was not disciplined following the alleged violation in this case. He testified that he might be disciplined after the hearing, but that he knew of no contemplated action. Also, Gruber testified that CF & T’s president, Joe McDonald, told her that, contrary to his instructions, another of CF & T’s boom operators used a boom at another worksite the same day.⁵ Gruber stated that she inquired as to what disciplinary action was taken concerning the failure to follow instructions at that other worksite, and that CF & T’s president told her merely, “I instructed him that he should not have done that and not to do it again.” Gruber further testified that CF & T’s president told her that he had not thought of firing an employee for disobeying the 10-foot clearance rule.

CF & T presented no rebuttal evidence on this or any other issue.⁶ Thus, the evidence indicates that CF & T did not take disciplinary measures regarding either Glennon

⁵We do not rely on the further testimony admitted by the judge, over CF & T’s objections, regarding the reasons why the boom was not supposed to be used at that worksite (“18th and Sanchez”). CF & T objected to admission of that testimony on the grounds that it was hearsay and lacked sufficient specifics.

⁶CF & T was on notice of the relevance of the knowledge and unpreventability issues, and had express opportunities to present any evidence that it wished to present. For example, it pled as an “affirmative defense” that a “violation was the result of unforeseeable actions of one or more employees of respondent . . . for which respondent should not be held accountable.” The Commission has consistently allowed the employer to plead and prove that it should not be held responsible for the violative conditions because they were the result of unpreventable employee misconduct. *E.g., Jensen Constr. Co.* In addition, the judge informed CF & T’s counsel at the hearing that it could present evidence on employee training and discipline.

or the other operator, or warn them of possible discipline. The significance of that evidence is increased by the fact that the company had a previous fatality related to working too close to electric power lines.⁷ Gruber testified that CF & T's president told her that following that fatality, he repeated the previous training in the electrical hazards. The facts regarding that fatality were not given, and it is not clear that it involved a boom or boom operator. However, we can infer from Gruber's un rebutted testimony about Mr. McDonald's statements to her that CF & T became aware, as a result of the fatality, that its previous safety training might not be adequate to prevent an accident without supplementation.⁸ The Commission may make findings based on reasonable inferences from the evidence. *E.g., Astra Pharmaceutical Prods. v. OSHRC*, 681 F.2d 69, 72-73, 74 (1st Cir. 1982), *aff'ing* 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981).

We conclude from the evidence that CF & T's previous fatality gave it sufficient notice that its safety program for preventing power line hazards was not adequate. If CF & T had exercised reasonable diligence to create an adequate safety program, it would have learned, as the Commission has consistently held, that it not only must have safety rules, but must effectively enforce them.⁹

The fundamental question here is whether the Secretary has presented sufficient credible evidence to convince the Commission that it is more likely than not that CF & T failed to implement an adequate enforcement program for violations of safety rules such as

⁷We do not rely on Ms. Gruber's initial testimony as to that previous fatality, because that testimony arguably was withdrawn. However, the subject of that fatality was brought up again later in Ms. Gruber's testimony. We will rely on that later testimony, which was admitted without objection and was not rebutted.

⁸Ms. Gruber testified that CF & T's president had told her that he felt that he had done everything possible to ensure that employees did not operate too close to the power lines. However, he did not testify, and there was no explanation at the hearing as to how CF & T dealt with safety rule violations and why it believed its enforcement efforts were adequate.

⁹CF & T provided Ms. Gruber with copies of its training programs that it had given employees. None of those documents was introduced in evidence by either party. We draw no conclusions from the parties' failure to introduce them. The mere existence of a safety program on paper does not establish that the program was effectively implemented on the worksite, as required. On the other hand, an employer need not reduce its entire safety program to writing in order to have an effective program. Thus, where either party could have submitted the training documents in evidence, and neither did, their absence from the record does not enlighten us as to the adequacy or inadequacy of CF & T's safety program.

the 10-foot line clearance rule. *E.g., Astra*, 9 BNA OSHC at 2131 & n.17, 1981 CCH OSHD ¶ 25,578, p. 31,901 & n.17 (No. 78-6247, 1981) (explaining preponderance of evidence test), *aff'd on other grounds*, 681 F.2d 69 (1st Cir. 1982). The necessary quantum of evidence to prove a fact “is surely less in a case . . . where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight.” *Astra*, 681 F.2d at 74, citing *Noranda Aluminum, Inc. v. OSHRC*, 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary’s case unrebutted “a legitimate but always dangerous defense tactic in litigation”). We hold that in the particular circumstances of this case, the Secretary’s evidence, thin as it is, establishes by a preponderance of the evidence that CF & T had an inadequate enforcement program.

The judge found the Secretary’s evidence of lack of disciplinary actions to be insufficient to prove employer knowledge. He stated, “nowhere is it required that an employer terminate an employee for violating work rules in order to have an effectively enforced safety program. Moreover, respondent should not be expected to discipline Mr. Glennon before the hearing to determine whether a violation took place on December 1, 1989.”

However, regarding CF & T’s failure to discipline Glennon before the hearing, Glennon admitted to Gruber before the citation was issued, in a meeting that CF & T’s president also attended, that he probably had positioned the boom within 10 feet of the power lines on the day in question. CF & T presented no evidence that Glennon had *not* violated the 10-foot requirement--it merely questioned the accuracy of Gruber’s estimates. Thus, CF & T gave no logical reason for not disciplining Glennon before the hearing, or at least warning him of possible discipline when it is clear that Glennon had committed a violation of the standard and the company’s safety rules. CF & T had an obligation to enforce the rule, even though it did not believe that *it* was responsible for Glennon’s action in violating it.

We agree with the judge that it is not necessary for an employer to include termination of employment as a possible sanction for every violation of a work rule, and we do not hold that an employer must always discipline an employee for any violation of any safety

rule. Effective enforcement depends on the situation. However, the unrebutted evidence here tends to show that CF & T had no discipline program at all. The Commission has emphasized in many cases that an effective strategy for enforcing safety rules in the event of violations is a necessary ingredient of an adequate safety program. *E.g., Floyd S. Pike Elec. Contrac.*, 6 BNA OSHC 1675, 1678, 1978 CCH OSHD ¶ 22,805, p. 27,544 (No. 3069, 1978) (Commission found that safety rules were effectively enforced where violators “received punishment ranging from reprimand to discharge, and disciplinary action had been taken in the past . . .”). We therefore find that the Secretary has presented minimally sufficient evidence to establish that CF & T could have known, with the exercise of reasonable diligence, that its safety program was inadequate, and that a violation such as Glennon’s would occur.

We note, however, that we expect the Secretary’s representatives to undertake a more thorough investigation before citing an employer based on its employee’s violation of established safety rules. A specific inquiry should be made into whether and how the employer has communicated them to employees, monitored the worksite for compliance, and indicated that the rules would be effectively enforced in the event of violations. The evidence here is just barely adequate.

III

The remaining issues are the classification of the violation and the appropriate penalty. The parties stipulated that the alleged violation, if any, was serious, and we accept that stipulation. The Secretary proposed a \$900 penalty. She argues for assessment of that penalty on review, but she points to no evidence regarding the size or violation history of CF & T, and we have found none.


As to the gravity of the violation, the consequences of employee exposure to the power line hazards likely would have been death or severe injury. On the other hand, so far as the record shows, the possibility of employee exposure was extremely low in this case. The operator was insulated from the hazards while on the rubber-tired pump truck, and there was no evidence that the other employees in the general vicinity were in or near the zone of danger, or had reason to be in or near it while Glennon was setting up. The


noncompliance was brief in both instances. Glennon was merely setting up the boom, and he moved it away both times when he noticed the apparent clearance problems.¹⁰

There was sufficient evidence of employee access to the potential hazards, and CF & T essentially acknowledged that by stipulating that a violation of the clearance rule would have created serious dangers. However, the extremely low possibility of exposure, due to the operator's good faith efforts to undo the violative conditions once he sensed them, is relevant to the appropriate penalty.

CF & T also showed good faith. It provided written safety instructions to its pump truck operators, and it had Pacific Gas & Electric Co. deliver talks on power line hazards, including required clearance distances. Thus, upon consideration of the penalty factors set forth in 29 U.S.C. § 666(j), we believe that a penalty of \$500 is appropriate.

In summary, we find a serious violation of 29 C.F.R. § 1926.600(a)(6) and assess a penalty of \$500 for the violation.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: February 5, 1993

¹⁰The brevity of exposure is particularly significant because a seven- to nine-foot clearance from an energized power line does not always violate the standard. Section 1926.500(a)(15)(iii) provides that "[i]n transit with no load and boom lowered, the equipment clearance shall be a minimum of 4 feet for voltages less than 50 kV. . . ." That provision does not apply here, but it shows that a predictably brief clearance of four feet, with no foreseeable employee exposure, is not always a violation.

Dissenting Opinion

WISEMAN, Commissioner

I disagree with my colleagues' decision that the Secretary met his burden of proving that CF&T knew or could have known, with the exercise of reasonable diligence, of the existence of the violative conditions and I would affirm the judge's decision to vacate the citation for lack of proof that CF&T had knowledge of the violation. Furthermore, I seriously question that part of the judge's decision where he finds that the Secretary proved the truck's boom was within 10 feet of the power lines; however, I would not disturb the judge's factual findings, considering the sketchiness of the evidence.

When the Compliance Officer inspected and cited CF&T for a violation, she based the citation on her own visual observation from at least 20 feet away that the boom was one to three feet closer to the power lines than it should have been for a very brief period of time during which CF&T's employee was attempting to move it farther away. CF&T, believing that its employee was in compliance with 1926.550 (a)(15)(i), successfully contested the citation. Now, on appeal to the Commission, the majority bases its finding of inadequate enforcement of an otherwise sufficient safety program solely on the fact that CF&T did not discipline its employee for a citation ultimately vacated by the judge.

I find the majority position to be contradictory with regard to several issues. For example, on the one hand, the majority states that "the scant evidence on this record does not establish any inadequacy in CF&T's safety rules or in its communication of those rules to employees." On the other hand, the majority concludes that CF&T's safety program was inadequate, because of a previous fatality and because the company did not discipline its employee in this case.

The majority infers that by repeating its previous training in the electrical hazards in response to the fatality, CF&T's previous training program may not have been adequate to

prevent an accident without supplementation. From this inference, the majority leaps to the conclusion that CF&T's current training program is, therefore, inadequate.

I disagree with this conclusion as well as the logic. Any company that has a fatality, if it is diligent, would repeat its training program to ensure employee understanding of the rules as well as to review its program for inadequacies. I would infer, based on the fact that CF&T made no changes to its program, together with the fact that the Secretary did not cite CF&T for an inadequate safety program, that such program did not lead to the fatality, and that its current safety program is adequate and effectively communicated to its employees.

Furthermore, the majority states that it is not necessary for an employer to include termination of employment as a possible sanction for every violation of a work rule, and it specifies that an employer is not always required to discipline an employee for any violation of any safety rule. The majority then concludes that CF&T nevertheless should have disciplined its employee immediately because it is clear that he committed a violation of the standard and the company's safety rules; no guidance is given as to why this violation is so "clear" nor as to exactly what types of violations an employee need not be disciplined for.

A visual "guesstimate" by the Compliance Officer (with minimal exposure to circumstances such as those at issue here) from over 20 feet away, as opposed to the judgment of an experienced crane operator, does not, in my opinion, "clearly" establish a violation without additional evidence. It is also my opinion that it is unreasonable to require an employer to discipline its employee prior to a hearing when it believes it is in compliance. In this case, CF&T's employee did not get the proper clearance on his first attempt, but in following the company's safety rules, he lowered the boom twice and on his third attempt, positioned the boom so there would be no employee exposure to an unsafe condition during the time actual work was being performed. Had CF&T's employee lifted the boom and proceeded to work within 10 feet of the power lines in total disregard of the standard, then I would find it reasonable to expect CF&T to discipline its employee. However, in this case, the employee was making a good faith attempt to comply with the standard and CF&T's safety requirements.

It was not unreasonable for CF&T to refrain from disciplining its employee until after the hearing, and thus I see no evidence that CF&T failed to enforce its safety program. For

the above reasons, I would find that the Secretary failed to meet his burden of proving that the employer in this case had knowledge of the alleged violation.

A handwritten signature in black ink, appearing to read "Donald G. Wiseman", written over a horizontal line.

Donald G. Wiseman
Commissioner

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

CF&T AVAILABLE CONCRETE PUMPING, INC.,

Respondent.

OSHRC DOCKET
NO. 90-0329

APPEARANCES:

For the Complainant:

Nancy E. Resnick, Esq., Office of the Solicitor,
U. S. Department of Labor, San Francisco, California

For the Respondent:

Robert D. Peterson, Esq., Rocklin, California

DECISION AND ORDER

Cronin, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651 et seq.; hereafter called "the Act").

Following an investigation of respondent's worksite on December 1, 1989 by the Occupational Safety and Health Administration (OSHA), the Secretary of Labor (Secretary) issued to respondent, CF&T Available Concrete Pumping, Inc. (CF&T Available), a

"serious" citation alleging a violation of 29 C.F.R. §1926.600 (a)(6) for failure to comply with 29 C.F.R. §1926.550(a)(15)(i).

Hearings were held in San Francisco, California on July 10, 1990 and November 20, 1990, and both parties have filed post-hearing briefs. This case is now ready for decision.

Alleged Violation

Item 1 of the citation alleges:

29 CFR 1926.600(a)(6): Mechanized equipment did not comply with the requirements of 1926.550(a)(15)(i) when working on being moved in the vicinity of power lines. 29 CFR 1926.550(a)(15)(i): Equipment was operated where part of the equipment was within 10 feet of electrical distribution or transmission lines rated 50kv or below that had not been de-energized and visibly grounded, nor had insulating barriers not a part of, or an attachment to, the equipment been erected to prevent physical contact with the lines.

- (a) 416 Portofino Drive, San Carlos: An employee while setting up a 42 meter schwing pump truck #10 came closer than 10 feet to the overhead power lines.

§1926.600(a)(6) provides:

- (6) All equipment covered by this subpart shall comply with the requirements of §1926.550(a)(15) when working or being moved in the vicinity of power lines or energized transmitters.

§1926.550(a)(15)(i) provides:

- (i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

Issues

1. Whether OSHA had enforcement jurisdiction on December 1, 1989 to inspect respondent's worksite and issue the citation?
2. Whether the Secretary had the burden of proving that the electrical transmission lines were energized?

3. Whether the record establishes by a preponderance of the evidence that respondent had actual or constructive knowledge of the violative conduct?

4. Whether the Secretary established by a preponderance of the evidence that a violation of §1926.550(a)(15)(i) was committed on December 1, 1989?

Jurisdiction

In its answer, respondent alleged as an affirmative defense that the Secretary lacked jurisdiction to enforce the Act in the State of California and authority to cite the alleged violation. See Eighth Affirmative Defense. During the July 10, 1990 hearing in the above captioned matter, respondent withdrew and waived its affirmative defense challenging OSHA's enforcement jurisdiction. A suggestion, however, that the Commission lacked jurisdiction was contained in the record. Noting that "subject matter jurisdiction" may not be waived, this judge ordered an additional evidentiary hearing on the issue of jurisdiction, which was held on November 20, 1990.

In addition to addressing the enforcement jurisdiction issue in his Post Hearing Brief, the Secretary argues that the matter at issue, that is, the Secretary's authority to issue citations where a state operational status agreement is in effect, does not affect the Commission's subject matter jurisdiction over this proceeding and was, therefore, improperly raised sua sponte by this Judge. The Secretary cites Willamette Iron & Steel Company, 9 BNA OSHC 1900 (No. 76-1201, 1981) in support.

In Willamette Iron, the Commission held that it "clearly" has subject matter jurisdiction to determine whether the Secretary exceeded his or her authority to issue citations under the Act. The Commission stated that an employer's assertion that the Secretary has exceeded that authority, therefore, is not a jurisdictional issue, but an affirmative defense which must be timely raised or it is waived. While continuing to believe that the Commission is deprived of subject matter jurisdiction whenever the Secretary lacks enforcement jurisdiction under the Act, this judge is bound by the holding in Willamette Iron.

Ordinarily, it is error for a trial court to raise a waivable defense sua sponte. Secretary of Labor v. Williams Enterprises Inc., 14 BNA OSHC 1001 (No. 88-1658, 1989); Davis v. Bryan, 810 F.2d 42, 44 (2d Cir. 1987). Moreover, in order to raise and consider the defense in this case, this judge would have to override the express waiver of the defense by respondent's counsel. According to Corpus Juris Secundum:

It is generally recognized that, if a person in possession of any right waives that right, he will be precluded thereafter from asserting it or from claiming anything by reason of it. That is, once a right is waived it is gone forever, and it cannot be reclaimed or recaptured and the waiver cannot be retracted, recalled or expunged even in the absence of any consideration therefor or any change of position by the party in whose favor the waiver operates (citations omitted).

92 C.J.S. Waiver (1955).

There is no question that respondent knowingly waived its right to present the defense at issue (Tr. 154). This judge,

therefore, concludes that he may not revive and rule on the waived affirmative defense.

Burden of Proof

Section 1926.550(a)(15)(i) states in relevant part:

Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following:

(i) For lines rated 50 kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

In order to show a failure to comply with the cited standard, the Secretary must demonstrate, by a preponderance of the evidence, that the employer failed to maintain the prescribed minimum 10 foot clearance between its equipment or machinery and a power line rated 50 kV or below. The remaining language in the standard, however, is couched in terms of exception, and describes two other possible methods of compliance (other than maintaining the clearances prescribed by the standard) which will exempt an employer from, or relieve him of, the clearance requirements of §1926.550(1)(15)(i).

The Commission has consistently held, "that when a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception". See, e. g., Finnegan Construction Company, 6 BNA OSHC 1496, 1497 (No. 14536, 1978). In Finnegan Construction, the Commission found that the judge improperly

placed on the Secretary the burden of showing that splices did not fall within an exception permitted by §1926.402(a)(5).¹ The form and content of that exception, which also provides for alternative compliance methods, is indistinguishable from that in §1926.550(a)(15).

Respondent argues that such an interpretation of the standard improperly shifts an element of the Secretary's established burden of proof, that is, the existence of a hazard, to the respondent. This argument lacks merit. The Commission has found that:

Certain standards promulgated by the Secretary contain requirements or prohibitions that by their terms need only be observed when employees are exposed to a hazard described generally in the standard. . . . However, most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. . . . These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation.

Austin Bridge Company, 7 BNA OSHC 1761, 1765 (No. 76-93, 1979).

Section 1926.550(a)(15) in effect is predicated on the existence of hazard when the minimum clearance of 10 feet between a 50 kV power line and a crane is not maintained. Moreover, the

¹ Section 1926.402(a)(5) provides:
Flexible cord shall be used only in continuous lengths without splice, except suitable molded or vulcanized splices may be used where properly made, and the insulation shall be equal to the cable being spliced and wire connections soldered.

presumption that overhead wires are energized is expressly created by 1926.550(a)(15)(vi), which states that:

Any overhead wire shall be considered to be an energized line unless and until the person owning such line or the electrical utility authorities indicate that it is not an energized line and it has been visibly grounded.

This judge finds that respondent bears the burden of proving that it was exempt from the standard's clearance requirements on December 1, 1989 by showing either that the lines involved here were deenergized and visibly grounded, or that insulating barriers had been erected. Respondent attempted no such showing.

Although respondent has not shown that any of the alternative compliance methods existed on the day of the investigation, the Secretary still must establish that respondent failed to maintain the required clearance from the electrical transmission or distribution lines.

Violation of the Standard

On December 1, 1989, OSHA Compliance Officer (CO) Gruber inspected respondent's worksite at 416 Portofino Road, San Carlos, California (Tr. 7). A CF&T pump truck arrived on the site shortly after the CO and began to set up approximately 20 feet from a pole supporting two 12kV high voltage, as well as utility, lines (Tr. 8-13, 83; Ex. C-1, C-2). When extending the first section of the boom, the operator, Mr. Glennon, indicated to other workers on the site that the boom was "too close to the wires" (Tr. 15, 18, 42, 87, 130-131). Mr. Glennon consequently

lowered the boom and moved the truck to a new location. He again raised the boom (Tr. 14-18).

The CO visually estimated that the boom was originally within approximately seven feet of the power lines and that the lines were about eight or nine feet from the craneboom in the second location (Tr. 23). The CO was 30 and 25 feet, respectively, from the boom when she made her estimates (Tr. 47, 53). The high voltage lines were 30 feet off the ground (Tr. 48). The boom of the pump truck extended 37 to 38 feet vertically (Tr. 49). Mr. Glennon testified at trial that he could not be sure in terms of feet how far the boom was from the high voltage wires on December 1 (Tr. 100); but admitted that on the day of the inspection, he believed that probably the boom was "too close" to the lines when he first elevated it towards the wires (Tr. 15, 61, 87, 91, 93, 98, 127).

Respondent contends that to carry his burden of proof the Secretary must offer actual measurements of the distance between equipment and high voltage lines and cites several judge's decisions in support of his contentions. The Commission, however, has not decided the issue; moreover, one case involving §1926.550(a)(15)(i) suggests that the issue is one of credibility. Gates & Fox Company, Inc., 12 BNA OSHC 1092 (No. 78-2831, 1984) resulted in a split Commission decision. While Commissioner Cleary would have accepted the CO's estimate of distances based on ground measurements "reasonably calculated" to approximate the distances 30 feet above, Chairman Buckley was of the

view the crane operator's estimate of the distances involved was more accurate, based on the operator's years of experience. Neither Commissioner, however, indicated that the lack of actual measurements standing alone would be fatal to the Secretary's case.

This judge finds that the evidence establishes that it is more likely than not that the boom of respondent's pump truck came within 10 feet of the high voltage lines on December 1, 1989. The CO took no measurements, but her usual observations and estimates were not contradicted or otherwise discredited by respondent. Indeed, respondent's pump operator, who was present at the same time, concedes that the boom may have been as close as the CO estimates (Tr. 87, 91, 93, 98, 100, 127).

Serious Characterization

The respondent stipulated at the hearing that a serious hazard exists when a crane boom comes closer than 10 feet to energized high voltage lines and that respondent knew on December 1, 1989 that going within ten feet of energized power lines would be extremely dangerous (Tr. 20, 22-23).

§1926.550(15)(vi) creates a presumption that any overhead wire shall be considered to be energized, and this presumption was not rebutted by respondent. Therefore, this judge finds that the overhead wires at issue in this case were energized on December 1, 1989. Based on this finding and respondent's stipulation, it is further found that a serious hazard existed on December 1,

1989, when the crane boom came within 10 feet of the energized power line.

Actual or Constructive Knowledge

Although respondent's counsel stipulated that respondent knew that a serious hazard exists when a crane comes within 10 feet of energized high voltage lines, he denied that respondent had any knowledge of the situation existing on December 1, 1989 (Tr. 22). Under Commission precedent, a violation cannot be found unless the Secretary establishes as an essential element of his case that the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. Prestressed Systems, Inc., 9 BNA OSHC 1864 (No. 16147, 1981); General Electric Co., 9 BNA OSHC 1722 (No. 13732, 1981) and cases cited therein. The actual or constructive knowledge of an employer's supervisor can be imputed to the employer. Dun Par Engineered Form Co., 12 BNA OSHC 1962 (No. 82-928, 1986). In this case, however, knowledge can not be imputed to respondent because there is no evidence that any management or supervisory personnel of respondent observed or reasonably could have observed the crane boom when it came within 10 feet of the high voltage wires. There is no indication that Mr. Glennon was a supervisor.

Constructive knowledge of a violation, however, also can be established by the Secretary by demonstrating that the employer's safety program was inadequate. Scheel Construction, Inc., 4 BNA OSHC 1824 (No. 8687, 1976).

In general, an employer is only responsible for violations it has the ability to prevent. If an employer's safety program is adequate to prevent a violation of a particular standard, an employer is not responsible for a violation that occurs in spite of the program. That violation is considered unpreventable. The converse also is true. If an employer's safety program lacks the elements of an effective safety program, which include work rules designed to prevent violations, adequate communication of the rules to employees, methods of discovering whether violations occur and enforcement of the rules if violations are discovered, it is reasonable to conclude that the violation was preventable. Under those circumstances, the employer will be found to have constructive knowledge of the violation.

The Commission additionally has recognized the affirmative defense of "unpreventable employee misconduct", which must be raised in the respondent's answer. To establish this affirmative defense, the employer must establish that the employee action was a departure from a uniformly and efficiently communicated and enforced work rule designed to prevent the violative conduct. Texland Drilling Corporation, 9 BNA OSHC 1023 (No. 76-5307, 1980).

Although respondent raised the defense of "unpreventable employer misconduct" in its answer, the record fails to establish that defense. Indeed, respondent rested without presenting any evidence whatsoever on this or any other issue.

Because respondent failed to establish this affirmative defense, however, does not relieve the Secretary of his burden of proving respondent's actual or constructive knowledge of the violation.

The Secretary attempted to anticipate respondent's affirmative defense of unpreventable employee misconduct by demonstrating the inadequacy of respondent's safety programs. This same evidence, of course, is relevant to establish respondent's constructive knowledge. In this judge's view, however, the evidence introduced is insufficient to support a finding that respondent's safety program was not adequate to prevent the type of violation committed on December 1, 1989. The record picture of respondent's safety program is unclear and extremely sketchy. The CO's knowledge about respondent's safety program was derived from respondent's president, Mr. McDonald and respondent's concrete pump operator at the informal conference on January 10, 1990.

According to the CO, respondent's president declared at the conference that as a management official he had done everything that was feasible to ensure that employees did not operate too close to the voltage lines, and he provided the CO with copies of the employee training programs given to employees (Tr. 26). None of these documents, however, were introduced into evidence. The CO also discussed with the president employee training and the procedures used to ensure that these operators were aware of wires at a site. But there are no details in the record of this discussion.

The CO specifically asked the president whether he had ever thought of firing someone if they disobeyed these rules, and he indicated "No" (Tr. 33). Whether any disciplinary action short of termination, however, was taken by respondent is unknown (Tr. 33). When asked whether respondent routinely contacted the utility company to turn off the power, the president indicated that he did not, nor did other concrete pumping operations (Tr. 35).

Mr. Glennon, respondent's concrete pump operator, testified at the hearing that he knew what the OSHA regulation is "as far as distance" because "[t]here's warning stickers all over the pump" (Tr. 92). In his words "it's been sitting right in front of me for years. It's just never sunk in" (Tr. 92). Mr. Glennon said he always thought the distance was 17, but it is 10 (Tr. 92).

According to Mr. Glennon, he knew wires were present at the site because he had talked to another operator who told him and from the indication (Noted in red and circled) in the job book in the office that he had reviewed (Tr. 88, 94).

Mr. Glennon testified that he usually reviews the job book in the office before going to a worksite, but sometimes he gets his information over the phone (Tr. 110-111). He admitted that he has gone out to a site and found wires when that information was not in the job book (Tr. 112).

As of the date of the hearing, no disciplinary action had been taken against Mr. Glennon as result of the December 1, 1989 incident (Tr. 118).

Mr. Glennon testified that at every safety meeting he was trained not to operate this type of equipment in the vicinity of high voltage lines (Tr. 126-127). He was told to "stay away from lines completely" (Tr. 127). He also was "probably" told "in feet" at these safety meetings (Tr. 128).

Based on this record, this judge is unable to find by a preponderance of the evidence that respondent's safety program did not include work rules designed to prevent the violation at issue or that respondent's work rules were not adequately communicated and effectively enforced. First, the record establishes that respondent's stickers on the pumps warned its operators not to operate within 10 feet of any power lines (Tr. 92). Moreover, contrary to the Secretary's suggestion, respondent is not required to have a work rule that requires it to "routinely" contact the utility companies to turn off the power.

The respondent also communicated its work rules concerning operating near power lines to its operators through safety meetings and the warning stickers on its pumps (Tr. 92, 126-128). There is no indication that Mr. Glennon's ignorance of the exact terms of the standard was respondent's fault.

Finally, the Secretary implies that respondent did not effectively enforce its safety program because respondent had never considered firing employees for disobeying its work rules and because Mr. Glennon had not been disciplined for the December 1 violation. But nowhere is it required that an employer terminate an employee for violating work rules in order to have

an effectively enforced safety program. Moreover, respondent should not be expected to discipline Mr. Glennon before the hearing to determine whether a violation took place on December 1, 1989.

Because the Secretary has failed to satisfy his burden of proof that respondent knew, or reasonably could have known, that its employee, Mr. Glennon, would operate the crane boom within 10 feet of the energized high voltage lines on December 1, 1989, this citation must be vacated.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Any proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

Conclusions of Law

1. The Commission has subject matter jurisdiction in this proceeding.
2. Because the respondent withdrew and waived its affirmative defense that the Secretary exceeded his enforcement jurisdiction in this case, the Commission may not consider this defense.
3. The standard at §1926.550(a)(15)(vi) creates a presumption that any overhead wire is energized.

4. The Secretary proved by a preponderance of evidence that respondent's concrete pump operator failed to maintain the minimum 10 foot clearance between its crane boom and energized power lines rated at 12,000V on December 1, 1989.
5. To be exempt from the requirements §1926.550(a)(15)(i), the respondent has the burden of proving by a preponderance of evidence that the power lines involved were deenergized and visibly grounded, or that insulating barriers had been erected on December 1, 1989. The respondent failed to carry this burden.
6. The respondent failed to prove by a preponderance of evidence its affirmative defense of "unpreventable employee misconduct."
7. The record fails to establish by a preponderance of the evidence that respondent knew, or reasonably could have known with the exercise of reasonable diligence, of the presence of the violation.
8. The record fails to establish by a preponderance of the evidence that respondent committed a violation of §1926.600(a)(6) and §1926.550(a)(15)(i) on December 1, 1989.

Order

Based upon the Findings of Fact, Conclusions of Law and the entire record, it is ORDERED:

1. Citation No. 1, issued December 22, 1989, is VACATED.


James A. Cronin
Judge, OSHRC

Dated: March 8, 1991