United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PUBLIC UTILITIES MAINTENANCE, INC., Respondent.	OSHRC Docket No. 08-1831

APPEARANCES:

For the Complainant:
James Glickman, Esq.
U.S. Department of Labor
Office of the Solicitor
JFK Federal Building, Room E-375
25 New Sudbury Street
Boston, Massachusetts 02203

For the Respondent:
Chris Georgoulis, Esq.
Georgoulis & Associates, PLLC
45 Broadway, 14th Floor
New York, New York 10006

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a citation issued by the Secretary of Labor ("Secretary"). The citation alleges that respondent, Public Utilities Maintenance, Inc. ("PUMI") committed a serious violation of the Act by failing to comply with the standard at 29 C.F.R. § 1910.269(l)(2) on the grounds that "Employees were violating the safe approach distance requirements when they were painting the power transmission tower." The Secretary proposes a penalty of $4,200.00 for the violation. Respondent contested the citation, and the hearing in this matter was held on June 3-4 and 8-9, 2009, in Boston, MA. Both parties have filed post-hearing briefs and reply briefs. For reasons set forth below, the citation is affirmed and the proposed penalty is assessed.

BACKGROUND

PUMI is an industrial painting contractor that specializes in the painting of energized electrical transmission towers. (Tr. 509) On July 22, 2008, the painting crew was assigned to paint electrical towers 345 and 346 owned by National Grid in Belchertown, MA., which were part of National Grid's E5/F6 transmission line. (Joint Prehearing Statement, Admitted Facts 4(d) and (f)) PUMI had already completed painting approximately 130-150 towers on the line. (Joint Prehearing Statement, Admitted Fact 4(d))

The towers on the E5/F6 line are constructed of steel. (Tr. 19)[1] Each support a total of six transmission wires. (Tr. 26) The towers have three cross-arms, lower, upper and middle, that extend horizontally in two directions from a vertical support. (Exhibits G-1-5) The towers have two configurations. One type is a "straight" wire configuration where the transmission wires are attached to a vertical insulator that hangs down from the cross-arms of the tower. (Tr. 28, 37) Tower 346 has a straight wire configuration. The second type of tower has a "looped" wire configuration. On this type of tower, the transmission wires are attached to horizontal insulators that extend in two directions from the cross-arms of the tower. (Tr. 23-26) The section of wire on either side of the insulators is connected by a "jumper loop" that hangs beneath the insulator and completes the electrical connection. (Tr. 25-26, Ex. G-1) This jumper loop is a live conductor. (Tr. 29) Tower 345 has a looped configuration. (Tr. 23) Both towers carry 69,000 volts of electricity. (Joint Prehearing Statement, Admitted Fact 4(d))

To prevent rusting, the towers are painted approximately every twenty years. (Tr. 47, 100-101) Besides painting, the only other task performed by PUMI on the towers of the E5/F6 line was to attach aerial numbers to the towers so they could be more easily identified. (Tr. 48) The work did not alter or improve the towers' structure or change the configuration of the lines. The work did not involve the addition or replacement of the structure of the transmission system. (Tr. 101)

The contract between PUMI and National Grid called for the lines to be painted while energized. (Tr. 98) In only one instance, in 2006, was a tower deenergized prior to painting. (Tr. 419) When painting energized lines, the minimum approach distance ("MAD") for the E5/F6 line was 36 inches. (Tr. 183-185) This is the distance that, under the cited standard, each painter is required to keep away from the energized parts on the tower. (Tr. 70)

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[1] "Tr" refers to the hearing transcript.
"Ex. G-*" refers to the government's exhibits.
"Ex R-*" refers to PUMI's exhhibits.

On July 22, 2008, a crew, supervised by foreman Nestor Chaparro, was assigned to paint towers 345 and 346. As foreman, Chaparro had the authority to order a work stoppage in case of a serious safety issue. (Tr. 95, 374) Chaparro also had the authority to request deenergization before a tower is painted. (Tr. 422) Chaparro's supervisor that day was Peter Karantenislis, PUMI's project manager. (Joint Prehearing Statement, Admitted Fact 4(e)) PUMI's Site Specific Safety Plan requires the company to "supply a qualified worker to act as a safety observer at each tower the painters are working." (Ex.R- 6, p.6, Tr. 97, 387) The purpose of the safety observer is to warn any painter if he is encroaching on the MAD and to be available to perform a rope rescue if a painter is injured on the tower. (Tr. 97, 100) The employees painting each tower have a crew leader. It is the responsibility of the crew leader to climb the tower and check the condition of the tower. The crew leader also checks the distance from the cable to the tower. Once he determines that the cables are the correct distance, he gives the order for other employees to climb up the tower. (Tr. 332, 456) Under the safety plan, however, the foreman as well as the crew leader has the responsibility to assess each tower to insure that minimum approach distances can be maintained. (Ex. R-6, pp. 5-7, Tr. 97-98) Where a structure poses a concern, it is required to be noted and painted at such time as the line can be taken out of service. (Ex. R-6, pp. 6-7, Tr. 97-98*)* Company policy is that if a tower arm was too close to a wire, the employees are not to paint it. The decision whether to paint the arm is made by the painters. (Tr. 402, 465, 470)

The painters are equipped with two lanyards. (Tr. 55) This enables them to move along the arm while clamped and while kneeling, lock the second clamp at the new location, then remove the first clamp and continue their movement as they paint. (Tr. 460) The painters kneel and crawl as they move along the transmission arm. (Tr. 470) They never stand on the arms. (Tr. 460, 469-470) Painters carry a gallon bucket of paint onto the towers and painting mitts which they would dip into the paint and rub on the towers. (Tr. 53)

Crew leader Carlos Mejia had more than 30 years experience painting towers. (Tr. 331, 402) On July 22, 2008, Chaparro pointed out the loop at Tower 345 and told the employees that they had to be careful. (Tr. 389) Mejia was assigned to climb Tower 345 because he had experience with loop towers. (Tr. 399, 464) Nobody saw what happened next. However, testimony from National Grid and PUMI employees at the site establish that there were a flash and the sound of an explosion. (Tr. 60-61, 474) Employees found Mejia seated on the middle arm, conscious, grimacing in pain, but moving. (Tr. 62-63, 475) A rescue was performed. (Tr. 63, 475) After the rescue, Mejia could not remember what occurred.

(Tr. 476)

As a result of the accident, OSHA compliance officer ("CO"), Robert Whitehall, conducted an inspection of the site. As a result of that inspection, PUMI was issued a citation alleging two serious violations of the Act. Item 1, which alleged a violation of 29 C.F.R. § 1910.269(c) was withdrawn prior to the hearing and is no longer before the Commission. Item 2 alleged a serious violation of 29 C.F.R. § 1910.269(l)(2)[2] on the grounds that "Employees were violating the safe approach distance requirements when they were painting the power transmission tower." Under Table R-6, which sets forth the appropriate minimum approach distances based on nominal phase to phase voltage, the minimum approach distance for lines carrying 46.1 to 72.5 kilovolts of electricity is 3 feet. As noted *infra*, the lines at Tower 345 and 346 were carrying 69 kilovolts.

DISCUSSION

A. THE VIOLATION

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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[2]The standard provides.

> 1910.269 Electric power generation, transmission, and distribution.
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> (l) *Working on or near exposed energized parts.* This paragraph applies to work on exposed live parts, or near enough to them, to expose the employee to any hazard they present.
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> * * *
>
> (2) Minimum approach distances. The employer shall ensure that no employee approaches or takes any conductive object closer to exposed energized parts than set forth in Table R-6 through Table R-10, unless:
>
> (i) The employee is insulated from the energized part (insulating gloves or insulating gloves and sleeves worn in accordance with paragraph (l)(3) of this section are considered insulation of the employee only with regard to the energized part upon which work is being performed), or
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> (ii) The energized part is insulated from the employee and from any other conductive object at a different potential, or
>
> (iii) The employee is insulated from any other exposed conductive object, as during live-line bare-hand work.

1. Applicability of the Standard

At the outset, PUMI argues that the citation should be vacated because it was involved in construction work and, as such, the cited standard is inapplicable. PUMI relies primarily on 29 C.F.R. § 1926.12 which defines construction work as "work for construction, alteration, and/or repair, including *painting* and decorating" (emphasis added). PUMI asserts that it is well settled that a regulation should be construed to give effect to the natural and plain meaning of its words. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)(citing cases). According to PUMI, the plain meaning of 29 C.F.R. § 1926.12 is that painting constitutes construction work and, therefore, that the painting of the towers is governed under the Construction Industry Standards of Part 1926.

PUMI also argues that the legislative history of 29 C.F.R. § 1910.269 indicates that the standard was designed to cover electrical utility workers. The final rule mentions line workers, apprentice line workers, working line foremen, substation electricians and general utility mechanics but nowhere mention painters. 59 Fed. Reg. 4320, 4321 (Jan. 31, 1994).

PUMI reads the standards too narrowly. The construction industry standards at 29 C.F.R. Part 1926 only apply to employers who are engaged in construction work or in operations that are integral or necessary to construction work. *See B.J. Hughes,* 10 BNA OSHC 1545, 1547 (No. 76-2165, 1982). Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a non-construction operation. *Id.* Moreover, activities that are ancillary to and in aid of primarily non-construction activities are not construction work. *Royal Logging Co.,*7 BNA OSHC 1744, 1750 (No. 15169, 1979). Maintenance work is not considered construction work. *Gulf States Utilities Co.,* 12 BNA OSHC 1544, 1546 (No. 82-867, 1985) Indeed, by its own terms, 29 C.F.R. § 1910.269 specifically applies to the maintenance of power transmission lines. 29 C.F.R. §1910.269(a)(l)(i).

Here, it is not disputed that the purpose of PUMI's painting activities was to maintain the towers and prevent them from rusting. (Tr. 47, 101) Besides painting and putting on the aerial numbers, PUMI employees conducted no other work on the towers. (Tr. 48, 101) OSHA Instruction, CPL 2-1.38 (June 18, 2003) clearly addresses the instant situation. In pertinent part it states in Section X "Construction vs. Maintenance" at paragraph B. 4, that "[s]cheduled touch-up and spot painting done to maintain equipment or structures is not construction. Therefore, maintenance painting for power generating, transmission, and distribution equipment is covered by §1910.269, while painting to complete newly

built structures and buildings is construction covered by §1926. Additionally, a complete repainting job in one room or on a major portion of a structure or building is construction and removal of lead-based paint is also construction."[3]

The problem with PUMI's argument is that it assumes that the purpose for including painting within the definition of construction work is to deem all painting a construction activity. PUMI misreads the intent of the standard. Rather than making all painting a construction activity, the definition is intended to short-circuit any argument that painting that is integral or necessary to a construction activity is not covered under the construction industry standard. Thus, an employer painting a newly built addition to a house cannot claim that it was not engaged in construction work merely because it had no part in the actual construction of the structure.

The history of the standard, cited by PUMI, supports the applicability of the standard. Though not explicitly including painters, the preamble clearly states the intention that the standard is intended to apply to "maintenance" of transmission lines. 59 F.R. at 4322. Accordingly, the standard was intended to apply to the painting of transmission lines where, as here, the purpose of the painting is maintenance.

Moreover, under *Secretary of Labor v. CF&I Steel Corp.,* 499 U.S. 144 (1991), the Commission must defer to the Secretary's reasonable interpretation of OSHA standards. I find nothing unreasonable in the Secretary's determination that PUMI's painting activities are covered under the general industry standards. Accordingly, PUMI's argument must fail.

2. Were employees exposed to the hazard?

PUMI argues that the Secretary failed to prove that Mejia came within three feet of the electrified wire and, therefore, failed to establish that he was exposed to the hazard. Under PUMI's theory, there can be no exposure to the wires unless an employee actually comes within the three foot MAD. PUMI appears to be under the misconception that the MAD constitutes the borders of the zone of danger around the electrified wire and that unless an employee actually comes within that zone of danger he or she cannot be exposed to the hazard.

[3]The evidence establishes that PUMI's work here is more accurately characterized as a "touch-up" rather than a "complete repainting." PUMI employees were not required to paint any portion of a tower if they believed that they could not do so without coming uncomfortably close to the energized wires, and there were several occasions where parts of the towers went unpainted. (Tr. 375, 465, 470) Had this job been intended to constitute a "complete repainting" it would have been necessary to deenergize the lines. (Tr. 496) PUMI had not requested that a line be deenergized since 2006. (Tr. 419).

Respondent reads the concept of exposure too narrowly. The violation occurs when an employee comes within the three foot MAD. The zone of danger, however, is broader. The Secretary may prove exposure by showing that "employees either while in the course of their assigned duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in the zone of danger." *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2003 (No. 504, 1976), quoted in *Capform Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994). Here, the evidence establishes that Mejia had to kneel, sit or crawl on the tower arm and that the upper tower loop was only 32 inches above the highest diagonal member on the middle arm of the tower. (Ex. 16, pp. 4, 6, 7, Tr. 158-161, 163, 470) The lowest structural member of the arm was only 58 inches below the jumper loop (Ex. 16, pp 6-7) which left only 22 inches of space below the jumper loop that was not within the MAD. Mejia was in the zone of danger because any "minimal upward movement, inadvertent or otherwise, would have placed some part of [the employee's] body closer than the [minimum approach distance] from the energized parts." *North Landing Line Construction Co.,* 19 BNA OSHC 1465, 1471 (No. 96-0721, 2001).

In any event, as noted, *infra,* the preponderance of the evidence demonstrates that some part of Mejia's body came, at a minimum, one to two inches from the loop wire. This, standing alone, is sufficient to demonstrate that Mejia was exposed to the hazard.

3. Did PUMI fail to comply with the standard?

PUMI properly notes that there were no eye witnesses to the incident and that Mejia could not recall what had occurred. Therefore, it asserts that it cannot be determined with any certainty that Mejia violated the three foot MAD. Rather, it contends that it is possible that an electrical charge jumped and struck the employee. PUMI points to the testimony of CO Whitehall to support its contention that, under certain circumstances, an electrical charge can jump.

The CO's testimony does not support PUMI's argument. According to the CO, it is possible for an electrical charge to arc without a wire being touched. He noted that a 250,000 volt line could jump a foot or two. (Tr. 189) However, he also testified that a 69,000 volt line won't jump and that "[y]ou almost have to contact it." (Tr. 189) Further, he opined that, under the right temperature and humidity conditions, a 69,000 volt line could possibly jump an inch or two. (Tr. 193) Obviously, the voltage could have jumped an inch or two and struck Mejia, only if he was well within the three foot MAD[4]. (Tr. 208)

[4]It is also worth noting that Chaparro's initial reaction was that Mejia contacted the line. According to National Grid's System Control Operator, who was at the scene, Chaparro told him

While we cannot tell the particular details of the accident, there is no question that a preponderance of the evidence establishes that Mejia was shocked because some part of his body came well within the three foot minimum approach distance set by the standard.

4. Knowledge

An employer is charged with constructive knowledge of a violative condition if it failed to exercise reasonable diligence. *Precision Concrete Construction,* 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Here, the Secretary showed that PUMI had constructive knowledge because it could have known, with the exercise of reasonable diligence, that Mejia was exposed to coming closer than 36 inches from the power line, in violation of the standard. *North Landing Construction Co.*, 19 BNA OSHC at 1472.

Reasonable diligence involves several factors, including a employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to prevent the occurrence." *North Landing Construction Co.*, 19 BNA OSHC at 1472, *citing Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Specifically, an employer must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area, and the employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC at 1387*; Butler Lime & Cement Co*., 7 BNA OSHC 1973, 1975 (No. 855, 1979). A preliminary inspection must be made even where the employees are experienced. *J.H. MacKay Electric Co*., 6 BNA OSHC 1947 (No. 16110, 1978). Moreover, the actual or constructive knowledge of the employer's foreman or supervisor can generally be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC at 1164, 1993-95 CCH OSHC at 41,216. *See also Donovan v. Capital City Excavation Co. Inc.*, 712 F.2d 1008 (6th Cir. 1983) (actions of company supervisors are imputed to company).

The evidence demonstrates that PUMI was aware that looped towers presented special dangers due to the proximity of the loops to the arms that were to be painted. (Tr. 389) Indeed, Mejia was assigned to paint the looped tower because of his experience in painting towers of that configuration. (Tr.

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right after the accident that Mejia hit the line with his hard hat. (Tr. 63) Moreover, in the accident report (Ex. G-11) Chaparro wrote that the accident was caused when Mejia's hard hat come to touch close to the conductors. (Tr. 391) While Chaparro did not directly witness the accident, his initial reaction is indicative of the general understanding that, for Mejia to have received the shock, he had to at least come within the MAD.

464) Yet, neither supervisor Karantenislis nor foreman Chaparro ever requested measurements from National Grid or took any other steps which would have informed them that employees painting the looped towers would be working extremely close to the MAD. (Tr. 384, 388, 420) Rather, Chaparro made an eyeball determination from the ground that there was clearance adequate to allow the employees to conduct their work. (Tr. 387-388) Arming Mejia only with an admonition to "be careful," the foreman relied on Mejia to climb the tower and determine for himself if it was safe to paint. (Tr. 388) Furthermore, the evidence establishes that PUMI's own Safety Plan requires that an observer be stationed at each tower. (Ex. G-6, p.5, Tr. 97) Even when, as here, the crew is split between two towers, a safety observer is still required at each tower. (Tr. 97) Here, however, Chaparro split his time between Towers 345 and 346, leaving Mejia without adequate supervision. (Tr. 386)

Accordingly, I find that the preponderance of the evidence establishes that with the exercise of reasonable diligence, PUMI would have known that its employees were exposed to the MAD of the energized lines and would have taken appropriate steps to avoid the violation.

B. Unpreventable Employee Misconduct

Once the Secretary makes a prima facie showing that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition, the employer can establish, as an affirmative defense, that it had a thorough safety program which was adequately communicated and enforced and that the violative conduct of the employee was idiosyncratic and unforeseeable. *Brock v. L.E. Myers Co.,* 818 F.2d 1270, 1277(6th Cir. 1987); *Pride Oil Well,* 15 BNA OSHC at 1815; *Mosser Constr. Co*., 15 BNA OSHC 1408(No. 89-1027, 1991). As part of the defense, the employer must show that it has taken steps to discover violations. *Pride Oil Well, id., R Zoppo* Co., 9 BNA OSHC 1392, 1395 (No. 14884, 1981).

PUMI argues that it has a safety program that properly and adequately trains its employees to work outside of the MAD, that its safety program is adequately supervised, communicated and enforced and that Mejia's failure to observe the MAD was the result of unpreventable employee misconduct. First. PUMI argues that it has work rules designed to prevent the violation and which are adequately communicated to its employees. The evidence establishes that PUMI has a Site-Specific Safety Plan, written in both English and Spanish. (Ex. G-6) This plan includes safety rules about observing the MAD, including requirements that the foreman and painting crew conduct a documented assessment to determine if painting can be accomplished without encroaching on the MAD. (T. 97) Where structures

pose a concern, the plan requires that all concerns be noted and painted at such time as the line can be taken out of service. (Tr. 97) Moreover, PUMI's painters are under instruction that they should not paint the arm of any tower about which they feel uncomfortable. (Tr. 43, 69-70, 402) Indeed, employees testified that there were occasions when they did not paint an arm because they felt that the work would bring them too close to the wires. (Tr. 375, 465, 470)

PUMI asserts that it conducts daily safety meetings prior to the start of each work day. (Tr. 408, 460. 468) During these meetings, which lasts 10-15 minutes, Chaparro reviews the safety rules and procedures for their work and points out the potential hazards of their work. (Tr. 72, 398) These meetings are conducted in Spanish so they could be understood by the Spanish speaking painters. (Tr. 72) Chaparro held a safety meeting attended by Mejia, on July 22, 2008 where they discussed the MAD, clearances, and pointed out the danger of the loop on Tower 345. (Tr. 398, 408-410, Ex. R-B) Furthermore, employees carry a card which outlines the minimum approach distances based on voltage. (Tr. 411) PUMI also provides training courses to its employees that covers, *inter alia*, training on minimum approach distances. Courses include High Voltage Electrical Safety Training, (Tr. 520, Ex. R-D) and the OSHA 10-Hour Safety Course (Tr. (Tr. 521, Ex. R-E)

PUMI next argues that it took adequate and reasonable steps to monitor for violations. Foreman Chaparro testified that PUMI supervisor Karantenislis visited the job site about twice a week. (Tr. 371-372) According to PUMI's safety plan, an observer is to be stationed at each tower. (Ex. G-6, p.5, Tr. 97) PUMI also points out that it holds industry certifications that attest to its safety record and quality operations. For example, PUMI holds QP-1 and QP-2 certifications from the Society of Protective Coatings ("SSPC")[5]. (Tr. 449) PUMI is also certified by the ISO, an international standardization

[5]The QP-1 certification covers, among other projects, the painting of electrical transmission towers. It is a quality program that works mainly with steel structure painting, surface preparation, control, worker training and quality control issues. A significant part of the certification involves safety. (Tr. 484-485) The QP-2 certification has to do with hazardous material generation and safety. (Tr. 485) Certification is a multi-step process that involves having certain safety and health procedural manuals, including a "Corporate Health and Safety Plan," a "Safe Operating Procedure Manual," and an "Inspection Procedure Manual." (Tr. 486-487) All QP1/QP2 members must be OSHA compliant and will have their certifications suspended for having too many OSHA violations, too many accidents, or even one job-related fatality. (Tr. 491) Members are subject to audits and evaluations, including annual audits and unannounced audits. (Tr. 492-493) Any company with an Experience Modification Rating (EMR) of 1.25 or more will be excluded from certification. PUMI has an EMR of 0.83 (Tr. 534-535)

organization, which measures quality of and safety of the company and which also requires a yearly audit. (Tr. 514)

PUMI contends that it has an excellent safety record and that, prior to the Mejia accident, no PUMI employee was ever injured at a PUMI work site. (Tr. 534) PUMI points out that Mejia was a highly experienced employee and crew leader. As such, it argues that it was not required to provide Mejia with constant supervision. *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 459 (1st Cir. 1979). Therefore, PUMI contends that there was no reason for it to take elaborate measures to constantly supervise Mejia, who was perhaps the most experienced painter in the entire company (Tr. 464) and who was doing work that was routine to him.

Finally, PUMI contends that it adequately enforces its safety rules. PUMI points out that it has a formal disciplinary program which consists of a disciplinary plan and recordkeeping. (Tr. 499-500) PUMI has, what it describes as a "three strikes and you're out" policy. (Tr. 500) Under this policy, the first time a work rule is breached, the employee receives a verbal warning. A second violation within six months results in a written warning and a day off. Finally, a third violation results in termination. (Tr. 500) A flagrant violation of fall protection rules can result in instant termination, even for a first offense. (Tr. 500) PUMI avers that it never had to suspend or terminate an employee for violation of a safety rule (Tr. 426), although two employees were terminated for drinking at the job. (Tr. 403, 426) Documentation does reveal, however, that various PUMI employees have been disciplined for failing to follow work safety rules. Indeed, Carlos Mejia was once disciplined for showing up at work without his personal protective equipment. (Tr. 516, Ex. C-13 at pp. 3, 15)

I find that PUMI failed to establish the "unpreventable employee misconduct" defense. Although PUMI established that it had a workrule requiring employees to maintain the three foot MAD, the evidence demonstrates that there were serious flaws in its implementation of that rule.

PUMI relied too heavily on employees to determine when a hazard existed. The evidence demonstrates that Chaparro made an eyeball determination that the loops were sufficiently distant from the arms to enable employees to maintain a three foot clearance. This determination was made from the ground. Chaparro, who was qualified to climb the towers, never either went up to determine for himself whether the work could be safely done, or asked National Grid to provide the measurements that would have revealed that at least one of the loops was no more than 32 inches from the middle arm on Tower 345. An employer "must make a reasonable effort to anticipate the particular hazards to which its

employees may be exposed in the course of their scheduled work." *Capform, Inc.*, 19 BNA OSHC 1374, 1377 (No. 99-0322, 2001),*aff'd* No. 01-60417 (5th Cir.,March 20, 2002)(unpublished), citing *Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). This includes a duty to inspect an area and determine what hazards exist or may arise during work before permitting work in an area. The employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions. *Automatic Sprinkler Corp.*, 8 BNA OSHC at 1387. That Mejia and the other painters were experienced employees did not discharge PUMI from providing the proper instructions or taking the measures necessary to minimize the hazard. *Butler Lime and Cement*, 7 BNA OSHC at 1975.

Although PUMI asserts that employees were instructed to maintain the three foot clearance, the evidence demonstrates that, on the date of the accident, they were given general instructions not to get too close to the wires. Neither crew leader Felix Britos nor painter Diego Espinolla testified that they were specifically warned to maintain a three foot clearance from the wires. Rather Britos testified that they were instructed on clearances during classes and carried a card that set forth the MAD for various voltages. (Tr. 461) At the morning meeting on July 22, they were reminded about observing the MAD, but when sent up on the towers, had to determine for themselves whether they could work safely. (Tr. 461, 465) Similarly, Espinolla testified that at the morning meeting, Chaparro instructed the employees to "be careful" and not to paint the arm where "the cables were very close to the arm." (Tr. 469) Critically, the painters had no measuring devices, but rather were left on their own to determine whether they could paint while kneeling, sitting or crawling along the tower arm without encroaching on the MAD and where any inadvertent movement of head, arm, or other body part could bring the employee within the minimum approach distance. This procedure constituted an undue reliance on employees to discover whether they could work safely. In this context, Chaparro's admonition to the employees to "be careful" and to observe the MAD gave employees "too much discretion in identifying unsafe conditions and was therefore too general to be effective in preventing employee exposure." *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021 (No. 94-200, 1997), *aff'd*, No. 97-60769 (5th Cir. Sept. 26, 1997)(unpublished).

Moreover, PUMI's own safety manual requires that there be a spotter for each tower. The evidence shows, however, that at the date of the accident, foreman Chaparro, who was supposed to act as the spotter, divided his attentions between Towers 345 and 346. This made it likely that he would not be in a position to warn an employee on any given tower that he was getting perilously close to violating the

MAD[6].

I find that PUMI unduly relied on employees to determine when it was safe to paint the arm in a situation where an inadvertent movement could bring them within the MAD, and failed to provide the supervision of its employees adequate to prevent them from violating the MAD. Accordingly, PUMI failed to establish that the violation was the result of "unpreventable employee misconduct."

C. Penalty

In assessing penalties, the Commission must give due consideration to the employer's prior history and good faith, the size of the employer's business, and the gravity of the cited violations. 29 U.S.C. §666(j); *S&G Packaging Co.*, 19 BNA OSHC 1503, 1509 (No. 98-1107, 2001).

The Secretary proposed a penalty of $4,200.00 for the violation. OSHA Area Director Michael Goyda testified that, based on the gravity of the violation, the Secretary arrived at an unadjusted penalty of $7,000.00. A 40% reduction was made due to the size of the company, resulting in an adjusted penalty of $4,200.00. Due to the gravity of the violation, no deduction was made for good faith or history. (Tr.314)

Considering the statutory factors, and considering the high gravity of the violation, I find that the Secretary's proposed penalty to be appropriate and the proposed penalty of $4,200.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

[6]The Secretary argues that National Grid twice complained to PUMI about employees failing to maintain the MAD. (Tr. 134, 141-142) However, the letters National Grid sent to PUMI were not produced at the hearing. Robert Maryyanek, Jr., a safety program manager for National Grid, remembered seeing the documents, but could not recall what was in them. Maryyanek remembered that the letters were received before the Mejia accident, and could recall only that they documented that PUMI was "spoken to about minimum approach distances." (Tr. 142) I find this testimony to be without value. While Maryyanek recalled that the letters documented some discussion about PUMI employees observing the MAD, there is nothing in the record to establish whether there was a problem with PUMI employees violating the MAD, or whether, for example, National Grid was merely concerned that employees might be working close to the MAD and was issuing a reminder to its subcontractor that the MAD had to be observed.

ORDER

For reasons set forth above, it is **ORDERED** that the citation for a Serious violation of Section 5(a)(2) of the Act for noncompliance with 29 C.F.R. § 1910.269(l)(2) is **AFFIRMED** and a penalty of $4,200.00 is **ASSESSED**.

/s/
Covette Rooney
Judge, OSHRC

Dated: 17 November 2009
Washington, DC