UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Pike Electric, Inc., Respondent.	OSHRC Docket No. **06-0166**

Appearances:

Karen E. Mock, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Carla J. Gunnin, Esquire, Constangy, Brooks, & Smith, LLC, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Pike Electric, Inc. (Pike), is an electrical utility contractor with headquarters in Mount Airy, North Carolina. On July 12, 2005, one of Pike's work crews was in Flomaton, Alabama, to repair damage to residential power lines following a hurricane. Class A lineman Ronnie Adams was electrocuted while splicing a sagging power line from an elevated lift.

Occupational Safety and Health Administration (OSHA) compliance officer Dale Schneider investigated Adams's death on July 13, 2005. As a result of his investigation, the Secretary issued two citations to Pike on January 6, 2006.

Citation no. 1 alleges a serious violation of 29 C.F.R § 1910.269(a)(3) for failing to determine existing conditions related to the safety of the work to be performed before work on or near the power lines was started. The Secretary proposed a penalty of $ 7,000.00 for this item.

Item 1a of citation no. 2 alleges a willful violation of 29 C. F. R. § 1910.269(m)(3)(ii) for failing to open all switches, disconnectors, jumpers, tags and other means through which known

sources of electric energy may be supplied to the particular lines and equipment. Item 1b of citation no. 2 alleges a willful violation of 29 C. F. R. § 1910.269(n)(3) for failing to ensure temporary protective grounds were placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential. The Secretary proposed a grouped penalty of $ 70,000.00, for items 1a and 1b.

A hearing was held in this matter on July 6 and 7, and August 15, 2006, in Atlanta, Georgia. Pike stipulated jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

Pike denies it violated the cited standards. It also asserts the affirmative defense of unpreventable employee misconduct on the part of Adams with regard to items 1a and 1b of citation no. 2.

For the reasons discussed below, item 1 of citation no. 1 and item 1a of citation no. 2 are affirmed as serious, and penalties of $ 5,000.00 and $ 7,000.00, respectively, are assessed. Item 1b of citation no. 2 is vacated.

Facts

In July 2005, Pike sent a crew to Flomaton, Alabama, after the Gulf Coast area had been damaged by a hurricane. Alabama Power Company contracted Pike to assist with repairing downed power lines and broken poles. Pike's crew comprised six workers supervised by foreman and lineman Richard Green. The crew traveled to Flomaton on July 11 and spent the night. At 7:00 a.m. on July 12, Green and Pike linemen Ronnie Adams and Robert Mitchell met with employees from Alabama Power Company to discuss the repair work (Tr. 23-25). Green and Adams were Class A lineman. Mitchell was a Class C lineman (at the time of the hearing, he was a Class B lineman) (Tr. 56-58).

An Alabama Power Company representative warned Pike's employees to be on the lookout for portable generators. Homeowners often use portable generators as a temporary energy source when storms knock out power lines. If the homeowner hooks up the generator directly to the house's circuit (rather than using it to power a single appliance), energy from the generator could "backfeed" from the house and re-energize the power lines (Tr. 26-27).

After meeting with Alabama Power Company, Green held a meeting with the six Pike employees. He explained the work to be done and divided the men into two crews: Mitchell worked

with Ryan Chamberlain and Curtis Montgomery, and Adams worked with groundman Matthew Snow and equipment operator Todd Casey (Tr. 39, 66). Green assigned Adams's crew to replace a damaged pole and to re-hang the four lines on a three-phase tap line on Jackson Street (Tr. 37-39). Green worked with Adams's crew until they started setting the new pole, around noon. Then Green left to work with Mitchell's crew (Tr. 72-73).

Pike was treating the power lines as de-energized because Alabama Power Company had opened the switches inside the substation (which prevented the circuit from being completed and energizing the lines). At the pole directly outside the substation designated as Y5307 on Wilkerson Street, Pike opened the set of switches on the pole, flagged, tagged, and grounded them. Pike also removed the jumpers to the phases from the switches at pole Y5307 (Exh. C-5). Green testified Pike did this despite the open switches in the substation just a few feet away "as an extra layer of protection" (Tr. 32). Also, Pike opened the set of switches and flagged, tagged, and grounded them at a pole designated as Y7929 on Ringold Street (Tr. 30-32). When operating normally, the three-phase line is energized at 7,220 volts, phase to ground (Exh. J-1; Tr. 27).

The two poles (Y5307 and Y7929) were on the same power distribution line. Between these two poles, a tap power line ran down Jackson Street and terminated at a dead-end pole. The transformer located on the dead-end pole was not opened, tagged, flagged and grounded.

After Green left, Adams went up in an insulated lift to repair the damaged lines. Three of the lines (the neutral, the road phase, and the field phase) were broken. The fourth line (the central line) was sagging but intact (Tr. 61). Although Adams could have repaired the sagging central line without splicing it, he chose to cut the line. The line on which Adam was working was connected by a secondary line to a house at the end of Jackson Street (referred to at the hearing as "a doctor's house"). The homeowner had connected a portable generator to the house's circuitry which caused electrical energy to backfeed to the line Adams was splicing, energizing it. Adams was electrocuted when he cut the line (Tr. 40, 95, 222, 269). The company has no written work rule requiring employees working on de-energized lines to wear protective rubber gloves (Tr. 40, 44). Adams was wearing leather work gloves, but not rubber gloves that day.

Compliance officer Dale Schneider arrived at the site the day after Adams's death, on July 13, 2005. Following Schneider's investigation of the circumstances surrounding the fatality, the Secretary issued the citations that gave rise to this proceeding on January 6, 2006.

Discussion

> 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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Applicability of the three cited standards is not at issue in this case. Pike "does not dispute the cited standards apply to the alleged conditions" (Pike's brief, p. 6). Pike does deny it violated the cited standards and that it had knowledge of any violations.

Citation No. 1

Item 1: Alleged Serious Violation of § 1910.269(a)(3)

The Secretary alleges Pike committed a serious violation of § 1910.269(a)(3), which provides:

> Existing conditions related to the safety of the work to be performed shall be determined before work on or near electric lines or equipment is started. Such conditions include, but are not limited to, the nominal voltages of lines and equipment, the maximum switching transient voltages, the presence of hazardous induced voltages, the presence and condition of protective grounds and equipment grounding conductors, the condition of poles, environmental conditions relative to safety, and the locations of circuits and equipment, including power and communication lines and fire protective signaling circuits.

Section 1910.269(a)(3) requires the employer to "determine" existing conditions before starting work. Each work site has its own unique set of hazards, which is why the pre-work assessment required by this standard is important.

The citation alleges Pike violated this standard by failing to identify, evaluate, and control the hazards associated with energy sources such as residential portable generators. Pike argues it took appropriate precautionary steps to protect its employees. It contends it was not aware of the generator that caused electricity to backfeed to the line Adams cut, and thus could not protect against it.

After Pike's crew opened the switches and flagged, tagged, and grounded poles Y5307 and Y7929, they considered the distribution including the tap line on Jackson Street to be de-energized (Tr. 28-29). Houses all along Wilkerson Street were connected by secondary lines to the primary

distribution lines between poles Y5309 and Y7929. The distribution line that ran from Wilkerson Street down Jackson Street to the dead-end pole also connected to secondary lines that serviced several more homes and a shed (Exh. J-1).

Alabama Power Company warned Pike about the potential for backfeed from improperly connected portable generators. Green repeated this warning to his crew, but did not assign anyone to systematically survey the area for generators. Green testified he believed Adams surveyed the area, but this belief was based on his experience with Adams, and not on anything he observed or that Adams told him: "I had confidence in Ronnie. I had worked with him before on storms, and I had confidence in his work habits" (Tr. 46).

Todd Casey testified that Green mentioned generators in the morning meeting, but Green did not specifically assign anyone to look for them. Casey stated he did not look for generators before starting work, and he was not aware of anyone else looking either (Tr. 88-89).

Lineman Robert Mitchell gave somewhat contradictory testimony regarding Green's instructions about generators. He asserted the warning he received was: "They are out there. Beware" (Tr. 171). Mitchell did not conduct a sweep for generators, but stated he could hear them running. If he located a generator, he would turn it off (Tr. 171-172). At first Mitchell stated he did this after lunch (after he had been working all morning), but then amended it to before and after lunch (Tr. 173). He stated he could hear generators while he was in the air working on the lines. Despite Adams's death, Mitchell seemed unconcerned about the potential dangers of generators (Tr. 173-174):

> Q: What did you do [when you heard a generator running while you were working on a line]?
> Mitchell: They weren't in between my ground, so I wasn't worried about it.
>
> Q: Where were they located in relation to your ground?
> Mitchell: I don't understand your question. There are generators everywhere. They're all over.
>
> Q: Were those generators at houses that were along the same line that you were working?
> Mitchell: They were.
>
> Q: They were just outside the area that you had established your grounds?
> Mitchell: You've got to understand there's wire everywhere. I mean, they could have a generator on–well, they might not even have a line going to their house. . . .I mean, there's nothing to them. I mean, they can run that thing all day long, I don't have a problem with that.

Matthew Snow also stated the instruction Green gave them regarding generators was "be aware" of them (Tr. 109). Snow testified he saw three generators at three houses on Wilkerson, but he could tell by looking at the cords they were properly connected, with an orange drop cord running from the generator in the yard through the front door (Tr. 112). Green did not assign anyone to survey for generators, but, Snow stated, "That's just something we do. We come on the road, and we actually saw the generators from the road, and we stopped. When we pulled into Jackson, they were visible to us" (Tr. 111).

Green's testimony regarding the generators was vague. He stated, "The men surveyed the areas and they found generators" (Tr. 45). When pressed, Green conceded he was not present when this survey occurred, and no one reported back to him about finding generators, but he thought Adams conducted a survey based on his training (Tr. 47). Green stated that he did not personally look for generators. His actual instruction to the Pike employees was "to be on the lookout for" generators. He did not assign them to actively search for generators hooked up to any of the 20 structures (homes and sheds) serviced by the distribution lines (Tr. 48).

Pike contends that Green's instructions to be on the lookout for generators and that opening the switches and flagging, tagging, and grounding them at poles Y5307 and Y7929 were sufficient to meet the requirements of § 1910.269(a)(3). Pike argues it had no actual knowledge that a generator was improperly connected to the house on Jackson Street.

Pike's contention is rejected. Almost 20 years ago, the National Institute for Occupational Safety and Health (NIOSH) issued an alert entitled "Preventing Electrocutions by Undetected Feedback Electrical Energy Present in Power Lines" (Exh. C-1). The alert reported the electrocution deaths of two electrical workers (in separate incidents) who were working on lines and switches they thought were deenergized, but in which undetected backfeed electrical energy was present. These cases did not involve backfeed from portable generators, but they did demonstrate "the problem of feedback electrical energy in electrical transmission and distribution lines is always present and that diligent efforts should be applied to safeguard against it" (Exh. C-1, p. 3). NIOSH states, "Unless a power line is effectively grounded on both sides of a work area, it must be considered energized even though the line has been deenergized" (Exh. C-1, p. 4).

More recently, the Centers for Disease Control and Prevention (CDC) issued a warning to electrical workers working during power outages. The CDC states (Exh. C-2, p.1, emphasis in original):

> During power outages, many people use portable electrical generators. If the portable generator is improperly sized, installed, or operated, it can send power back to the electrical lines. This problem is called **backfeed** or feedback in the electrical energy in power lines. **Backfeed can seriously injure or kill repair workers or people in neighboring buildings.**

The CDC urged workers to "ground all lines on both sides of the work area unless he/she is wearing the proper personal protective equipment."

As an electrical utility contractor, Pike is aware of the hazards of backfeed caused by portable generators. The morning of July 12th, Alabama Power Company reminded Pike of the prevalent use of generators during power outages. Flomaton's location on the Gulf Coast in the middle of a particularly active hurricane season (Summer 2005) increased the probability that homeowners would have generators available. There were only 20 structures serviced by the three-phase line on which Adams's crew was working. A systematic survey of the houses among the four crew members (Green accompanied Adams's crew in the morning) would not have taken much time. Pike's method, such as it was, relied on generators being located in plain sight in areas Pike's crew was passing anyway. It did not allow for generators that may have been located in backyards or areas not easily seen from the street. Pike's crew did not knock on doors and ask people not to use generators. Mitchell stated he turned off generators if he saw them, but he did not account for homeowners turning them back on again, or other homeowners starting up generators after the electrical repair started. Pike's method left much to chance, with tragic results.

As an alternative to surveying the area for generators, Pike could have opened the switches on the five transformers on Wilkerson and Jackson Streets, a process estimated to take about five minutes per fuse. This would have protected Pike's employees against backfeed from any generators in the vicinity (Tr. 191-192).

Pike argues it had no actual knowledge of the generator's existence. Knowledge, actual or constructive, of the generator is not the issue for this item. Section 1910.269(a)(3) requires employers to determine the existing conditions relating to work safety, based on the information available, before

beginning work on the electrical lines. It is not Pike's failure to discover the improperly connected generator that violated the standard, it is Pike's failure to conduct an organized search for the generators, and to communicate the results of the search with all members of the crew. If Pike did not choose to conduct a search, it could have opened all the switches on the five transformers, or treated the lines as energized and worked hot. Pike, however, chose to do none of these, despite the warning from the Alabama Power Company, the generators randomly happened upon, and Mitchell's assertion that there were generators "everywhere."

Pike failed to comply with the terms of § 1910.269(a)(3). Its failure exposed Adams to the hazard of electrocution caused by backfeed in the line. Pike, through foreman Green, knew it had not adequately determined the existing conditions relating to work safety before it sent Adams up to repair the distribution line. Pike's violation of § 1910.269(a)(3) created a "substantial possibility that death or serious physical harm could result," which § 17(k) of the Occupational Safety and Health Act (Act) classifies as serious.

Item 1 is affirmed as a serious violation.

Citation No. 2

Item 1a: Alleged Willful Violation of § 1910.269(m)(3)(ii)

Section 1910.269(m)(3)(ii) provides:

> All switches, disconnectors, jumpers, taps, and other means through which known sources of electric energy may be supplied to the particular lines and equipment to be deenergized shall be opened. Such means shall be rendered inoperable, unless its design does not so permit, and tagged to indicate that employees are at work.

The citation alleges Pike violated this standard by failing to ensure backfeed from portable generators was protected against by "opening the barrels on each transformer within the section of conductors being worked on." Pike does not dispute that it did not open the transformer as alleged. Pike knew this was not done, and its failure to do so exposed Adams to the hazard of electrocution. Thus, proof of the violation of this standard hinges on the word "known." If the court determines the portable generator was a "known" source of energy, Pike violated § 1910.269(m)(3)(ii). If the court determines the generator was not a known source of energy, Pike was not in violation of the standard.

Pike relies on an extremely narrow sense of the word "known." Strictly speaking, none of Pike's employees may have known the exact location of the generator on Jackson Street that caused

the backfeed to the distribution lines, but that is only because they chose not to actively look for generators. Pike had been warned of the prevalence of generators in the area. Its crew members came across three generators as they drove down the street. Mitchell testified he could hear them running while he was aloft working on the lines.

In its brief, Pike states, "Mr. Snow believed that Adams had checked the doctor's house and had taken whatever necessary measures were needed to be taken" (Pike's brief, p. 9). This statement is not borne out by Snow's testimony. Snow stated that as they drove down Wilkerson, he looked on one side of the street and Adams looked down the other (Tr. 110). When asked if he had seen any generators on Jackson Street, Snow replied, "I didn't look off Jackson Street. Only Ronnie looked off of Jackson Street. He walked around while me and Todd were putting material on the pole" (Tr. 142). Snow's awareness that Adams walked around Jackson Street is not the same as knowing that Adams actually went up to a specific residence to determine whether a generator was in use. Pike's safety supervisor Earl Music testified the generator was located "about 3 to 5 feet out from the house" behind a tree (Tr. 208). The generator was outdoors, visible to anyone actually looking for generators in use. Philip Jensen, Pike's director of safety and training, investigated the accident for Pike. He testified there were actually two generators outside the doctor's house, and "[i]t appeared that the generators were in open view for Mr. Adams to see" from his position in the lift (Tr. 232).

Pike also states, "No witness testified to any generator being used in such a manner as to create a hazard of backfeed to the power line" (Pike's brief, p. 10). This statement is belied by Mitchell's testimony that, "There are generators everywhere. They're all over" (Tr. 174). Pike's knowledge that generators were prevalent and in use makes the generator on Jackson Street a "known" source of electrical energy. Pike was in violation of the cited standard.

Pike's Unpreventable Employee Misconduct Defense

Pike contends any violation of § 1910.269(m)(3)(ii) is a result of unpreventable employee misconduct on the part of Adams. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when

violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

Pike argues that Adams's misconduct was not wearing protective rubber gloves while working on distribution lines. This argument is rejected. The first element of the affirmative defense is having an established work rule designed to prevent the violation, not the injury. Pike's failure was in not opening the transformers. A work rule requiring employees to wear rubber gloves (which Pike did not, in fact, have (Tr. 40, 44)), is not designed to prevent a violation of § 1910.269(m)(3)(ii). The work rule must address the terms required by the standard.

Willful Classification

The Secretary alleges Pike's violation of § 1910.269(m)(3)(ii) is willful.

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev'd on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer's efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

Pike's violation of the standard was not willful. Adams was an experienced Class A lineman Tr. 58). Pike's crew had taken the precaution of opening the switches and flagging, tagging, and

grounding them on poles Y5307 and Y7929. Although Pike's "search" for generators was cursory, there is no evidence Pike acted with conscious disregard or plain indifference for the safety of the employees. Had Adams not spliced the distribution line, the grounds in place would have protected him from the backfeed of electrical energy present in the line (Tr. 204, 234).

The violation is properly classified as serious.

Item 1b: Alleged Willful Violation of § 1910.269(n)(3)

Section 1910.269(n)(3) provides:

> Temporary protective grounds shall be placed at such locations and arranged in such a manner as to prevent each employee from being exposed to hazardous differences in electrical potential.

The Secretary contends Pike should have installed grounding jumpers on both sides of the phase conductor where Adams was working on the line. Had Pike done so, the grounding jumper on the residence (downstream) side of where Adams cut the line would have prevented backfeed energy from the generator from causing an electrical potential difference on the line.

Pike does not train its employees to use equipotential zones. Instead, it trains them to use bracket grounding (Tr. 200). The Secretary believes this is enough to establish a *prima facie* case that Pike violated § 1910.269(n)(3). The preamble to § 1910.269(n)(3) indicates, however, that the Secretary did not intend for the standard to be interpreted narrowly (59 FR 4395):

> Final 1910.269 (n)(3) requires protective grounds to be so located and arranged that employees are not exposed to hazardous differences in potential. The final rule thus allows employers and employees to use whatever grounding method they prefer as long as employees are protected. For employees working at elevated positions on poles and towers, single point grounding may be necessary, together with grounding straps to provide an equipotential zone for the worker. Employees in insulated aerial lifts working at midspan between two conductor supporting structures may be protected by grounding at convenient points on both sides of the work area. Bonding the aerial lift to the grounded conductor will ensure that the employee remains at the potential of the conductor in case of a fault. Other methods may be necessary to protect workers on the ground, including grounding mats and insulating platforms. The Agency believes that this performance-oriented approach will provide the flexibility needed by employers, but will afford the best protection to employees.

The Secretary promulgated § 1910.269(n)(3) as a performance standard, in which she specifies the hazard to be protected against while giving the employer some leeway in achieving the desired

result. Pike argues it was in compliance with the standard until the moment Adams unexpectantly cut the line. Pike contends the grounds it had in place were adequate to protect Adams had he not cut the line. Clayton King, the Secretary's expert witness in electrical safety (Exh. C-4) agreed that, prior to Adams cutting the line, Pike had established an equipotential zone (Tr. 403).

It is determined Pike's use of bracket grounding in this instance met the requirements of the standard until the moment Adams cut the line. At that point, the generator side of the line was no longer grounded and the current flowed through Adams's body from hand to hand (Tr. 369). It was only after the splice that Pike was in noncompliance with the standard.

The Secretary must prove Pike had actual or constructive knowledge of the violation. Foreman Green had left the work area while Adams's crew was still setting the pole. He was not present when Adams went up in the lift. Linemen Green and Mitchell both stated they would have repaired the line by taking up the slack instead of splicing it (Tr. 62, 180). Green had no actual knowledge, imputable to Pike, that Adams planned to splice the line.

The record does not establish that Green had constructive knowledge that Adams would splice the line. To prove constructive knowledge, the Secretary must show that the employer could have discovered the violative condition with the exercise of reasonable diligence. "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1349 (No. 99-0191).

Green testified the assigned work was routine storm work in which Adams was experienced (Tr. 59). Although Pike did not have a written work rule requiring employees to wear rubber gloves when working on deenergized lines, Green instructed the employees at the morning meeting to wear their rubber gloves at all times (Tr. 40). Casey, Snow, and Mitchell all testified Green told them to wear rubber gloves that morning (Tr. 89, 116, 170). Green assumed Adams would repair the line by taking up the slack. It was reasonable for Green to assume that if Adams did cut the line, he would take additional steps to protect himself. Green had worked with Adams for at least seven years, and Adams had been qualified as a Class A lineman (Tr. 58).

The Secretary has failed to prove a violation of § 1910.269(n)(3). There is no evidence Pike knew that Adams would cut the line, thus removing the grounding protection Pike had in place. Item 1b is vacated.

PENALTY DETERMINATION

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

Pike employs more than 250 employees. It had been cited for OSHA violations within the three years prior to Adams's death. Pike has a written safety manual and a training program, and it employs full-time safety personnel. The company demonstrated good faith (Tr. 267).

The gravity of the violation of § 1910.269(a)(3) is high. An organized search for generators would have resulted in locating the generator on Jackson Street that created the backfeed that killed Adams. A penalty of $ 5,000.00 is assessed.

The gravity of the violation of § 1910.269(m)(3)(ii) is high. Failing to open all the transformers when it was known that generators were in use all over the work area resulted in the electrocution of Adams. A penalty of $ 7,000.00, is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of citation no. 1, alleging a violation of § 1910.269(a)(3), is affirmed and a penalty of $ 5,000.00 is assessed;

2. Item 1a of citation no. 2, alleging a violation of § 1910.269(m)(3)(ii), is affirmed as serious, and a penalty of $ 7,000.00 is assessed; and

3. Item 1b of citation no. 2, alleging a violation of § 1910.269(n)(3), is vacated and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 5, 2007