

United 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.

GEORGIA POWER COMPANY,

Respondent.

OSHRC Docket No. 12-0553

Appearances:

Lydia J. Chastain, Esquire, John Black, Esquire, U.S. Department of Labor
Office of the Solicitor, Atlanta, Georgia
For Complainant

Robert H. Buckler, Esquire, Tashwanda Colleen Pinchback, Esquire
Troutman Sanders, LLP, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Georgia Power Company (Georgia Power) is engaged in the business of providing electrical power generation, transmission and distribution to customers throughout the State of Georgia. On the evening of August 9, 2011, a line crew consisting of two journeyman linemen and an apprentice was assigned to repair a downed distribution line, 7,200 volts phase to ground. The line was downed during a thunderstorm earlier that evening in the area of the Brookfield substation grid, near Tifton, Georgia. The entire Brookfield grid lost power as a result of the downed line, which Georgia Power began to isolate in order to resume power to as many customers as possible. This was accomplished by re-energizing the rest of the grid except for the area west of a gang pole from the downed line and east of a recloser pole from the downed line. At approximately 9:00 p.m., after the crew met to discuss their job plan, one journeyman lineman went to the recloser pole to ground one end of the downed line. The other two crew

members stayed at the pole that was two poles west of the recloser pole to ground the line on that end. At the recloser pole, as the journeyman lineman ascended the pole in the bucket of his truck, he saw that the downed line attached to the top of the recloser pole was within six inches of an energized jumper. He attempted to notify the other crew members by radio but was unable to reach them. As he was descending in his bucket, an arc flash occurred above his head. The downed line had contacted the jumper, causing the arc flash and energizing the line. When the journeyman lineman reached the ground, he went towards the pole where the other crew members were. He came upon the apprentice, who told him that the other lineman had left that area and had gone towards the recloser pole. The other lineman was found lying on top of the downed line in a ditch. He had been electrocuted.

As a result of an investigation into the fatality, the Occupational Safety and Health Administration (OSHA) issued a serious citation on February 8, 2012. Georgia Power timely contested the citation. The citation, as amended, alleges Georgia Power violated 29 C.F.R. § 1910.269(a)(3) by failing to determine the existing conditions related to safety before work began on or near electric power lines or equipment.¹ The citation proposes a penalty of \$7,000.

Georgia Power denies that it violated the cited standard. It asserts that the troubleman and engineer who directed the resumption of electric power to the east of the recloser pole and to the west of the other pole, as well as the line crew, properly evaluated the conditions before starting work. Georgia Power argues that the lineman who died violated its rule to not touch any line until confirming that the line has been grounded. It asserts that the lineman was engaged in unpreventable employee misconduct.

The hearing in this matter was held in Macon, Georgia, on October 16-18, 2012. Jurisdiction and coverage are stipulated. The parties filed post-hearing briefs on March 4, 2012.

For the reasons discussed, the alleged serious violation of 29 C.F.R. § 1910.269(3) is vacated.

The Accident

Georgia Power is engaged in the business of electrical power generation, transmission and distribution throughout the State of Georgia. Its headquarters office is in Atlanta, Georgia. Georgia Power is a large employer.

¹ The citation initially alleged a violation of 29 C.F.R. § 1910.269(m)(3)(ii). The citation was amended to allege a violation of 29 C.F.R. § 1910.269(a)(3) by Order issued August 3, 2012.

On the evening of August 9, 2011, during an electrical storm near Tifton, Georgia, lightning struck a power pole located on Georgia Highway 82, causing a power line (Line) to break in two and fall down. The incident caused the entire Brookfield substation grid to lose power. Georgia Power dispatched employees to locate the downed Line, isolate the broken section of the Line, restore power to as many customers as possible, and repair the downed Line. An Engineer was the first to arrive at the location of the downed Line. He could see from his car that the Line was hanging from a three-phase recloser pole designated #S2217 (Recloser Pole). He did not leave his car to look more closely at the Line hanging from the Recloser Pole. The Engineer reported the location of the Line to Georgia Power's Distribution Control Center (DCC) in Macon. He then left the area to perform the switching necessary to establish an isolation zone and to restore power as much as possible (Tr. 86-92, 293-94, 300-10).

Shortly after 7:30 p.m., a Troublemaker arrived at the Recloser Pole. His job was to open certain switches, as directed by the DCC. He was also responsible for assessing the situation and reporting any unusual conditions to the DCC, including informing the DCC if a condition on the pole made it an unsafe isolation point. The Engineer stopped by and told the Troublemaker he was on his way to restore power to the Recloser Pole. Following instructions from the DCC, the Troublemaker opened six switches at the top of the Recloser Pole, using his insulated telescoping pole, so that when the Engineer restored power to the east side of the Recloser Pole, the west side of that pole, including the part of the Line upon which repairs would be performed, would remain de-energized. After opening the switches on the Recloser Pole, the Troublemaker left the site to do more switching work. He had not observed any problems with the downed Line being in close proximity to parts of the Recloser Pole that would soon be re-energized (Exh. C-8; Tr. 80-84, 101, 105-09, 121-34, 140-46, 171-74, 310-14).

The Troublemaker returned to the Recloser Pole around 9:00 p.m., to open the three recloser handles on that pole he had forgotten to open previously. He knew that, by that time, power had been restored to the east side of the Recloser Pole. With his truck's spotlight directed up on the Recloser Pole, the Troublemaker began opening the recloser handles with his telescoping pole. As he did so, he noticed that the Line was hanging very close – less than ten inches – to an energized component called a jumper. The Troublemaker believed that the Line had moved, as he had not noticed it being so close before. He decided to tell the repair crew about the Line's proximity to the energized jumper (Tr. 148-61; 173-74).

Georgia Power had dispatched a three-person line crew to repair the Line. The first lineman (Lineman 1) arrived shortly after 9:00 p.m. He parked two poles west of the Recloser Pole, at what is shown as Pole B on Exhibit C-1.² Pole A, also shown on C-1, was between Pole B and the Recloser Pole. Poles A and B were within the isolation zone, meaning there was no power going to them. The apprentice lineman (Apprentice) arrived next, followed by the second lineman (Lineman 2). These two crew members also parked at Pole B. The Troubleman drove down to Pole B after he finished his work on the Recloser Pole. He gave Lineman 2 the clearance points for the isolation zone and told him the Recloser Pole was one of the isolation points. Lineman 2 radioed the DCC and established a clearance for the isolation zone at 9:32 p.m. Receiving a clearance meant the crew had permission to test the de-energized Line for voltage and then, if none was present, to ground the Line. Once grounds were installed, the crew could work the Line as de-energized (Tr. 163-66, 193-98, 246, 249, 256, 275, 324-26).

The Troubleman testified that while Lineman 2 was speaking to the DCC by radio, he told Lineman 1 that the Line at the Recloser pole was near the energized jumper, that the Line could “get in it,” and that “somebody’s going to have to look at it.” The Troubleman also testified that Lineman 1 responded that they would go look at it and take care of it. The Troubleman then left the site to respond to other trouble calls (Tr. 166-70, 180-81, 211, 330).

After the Troubleman left, the crew held a job safety briefing led by Lineman 1, using the job briefing form he had filled out earlier. The crew discussed the isolation points and the fact that power had been restored to the east side of the Recloser Pole. They also discussed that the Line’s voltage was 7,200 from phase to ground and that the Line needed to be grounded. The crew members discussed other general hazards, such as the terrain and the traffic along the highway. Lineman 1 did not tell the other crew members that the Line was hanging close to an energized jumper on the Recloser Pole. He also did not say anything about going to look at the Recloser Pole, and no one on the crew did so before the work began (Tr. 199-201, 206-213, 245-49, 275, 326, 329-33).

At the job briefing, the crew decided that the Apprentice would test and ground the end of the Line hanging from Pole B and that Lineman 1 would observe his work from the ground. Lineman 2 would go to the Recloser Pole to test the Line for voltage and ground the Line at that

² Exhibit C-1 is a diagram showing the Brookfield substation, the Recloser Pole and other nearby poles. Exhibit R-5 is the same diagram but contains more detail.

end. The crew would then meet back in the middle, near Pole A, so that they could repair and rehang the Line (Tr. 214, 275-76, 333, 339-40).

After the job briefing, the Apprentice went up in his bucket at Pole B and began his work. As he was applying the final ground to the Line, Lineman 1 told him that he was going to walk over to Lineman 2's location at the Recloser Pole. The Apprentice finished his grounding work and started to descend in his bucket. As he did so, he saw a big "blue ball of fire on top of the [Recloser Pole], and the whole ditch line caught on fire" (Tr. 340-44).

Lineman 2, meanwhile, set up his truck with the spotlight on the Recloser Pole. He then went up the pole in his bucket, and when he was 18 to 20 feet from the ground, he saw that the Line was hanging about six inches from an energized jumper. He realized the Line's location made it unsafe to ground the Line as he could bump it into the jumper, thereby causing an arc flash. Lineman 2 was also concerned that a crew member might go "down there and grab [] ahold of that wire and sw[i]ng it into that energized jumper." He attempted to call the other crew members on his radio but could not reach them due to traffic on the radio. Lineman 2 began to descend in his bucket, and, as he did so, a very "intense ball of fire" erupted above his head on the Recloser Pole. The fire ran down the Line and set the grass on fire. When Lineman 2 got to the ground, he went towards Pole B where he met with the Apprentice, who told him that Lineman 1 had gone towards the Recloser Pole. The Apprentice called 911, and Lineman 2 called the DCC to tell them to "drop the breaker" out of the Alapaha substation to de-energize the Line. Lineman 2 found Lineman 1 lying face down on top of the Line in the ditch between Pole A and the Recloser Pole. As soon as he heard from the DCC that the breaker was open, Lineman 2 pulled Lineman 1 out of the ditch and started CPR. Emergency personnel took Lineman 1 to the hospital, where he was pronounced dead (Tr. 222-39, 264-65, 344-46, 351).

After the accident, Georgia Power performed an investigation. One recommendation in the resulting report was that "[w]hen there is an abnormal situation at an energy source, crews should visit the location as part of the [Job Safety Briefing] discussion." Another was to review with all employees the rule: "It's Not Dead Until It's Grounded" (C-17; Tr. 243-44, 250-52).

The Cited Standard, as Amended

Section 1910.269(a)(3) provides as follows:

Existing conditions. 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.

The Alleged Violation, as Amended

The citation, as amended, alleges that Georgia Power violated 29 C.F.R. § 1910.269(a)(3) as follows:

- (a) On or about August 9, 2011, on Georgia Highway 82 East,³ where the work to be performed was repair of a downed power line (the “Line”) hanging from a three-phase recloser pole #S2217 (the “Pole”), the employer failed to identify, evaluate and control the hazards associated with the configuration of the components on the Pole before starting work. Specifically, the employer opened switches at the top of the Pole and restored energy to the East side of the Pole without determining that the Line was hanging near a jumper which became energized upon the restoration of energy to the East side of the Pole. This existing condition was related to the safety of the work to be performed as any contact between the Line and the jumper once it was energized would cause the Line to become energized.

- (b) On or about August 9, 2011, on Georgia Highway 82 East, where the work to be performed was repair of a downed power line (the “Line”) hanging from a three-phase recloser pole #S2217 (the “Pole”), the employer failed to identify, evaluate and control the hazards associated with the Line hanging near a jumper before continuing the work on or near the Line. This existing condition was related to the safety of the work to be performed as any contact between the Line and the energized jumper would cause the Line to become energized.

Georgia Power’s Motion to Dismiss

On July 16, 2012, the Secretary filed a motion to amend the citation to allege a violation of a different standard and to change the alleged violation description, as reflected above. Georgia Power objected, arguing that in seeking to amend the citation issued on February 8, 2012, the Secretary used entirely different facts from those alleged in the original citation. Therefore, according to Georgia Power, the amendment should be denied as it was in violation of the six-month statute of limitations set out in § 9(c) of the Occupational Safety and Health Act, 29 U.S.C. § 659 *et seq.* (Act). The Secretary’s motion was granted by Order of August 3, 2012.

³ The Secretary’s motion to amend a typographical error by changing the incident location from “Georgia Highway 84” to Georgia Highway 82” was granted at the hearing, over the objection of Georgia Power (Tr. 35-38).

The motion was granted because, while the amendment changed the standard cited, the essential facts remained the same. The Order noted that the amended alleged violation description simply reflected with more specificity the nature of the alleged charges. The amendment did not prejudice Georgia Power, and the initial hearing date was continued for two months to allow Georgia Power to engage in additional discovery.

At the hearing, Georgia Power renewed its objections to the Secretary's amendment and made an oral motion to dismiss the citation. The Secretary responded to the motion. A decision regarding Georgia Power's motion was held in abeyance, and the parties were instructed to brief the issue in their post-hearing briefs (Tr. 11-36). The parties have done so (S. Brief, pp. 18-26; R. Brief, pp. 23-31). The parties' positions as set out in their briefs have been fully considered. Particular attention has been given to Georgia Power's claim that "new evidence" it discovered, in depositions taken after the Order, supports its assertion that the citation should be dismissed because the Secretary's amendment used facts not obtained during the OSHA inspection. The court does not agree. As concluded in the Order, the essential facts in this case remain the same, the amendment relates back to the original citation date, and, consequently, the amendment does not violate the six-month statute of limitations set out in § 9(c) of the Act. Georgia Power's motion to dismiss is denied.

Discussion

To demonstrate a violation of an OSHA standard, the Secretary has the burden of proving that: (a) the cited standard applies; (b) the employer did not comply with the terms of the cited standard; (c) employees had access to the violative condition; and (d) the employer had 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 condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

As noted above, Georgia Power is engaged in the business of providing electrical power generation, transmission and distribution. In addition, the facts of this case show that on the evening of August 9, 2011, Georgia Power's employees were performing work that was covered by the cited standard. The cited standard therefore applies in this case.⁴

⁴ Georgia Power contends in its post-hearing brief that the cited standard does not apply, based on testimony of its expert witness (R. Brief, pp. 31-33. *See also* Tr. 711-16, 748-54, 801-03). Georgia Power's contention is rejected.

The cited standard, set out above, requires that existing conditions related to the safety of the work “shall be determined” before work is started on or near electrical lines or equipment. Each work site has its own unique hazards, which is why a pre-work evaluation or assessment is significant. The standard, however, does not explain what “shall be determined” means or set out what the employer must do to meet the terms of the standard. In *Trinity Indus.*, 1997 WL 166156 (No. 95-455), the Judge observed that the term “evaluate” was not defined by the standard cited in that case. The Judge stated that “[t]he standard requires that an evaluation be reasonable, not that it be made with perfect foresight.” The Judge also stated that “[a] rational initial evaluation is all that is required.” *Id.* at *7.⁵ The court concludes that § 1910.269(a)(3), the standard cited in this case, requires a reasonable or rational evaluation of existing conditions before work is started on or near electrical lines or equipment.⁶

Alleged Violation Description (a)

In regard to alleged violation description (AVD) (a), the Secretary alleges that Georgia Power “opened switches at the top of the Pole and restored energy to the East side of the Pole without determining that the Line was hanging near a jumper which became energized upon the restoration of energy to the East side of the Pole.” The evidence shows that the Engineer who arrived first at the site saw the Line hanging from the top of the Recloser Pole from his car. He reported his findings to the DCC, and he then left to perform the switching that was necessary to establish an isolation zone and to restore power to as many customers as possible (Tr. 300-10).

The Troubleman arrived on the site at approximately 7:30 p.m. His job was to open switches, as directed by the DCC, to assess the situation, and to inform the DCC of any unusual conditions, including if a condition on a pole made it an unsafe isolation point. The Engineer came by and told the Troubleman he was on his way to restore power to the Recloser Pole. As instructed by the DCC, the Troubleman opened six switches on the Recloser Pole, using his insulated telescoping pole. Thus, when power was restored to the east side of the Recloser Pole, the west side of that pole, including the downed Line would remain de-energized. After opening the switches, the Troubleman left to do more switching elsewhere. He had not observed any

⁵ Affirmed by the Review Commission. 18 BNA OSHC 1635 (1999), vacated on other grounds by the Fifth Circuit. *Trinity Industries v. OSHRC*, 206 F.3d 539 (5th Cir. 2000).

⁶ The Secretary cites to a decision of this court, *Pike Elec., Inc.*, 21 BNA OSHC 2153 (No. 06-0166, 2007), to support her position that Georgia Power violated the cited standard in this case (S. Brief, pp. 28-30). The facts in that case are very different from those presented here. The Secretary’s reliance on that case is unpersuasive.

problems with the Line being in close proximity to parts of the Recloser Pole that would be re-energized (Exh. C-8; Tr. 80-84, 101, 105-09, 121-34, 140-46, 171-74, 310-14).

The Troubleman returned to the Recloser Pole around 9:00 p.m., to open the recloser handles on that pole. He was aware that, by that time, power had been restored to the east side of the Recloser Pole. It was dark, and, with his truck's spotlight directed up on the Recloser Pole, the Troubleman began to open the recloser handles with his telescoping pole. As he did so, he saw that the Line was hanging less than ten inches from an energized jumper. The Troubleman believed the Line had moved, as he had not noticed it being so close before. He recognized at that point that the Line's location was a potential hazard and that he needed to tell the repair crew about the Line's proximity to the energized jumper (Tr. 148-61; 173-74).

The Secretary faults Georgia Power for restoring energy to the east side of the Recloser Pole without determining that the Line was hanging near a jumper which became energized when power was restored to the Recloser Pole's east side. The evidence, however, does not establish that the Line, when the Engineer and the Troubleman saw it earlier in the evening, was hanging close enough to the jumper that it would have been a hazard once power was restored to the Recloser Pole. The Troubleman testified that when he was at the site the first time, he had not noticed any problems with the Line's location. He also testified he had to move around the Recloser Pole to open the six switches and would not have been able to do that work if the Line had been as close as it later was to the jumper.⁷ It was only when he returned to the site at 9:00 p.m. that he observed that the Line was less than ten inches from the energized jumper. It was then that he determined the location of the Line was a potential hazard and he needed to tell the crew (Tr. 131-34, 148-61, 173-74).

The record indicates the Line moved closer to the jumper during the time the Troubleman was gone from the site. The Troubleman's testimony in this regard was credible. The testimony of Georgia Power's expert supports that of the Troubleman.⁸ The expert testified that a broken line hanging down on the ground tends to move closer to the pole depending on its weight and angle and factors like wind and friction (*i.e.*, the ground being wet) (Tr. 762-65, 803-04). The record shows that the grass in the area of the Recloser Pole was wet and slippery due to the

⁷ The Troubleman noted that while the Line and Recloser Pole were de-energized then, he still had to avoid contact with the Line because of Georgia Power's work rule, *i.e.*, "It's not dead unless it's grounded" (Tr. 131-33, 156).

⁸ The expert, with 40 years of experience in the electrical power generation, transmission and distribution industry, was accepted as an expert in regard to safety, customs, practices and procedures in the industry (Tr. 735-38).

earlier thunderstorm and that, at 9:00 p.m., the wind was still blowing (Tr. 195-96, 211, 326-27, 336). Also, the Troubleman testified that when he left the site after his first visit, it started raining again, so much so that he sat in his truck at a nearby site for six to ten minutes to avoid getting drenched (Tr. 181-83). The expert's opinion indicating that the Line could in fact have moved closer to the Recloser Pole during the time the Troubleman was gone, especially in view of the wind and the wet ground conditions, is credited (Tr. 762-65, 803-04).

Based on the record, the Troubleman made a reasonable evaluation of the existing conditions at the site, as the standard requires. Specifically, when he was at the site the second time, he determined the Line was a potential hazard, as it was within ten inches of the energized jumper, and that he needed to tell the repair crew. The Secretary disagrees, stating he "should have made this determination during his first visit to the site, before opening the switches which he knew would establish the Recloser Pole as a clearance point." (S. Brief, p. 33). As found above, however, the Line was not in the same location at 9:00 p.m. as it had been at 7:30 p.m. In any case, second guessing the actions of Georgia Power after the fact is not the role of the Commission. This is particularly true in this case, where the Troubleman has been in his position for eight years and before then was a lineman for Georgia Power for 20 years (Tr. 176). The record also shows that Georgia Power considers the Troubleman a safe and responsible employee who identifies the hazards associated with his jobs and takes the necessary precautions (Tr. 641-42). While the Troubleman could have told the DCC of the Line's condition, Georgia Power's expert testified that notifying the crew was an acceptable alternative (Tr. 830).

The Secretary has failed to meet her burden of proving that Georgia Power violated the terms of the cited standard with respect to AVD (a).

Alleged Violation Description (b)

In regard to AVD (b), the Secretary alleges that Georgia Power "failed to identify, evaluate and control the hazards associated with the Line hanging near a jumper before continuing the work on or near the Line." In this AVD, the allegation is that the crew began working on or near the electric lines and equipment at the site without having first determined the existing conditions at the Recloser Pole (S. Brief, p. 33).

The Secretary questions the Troubleman's testimony that he reported the Line's condition to Lineman 1 (S. Brief, pp. 8-9, 34-35). The Troubleman testified he told Lineman 1 that the Line was near the energized jumper, that the Line could "get in it," and that "somebody's going

to have to look at it.” He also testified that Lineman 1’s response was that they would go look at it and take care of it. Although he did not convey this information to the other crew members, the Troubleman believed that Lineman 1 had understood what he told him based on his response and his facial expression (Tr. 166-70, 180, 211, 330).

The Troubleman’s testimony cannot be verified because Lineman 1, the only person to receive the information, is deceased. The Troubleman’s testimony is nonetheless credited. First, he has been consistent about what he told Lineman 1 throughout this matter. Besides his testimony at the hearing, he informed OSHA of his conversation with Lineman 1 during the inspection. He also advised the Georgia Power officials of that conversation during their investigation (Exh. C-17, p. 2, § 5; Exh. C-21, pp. 2-3). Second, the Troubleman explained at the hearing that he gave the information to Lineman 1 because Lineman 2 at that moment was on the radio with the DCC. He also explained that he had worked with both Lineman 1 and 2 before, that both were qualified, experienced linemen, and that he considered telling one man the same as telling the crew (Tr. 166-68, 178-80). In this regard, the record shows that while Lineman 2 was the senior lineman at the site, the crew was “self-directed,” *i.e.*, they had no supervisor with them but they could contact an on-call supervisor if it became necessary (Tr. 185-87). Third, the court observed the Troubleman’s demeanor as he testified and found him to be a reliable and trustworthy witness.

The record shows that Lineman 1 did not pass on the information the Troubleman gave him to the rest of the crew, even during the safety briefing the crew held to address the hazards at the site (Tr. 211, 330-33). It is unknown why Lineman 1 did not convey the information to the rest of the crew. The Line’s condition was clearly a potential hazard that affected the safety of the work. It is possible Lineman 1 did not understand the significance of the hazard. Certain other actions suggest he might have wanted to finish the job as soon as possible. It was 9:00 p.m. on a Tuesday evening. Despite supervising the Apprentice’s work at Pole B, the record shows, however, that he left the Apprentice who was still grounding the line, and started walking to the Recloser Pole (Tr. 263, 340-41, 343-344, 349-350). Further, the record indicates that when Lineman 1 reached the area where the Line was lying on the ground, he may have picked it up with the intent of beginning the repair work without first confirming the Line was grounded. When he was found, Lineman 1 was lying face down on top of the Line in a ditch. His hands were clenched, although he did not have anything in his hands. He was badly burned

in the face, chest and arms, and his gloves were burned. He had a new span of wire with him, as well as a flashlight, a set of bolt cutters and an automatic zip sleeve (Tr. 235, 264-65, 270-72, 344-45, 351-52). The supervisor of the crew (Supervisor) testified about the condition of Lineman 1's gloves; there were burn marks on the palms and fingers of both gloves, and the right glove's thumb was essentially burned off (Tr. 621-25, 629-30).⁹ It would appear, therefore, that Lineman 1 may have violated Georgia Power's work rule that prohibits touching a power line without confirming that it is grounded (Exh. C-21; Tr. 271-72, 350-51, 562; 607-08, 619).

The Secretary contends the crew should have gone to look at the Recloser Pole and made a determination of the hazard it presented before beginning any work on the Line (S. Brief, pp. 33-34). If Lineman 1 had told the other crew members what the Troublemaker said, the crew likely would have done so. But Lineman 1 did not convey that information. The Secretary also indicates that Lineman 2 should have observed the Line from the ground before going up in the bucket (S. Brief, pp. 35-36; *see also* Tr. 223). Lineman 2 could have done that. He testified, however, that even if he had known of the Line's condition, he probably would have gone up in the bucket anyway to get a better look (Tr. 262-63). Regardless, it is clear from the record that while the Line was too close to the energized jumper to be safely grounded, the act that created the arc flash may have been Lineman 1's picking up the Line, causing it to contact the jumper.

The Secretary further contends that Lineman 2's observing the Line's condition while going up in the bucket was too late and was not a timely determination under the standard (S. Brief, pp. 36-38). The court disagrees. As noted above, Lineman 2 testified he would probably have gone up in the bucket to get a better look at the Line anyway; he said it was dark and had been raining, which can affect perspective, and he wanted to get a closer look to see if the Line was actually too close for him to ground it (Tr. 262-63). He also testified that it was when he was about halfway up the Recloser Pole that he could see that the Line was about six inches from the jumper and therefore too close for safe grounding (Tr. 223-25, 261). It was at this point that he determined the Line was a hazard and that to safely ground it the entire Recloser Pole would need to be de-energized (Tr. 224-26, 272-73). Under the circumstances of this case, Lineman 2 made a reasonable evaluation of the existing conditions on the Recloser Pole, as required by the standard.

⁹ While this individual supervised the employees on the subject crew during the day, he was not supervising the crew the evening of the accident (Tr. 621-23, 653-57). The Supervisor brought Lineman 1's gloves with him to the hearing. Exhibits R-27A and B were admitted as two photographs of the gloves (Tr. 624-27, 909-10).

The Secretary has failed to meet her burden of proving that Georgia Power violated the terms of the cited standard with respect to AVD (b).¹⁰

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Item 1 of Citation 1, as amended, alleging a serious violation of 29 C.F.R. § 1910.269(a)(3), is vacated.

/s/ Ken S. Welsch
KEN S. WELSCH
Judge

Dated: April 29, 2013
Atlanta, Georgia

¹⁰ Since the court is finding that Georgia Power did not violate § 1910.269(a)(3), there is no need to discuss the unpreventable employee misconduct defense. However, it is noted that Georgia Power was cited for failing to determine the existing conditions before starting the work, it was not cited because Lineman 1 may have picked up the Line without ensuring it was grounded.