1United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. The L.E. Myers Co., Respondent.	OSHRC Docket No. **20-0882**

Appearances:

Jana J. Edmondson-Cooper, Esq.
U.S. Department of Labor, Office of the Solicitor, Atlanta, GA
For Complainant

Carol A. Field, Esq.
Morgan, Lewis, & Bockius LLP, Miami, FL
Jason S. Mills, Esq.
Morgan, Lewis, & Bockius LLP, Los Angeles, CA
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

The L.E. Myers Company, an electrical contractor, contests a Citation and Notification of Penalty issued to it by the Secretary on May 12, 2020. The Citation resulted from a fatality investigation conducted by the Occupational Safety and Health Administration in response to the electrocution death of a journeyman lineman at a worksite in Hallandale, Florida, on November 15, 2019.

The Citation originally alleged three serious violations (Citation No. 1) and one other-than-serious violation (Citation No. 2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 657-78 (Act). The Secretary subsequently withdrew Item 1 of Citation No. 2, which alleged an other-than-serious violation of 1926.960(g)(1) (Tr. 11-12). Remaining at issue are the three items alleging serious violations in Citation No. 1:

Item 1 alleges a violation of 29 C.F.R. § 1926.950(b)(2)(iii) for failing to ensure each qualified employee was trained and competent in the minimum approach distances to energized

power lines to which the employee would be exposed, and the skills and techniques necessary to maintain those distances.

Item 2 alleges a violation of 29 C.F.R. § 1926.960(c)(1)(iii) for failing to ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance.

Item 3 alleges a violation of 29 C.F.R § 1926(c)(2)(i) for failing to ensure an employee using rubber insulating gloves as insulation from energized parts, also used rubber insulating sleeves. The Secretary proposes a penalty of $13,494 each for Items 1, 2, and 3, for a total proposed penalty of $40,482.

The Court held a three-day videoconference hearing in this matter from September 28 to September 30, 2021. [1] The parties filed post-hearing briefs. The L.E. Myers Company (LEM) contends the Secretary failed to establish the company did not ensure its linemen were adequately trained, as cited in Item 1. LEM does not dispute that the journeyman lineman, whose death triggered OSHA's investigation, was not wearing rubber insulating sleeves and was carrying a conductive object when he breached the minimum approach distance to the energized distribution lines at the worksite, as cited in Items 2 and 3. LEM argues, however, that the Secretary did not establish the company knew of the journeyman lineman's violative conduct. For the reasons that follow, the Court finds the Secretary failed to establish the violations cited in Items 1, 2, and 3. Accordingly, the Court **VACATES** Items 1, 2, and 3 of Citation No. 1.

JURISDICTION AND COVERAGE

LEM timely contested the Citation. The parties stipulate the Commission has jurisdiction over this action and LEM is a covered employer under the Act (Exh. J-1, *Joint Stipulation of Facts and Agreed Upon Principles of Law*, ¶¶ B.1 & B.2; Tr. 14-15). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and LEM is a covered employer under § 3(5) of the Act.

[1]After the Secretary rested, LEM moved for a directed verdict. The Court deferred ruling on the motion (Tr. 217-21). The Court now construes the motion as one for a judgment on partial findings under Fed. R. Civ. P. 52(c) ("If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence.") The Court denies LEM's motion.

BACKGROUND

In 2019, the Florida Power & Light Company (FPL) subcontracted LEM to perform work on a project in Hallandale, Florida (Tr. 267). In November 2019, LEM assigned a four-man crew to transfer electrical distribution lines from an existing utility pole to a new one. The distribution lines remained energized during this process because FPL did not want its customers to be without electricity (Tr. 268-74). The voltage of the distribution lines was 7.62 kilovolts (kV) (Tr. 57, 266).

OSHA requires an employer to determine the minimum approach distance before its employees work near energized lines at a worksite. § 1926.960(c)(1)(i). The minimum approach distance (MAD) is the "closest distance an employee may approach an energized or a grounded object" without taking specified precautions. § 1926.968. LEM determined the MAD at the Hallandale worksite was 2 feet, 2 inches, based on the voltage of the distribution lines (Tr. 266).

On November 15, 2019, LEM's crew at the worksite consisted of the crew foreman (Foreman), two journeyman linemen (referred to in this decision as JL and the Decedent), and a fifth year apprentice (Apprentice). The crew members began their shift around midnight to take advantage of the cooler temperature (Tr. 280). They met with other LEM crews in the parking lot of the Big Easy Casino on North Federal Highway, where they performed calisthenics and stretching before holding a general meeting to discuss their respective assignments (Tr. 282-83). The Foreman and his three crew members then drove to the nearby utility pole on which they would be working (Tr. 283).

At the worksite, the Foreman conducted a pre-job briefing with the crew to discuss the assigned tasks (Tr. 288-89). He completed a *Daily Pre-Job Brief* form for the briefing, which was signed by the crew members (Exh J-2).[2] The crew's assignment was to transfer the distribution lines from an old utility pole to a new pole (Tr. 275). The *Daily Pre-Job Brief* form for that day lists the steps for this assignment as "Move Wires to New Pole [and] Hang Arms and Mac." (Exh. J-2, p. 1) The form includes a checklist for "PPE/Tools Required" listing the following: "Rubber Insulating Gloves, Rubber Insulating Sleeves, Line Hose, Blankets, Hoods, Slings, and Live Line Tools." The Foreman checked the "Yes" box next to each of the listed items, indicating the items were all required for the assigned tasks that day (Exh. J-2).

[2] The Foreman testified the work shift began "before or after midnight. I'm not exactly sure." (Tr. 280). The date listed on the *Daily Pre-Job Brief* form for that shift is November 14, 2019 (Exh. J-2, p.1). It is undisputed the fatality occurred the morning of November 15, 2019, and the *Daily Pre-Job Brief form* admitted as Exhibit J-2 is the form completed for the work shift at issue (Exh. C-17, p. 1; Tr. 290).

The crew had two bucket trucks and a smaller "backyard machine" at the worksite. Each vehicle was equipped with a personnel bucket used to elevate workers to the heights required to perform their tasks (Tr. 288, 297-98). The crew members positioned the three vehicles in a "Y" formation with the utility pole in the center, so "there's no portion of the pole that a lineman couldn't reach or get help to reach." (Tr. 300) The Apprentice and the Decedent were in the buckets of the bucket trucks. The JL was in the bucket of the backyard machine. The Foreman stayed on the ground and acted as an observer (Tr. 301-02). The buckets of the bucket trucks could be positioned by the workers from within the bucket, using grip controls. The Foreman stated a grip control is:

> a handle and it has a switch on it or like a handle that you pull up on. And then you rotate the handle left or right, go up or push down, and that makes the bucket raise and lower and rotate left and right. But there's like a switch on that handle, and it's an activation switch that causes the bucket to move, so you just can't push the handle or tap the handle in any certain direction for it to move. You actually have to grasp the handle, apply the switch, and then rotate it, twist it, or pull up or push down.

(Tr. 376-77)

Much of the work shift was devoted to drilling holes and attaching crossarms to the new utility pole (Tr. 319). The buckets were raised 30 to 40 feet high for these tasks (Tr. 349).[3] Toward the end of the work shift, the Foreman called to the Decedent to lower his bucket so the Foreman could hand a *mac* to him. A mac is a flexible wire with clamps at either end, used to bypass an area of an energized line so work can be done on the bypassed area.[4] The Foreman described a mac as "a mechanical jumper used to jump around . . . a line when you need to cut-out a permanent jumper or put . . . a fuse or a switch or something like that, so you can continue the flow of electricity around the switch and remove that switch safely." (Tr. 307-08)

[3] The height of the utility pole is not found in the record.

[4] Exhibit C-10 is a photograph showing two macs (Tr. 313-14). The Foreman demonstrated how he would attach a mac to a distribution line at the hearing (Tr. 318). The Foreman explained the mac has

> a metal clamp attached to a copper conductor, and it has a hook-shaped bill at the top that you would put onto the conductor, and then you would tighten [it] up and then travel to the other side of the line and attach the identical clamp to the other side. And the, in-between, you could open that wire or switch and remove it, and this would complete the flow of electricity.

(Tr. 316)

The Foreman handed the mac up to the Decedent after he had lowered his bucket and reached down to take it. The Foreman did not observe whether the Decedent was wearing rubber insulating sleeves when he reached over the edge of the bucket and took the mac from him (Tr. 350-51, 353-54).[5] The Foreman estimated it took "[a] couple of seconds" for the Decedent to raise the bucket to the height needed to determine if the mac was long enough to bypass the area on which the crew planned to work.[6]

The Foreman is the only testifying witness who was at the worksite at the time of the fatality. He provided this eyewitness account:

> I had just given [the Decedent] a mac, and I asked him to measure it and make sure that that would work for the purposes of mac-ing (phonetic) out the line side to the load side, to make sure that it was going to work. So, he went up to below the crossarms, and I don't remember if he turned around and hollered or if he yelled down, but he said, "That'll work," or "This'll work." So, then I looked down at the macs, made sure we had two more just in case, started to walk to my left . . . towards [the Apprentice's] bucket out from underneath [the Decedent's] bucket, and that's when the incident happened.

(Tr. 320-21)

The Foreman stated that as he walked toward the Apprentice's bucket, "[A]ll of a sudden, I saw the flash, I heard the sizzling and the popping and a jerking in the bucket." (Tr. 330)

> I screamed to [the Apprentice], you know, "What happened[?]" I screamed up to [the Decedent,] "[W]hat's going on, what's going on[?], and then I could see that [the Decedent] had slumped forward and was down in his bucket. So, the mac, at that point I could see it was attached, but it was only, you know, a little bit of it visible. And I said, "[W]e need to get him down, we need to get him down." So, I screamed to [the Apprentice] to go over to him and see what's going on with him. So, he moved his bucket in, and by that time, [the JL] had come down and got onto the bucket and was working the controls to try to bring [the Decedent] down, and I was dialing 9-1-1. And when they couldn't bring him down because the mac was in the bucket, I screamed, "[C]ut the mac, cut the mac."[7] So, [the Apprentice]

[5] The Foreman explained the process for donning the rubber insulting sleeves and gloves. The lineman puts on the sleeves first (Tr. 346-47). The sleeves "have a strap across the back and across the front. You have to put your arms up in the air, slide them on, and then you place your gloves over the sleeves." (Tr. 345) A photograph of a rubber insulating sleeve can be seen on page 3 of Exhibit C-6.

[6] At the hearing, the Foreman testified he only wanted the Decedent to get close enough to the distribution line to determine whether the mac was long enough to connect it at the desired points on the line. This determination would not require the Decedent to breach the MAD of 2 feet, 2 inches. The Court will address the credibility of the Foreman's claim in the next section.

[7] The Foreman explained that one end of the mac was attached to "one of the conductors on the line side" but the other end "fell down into the bucket with him, [and] it was preventing us from getting him down without pulling

> cut the mac, and at that time I had 9-1-1 dispatch on the phone. And I called the dispatchers, and then I called supervisors.

(Tr. 331-32)

The Decedent died as a result of electrocution. He had breached the MAD and attached one end of the mac to the distribution line. It was discovered after the Decedent's bucket was lowered to the ground that he was wearing rubber insulating gloves but was not wearing rubber insulating sleeves. His rubber insulating sleeves were found in his bucket (Tr. 80-81, 334).

The Hallandale Police Department responded to the emergency call and subsequently notified OSHA's Fort Lauderdale area office of the fatality at LEM's worksite (Tr. 26). Two OSHA compliance safety and health officers (CSHOs) went to the worksite the day of the fatality and conducted an investigation. They interviewed employees and took photographs of the worksite (Exhs. C-2, C-5, C-10). They did not take measurements or conduct simulations of the accident (Tr. 121). LEM terminated the Foreman's employment with the company in December 2019 (Tr. 344).

Credibility Determination of the Foreman's Testimony

The Scope of the Foreman's Assignment to the Decedent

The parties disagree regarding the specific task the Foreman instructed the Decedent to perform just prior to his death. It is LEM's position that the Foreman handed a mac to the Decedent and instructed him to check to see if it was long enough to make the required connection.

> To be clear on this point, [the Decedent] was not installing the MAC—that would require at least two linemen and two buckets. . . . Thus, [the Decedent] had no reason to encroach the MAD until all three crewmembers—two in separate buckets and a third in a backyard machine— were in position to complete the installation. . . . All [the Foreman] wanted and expected [the Decedent] to do was eyeball the MAC to see if it was long enough. . . . If it was, [the Foreman] had two more MACs of the same length at the ready, and the Crew together could move to installing all three of them.

(LEM's *Brief*, p. 4) (citations to the transcript omitted)

The Foreman stated the macs available on the worksite were of different lengths, and he wanted to make sure the one he handed to the Decedent would work for its intended connection.

> [The purpose was] [t]o make sure it would be long enough and reach where [the Decedent] wanted to place the mac with [the JL and the Apprentice]. You know, they were up there doing the work, so I wanted to give them a mac long enough to

him out of the bucket. . . . [The Apprentice] cut that mac so that we could bring the bucket straight down to the ground." (Tr. 333)

> be able to, you know, complete this work safely and have it up there over the weekend so that it wouldn't be, you know, swinging against the pole or, you know, too tight and not able to get the switches off of the old pole so that these could bypass those switches.

(Tr. 321-22)

The Foreman stated the Decedent could determine whether the mac was long enough for its intended purpose without raising his bucket and entering the MAD (Tr. 322). He explained it is difficult to estimate distances between sections of the power lines from the ground. The Foreman testified,

> My experience is everything always looks closer [from the ground]. You know, your guys always look closer to things. That's why you, you know, sometimes you'll say, oh, you know, too close to that, or you holler up or whatever, and, you know, they might say, oh no, I'm about this far away, or whatever. But it's hard to judge from 40-feet or 35-feet or whatever on the ground, how far your buckets and your Linemen are at some points – sometimes.

(Tr. 324)

He stated that being elevated closer to the power lines facilitates a more accurate estimate.

> [Y]ou have the mac up there, and you can estimate, okay, this is where I'm going to place it, and that's where I'm going to end up with it. And then, this is how I might coil it up, or this is, you know, is it going to be long enough. So, you kind of go up, and you give it a little bit of a test. But, you know, because you don't know if that one might particularly be long enough or not; 'til you get up near the work and kind of eyeball where you can put it.

(Tr. 323)

The Foreman stated he did not instruct the Decedent to raise the bucket into the minimum approach distance and attempt to install the mac himself, nor did he expect him to do so (Tr. 329, 336). His testimony is consistent with the interview statement he provided to the CSHOs on December 10, 2019, when he stated the Decedent "was going back up to measure (mac)." (Exh. C-13, p. 2, line 13)

The Secretary contends the Foreman's testimony is at odds with the crew's overall assignment for that day.

> Respondent's own accident investigation report indicates that [the Decedent's] task was not just to estimate whether the MAC was long enough but also to install it – and that he did not do so by himself but asked for assistance from another

> member of the crew. . . . This is consistent with [the Foreman's] testimony (1) that the crew, including [the Decedent], understood that their task for the remainder of the shift included installing MACs to secure the line for the weekend, and (2) that the reason for the crew having the backyard machine in addition to the two bucket trucks was so that the third crew member would be available to assist should the other two "need help putting material up on the pole."

(Secretary's *Brief*, p. 10) (citations to the transcript and exhibit omitted)

The investigation report referred to by the Secretary is an *Incident Investigation Report* (*Report*), dated December 17, 2019. It is a four-page document. LEM's logo appears on the first page (Exh. C-17). Assistant Area Director (AAD) Jaime Lopez testified OSHA received the *Report* from LEM in response to a request from the lead CSHO during her investigation (Tr. 523-24, 547).[8] The Court admitted the *Report* over LEM's objection (Tr. 529).

The *Report* is not signed and it does not describe the methodology used to conduct the investigation. It includes an "Event Detailed Narrative" giving an account of the circumstances of the fatality. The *Report* states that the crew members had previously measured the mac against the desired connection points and determined it was not long enough. The crew decided, "as an intermediate step," to change the connection points (Exh. C-17, p. 2). The *Report* states, "It is *assumed* that that [the Decedent] moved his bucket into position to reach and install the east end of the [mac]." *Id.* (emphasis added) The narrative goes on to state that the Decedent asked the JL for help in installing the mac, and the JL told him to wait until he could reposition his bucket. Then the JL and the Apprentice saw the flash as the Decedent breached the MAD. *Id.*

LEM's counsel disputed AAD Lopez's claim that LEM produced the *Report* to the Secretary and questioned its provenance (Tr. 549-50). Exhibit C-33 is a letter from LEM's counsel, dated December 24, 2019, in response to OSHA's request for documents related to the November 15, 2019, fatality. The letter itemizes the attached documents requested by OSHA. The *Report* is not listed among the itemized documents.

Upon consideration of the record evidence, the Court determines the *Report* has no evidentiary weight. It is unsigned and its provenance is unknown. There is no evidence

[8] Lopez is an assistant area director in OSHA's Fort Lauderdale area office (Exh. C-1, pp. 1, 9; Tr. 19). AAD Lopez supervised the CSHOs assigned to investigate the fatality at LEM's worksite (Tr. 24-25). At the time of the hearing, the lead CSHO had relocated to OSHA's Orlando area office (Tr. 25). Neither she nor the assisting CSHO testified at the videoconference hearing. AAD Lopez had not visited LEM's worksite, and he did not interview or attend interviews with LEM's employees (Tr. 120). He attended the deposition of the Foreman taken by the Secretary (Tr. 518).

identifying who investigated the incident, who authored the report, or the sources of the information found in the narrative of the *Report.* It is deemed unreliable.

The Court finds the Foreman to be more credible than not on the issue of instructing the Decedent to take the mac up in the bucket high enough to determine whether it was of adequate length for its intended installation. He appeared nervous and at times defensive under cross-examination, but his testimony is internally consistent and is supported by his interview statement taken more than twenty months before the hearing. He responded fully to the questions put to him and did not engage in evasive or stonewalling behavior. LEM had terminated the Foreman's employment more than twenty months before the hearing, and it was LEM who subpoenaed him to appear as a witness.

The Foreman's testimony remains credible in part because the Secretary did little to undermine it. At the hearing, the Secretary claimed the Foreman's deposition testimony conflicted with his hearing testimony, but the Secretary did not use the deposition to impeach the Foreman while he was on the stand. Instead, the Secretary called AAD Lopez as a rebuttal witness to testify that he remembered the Foreman's deposition testimony to be different from his hearing testimony. The Court sustained LEM's objection to AAD Lopez's testimony (Tr. 518, 521). The Secretary did not call the lead CSHO to testify, even though she was working for OSHA at the time of the videoconference hearing, nor did he call the assisting CSHO. The Secretary did not call either the JL or the Apprentice, the only other witnesses to the fatality, to testify. Any of these witnesses could have provided more information to clarify the events of November 15, 2019, or perhaps counter the Foreman's version. As the record stands, however, the Foreman's testimony that he instructed the Decedent to carry the mac in his bucket only high enough to determine its adequacy for the intended installation is not contradicted by any reliable evidence. The Court credits the Foreman's testimony regarding the task he assigned to the Decedent immediately before his death.

The Decedent's Rubber Insulating Sleeves

The rubber insulating sleeves found in the Decedent's bucket were yellow with orange trim (Exh. C-6, p. 3). The Foreman testified that he did not observe whether the Decedent was wearing the bulky yellow rubber insulating sleeves when he reached down from the bucket to grab the mac the Foreman was handing up to him (Tr. 350-51, 353-52). At a minimum, the Foreman would have been able to see the arm that the Decedent reached with to take the mac

from him. The Foreman was close enough to detect, with the exercise of reasonable diligence, whether the Decedent was wearing a rubber insulating sleeve on that arm.

THE CITATION

The Secretary's Burden of Proof

> 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., Inc., No. 90-1747, 1994 WL 682922, at *6 (OSHRC Dec. 5, 1994).[9]

Item 1: Alleged Serious Violation of § 1926.950(b)(2)(iii)

Alleged Violation Description

Item 1 alleges,

> 29 CFR 1926.950(b)(2)(iii): Each qualified employee was not trained and competent in the minimum approach distances specified in this subpart corresponding to the voltages to which the qualified employee will be exposed and the skills and techniques necessary to maintain those distances:
>
> On or about November 15, 2019, at jobsite location 831 N. Federal Highway, Hallandale, Florida, employees were exposed to an electrocution hazard while working near 7,620-volt phase to ground power lines without the employer ensuring that employees were trained to recognize the hazards associated with keeping the minimum approach distance from energized power lines.

The Cited Standard

Section 1926.950(b)(2)(iii) provides:

> (b)(2) *Qualified employees*. Each qualified employee shall also be trained and competent in:
>
> . . .

[9] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). Here, the violations allegedly occurred in Hallandale, Florida, in the Eleventh Circuit. The Secretary states in the *Complaint* that LEM's principal place of business is in Sorrento, Florida (*Complaint*, ¶ 3). LEM denies this statement (*Answer*, ¶ 3) but otherwise does not provide the correct location of its principal place of business. The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case — even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the Court will apply the precedent of the 11th Circuit.

> (iii) The minimum approach distances specified in this subpart corresponding to the voltages to which the qualified employee will be exposed and the skills and techniques necessary to maintain those distances[.]

Section 1926.968 defines a *qualified employee* or *qualified person* as one "knowledgeable in the construction and operation of the electric power generation, transmission, and distribution equipment involved, along with the associated hazards."

Analysis

(1) Applicability of the Cited Standard

Section 1926.950(b)(2)(iii) is found in Subpart V (*Electric Power Transmission and Distribution*) of the Part 1926 construction standards. Section 1926.950(a)(1)(i) provides Subpart V "covers the construction of electric power transmission and distribution lines and equipment. As used in this subpart, the term 'construction' includes the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of existing electric transmission and distribution lines and equipment."

Here, the task of LEM's crew on November 15, 2019, was to transfer distribution lines from an existing utility pole to a new one. The Court determines § 1926.950(b)(2)(iii) applies to the conditions and activities at the Hallandale worksite cited in Item 1 of the Citation.

(2) Compliance with the Terms of the Standard

The cited standard requires employers to train and ensure the competence of employees in the MADs to which they will be exposed and in the skills and techniques needed to maintain those distances. The Secretary's argument, however, focuses on LEM's recordkeeping of its employees' training, rather than on the training itself. "More than once OSHA requested [the Decedent's] training records from Respondent . . . All Respondent produced was inadequate, general documents indicating that MAD is a topic that Respondent is supposed to discuss with its new hires." (Secretary's *Brief*, p. 6) This position was emphasized at the hearing by the Secretary's designated representative, AAD Lopez (Tr. 9, 13).

AAD Lopez explained the Secretary's basis for citing Item 1: "We tried to obtain information to confirm that the [D]ecedent had received the training as outlined in the standard, and the employer never provided the evidence. . . . We requested training records of [the Decedent] and did not receive anything outlining the MAD." (Tr. 36-37) He acknowledged LEM provided OSHA with a 45-minute safety training video it shows to newly hired linemen (Exhibit

C-18), but stated it did not include training "on the specifics of MAD" except for a brief section (Tr. 39-40).

LEM provided the Secretary with a signed receipt, dated September 20, 2019, indicating the Decedent had received a copy of LEM's *Safety Manual*, which addresses MADs (Exh. J-13 (receipt), Exh. C-24, § 1.8, pp. 36-39 (*Safety Manual*)), and a copy of Decedent's class history form, showing he had undergone new hire orientation on September 20, 2019 (Exh. R-26; Tr. 147-48). AAD Lopez testified these documents were inadequate to establish LEM trained the Decedent because they did not demonstrate LEM "provided a particular training for the employee to again recognize and avoid the hazard working with MAD." (Tr. 45)

AAD Lopez stated the Secretary cited LEM for failing to train the Decedent because there was no "tracking record of [the Decedent] actually receiving the training." (Tr. 124) He conceded § 1926.950 does not require employers to retain employee training documents (Tr. 46). He contended, however, that employers in the electrical contractor industry "keep records of all electric and related training provided to the employees. So, in this particular case, we did not receive any document that would substantiate what [the Decedent] knew about" the MADs (Tr. 47). OSHA also requested information regarding the Decedent's training from his union, the International Brotherhood of Electrical Workers (IBEW), who responded it did not have that information (Tr. 49).

LEM argues there is no requirement in § 1926.950 that an employer maintain records of its employees' training in MADs and the skills and techniques necessary to maintain the distances. LEM also contends § 1926.950 allows for employers to rely on training that employees received from previous employers. Two notes in § 1926.950 support LEM's arguments.

Recordkeeping

Section 1926.950 is the *General* standard of Subpart V. The cited subsection is found in § 1926.950(b), which addresses *Training.* Section 1926.950(b)(7) of the *Training* subsection requires employers to "ensure that each employee has demonstrated proficiency in the work practices involved before that employee is considered as having completed the training required by paragraph (b) of this section." Two notes are appended to that section. The first note explicitly states employers are not required to maintain records for training mandated by § 1926.950(b):

> **Note 1 to paragraph (b)(7):** *Though they are not required by this paragraph*, *employment records* that indicate that an employee has successfully completed the required training are one way of keeping track of when an employee has demonstrated proficiency.

(emphasis added)

The basis of the Secretary's argument for finding a violation of § 1926.950(b)(2)(iii) is LEM's alleged failure to document employee training on the topic of MADs ("Without evidencing the content of the training, Respondent fails to show its trainings are compliant with the cited OSHA standard." (Secretary's *Brief*, p. 7)). The Secretary is asking the Court to impose the additional requirement of recordkeeping for full compliance with the cited standard, and to shift the burden of proof to LEM to establish the company provided the required training ("Respondent failed to provide any credible evidence that rebuts the Secretary's allegations." (Secretary's *Brief*, P. 6)).

The Secretary cites *Well Solutions, Inc., Rig No. 30*, No. 91-340, 1995 WL 242595 (OSHRC April 19, 1995) in support of his argument that it was incumbent on LEM to provide documentation that it had trained the Decedent in MADs. In that case, two members of a four-member crew died in an oil well fire. The Secretary had cited the respondent (WS) for a violation of § 1910.151(b) for failing to train an employee or employees in first aid where no medical facility was near the worksite. The two surviving employees testified they had not received training in first aid. It was their opinion that one of the two deceased employees (who was their cousin) also had not received first aid training because they were close to him and thought they would have known if he had. There was no specific evidence regarding whether the other deceased employee had been trained in first aid. WS argued the Secretary should have made a greater effort to determine whether the deceased employees had received first aid training. The Commission rejected this argument.

> [W]e conclude that the Secretary has introduced sufficient evidence to establish a prima facie showing of a violation. WS presented no evidence to rebut the Secretary's case, even though it would have possession of any first aid training records. While the Secretary's evidence is not overwhelming, it is sufficient in the absence of rebuttal, and therefore we conclude that the Secretary has proven a violation of section 1910.151(b). "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.' " *CF & T Available Concrete Pumping,* 15 BNA OSHC 2195, 2198, 1991–93 CCH OSHD ¶ 29,945, p. 40,938

> (No. 90–329, 1993) (quoting *Astra Pharmaceutical Prods. v. OSHRC,* 681 F.2d 69, 74 (1st Cir.1982)); *see Noranda Aluminum, Inc. v. OSHRC,* 593 F.2d 811, 814 & n. 5 (8th Cir.1979).

Id. at *4.

The record evidence in this proceeding is distinguishable from that of *Well Solutions*. Here, the Secretary's case does not stand "entirely unrebutted"—there is evidence that the Decedent received new hire orientation training and a copy of LEM's *Safety Manual,* which specifically addresses MADs (Exhs. C-24 & R-26). The Commission found in *Wells Solutions* that slight evidence presented by the Secretary is sufficient to prove a violation "in the absence of rebuttal." Here, LEM provided rebuttal evidence. In addition to the documentation of the orientation training and receipt of the *Safety Manual*, LEM presented evidence establishing the Decedent had extensive previous training, and LEM determined he was proficient in safe work practices so that he was considered to have completed the training required by § 1926.950(b).

Previous Training

The second note appended to § 1926.950(b)(7) provides:

> **Note 2 to paragraph (b)(7):** For an employee with previous training, an employer may determine that that employee has demonstrated the proficiency required by this paragraph using the following process: (1) Confirm that the employee has the training required by paragraph (b) of this section, (2) use an examination or interview to make an initial determination that the employee understands the relevant safety related work practices before he or she performs any work covered by this subpart, and (3) supervise the employee closely until that employee has demonstrated proficiency as required by this paragraph.

At the time of his death, the Decedent had been a journeyman lineman for fifteen and a half years. He had performed his apprenticeship with Baltimore Gas & Electricity Utility (Exh. R-21; Tr. 409). The Foreman, who was also a journeyman lineman, described the training necessary to achieve that position.

The Foreman stated that to become a journeyman lineman, he had "gone through the IBEW and the [National Joint Apprenticeship and Training Committee] training and gotten the certificate and the diploma." (Tr. 233) He went through a five-year apprenticeship program (Tr. 234). He worked for Florida Keys Electric Coop, starting as a groundman. After working for a year, his foremen and an area supervisor reviewed his work and recommended him to advance to the position of apprentice (Exh. J-4, p. 3; Tr. 234-36). The apprenticeship included on-the-job

and classroom training, as well as the completion of workbooks and tests (Tr. 242-43). Apprentices received safety instruction in PPE, isolation, insulation, and MADs, among other topics (Tr. 246-47). As the Foreman advanced in his apprenticeship, the foremen and area supervisor continued to assess and critique his work "constantly." (Tr. 247) The Foreman progressed through the program, from apprentice first year through apprentice fourth year, and was, at the end of his fifth year, elevated to journeyman lineman (Tr. 249-53). To become a journeyman lineman, the Foreman was required to take a written examination and complete a bucket rescue in under three minutes, as well as other timed assignments (Tr. 253-54). Once an apprentice becomes a journeyman lineman, he has "topped out," meaning he has reached the top position possible. Training to become a journeyman lineman requires "thousands of hours" of field work (Tr. 128). At the time of the fatality at issue here, the Foreman had been a journeyman lineman for more than twenty years (Tr. 257-58).

The record establishes the Decedent had completed his apprenticeship and had been a journeyman lineman for fifteen and a half years at the time of his death. The Foreman's testimony establishes that, as a journeyman lineman, the Decedent would have had previous training, including the MADs for different voltages.

AAD Lopez conceded that if a lineman "had been trained, the employer only has to assess and track that assessment." (Tr. 153) He stated that neither he nor anyone else at OSHA had determined whether LEM had met the requirements of Note 2 for employees with previous training with regard to the Decedent (Tr. 153).[10]

Safety engineer Patrick Cross works for LEM. He provides orientation and safety training for newly hired employees, periodic safety training, crew visits, and onsite audits. (Tr. 385-86). His *New Hire Orientation Topics Outline* includes "MAD distances required for the different voltages that are present on the work site, line cover requirements." (Exh. R-19) Cross provided

[10]At the hearing, the Secretary tendered Harry Floyd as an expert in "the field of electrical safety, which includes Minimum Approach Distance," and moved to admit his expert report (Exh. C-14 (rejected); Tr. 196). LEM objected, arguing Floyd's opinions "appear to be directly overlapping with the Judge's purview in fact-finding." (Tr. 197) After reviewing Floyd's proffered report, the Court acknowledged Floyd's impressive credentials but found his opinions in the proffered report address the ultimate issues the Court must decide. The Court did not allow Floyd to testify (Tr. 209-12). *See J. C. Watson Co.,* Nos. 05-0175 & 05-0176, 2008 WL 2045818, at * 3, n. 3 (OSHRC May 6, 2008) (The Commission "determine[s] that, as Watson's intended purpose for the testimony of this witness was regarding a conclusion of law, the judge properly refused to permit his testimony."). The Secretary made an offer of proof, stating that Floyd's testimony and the report he prepared would provide his expert opinions regarding adequate training, the significance of the Decedent's encroachment of the MAD, and the significance of the Decedent's possession of a conductive object in his bucket (Tr. 213-15).

orientation and safety training to the Decedent on September 20, 2019 (Exh. R-24; Tr. 135-36). There was only one other participant that day, so the orientation session involved only Cross, the Decedent, and the other new hire (Tr. 393-94). No one from OSHA interviewed Cross to determine how he provided orientation and safety training or assessed employees with previous training (Tr. 131).

Cross gave a detailed explanation of his training process. He testified that after completing paperwork and drug testing, he questions new hires on "what experience they have, where they're coming from, what their past work experience may be." (Tr. 387)

> [The new hires] have to go through a set of videos and just oral interviews where we talk about all the elements of what we're doing, that we're doing safely. And just kind of . . . an open interview to question what kind of experience they have and to get them to elaborate on that a little bit. And then we go through the videos, go through PowerPoints, even use some YouTube videos of safety companies that . . . may deal with what we are specifically working on, on that project or what they may worked on, on upcoming projects that we're going to have. . . . We['re] just trying to make sure we cover everything we possibly can, not only to inform them, but to . . . add more information about what they already know.

(Tr. 387-88)

As Cross discusses safety training with the new hires, he assesses their levels of previous training and experience.

> [W]hen you ask someone what they know about MAD distance or rubber goods, you know, use gloves and sleeves and things of that nature, you can always gauge by how someone answers or doesn't answer. If you ask for more information, can they give more information or they, you know, just kind of beat around the bush? And so you're assessing what they know or don't know and try to lead that on into a direction to find out if they are proficient in what they should know or they will need to get some of those other training videos or spend a little bit more time discussing all the elements of the videos that you already have going, how many times we going to stop it. Sometimes that 45 or 43 minute video, whatever it may be, could be an hour and a half, two hours depending on how that discussion goes when we stop at the end of each section and ask questions or start a discussion. . . . So it's fairly easy usually to gauge what someone does or doesn't know and their willingness to learn.

(Tr. 396-97)

Cross testified that once a new hire is working in the field, his supervisors watch him closely to ensure he is trained and proficient in safe work practices.

> Everyone onsite, [whether] anyone is a J/L foreman, general foreman, they are required to continue observations throughout the day, throughout the job, and that's what they're there for is onsite oversight and management to make for sure that everyone is proficient as they say they are and are performing their duties safely and correctly.

(Tr. 412)

Note 2 to paragraph (b)(7) of § 1926.950 provides than an employer may rely on the previous training of employee if it: (1) Confirms the employee has the training required by § 1926.950(b), (2) uses an examination or interview to initially determine that the employee understands the relevant safety related work practices, and (3) supervises the employee closely until that employee has demonstrated proficiency as required by § 1926.950(b). Here, LEM has established (1) the Decedent's apprenticeship and previous employment as a journeyman lineman entailed the required safety training, including the MADs for different voltages; (2) Cross interviewed the Decedent during orientation to determine his knowledge and understanding of the relevant safety related work practices, including MADs; and (3) its supervisors, including the Foreman, are trained to observe closely the newly hired employee to ensure he has the proficiency required by the training standard.

The Court finds LEM met the requirements set out in Note 2 to paragraph (b)(7) to determine the Decedent had demonstrated the proficiency in safe work habits required by § 1926.950(b).

The Secretary's emphasis on LEM's failure to submit detailed training records is misplaced. Section 1929.950(b)(2)(iii) does not require the employer to maintain such records, as set out in Note 1 to paragraph (b)(7). The Secretary considered the records LEM did submit to be inadequate, but he failed to factor in the previous training a journeyman lineman would have had at the Decedent's point in his career. An employer's reliance on an employee's previous training is expressly permitted in Note 2 to paragraph (b)(7).

The Court finds the Secretary failed to establish the Decedent was not trained in the MAD for the 7.62 kV distribution line at the Hallandale worksite on November 15, 2019. Item 1 is vacated.

Items 2 and 3: Alleged Serious Violations of §§ 1926.960(c)(1)(iii) and (2)(i)

The Secretary cited Items 2 and 3 based on the single incident of the Decedent breaching the MAD of the distribution line without taking appropriate precautions. Because Items 2 and 3

arise from the same incident and only the element of employer knowledge is at issue for both items, the Court will address the items together.[11]

Alleged Violation Descriptions

Item 2 alleges:

> 29 CFR 1926.960(c)(1)(iii): The employer did not ensure that no employee approached or took any conductive object closer to exposed energized parts than the employer's established minimum approach distance:
>
> On or about November 15, 2019, at jobsite location 831 N. Federal Highway, Hallandale, Florida, an employee carried an energized mechanical jumper inside a truck-mounted bucket, exposing the employee to an electrocution hazard.

Item 3 alleges:

> 29 CFR 1926.960(c)(2)(i): When an employee used rubber insulating gloves as insulation from energized parts, the employer did not ensure that rubber insulating sleeves were also used:
>
> On or about November 15, 2019, at jobsite location 831 N. Federal Highway, Hallandale, Florida, an employee was exposed to an electrical shock and/or electrocution hazard when using rubber-insulating gloves as insulation from energized parts without using rubber-insulating sleeves.

The Cited Standards

Section 1926.960(c)(1)(iii) provides:

> The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance, unless:
>
> (A) The employee is insulated from the energized part (rubber insulating gloves or rubber insulating gloves and sleeves worn in accordance with paragraph (c)(2) of this section constitutes insulation of the employee from the energized part upon

[11] Despite arising from the same incident, Items 2 and 3 are not, as LEM contends, duplicative. "[V]iolations are considered duplicative only where they *requir*e the same abatement conduct." *J. A. Jones Constr. Co.,* No. 87-2059, 1993 WL 61950, at *7 (OSHRC Feb. 19, 1993) (emphasis added). Here, § 1926.960(c)(1)(iii), cited in Item 2, permits three separate forms of abatement (wearing "rubber insulating gloves or rubber insulating gloves and sleeves worn in accordance with paragraph (c)(2)" of § 1926.960; insulating the energized part "from the employee and any other conductive object"; and insulating the employee "from any other exposed conductive object in accordance with the requirement for live-line barehand work"). A violation of § 1926.960(c)(2)(i), cited in Item 3, can only be abated by the employee wearing rubber insulating gloves and sleeves together. "Although a worksite condition may violate more than one standard, section 5(a)(2) of the Act requires an employer to comply with all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards may be satisfied by compliance with the more comprehensive standard." *H. H. Hall Constr. Co.,* No. 76-4765), 1981 WL, 18913, at *4 (OSHRC Oct. 7, 1981) (emphasis in original).

which the employee is working provided that the employee has control of the part in a manner sufficient to prevent exposure to uninsulated portions of the employee's body), or

(B) The energized part is insulated from the employee and from any other conductive object at a different potential, or

(C) The employee is insulated from any other exposed conductive object in accordance with the requirements for live-line barehand work in § 1926.964(c).

Section 1926.960(c)(1)(i) provides:

When an employee uses rubber insulating gloves as insulation from energized parts (under paragraph (c)(1)(iii)(A) of this section), the employer shall ensure that the employee also uses rubber insulating sleeves.

Analysis

(1) Applicability of the Cited Standards

Section 1926.950(a)(1)(i) provides Subpart V "covers the construction of electric power transmission and distribution lines and equipment. As used in this subpart, the term 'construction' includes the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of existing electric transmission and distribution lines and equipment."

On November 15, 2019, LEM's crew was in the process of transferring distribution lines from an existing utility pole to a new one. The Court determines § 1926.950(b)(2)(iii) applies to the conditions and activities at the Hallandale worksite cited in Items 2 and 3 of the Citation.

(2) Compliance with the Terms of the Standards

It is undisputed that on November 15, 2019, the Decedent elevated his bucket to the height of one of the distribution lines at the worksite. While holding a conductive object (the mac), he breached the MAD of 2 feet, 2 inches, and connected one end of the mac to the line. The Decedent was wearing rubber insulating gloves at the time but was not wearing rubber insulating sleeves. This action violated the terms of § 1926.960(c)(1)(iii) ("The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance.") cited in Item 2. It also violated the terms of § 1926.960(c)(2) ("When an employee uses rubber insulating gloves as insulation from energized parts (under paragraph (c)(1)(iii)(A) of this section), the employer shall ensure that the employee also uses rubber insulating sleeves.") cited in Item 3.[12]

[12] Sections 1926.960(c)(2)(i)(A) and (B) provide an exception to the requirement to wear rubber insulating sleeves:

The Court finds the Decedent's action in breaching the MAD while holding the mac and not wearing rubber insulting sleeves violated the terms of the standards cited in Items 2 and 3.

(3) Employee Access to the Violative Condition

The Decedent died of electrocution after breaching the MAD for the distribution line. To prove employee access to a hazard, the Secretary is required to

> show either that employees were actually exposed to the violative condition (through injury or death) or that it is reasonably predictable they have been or will be in the zone of danger posed by the condition. *Dover High Performance Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *2 (O.S.H.R.C., Sept. 25, 2020); *see also Aerospace Testing*, 2020 WL 5815499, at *3 n.3. . . . [T]he Secretary "need not show that an employee's exposure was reasonably predictable' where there is actual exposure." *George J. Igel & Co. v. OSHRC*, 50 F. App'x. 707, 713 (6th Cir. 2002) (unpublished)[.]

Armstrong Utilities, Inc., No. 18-0034, 2021 WL 4592200, at *3 (OSHRC Sept. 24, 2021)

The death by electrocution of the Decedent establishes actual exposure to the violative conditions.

(4) Employer Knowledge

The Secretary does not argue LEM had actual knowledge of the violative conduct cited in Items 2 and 3.[13] He contends LEM had constructive knowledge, based on the Foreman's position

---

> However, an employee need not use rubber insulating sleeves if . . . [e]xposed energized parts on which the employee is not working are insulated from the employee; and [w]hen installing insulation for purposes of paragraph (c)(2)(i)(A) of this section, the employee installs the insulation from a position that does not expose his or her upper arm to contact with other energized parts.

LEM argues the Secretary failed to establish the energized parts were not insulated from the employee, "for which he bears the burden of proof." (LEM's *Brief*, p. 12) LEM is mistaken. "[T]he party claiming the benefit of an exception bears the burden of proving that its case falls within that exception*." Ford Dev. Corp.,* No. 90-1505, 1992 WL 381669, at *3, n. 7 (OSHRC Dec. 3, 1992). LEM presented no evidence it insulated exposed energized parts on which the Decedent was not working.

[13] The Secretary was specific on this point.

> Q.: Did OSHA determine that there was employer knowledge with regard to Citation 1, Item 2?
> AAD Lopez: Yes, ma'am.
> Q.: How did OSHA -- well, let me first ask you, did OSHA determine there was actual knowledge?
> AAD Lopez: No, ma'am.

(Tr. 60)

This position appears to be at odds with the Secretary's theory that the Foreman instructed the Decedent "not just to estimate whether the mac was long enough but also to install it." (Secretary's *Brief*, p. 7) If the Secretary's theory were correct, the Foreman would have actual knowledge of the violative conduct of the Decedent in not wearing rubber insulating sleeves and carrying a conductive object when breaching the MAD.

as an observer on the worksite where the employees were working in plain view. "To establish constructive knowledge, the Secretary must prove that, with the exercise of reasonable diligence, the employer should have known of the conditions constituting the violation." *AJM Packaging Corp., Respondent.,* No. 16-1865, 2022 WL 1102423, at *5 (OSHRC Apr. 1, 2022).

AAD Lopez stated,

> There was an observer/foreman at the site in charge of conducting the duties of supervisory and observing the workers doing work with the power lines. And the foreman was present at the site with the condition in plain view, and he should or could have known that the injured employee encroached the MAD because he was there at the site and was in charge of observing these workers doing work.

(Tr. 60-61)

Constructive knowledge can be shown either by proximity of a supervisor to employee misconduct or by the inadequacy of the employer's safety program.

> An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture,* 16 O.S.H. Cas. (BNA) 1073, at *17–19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. & Gas Corp.,* 88 F.3d at 105–06 (citations omitted), with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable.

ComTran Grp., Inc. v. U.S. Dep't of Lab., 722 F.3d 1304, 1308 (11th Cir. 2013).

The Secretary does not argue LEM's implemented safety program was inadequate. His case for constructive knowledge rests on the Foreman's proximity to the Decedent's violative conduct (Secretary's *Brief*, pp. 12, 15-16).

Item 2

The Decedent breached the MAD while holding the mac, a conductive object, violating § 1926.960(c)(1)(iii), cited in Item 2. The Secretary argues the Foreman's presence on the worksite at the time of the Decedent's death is sufficient to establish his knowledge of the violative conduct, and this knowledge is imputed to LEM.

> [The Foreman] was present when the accident occurred and, as he admitted on cross-examination, it was his responsibility to observe the crew for safety violations and make corrections as needed. . . . Accordingly, he should have known of the MAD violation with the exercise of due diligence as the foreman

> and designated ground observer. Therefore, Respondent had constructive knowledge of the violation.

(Secretary's *Brief*, p. 12)

It is undisputed the Foreman knew the Decedent had the mac with him in his bucket—he had handed it to him. The question is whether, with the exercise of reasonable diligence, the Foreman should have discovered the Decedent's violative conduct. The Court concludes the Foreman's failure to detect the Decedent's violative conduct before he made contact with the energized line does not establish a failure to exercise reasonable diligence.

The Foreman testified it took only a "couple of seconds" for the Decedent to raise his bucket to the height the Foreman expected him to reach (Tr. 351). The Decedent then called down to the Foreman that the mac would work (Tr. 320). At this point, the Decedent had completed the task the Foreman had assigned him. The Foreman looked down at the other macs and turned towards the bucket of the Apprentice (Tr. 321). As he started walking, he saw the flash that resulted from the Decedent's contact with the energized line (Tr. 330). The Foreman's description indicates only seconds had elapsed between the time the Decedent called down to him and when the flash occurred. The Commission has held the duration of a violative activity is a factor in determining whether a supervisor should have detected it with the exercise of reasonable diligence.

> *See, e.g., Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2196-97, 2000 CCH OSHD ¶ 32,134, p. 48,422 (No. 90-2775, 2000) (concluding that "in the absence of any evidence indicating how long the violative conditions had been in existence, we are unable to evaluate whether [the employer] could have known of them even if it had been reasonably diligent in inspecting its equipment"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999) (concluding that constructive knowledge was not shown where lack of evidence of violation's duration precluded Commission from determining whether employer could have known of conditions with exercise of reasonable diligence).

Thomas Indus. Coatings, Inc., No. 06-1542, 2012 WL 1777086, at *4 (OSHRC Feb. 28, 2012).

The Decedent was a journeyman lineman with all the experience and training that position implies. In the approximately two months the Foreman had worked with the Decedent on his crew, he had not observed him engage in any unsafe work practices (Tr. 335). The Foreman had no indication heightened monitoring was indicated.

The Commission has held reasonable diligence does not require employers to detect every instance of violative conduct on its worksite.

> The thrust of the Secretary's argument seems to be that the very fact the violations occurred proves Stahl's supervision was inadequate. However, an "employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard." *Texas A.C.A., Inc.,* 17 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30653, p. 42,527 (No. 91-3467, 1995) (emphasis in original). "Where the evidence fails to show that the employer should have perceived a need for additional monitoring or that such an effort would have led to the discovery of instances of employee misconduct, increased supervisory efforts to monitor employee compliance are not required." *Dover Elevator Co.,* 16 BNA 1281, 1287, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).

Stahl Roofing, Inc., Nos. 00-1268 & 00-1637, 2003 WL 440801, at *3 (OSHRC Feb. 21, 2003).

The Secretary has failed to establish LEM had constructive knowledge of the Decedent's violation of the terms of § 1926(c)(1)(iii).

Item 3

The Decedent was not wearing rubber insulating sleeves when he breached the MAD, violating § 1926.960(c)(2)(i), cited in Item 3. The Secretary again argues the Foreman's presence on the worksite at the time of the Decedent's death is sufficient to establish his knowledge of the violative conduct.

The Secretary claims that the Decedent was required to wear rubber insulating sleeves in the bucket even if he only went up far enough to determine the adequacy of the length of the mac, as instructed by the Foreman.

> [T]he correct practice was not for [the Decedent] to wait until he was within inches of the MAD before donning gloves and sleeves, but to wear the PPE the entire time, from before his bucket left the cradle position until his bucket returned to the cradle position, as [the Decedent] was indisputably exposed to high voltages and it was reasonably foreseeable [the Decedent] could encroach the MAD. . . . Ex. J-6 [*Safety Manual*] at 216 (requiring "cradle-to-cradle" use of insulating gloves and sleeves when employees are working on energized equipment from an aerial platform).

(Secretary's *Brief*, pp. 14-15).

The Secretary refers to LEM's *cradle-to-cradle* policy found in its *Safety Manual*:

> *When employees are working on energized circuits* or equipment using the rubber glove method, rubber protective-insulating gloves and sleeves rated for the

exposure of the highest nominal voltage shall be worn cradle-to-cradle when working from an aerial platform.

(Exh. J-6, p. 219, § BP6.1) (emphasis added)

Both the Foreman and safety engineer Cross disputed the Secretary's interpretation of the cradle-to-cradle policy. The Foreman testified that the task he assigned the Decedent "wouldn't have required gloves and sleeves. . . . He was not ordered to go up and apply that mac or go within the MAD distance. It was just measuring the mac out." (Tr. 352) Cross agreed that rubber insulating gloves and sleeves are not required for employees working outside the MAD (Tr. 457). Their interpretation of LEM's policy aligns with the requirements of § 1926.960(c).

The cited standard should be read in the context of the § 1926.960(c)(1) and (2) standards. Sections 1926.960(c)(1)(iii) through (2)(i)(B) provide (with the most pertinent subsections bolded):

> (c)(1)(iii) **The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than the employer's established minimum approach distance, unless**:
>
> (A) **The employee is insulated from the energized part (rubber insulating gloves or rubber insulating gloves and sleeves worn in accordance with paragraph (c)(2) of this section constitutes insulation of the employee from the energized part upon which the employee is working provided that the employee has control of the part in a manner sufficient to prevent exposure to uninsulated portions of the employee's body)**, or
>
> (B) The energized part is insulated from the employee and from any other conductive object at a different potential, or
>
> (C) The employee is insulated from any other exposed conductive object in accordance with the requirements for live-line barehand work in § 1926.964(c).
>
> (c)(2)(i) **When an employee uses rubber insulating gloves as insulation from energized parts (under paragraph (c)(1)(iii)(A) of this section), the employer shall ensure that the employee also uses rubber insulating sleeves**. However, an employee need not use rubber insulating sleeves if:
>
> (A) Exposed energized parts on which the employee is not working are insulated from the employee; and
>
> (B) When installing insulation for purposes of paragraph (c)(2)(i)(A) of this section, the employee installs the insulation from a position that does not expose his or her upper arm to contact with other energized parts.

Read together, the plain meaning of §§ 1926.960(c)(1)(iii), (c)(1)(iii)(A), and (c)(2)(i) is that rubber insulating gloves *and* rubber insulating sleeves are required to be worn by an employee only when the employee is closer than the MAD to exposed energized parts.

Here, the Foreman's instruction to the Decedent was to take the mac up high enough to determine it was of an adequate length for later installation. At that height, the Decedent was not within the MAD for exposed energized parts. It was only when the Decedent elevated his bucket to the height of the distribution lines and connected one end of the mac to the line that he breached the MAD. As the previous section states, the Foreman's failure to detect the violative activity in that fleeting moment does not establish a failure to exercise reasonable diligence.

The Secretary has failed to establish LEM had constructive knowledge of the Decedent's violation of the terms of § 1926.960(c)(2)(i).

The Court concludes the Secretary has not established the Foreman failed to exercise reasonable diligence regarding the violative conduct of the Decedent. The Secretary has not proven LEM had knowledge, actual or constructive, of the violations cited in Items 2 and 3. They are, therefore, **VACATED**.

FINDINGS OF FACT AND CONCLUSION OF LAW

The foregoing decision constitutes the findings of face and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Item 1, alleging a serious violation of § 1926.950(b)(2)(iii), is **VACATED,** and no penalty is assessed; and

2. Item 2, alleging a serious violation of § 1926.960(c)(1)(iii), is **VACATED**, and no penalty is assessed; and

3. Item 3, alleging a serious violation of § 1926.960(c)(2)(i), is **VACATED**, and no penalty is assessed.

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: May 5, 2022
Atlanta, GA