

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4444-07

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

BOWLIN ENERGY, LLC

RESPONDENT

DECISION AND ORDER
OF THIS REVIEW
COMMISSION

James R. Grider, Jr, Frankfort, for the secretary. Robert A. Dimling, Cincinnati, for Bowlin Energy.

This case comes to us on the secretary's petition for discretionary review; we granted review and asked for briefs. 803 KAR 50:010, sections 47 (3), 48 (1) and 48 (5) (ROP 47 (3) and 48 (1) and (5)). After investigating a fatality, the secretary issued 12 serious citations and one nonserious citation. Those citations carried proposed penalties of \$40,250.

In his recommended order, written after he conducted a trial on the merits, our hearing officer affirmed serious citations 3, 5, 6 and 12 and reduced serious item 2 to nonserious. He affirmed the one nonserious citation.¹ He dismissed serious items 1, 4, 7, 8, 9 10 and 11. The total penalties for the affirmed citations came to \$14,000.

Because Bowlin did not file a petition for discretionary review, only labor did, the four serious citations, items 3, 5, 6 and 12, and serious item 2 reduced to nonserious which our hearing officer sustained are now final and unappealable orders. KRS 338.081 (3), KRS 338.141 (1) and ROP 47 (3).

¹ Citation 2, item 1.

In this decision we will take up the seven serious items dismissed by our hearing officer and the penalty for the one nonserious citation.

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the review commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass², 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the commission..."³

² In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

³ See federal commission rule 92 (a), 29 CFR 2200.

Our supreme court in Secretary, Labor Cabinet v Boston Gear, Inc, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." In Terminix International, Inc v Secretary of Labor, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Bowlin Energy, an electrical contractor, was doing work for Meade Rural Electric. Volume I, transcript of the evidence, pages 21-22 (I TE 21-22). Bowlin, according to Blevins Bowlin, the company's president, does "construction and maintenance for power companies." I TE 21.

Labor called Mr. Bowlin as its first witness. Essentially, Mr. Bowlin described what he had learned about the accident as a result of his investigation. At the time of the fatality, Bowlin was "adding a pole in a three phase line, 7,200 volt primary, three phase line..." I TE 22-23. According to Mr. Bowlin a three phase line is "where you have three hot wires, 7,200 volt wires and...there's neutral wire that's four foot below those that provides the power...from substations to certain points." I TE 24. He said a "hot arm" was used to separate the live wires from one another and keep them stabilized so the work could continue while the power to customers remained on, as he put it "to keep the people's power on." I TE 24. Exhibit 1, page 61, lower right, is a photograph of the hot arm which is horizontally attached to a cross piece on a telephone pole. The hot arm sticks out from the cross piece on the pole. The hot arm, apparently, is so placed to keep the hot wires out of the way from the work and also to separate the wires from one another.

Mr. Donald Taylor, the electrocuted employee, had been working from a truck with a boom or man lift. This truck, according to Mr. Bowlin, was constructed to be electrically inert, that is it would not conduct electricity. Parts of the truck were enclosed with fiberglass. On the day of the accident, Mr. Taylor, the man in the lift, had been wearing rubber gloves and rubber sleeves while he placed the live wires on the hot arm. But at the time of the accident he had taken the rubber sleeves and gloves off. See exhibit 1, page 19, which is a portion of the report of the accident prepared by David R. Poe, PE, Meade County's vice president for operations and engineering. Mr. Taylor was wearing leather gloves which are worn beneath the rubber gloves. Photographic exhibit 6 depicts Mr. Taylor's leather gloves which were badly burned by the electric current.

With the live wires pushed out of the way, the company was going to "pull in the new conductor" (I TE 23 and 26), a heavier aluminum wire replacing the old and lighter copper. According to Mr. Bowlin, current would flow from one phase wire to another if a conductive object touched both wires, or from "phase to neutral." I TE 27. Once the telephone pole was put in place, then the live wires would be attached to it. I TE 24 and 26.

Each employee had his own sleeves and gloves. I TE 30. Mr. Bowlin said an employee wearing the rubber gloves could handle a live wire up to 20,000 volts using the rubber sleeves and gloves. I TE 46 and 69-70. See the third page of exhibit 6 which shows two rubber gloves placed on the grass. Some witnesses testified they found rubber gloves which were supposed to have been Mr. Taylor's. I TE 33. But others had no idea whose gloves they were. I TE 34-35. We take no position on the location of the gloves and sleeves after the accident.

At the time of the accident the victim was getting ready to attach a temporary guy wire to the newly set telephone pole. Exhibit 1, page 19. The temporary guy wire was needed because

Bowlin was going to pull 1,000 feet of wire using the new pole; without the temporary guy, the force of the wire pull would have toppled the pole. I TE 70-71. The procedure was to attach a hand line to the guy wire so Mr. Taylor in the bucket could hold the hand line while the bucket lifted him into position to pull up the guy wire and attach it to the top of the telephone pole. I TE 37. When Mr. Taylor reached the ground, he found out there was no hand line readily available. Mr. Blevins Bowlin said Mr. Taylor became "aggravated" when he learned a hand line was not available and said "the hell with it, just give me the guy wire. And one of the men handed him the guy wire and he took off." I TE 37. Mr. Taylor, guy wire in his hand, then began to raise his bucket toward the point on the telephone pole where he was to attach the wire.

Mr. Bowlin said Taylor would have had his rubber gloves on before the accident because "when he laid out those hot phases. Doing the work at top that he was doing, he would have had to have those on...you can't handle the line with – bare handed." I TE 37. This is the only testimony which indicates Mr. Taylor had been using the rubber gloves and sleeves prior to the accident; otherwise the implication, given the confusion about the location of Taylor's rubber sleeves and gloves, would have been Mr. Taylor had not used the rubber gloves and sleeves earlier in the day.

After attaching the two hot wires to the hot arm, Taylor lowered his lift, the bucket, to the ground. I TE 74-75. While near the ground Mr. Taylor, a line man, told a ground man (an employee who is not qualified as a line man) he needed "a preformed guy wrap," an eye hook to attach the guy to the pole. I TE 73. According to Mr. Bowlin, it was the ground man who handed Mr. Taylor the guy wire; "then that's when he took off." I TE 75. Mr. Bowlin then said Taylor's bucket "hit the neutral wire and did not know it. And, when he – rather than stopping, he continued to go up and that's when he made contact over here with the – he made contact over

here with the – he went up about another foot or so – I think it was about eighteen inches...I think he just forgot that that phase was there or didn't realize he was that close to it." I TE 76 and 77.

Toward the conclusion of the two day trial, Bowlin Energy called Mr. Blevins Bowlin back as its own witness. After direct and cross examination, the hearing officer asked Mr. Bowlin several questions. Bowlin testified he learned that when Taylor asked for a thimble eye nut, Foreman Earl Hanson went to his truck to get one; Mr. Bowlin who was not on site when Mr. Taylor was killed said the foreman was some 100 feet away from Donald Taylor's truck when the accident occurred. III TE 302. Bowlin said he learned Mr. Martin, the ground man, was the only employee near Mr. Taylor's truck at the time of the electrocution. TE 303. Mr. Bowlin said Martin told him he did not see Mr. Taylor go up in the bucket. III TE 303. Martin said he too was walking toward Forman Henson's truck to get a hand line when he heard the electrocution. III TE 304.

In the public service commission's order which incorporated Meade County's independent investigation by David Poe, exhibit 1, Mr. Poe said it was Mike Dutschke, a lineman, who heard the explosion and ran to Taylor's truck; Poe's report said Foreman Henson and Dutschke lowered the boom using the lower controls. Exhibit 1, page 16. Compliance Officer Seth Bendorf said "Mr. Dutschke stated that he accessed the lower controls and could not get the lift to come down. And, that then Mr. Henson had accessed the truck and was able to lower the bucket." III TE 391-392.

According to Mr. Bowlin, Foreman Earl Hanson was going to his truck to get the thimble eye nut when he heard the electrocution. I TE 22.

Now that we have sketched out the events leading up to the tragic accident, details we took from Mr. Bowlin's testimony and Mr. Poe's report found in exhibit 1, we turn to the citations at issue which our hearing officer dismissed.

Serious citation one

Serious item 1, instance a, said the line man working from a man lift adjacent to live 7,200 volt wires was not wearing the proper personal protective equipment, rubber gloves and rubber sleeves. Instance b alleged employees, working on the ground and nearby a truck which was engaged in setting telephone poles and relocating 7,200 volt wires, were not wearing dielectric⁴ shoes.

Serious item 1 carried a proposed penalty of \$3,500.⁵

The citation said:

29 CFR 1926.28 (a):⁶ The employer did not require the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees:

a. An employee working in close proximity to three 7,200 volt electric lines, located at or near 12025 Highway, South 261 in Mc Quady, Kentucky, was not wearing insulated electric gloves or sleeves prior to raising an aerial device off the ground or devices cradle.

b. Employees working in the proximity of pole setting activities and guy wire attachment activities, located at or near [same address] were not wearing dielectric overshoes.

⁴ Dielectric means "A nonconductor of electricity." Webster's II New Riverside University Dictionary, The Riverside Publishing Company, 1984, page 375.

⁵ Labor's compliance officer rated the hazard as high because of the electrocution and greater probability because the employee was working in close proximity to 7,200 volt wires and because he spent a considerable amount of his time doing just that. High serious/greater probability produced a gravity based, unadjusted penalty of \$5,000. Bowlin got 20 % credit for size of the business (the number of employees) and 10 % credit for history (it had had no serious citations in the past three years). \$5,000 less the 30 % credit equals \$3,500. I TE 92-96.

⁶ Adopted in Kentucky by 803 KAR 2:401, section 2(1).

Section 1926.28 (a) is a very general standard calling for the wearing of personal protective equipment to protect employees from hazardous conditions. The standard says in part:

The employer is responsible for requiring the wearing of appropriate personal protective equipment [PPE] in all operations where there is an exposure to hazardous conditions...

A majority of the federal courts of appeals have held the standard may be interpreted by resort to a reasonable man test which asks what equipment must be worn for a given set of circumstances. In other words, the courts held it was not possible to just look at 1926.28 (a) and tell what kinds PPE are needed; instead a reasonable employer must look at the hazards his employees are exposed to.

In Bristol Steel and Iron Works, Inc v OSHRC and Marshall, 601 F2d 717, 723 (CA4 1979), CCH OSHD 23,651, BNA 7 OSHC 1462, the fourth circuit said the federal commission should apply the reasonable man test when an employer is cited for a violation of 1926.28 (a), rejecting the fifth circuit's "knowledge and experience of the employer's industry" test.⁷ In its decision the fourth circuit said:

While the custom and practice of most industries will adequately protect employees from hazardous conditions, the inquiry must be broad enough to prevent an industry, which fails to take sufficient precautionary measures against hazardous conditions, from subverting the underlying purposes of the Act. In determining whether Bristol violated section 1926.28 (a), the appropriate inquiry is whether under the circumstances a reasonably prudent employer familiar with steel erection would have protected against the hazard of falling by the means specified in the citation.

At 601 F2d 723, CCH page 28,675, 7 OSHC 1465.

The fifth circuit court of appeals in B and B Insulation said the test for whether PPE is required would depend on what the particular industry thought was required. At 583 F2d 1370. But the fourth circuit in Bristol Steel case said an industry's safety practices could be very lax; and so it

⁷ B and B Insulation, Inc v OSHRC, 583 F2d 1364 (CA 5 1978), CCH OSHD 23,151, BNA 6 OSHC 2062.

said the standard should be whether a reasonably prudent employer, for our case a power transmission contractor, would have protected his employees with PPE. For example serious item 1 says Bowlin employees should have been wearing rubber gloves, sleeves and boots.

We agree with the fourth circuit's reasoning; we will apply the reasonably prudent employer standard when interpreting 1926.28 (a). Bristol Steel.

Our hearing officer dismissed serious item 1, instance a which is about the wearing of rubber gloves and sleeves and instance b which is about the wearing of rubber overshoes, what people in the high voltage construction industry call dielectric boots. He said the secretary failed to prove employer knowledge of the violation. He also found Bowlin proved, for serious item 1, all four elements of the affirmative defense of employee misconduct.

For each item, the secretary must prove all the elements set down in Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), where the federal review commission said:

In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew,⁸ or with the exercise of reasonable diligence, could have known of the violative conditions.

serious item 1, instance a,
Mr. Taylor wore
no rubber gloves
or sleeves

Bowlin does not claim Mr. Taylor should not have worn the rubber sleeves and gloves when ascending in the bucket; in fact Mr. Bowlin's testimony is proof Taylor was trained to use then and should have. The question is whether to apply the industry rule, as Bowlin and our

⁸ The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

hearing officer suggest, for interpreting 1926.28 (a) or the reasonably prudent employer rule as we have held. Bristol Steel. Our problem with the industry rule is it defers to industries with a poor history of concern about safety issues. On the other hand, a reasonably prudent employer familiar with the circumstances will know what precautions need to be taken to protect his workers. Under the majority rule, imprudent employers and industries will be held to the reasonably prudent employer standard.

In L. R. Willson and Sons, Inc v OSHRC and Donovan, Secretary of Labor, 698 F2d 507, 513 (CADC 1983), CCH OSHD 26,395, pages 33,499-33,500, BNA 11 OSHC 1097, 1101, the DC circuit said:

To establish a violation of the general safety regulation, section 1926.28 (a), the *Secretary* must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation...The Secretary must provide evidence from persons qualified to express such opinions that, absent the specified protective equipment, the hazard was likely to occur.

(emphasis added)

Mr. Blevins Bowlin, the president and founder of Bowlin Energy, is certainly a person qualified to express opinions about what a reasonably prudent employer in his industry would do to protect his employees while they were working on live wires carrying 7,200 volts and we so find; he would protect them with rubber gloves and rubber sleeves. While Mr. Bowlin was not the only witness in this case capable of expressing his opinion, he was certainly well qualified.

On the other hand, on cross examination the compliance officer said this was his first power transmission inspection. II TE 187. This, without more from the CO and there wasn't, establishes the fact the CO was not, according to Willson, qualified to give his opinion about

how an employee in the power transmission industry should be protected. But in any event, for instance a of serious item 1, Mr. Bowlin's testimony was more than enough.

Mr. Bowlin's testimony proved the 1926.28 (a) standard applied and its terms were not met for instance a: Mr. Taylor who died in the accident should have been wearing rubber gloves and rubber sleeves when he went aloft to attach the guy wire to the pole. I TE 80.

Mr. Bowlin agreed with the following question put to him:

Q. ...you said he should have had on some rubber sleeves and some rubber gloves at the time of the accident, correct?

A. Uh-huh. (Yes)

I TE 29

We find a reasonably prudent employer in the power transmission construction business would require his employees to wear rubber sleeves and rubber gloves when working in proximity to live electric transmission lines carrying 7,200 volts. Because Mr. Taylor at the time of his death was not wearing the rubber sleeves and gloves, the company violated the standard which applies because the gloves and sleeves are personal protective equipment. I TE 89-90.

The third Ormet element is whether an employee was exposed to the hazard. Mr. Bowlin proved this as well; Donald Taylor was a Bowlin employee and he was exposed to the hazard of working without rubber sleeves and rubber gloves when he, holding onto the guy wire, directed his bucket upwards to the point where contact was made with the 7,200 volt wires, causing his death.

employer knowledge

Finally, Ormet says the secretary must prove the employer had knowledge, actual or constructive, the standard was violated. Our hearing officer said labor failed to prove Bowlin had knowledge of the violation. He said "There was no evidence shown that Henson should

have known that Taylor would attempt to attach the guy wire by hand and use of the aerial bucket...Henson and Martin [the ground man] would not have wasted their time to walk a considerable distance up a hill to obtain the guy line and bolt had they known Taylor's intentions." Recommended order, page 31 (RO 31).

Constructive knowledge requires a showing the employer could have known of the violation "with the exercise of reasonable diligence." KRS 338.991 (11) and 29 USC 666 (k). Of course, what constitutes reasonable diligence depends on the facts of the case and applicable case law.

"Constructive knowledge has been found where the hazard was in plain view." Mark Rothstein, Occupational Safety and Health Law, section 5:15, page 191, 2010 edition, citing to Kokosing Construction Co, a review commission decision, CCH OSHD 31,207, page 43,723, BNA 17 OSHC 1869,1871 (1996). Kokosing, a contractor, received a citation for unguarded rebar. The inspecting compliance officer said he observed the unguarded rebar "in plain view" and said it "would have been in plain view of Kokosing's employees." Upholding the citation, the commission said the company "with the exercise of reasonable diligence...could have known of the violative condition."

Donald Taylor had worked during the day from the bucket which he controlled. While there is testimony he had worked on the three phase lines while wearing rubber sleeves and rubber gloves, he had on neither when he met his death from electrocution. Mr. Taylor's foreman and highest company official on site, Earl Henson, was working in the same area. We have evidence in the trial record about employer knowledge of the hazard for serious item 1, instance a, from two sources. Mr. Bowlin said Donald Taylor, the decedent, expressed a need for a thimble eye for the guy wire he was going to attach to the top of the telephone pole at

which point Foreman Henson turned and began walking to his truck to get one. Our hearing officer used Mr. Bowlin's testimony to find the company had no knowledge of the violation – Mr. Taylor exposed to the hazard of the live wires without the protection of his rubber gloves and sleeves. Our hearing officer said Foreman Henson, his back turned to Mr. Taylor, had no reason to know Taylor would ascend without the PPE.

We also have exhibit 1 which is an order from the Public Service Commission; the PSC order contains an investigation of the accident conducted by David Poe, an executive with the Meade County electric cooperative. Mr. Poe's investigation tells a very different story. The PSC's order contains attachment A which is the Meade County RECC's report about the accident to the PSC; David Poe, vice president of operations and engineering for Meade County RECC, wrote and signed the report which is found at pages 12 through 21 of exhibit 1. Mr. Poe testified he investigated the accident "on behalf of the Meade County Rural Electric Cooperative Corporation." II TE 231.

Bowlin objected to the introduction of the report through Mr. Bowlin. I TE 42. Our hearing officer denied the company's objection and admitted the report. I TE 43-44. Hearing Officer Humphress said the report was a public record and so was "self-authenticating under [KRE] 902 and 803..." A public record, the PSC order, can be admitted to evidence because it is self-authenticating. KRE 902 (4). Exhibit 1 was attached to an affidavit from Stephanie Stumbo, the executive director of the PSC. Ms. Stumbo's affidavit said the report, numbered pages 1 through 111, was a correct copy of official records maintained by the PSC. That is enough for it to be admitted as our hearing officer correctly ruled.

We would add Mr. Bowlin, labor's first witness, could and did identify the report himself because he was familiar with it and indeed signed a document found at page 97 of the report.

For that matter David Poe signed on page 97 as well. KRE 901 (a) and (b) (1). Bowlin Energy called Mr. Poe as a witness. No one at the trial, neither the parties nor the hearing officer, questioned Mr. Poe about his report where it said "one of the crew members," but not Foreman Henson because this information came from him, "went up the hill to get one [a hand line] off of another truck." Exhibit 1, page 16. Mr. Poe said Donald Taylor asked Mr. Sizemore, a ground man, "to get a handline." Page 16. Then Mr. Poe recounts his discussion with Doug Martin, another ground man. Mr. Martin, according to Mr. Poe's report, said he "left and went to one of the other trucks to get one [a hand line] when he heard the frying." Page 17.

According to Poe's investigation of the accident, Mr. Taylor's comments and actions caused two men, Mr. Sizemore and Mr. Martin, to get a hand line for the guy wire installation. Neither man mentioned Foreman Henson. In fact Mr. Poe's report says nothing about Foreman Henson leaving the area where Taylor was using the boom on his truck to access the power lines attached to the newly placed telephone pole.

Mr. Poe said Donald Taylor wore the rubber gloves and rubber sleeves to attach two phase wires, there were three at the top of the pole, on the hot arm. Exhibit 1, page 19. Then the report says Mr. Taylor "apparently removed his rubber gloves and sleeves and placed them in the bucket with him." Page 19. "The remaining energized phase [the third] and neutral was left swinging since they did not pose any obstruction for the pulling process." Page 19.

Here at the trial is David Poe responding to a question:

A. My questioning with Mr. Henson says at that time Mr. Taylor had already removed his rubber gloves and sleeves and was working with leather gloves.

II TE 240

This is information Mr. Poe gleaned from his conversation with Foreman Henson; he included the information so obtained in his report. Exhibit 1, page 16. Mr. Poe's testimony confirms Mr. Poe's report is the result of a conversation he had with Mr. Henson.

Then Henson's statement says "one of the crew members went up the hill to get one [a hand line] off of another truck..." Page 16. Poe's report says Hanson related that another employee left the area immediately adjacent to Mr. Taylor's truck to get a hand line. This statement says nothing about Henson himself going for a eye for the guy wire.

The issue for employee knowledge, either actual or constructive it turns out according to the facts of our case, is whether Foreman Henson was in the vicinity of Mr. Taylor's truck just before Taylor ascended in his bucket, guy wire in hand. If Mr. Henson was in the vicinity of the boom truck when Taylor ascended, then it would have been reasonable, exercising reasonable diligence as required by KRS 338.991 (11), for him as a foreman to glance in his employee's direction to see if he wore the proper PPE, the sleeves and gloves, given the voltage of the lines overhead. If, however, Mr. Henson were elsewhere, with the understanding that Poe's investigation as well as Bowlin's revealed Taylor had been wearing the gloves and sleeves when he put the two phase wires on the hot arm, then it is just as reasonable for the commission to find Henson had no additional reason to check on the PPE.

Here is what Mr. Poe learned from Foreman Henson, exhibit 1 at page 16:

While one of the crew members went up the hill to get one [hand line] off of another truck, Donald grabbed the guy wire and went on up into the air with it. At that time, Mr. Taylor had already removed his rubber gloves and sleeves and was using only leather work gloves, but did have on his safety glasses and hard hat.

(emphasis added)

Mr. Henson, according to Mr. Poe's investigation, saw Taylor had on his safety glasses and hard hat; he also saw Mr. Taylor had removed his rubber sleeves and gloves. Henson's words "At that time" refers to the time when Taylor "went on up into the air..." This means Henson was there to see, one, Mr. Taylor had removed his gloves and sleeves and was, two, ascending in his bucket – he was close enough to him to observe his actions. Henson himself told Mr. Poe another crew member went up the hill. Mr. Henson had the opportunity to see Mr. Taylor's ascent and, by statute, had the duty to be reasonably diligent about determining if Mr. Taylor wore the proper PPE for the hazard he faced above, the 7,200 volt live wires. KRS 338.991 (11).

Mr. Poe's investigation, exhibit 1, contradicts Mr. Bowlin's investigation on this one important point. Mr. Bowlin says Foreman Henson had walked away from Mr. Taylor's truck and did not see him, without the sleeves and gloves, beginning his ascent in the bucket. This means, according to the company's theory of events, Foreman Henson had assumed Taylor would wait until he got back with the hand line. And so the foreman would have no reason to know Mr. Taylor was going back up in the bucket without the protective sleeves and gloves.

Mr. Poe on the other hand says Foreman Henson was in the vicinity of Taylor's truck and knew Taylor had removed the sleeves and gloves and was at that time ascending. Mr. Bowlin's testimony provides his company with the proof needed for an employee misconduct defense; Mr. Poe's investigation does not. Mr. Poe works for Meade County electric⁹ while Mr. Bowlin owns Bowlin Energy.

The question for us is whether we as an administrative agency charged with finding facts can look to documentary evidence for proof. Yes, we can. Our trials, like others, consist of witnesses who are examined on direct and cross and documentary evidence. ROP, sections 38

⁹ Meade County electric was fined \$9,000 by the Public Service Commission; Meade County had been fined well before our trial took place. Exhibit 1, page 108.

and 41. Professor Charles Koch in Administrative Law and Practice,¹⁰ said "Most administrative processes put a premium on the effective use of documentary evidence." Our trials are no exception. Although the parties made little use of it, during review our attention was drawn to the report of the fatality compiled by David Poe for Meade County electric. Mr. Poe's report recounts what he learned from Bowlin employees who were present at the time of Mr. Taylor's accident.

In Woolsey v National Transportation Safety Board and Federal Aviation Administration, 993 F2d 516, 520 (CA5 1993), the court said the NTSB was correct when it affirmed the administrative law judge's ruling admitting certain exhibits tending to prove an essential fact. The court said "there was adequate assurance of authenticity for the admission;" then the court said there was no evidence the documents were false. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Appellant Woolsey had argued the ALJ's failure to authenticate "by presenting their authors or signatories as witnesses deprived him of the right to confront and cross-examine witnesses against him." At 993 F2d 519.

In the case at bar Mr. Bowlin identified the PSC report (exhibit 1) as required by KRE 901. Both he and Mr. Poe had signed a document memorializing their participation in an informal conference about the PSC report. Page 97. Our hearing officer correctly admitted the report because it was a public record. Although Mr. Poe was called as a witness in our case, no one asked him to comment about his findings as to Foreman Henson's approximate location at the time of the accident even though they had the opportunity to do so – and his report directly dealt with the issue.

¹⁰ Charles H. Koch, Jr, 2 Administrative Law and Practice, section 5:53 [2], page 201, 2010 edition.

We find Mr. Poe's investigation about Foreman Henson's whereabouts at the time of the accident to be more persuasive than Mr. Bowlin's. When asked why he fired Dutschke, Foreman Henson, Sylvester Henson¹¹ and Martin after Mr. Taylor's death, Mr. Bowlin said:

...they had been in the industry long enough, if they saw him go up without rubber gloves...I would have to say that all of them had a – had some – if they saw him not doing it.

I TE 50

Mr. Bowlin in his own words said he fired the workers, including Foreman Henson, because they saw Mr. Taylor ascend to his death, without gloves and sleeves, and said nothing to stop him.

Mr. Bowlin's explanation why he fired the four employees, they saw him ascend and did nothing, conflicts with the testimony he gave earlier: that Foreman Henson had told him 'I was up the hill getting a thimble line eye nut for Donnie where my truck was...' I TE 22. Mr. Poe's investigation, however, is unequivocal. Two Bowlin Energy employees went to get Mr. Taylor some construction materials he said he needed; neither of them was Foreman Henson.

We find Henson was aware Taylor did not have on the sleeves and gloves as he proceeded upwards to the top of the pole in his bucket, proving actual employer knowledge of the hazard for instance a. Ormet, supra.

In addition to the actual knowledge, we also have proof of constructive knowledge. Foreman Henson, according to Mr. Poe's investigation, was nearby when Donald Taylor went aloft in his bucket, guy wire in hand. All Foreman Henson had to do was glance in Mr. Taylor's direction and see he had taken off his sleeves and gloves and was on the way up. An employer, and Foreman Henson was the company's representative on site, must be reasonably diligent about discovering violations. Kokosing, supra.

¹¹ Sylvester Henson was a ground man. I TE 49.

Bowlin Energy says Mr. Taylor, after attaching the two phase wires to the hot arm, had forgotten to attach a guy wire to the top of the pole. He came down to get a hand line and learned his truck had no hand line on it; Foreman Henson and another employee went to get supplies from trucks in the vicinity. Mr. Taylor forgot to put his rubber gloves and sleeves back on and went aloft with the guy wire in his hand. But KRS 338.991 (11) says an employer must exercise reasonable diligence to detect violations and so the issue remains whether the employer's Foreman Henson exercised that reasonable diligence. Bowlin then says we should defer to the hearing officer's findings of fact and conclusions of law. That is not our law. Our creating statute says the review commission "shall hear and review on appeals from citations." KRS 338.071 (4). This means we have the right to reverse our hearing officers on both factual and legal issues. Boston Gear, supra.

Mr. Blevins Bowlin and David Poe both investigated the accident.

Mr. Bowlin said Foreman Henson had moved away from David Taylor's truck and so had no reason to know Taylor would take the guy wire aloft without the protection provided by the rubber glove and sleeves. But then Mr. Bowlin said he fired Foreman Henson and others because they saw what was happening and did nothing to stop it. I TE 50. It is difficult to reconcile these two positions.

David Poe's investigation, on the other hand, said two employees, but not Foreman Henson, went off to a truck for supplies while Taylor was ascending. Mr. Poe's investigation report then says Foreman Henson was aware Taylor had taken off the gloves and sleeves when he went aloft: "At that time, Mr. Taylor had already removed his rubber gloves." Mr. Poe's report says Foreman Henson told him "one of the crew members went up the hill," not mentioning himself. Exhibit 1, page 16.

Our hearing officer focused on Mr. Bowlin's testimony about Foreman Henson going up the hill for parts. Our hearing officer ignored or did not pick up on Mr. Bowlin's statement he fired his employees because they saw Taylor without his sleeves or gloves take his bucket aloft and said nothing. Our hearing officer also did not notice David Poe's report of his investigation or at least did not refer to it. If the hearing officer was going to pay no heed to Mr. Poe's report or Mr. Bowlin's reasons for firing his employees, he at least owed us some explanation for his reasoning.

We find Bowlin Energy had actual and constructive knowledge Mr. Taylor, while not wearing either his rubber gloves or rubber sleeves, was exposed to the hazard of contact with wires carrying 7,200 volts of electricity. Kokosing, supra. We reverse the hearing officer and affirm item 1, instance a, as a serious violation with the proposed penalty of \$3,500. Ormet, supra.

Then the question is whether Bowlin Energy proved its employee misconduct defense; our hearing officer concluded the company did prove the defense. RO 32.

Bowlin's employee
misconduct defense for
serious item 1, instance a

In Jensen Construction, CCH OSHD 23,664, page 28,695, BNA, 7 OSHC 1477, 1479, (1979). the federal review commission laid out the four elements an employer must prove to establish the affirmative defense of employee misconduct; if an employer proves all four, then the commission will dismiss the citation even though the department of labor had proved the elements of the violation. If Bowlin Energy violated the PPE standard, 1926.28 (a), then Bowlin

still may avoid the citation by proving the four elements of the defense.¹² In Jensen, the commission said the employer had to prove:

1. the employer has established work rules designed to prevent the violation,
2. the employer has adequately communicated these rules to its employees,
3. the employer has taken steps to discover violations and
4. the employer has adequately enforced the rules when violations have been discovered.

The first two elements, rules and communication of the rules to employees, are often quite easy for a company to prove; elements three and four are more difficult.

elements one and two of
the defense

Exhibit 2, consisting of 58 pages, is Bowlin Energy's safety and health policy and procedure manual; this manual covers various subjects. Then Bowlin introduced exhibit 18 which covers the use of rubber sleeves and rubber gloves when working on "Exposed energized parts..." Page 6. Each page of exhibit 18 is initialed by "DRT," Donald Taylor according to Clyde Wyatt, Bowlin's safety coordinator. III TE 307 and 317. These two documents prove Bowlin had rules and had communicated them.

Our hearing officer ruled, correctly, that Bowlin had safety rules in place and took steps to communicate those rules, elements one and two of the defense. RO 29-30.

element four of
the defense

For element four the company must prove it has enforced its rules by disciplining employees. The federal review commission, supported by the courts of appeals, says employers may offer proof of discipline meted out in the past. Or it may offer evidence of disciplinary

¹² Respondent is correct when it states it is not required to prove, in addition to the Jensen elements, the employee's conduct was "idiosyncratic and unforeseeable." See Morel, KOSHRC 4147-04, 4151-04 and 4149-04.

action taken after the observance of the hazard, what we here refer to as contemporaneous discipline.

In Asplundh Tree Expert Co, CCH OSHD 24,147, pages 29,344 and 29,347, BNA 7 OSHC 2074, 2077 and 2080 (1979), the federal commission said the company "effectively enforced its work rule requiring the use of body belts in aerial lifts." An Asplundh foreman had been demoted for his violation which led to the citation. Asplundh says discipline which is contemporaneous with the violation may be used to determine the effectiveness of the safety program: "Asplundh's evidence that its supervisors discovered infrequent violations of its body belt rules supported, rather than discredited, Asplundh's argument that its safety program was effective." At CCH page 29,347, 7 OSHC 2079.

Of course, the other side of the federal commission's argument is an employer who is not interested in discovering violations of his rules will have very little history of discipline of employees for infractions – that is labor's argument in our case. The same argument applies to giving credit to an employer for a discipline history when the only discipline ever handed out is for the violation under contest. What if the contemporaneous discipline was only administered to protect an employer in the event he received a citation.

In Reynolds, Inc, CCH OSHD 32,411, BNA 19 OSHC 1653 (2001), a federal administrative law judge denied the company's employee misconduct defense because "This discipline occurred *after* OSHA issued the citations in this case..." CCH page 49,930, 19 OSHC 1657. On this subject, it troubles us Mr. Blevins Bowlin said he fired Foreman Henson, Dutschke, Sylvester Henson and Martin but introduced no documentary evidence of their terminations, although he did say it took him "two or three months and talking with those employees..." before he made up his mind to fire them. I TE 48. It is doubtful the company had

simply forgotten about the terminations because that was what the whole case was about. More likely the company offered no paperwork because the terminations came late in the game, perhaps after the citations were issued.

Here is the proof Bowlin Energy offered about their past history of discipline. Prior to the accident the only documented discipline history the company could point to was two warnings (the same incident) about reports of two Bowlin trucks speeding on an interstate highway and then three employees found, at the same time, working without hard hats. Exhibit 20, discipline reports. These disciplinary reports contained a plan for progressive discipline: warnings suspension, termination.

Clyde Wyatt, a safety coordinator for Bowlin said he suspended Donald Taylor for failing a random drug test; but here again Bowlin did not produce any paperwork for Taylor's suspension. Taylor did not return to work until he passed another test. III TE 320-321.

After the accident, Mr. Bowlin fired Foreman Henson, Mike Dutschke, Sylvester Henson and Doug Martin. I TE 48-49. He did that because he said they saw Mr. Taylor ascend in his bucket without his rubber gloves and sleeves.

In Precast Services, Inc, CCH OSHD 30,910, page 43,036, BNA 17 OSHC 1454, 1455 (1995), the federal review commission said evidence "of verbal reprimands alone suggests an ineffective disciplinary system." To this, Bowlin would argue the speeders and hard hat violators received written warnings and four men were terminated after Taylor's electrocution.

Our hearing officer began his discussion of the employee misconduct defense issue with a statement about which we must respond. In his recommended order he said:

Unlike some industries, Bowlin is not involved in an industry where an employee creates policies for appearance only, and then management and employees pay little attention to those safety practices for daily operations unless visited by a KOSH

inspector.

RO 29

This sort of personal, uninformed aside by a hearing officer charged with deciding our cases in the first instance is intolerable. Employers who feel aggrieved by a citation come to us for a decision. KRS 338.141 (1) and (3). They have a right to expect fair treatment at the hands of the commission and our hearing officers. We have, since we were created by statute in 1972, worked very hard to see all parties who come before us, the secretary, employers and intervenors, are treated fairly and with respect. We have an unblemished record. Our experience at the commission teaches us that employers in Kentucky, regardless of their industry, are very committed to the safety and health of their employees. Reasonable people can disagree about the validity of a citation; that is why we exist. Our decisions are based on the facts the parties bring to us; we will not permit our hearing officers to decide otherwise.

In his recommended order our hearing officer accepted the speeding and hard hat discipline as well as Mr. Taylor's drug test related suspension. Labor in its brief had argued bringing Taylor back to work indicated lax enforcement of safety rules. We agree with our hearing officer who said it was up to Bowlin Energy to determine when or if to reinstate Mr. Taylor.

For element four of the employee misconduct defense, companies are regularly cited for hard hat violations. For the speeding discipline, highway crashes are perhaps the leading cause of employee injuries and fatalities. But since OSHA has no standards for on the road driving, these accidents are not recorded by OSHA. We find Bowlin has a history, although not a very significant one, of disciplining employees for safety violations without getting to the

contemporaneous discipline issue, the termination of the two Hensons, Dutschke and Martin after Mr. Taylor's death.

element three of
the defense

This takes us to the third and often the most difficult of the employee misconduct elements: whether Bowlin had a system of discovering violations. Even with the commission finding Bowlin proved elements one, two and four, if Bowlin cannot prove the third, then its defense fails and the commission would sustain serious item 1, instance a.

Our hearing officer said "Bowlin took steps to discover violations by having supervisors at each work site, upper management making surprise visits, and conducting surprise drug tests." RO 30. We must exclude drug tests because that is not done at a construction site. What then was the extent of the surprise visits? Clyde Wyatt, a company safety coordinator, said he wrote the company safety manual. III TE 310-311. When asked about job observations, he said "Yes, I did those usually quarterly. Occasionally I would do them more often...a couple times a month." III TE 315. We find quarterly inspections, or even a couple of times a month, is not exercising reasonable diligence. KRS 338.991 (11). That leaves the supervisor on site, Foreman Henson, to be reasonably diligent.

...when a supervisor is involved...the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision...' *Archer-Western Contractors, Ltd*, BNA 15 OSHC 1013, 1017 (1991). (A) supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax.' *Ceco Corp*, BNA 17 OSHC 1173, 1176 (1995).

Reynolds, Inc, CCH page 49,929, 19 OSHC 1656

According to our hearing officer, Foreman Henson was not involved in the misconduct, except that if we take Blevins Bowlin at his word he fired Henson because the foreman saw Mr. Taylor ascend in the bucket, then he was at least not enforcing the company's published and communicated rule requiring the use of rubber sleeves and gloves when exposed to live wires. As Bowlin's senior person at the construction site it was up to him to enforce the company's electrical safety rules. If Bowlin Energy's representative on site was not enforcing the rules, requiring his workers to use the proper PPE, then it cannot prove element three of the defense.

In Daniel Construction Company, CCH OSHD 26,027, page 32,672, BNA 10 OSHC 1549, 1552 (1982), the federal commission said "Daniel's area superintendent engaged in violative conduct and was present on the roof while other violations occurred in plain sight." (emphasis added) A Daniel "superintendent was not wearing a safety belt or lanyard while installing a lifeline 4 feet from an unprotected edge of the roof. In addition, two employees assisting the superintendent were wearing safety belts and lanyards, but were not tied off and came within 4 feet of the edge of the roof." At CCH page 32,672, 10 OSHC 1551. In other words, the Daniel superintendent worked with two employees who were not tied off and he did nothing to enforce the fall protection rule. Except for a small section presenting a 10 foot fall, the roof where the employees and superintendent was 26 feet above the ground below. At CCH page 32,671, 10 OSHC 1550.

the supervisor's knowledge of the violations, both actual and constructive, is imputable to Daniel for the purpose of proving employer knowledge of the violation unless Daniel establishes it took all necessary precautions to prevent the violations, including adequate supervision of its supervisor... The Commission has stated that where a supervisor employee is involved in the violation the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision.

At CCH page 32,672, 10 OSHC 1552

The Daniel supervisor was with his employees when they worked without fall protection safety belts and lanyards. In our Bowlin case, Mr. Taylor was exposed to the 7,200 volt wires overhead without rubber gloves and sleeves. Foreman Henson was, according to David Poe's investigation and Mr. Bowlin's explanation of the terminations, present when Taylor went aloft without the proper PPE. And yet Foreman Henson did nothing to stop Taylor or make him put on the protective equipment. We find Bowlin through its foreman was not enforcing the company's safety rules about working with high voltage lines. Foreman Henson was not protecting the safety of the employees under his supervision. Daniel Construction. We reverse our hearing officer and deny Bowlin Energy's employee misconduct defense which applies to serious item 1, instance a, because it failed to prove element three.

serious item 1, instance b,
no dielectric overshoes
required

Mr. Bowlin testified several times he did not require his ground workers to wear dielectric overshoes unless his customer did. III TE 260 and I TE 63-66. But Duke Power according to Mr. Bowlin did require them and so Bowlin employees wore them when working for Duke. A careless employer leaves it to his customer; a reasonably prudent employer might require the use of the dielectric over shoes for his ground workers but we have no proof of what that reasonably prudent employer would do.

The importance of this alleged violation is underscored by the actions of Foreman Henson and another Bowlin employee who, concerned about lowering Mr. Taylor's bucket, ran up to and touched the truck Mr. Taylor was using when electrocuted. If the truck had been

energized, then the overshoes would have perhaps provided protection. Neither employee was harmed by his contact with the truck.

Instance b, employees not wearing dielectric overshoes, is also a 1926.28 (a) violation; here again labor must prove a reasonably prudent employer would require their use. Blevins Bowlin as the owner of the company is qualified to express an opinion about the use of the overshoes in the face of a hazard. Labor's problem here is it did not ask Mr. Bowlin if the foreman and ground man who rushed up to Mr. Taylor's truck should have been wearing the boots. According to Willson and Sons, supra, labor did not produce a witness who was qualified to express an opinion about the necessity of the ground man and the foreman wearing dielectric boots when working around a truck engaged in "pole setting activities" and live electric wires. Although Mr. Bowlin said Duke Power would have required the boots, he did not say why they would require them and certainly did not express an opinion why he thought employees working in the vicinity of Mr. Taylor's truck should wear them.

Here is instance b of serious item 1:

b. Employees working in the proximity of pole setting activities and guy wire attachment activities, located at or near [same address] were not wearing dielectric overshoes.

Instance b does not apply to Donald Taylor who was killed in the accident; in other words, the employee misconduct defense does not apply to instance b.

In Willson and Sons, supra, the US circuit court of appeals for the District of Columbia dismissed a 1926.28 (a) citation because the only testimony about whether welders should be using safety belts, this was before the time when harnesses were required, came from a compliance officer who had never previously inspected a structural steel work site:

no evidence was provided as to the normal practice of the structural steel erection industry with respect to use of safety

belts by 'welding workmen straddling beams.'

Willson and Sons, at 698 F2d 514, CCH OSHD 23,395,
page 33,500, 11 OSHC 1101-1102

In footnote 22 the court said "It is doubtful that [CO] Brown was qualified to testify as to practices of the structural steel erection industry since her inspection of the...court site was apparently her first inspection of a structural steel erection site." Ibid. The same holds true for labor's CO in the case at bar. Recall, Willson says proof about the use of personal protective equipment under the very general 1926.28 (a) standard must come from persons qualified to express such opinions. For our case labor should have asked Mr. Bowlin, not its CO, why workers on the ground would need them. Of course he might have said they did not need the dielectric boots which may explain why labor did not ask him.

Mr. Bowlin did say, when asked if Mr. Taylor should have work rubber overshoes, "Because he's in a \$100,000 piece of equipment that is insulated from the ground that's – provides much more protection than those insulated boots would." I TE 65.

Mr. Bowlin said several times said he would require employees to wear the rubber boots if their customers required them but that is not the same thing as saying they should be worn in certain circumstances. I TE 64-66, III TE 260-261.

In our opinion, a reasonably prudent employer in the power transmission construction business would require employees working adjacent to boom trucks to wear rubber boots or overshoes to protect against accidental shock if they touch the truck while standing on the ground. But we do not enforce the standards; we just decide cases brought before us.

Case law says 1926.28 (a) can only be applied to situations where a qualified witness gives his opinion about the use of PPE for a particular hazard. We have no such testimony in this case and that is labor's problem. Because the compliance officer said this was his first power

transmission industry inspection, he certainly was not qualified to give his opinion as the Willson case just above shows. For this case that left Mr. Bowlin or one of his employees who testified for him.

Following the analysis required by Ormet, supra, labor failed to prove the terms of the standard were not met because labor produced no person familiar with the power transmission business to say it would apply to the wearing of dielectric boots. Because Bowlin did not violate the terms of the standard, we see no need to consider the other three Ormet elements.

Because no one with experience in the power transmission industry testified about when rubber boots should be worn, only that some customers required them and some did not, we dismiss instance b of serious item 1 because labor did not prove Bowlin violated the terms of the 1926.28 (a) PPE standard. This dismissal of instance b leaves serious item 1, instance a (rubber sleeves and gloves), affirmed with a penalty of \$3,500.

serious item 4

For item 4, the citation says:

...1926.453¹³ (b) (2) (v): A body belt was not worn and a lanyard attached to the boom or basket when working from an aerial lift.

Note to paragraph (b) (2) (v): As of January 1, 1998, subpart M of this part (1926.502 (d)) provides that body belts are not acceptable as a part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under 1926.502 (e).

a. An employee working in an aerial lift, located at the Richardson Contracting job site at or near 12025 Hwy S 261, was not attached to the boom or basket by a body or body harness and lanyard.

This serious citation carried a penalty of \$3,500.¹⁴

¹³ 1926.453 is adopted by reference by 803 KAR 2:411, section 2 (a).

¹⁴ High serious and greater probability because a fall from the bucket could kill. Bowlin got 20 % for size and 10 % for history for a \$3,500 penalty. I TE 122.

Even though the cited standard which is found in the aerial lifts section says a body belt is to be used by an employee working from an aerial lift, as the above citation points out body belts are no longer required but full body harnesses are. Here is 1926.502¹⁵ (d), referenced in the citation:

Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, body belts are not acceptable as part of a personal fall arrest system. NOTE: The use of a body belt in a positioning system¹⁶ is acceptable and is regulated under paragraph (e) of this section.

Our hearing officer said Bowlin through its Foreman Henson could not have known Mr. Taylor did not have on a full body harness. The hearing officer used the same facts for serious item 1, instance a – that Foreman Henson did not see Taylor ascend without rubber gloves, sleeves and now no body harness. His reasoning assumes Foreman Henson did not see Taylor come down with the boom without a harness. It also assumes Foreman Henson was generally unaware Taylor worked that day from the basket without a full body harness which is unlikely.

Our first question is whether the foreman was there to see Taylor come down in the bucket. Recall Taylor came down in the bucket and asked for a hand line for the guy wire. According to Mr. Bowlin's story it was at that point Foreman Henson went to his truck for a hand line. Even if we accept Mr. Bowlin's story Foreman Henson did not see Taylor ascend, and we do not accept Mr. Bowlin's story since the David Poe investigation revealed two other employees left the scene for hand lines and Mr. Henson remained to see Taylor ascend, then the foreman was present to hear Mr. Taylor needed a hand line and went to get one. Otherwise, how else would the foreman have known Taylor needed a hand line except by hearing him request one.

¹⁵ 1926.502 is incorporated by reference by 803 KAR 2:412, section 2 (1) (b).

¹⁶ A positioning system is a body belt on a very short leash so a person cannot get close enough to an edge to fall.

In Baker Drywall, Co, Inc, CCH OSHD 31,864, page 47,016, BNA 18 OSHC 1862, 1863 (1999), the federal review commission affirmed a serious citation accusing the company of violating 1926.453 (b) (2) (v) because the standard requires the use of a safety belt, now harness, when working from an aerial lift. In Baker the compliance officer explained an employee can fall out of an aerial lift.

In its brief Bowlin argues it did not have constructive knowledge Mr. Taylor wore no full body harness. This argument is difficult to credit for two reasons: one, the commission has already determined Foreman Henson was present when Taylor asked for the hand line and then went aloft. Two, Taylor had before he came down been working overhead. It would have been easy for Foreman Henson to glance up and see Taylor had no harness. This also applies to employee misconduct. If Foreman Henson had an opportunity to see Mr. Taylor without a harness, and everything points to the fact he did have that opportunity, then Bowlin Energy was not enforcing the rules.

Baker Drywall, Inc, says the standard requires fall protection while working from an aerial lift. The ALJ rejected the employer's argument the citation should be nonserious; ALJ Sommer said a fall from a height could cause a serious injury.

The standard applies because Mr. Taylor was working from an aerial lift, the section where the standard is found. Mr. Taylor's body was found without a harness and so the terms of the standard were violated. I TE 121. Mr. Taylor was a Bowlin employee and so labor proved employee exposure. Foreman Henson had actual knowledge Mr. Taylor had no harness because Henson was present when Taylor came down and asked for a hand line. Also labor proved constructive knowledge because even if the foreman did not actually observe Mr. Taylor in the

bucket, he was in the area and could have glanced over and seen him which proves constructive knowledge since Mr. Taylor in the bucket was in plain sight. Daniel Construction, supra.

We affirm serious item 4. Ormet, supra.

Then our hearing officer said the employee misconduct defense applied, just as he did for serious item 1, instance a (the lack of rubber gloves and sleeves). As we did for serious item 1, we reject Bowlin's employee misconduct defense since the foreman was present when Taylor ascended in the bucket without gloves, sleeves or harness and did not correct him. Daniel, supra. Bowlin failed to prove it had a system for detecting violations. This is especially so because Mr. Henson the foreman was the senior company manager present and Mr. Bowlin by his own testimony was four hours away. I TE 21. Also the safety manager said he made quarterly surprise visits and then corrected himself and said they were monthly. III TE 315. Neither is sufficient to prove the company had a system for detecting violations.

Serious item 7

For serious item 7, labor said the insulated portion of the aerial lift was altered in such a manner it might reduce its insulating value. For this item we must remember the compliance officer testified this was his first power transmission case.

Here is the citation:

...1926.453 (b) (2) (xi): The insulated portion of an aerial lift was altered in a manner that might reduce its insulating value:

- a. The insulated portion of a "Ford" Model 800 Truck with a "Telelect" Model I-4040 aerial lift, operated at a job site at or near 12025 Hwy S 261, had been altered in such a manner that could have reduced its insulating value.

(emphasis added)

This citation carried a proposed penalty of \$3,500.¹⁷

¹⁷ High serious/greater probability with 30 % credit.

Initially, we are skeptical about a standard and citation couched in terms such as "might" or "could have." Either a company violates a standard or it does not. Without a positive allegation the company violated the standard, we do not understand how the commission could find a violation or labor could issue a citation for that matter. Ormet, supra, says one element labor must prove is the terms of the standard were violated. If labor is cannot prove the company altered the lift in such a way as to reduce its insulating value, and labor cannot so prove, then this item must be dismissed. First of all Mr. Bowlin testified the lift passed its last insulation test. III TE 266. Second, labor made no independent investigation of the lift's insulating qualities. Third, the enforcement statute says "Each employer...(b) Shall comply with...standards..." KRS 338.031 (1) (b). For lack of a better phrase, "shall" and "might have" or "could have" don't mix. This standard was very badly written.

To state the problem again; the cited standard says:

The insulated portion of an aerial lift shall not be altered in any manner that might reduce its insulating value.

(emphasis added)

Our hearing officer dismissed this item 7; he said the proof showed the damage observed by the compliance officer had no actual effect on the truck's insulating value. He recounted the testimony of a Bowlin employee who said the truck had passed its last required annual insulating inspection performed by Torco Testing. He said the compliance officer introduced no proof contradicting this, which is true.

Labor's compliance officer said he observed a chip out of the bucket liner, cracks in plastic housing, things held together with wire. II TE 146. He then introduced photographs 29 and 30, exhibit 12, which, he said, showed damage to the truck lift, and 102 showing wire

holding pieces together. II TE 147 and 149. Bowlin employees told the CO the truck, Mr. Taylor's, was referred to as the rough truck. II TE 151.

The parties did not discuss serious item 7 in their briefs.

Mr. Bowlin said his trucks used in electric service must be tested ever year; he said it was done in November because it is a down month for him. III TE 265. He said the trucks "are tested for the dielectric strength of the boom and the basket." III TE 265-266. He said the truck passed; if it had not passed, he would have had to take it out of service." III TE 266.

The only real proof we have is from Mr. Bowlin who said the truck was tested and it passed. There is simply no way for us to hold labor proved the terms of the standard were not met. Ormet, supra. We affirm our hearing officer's decision to dismiss serious item 7. This standard is unenforceable as written.

Serious item 8

Labor said Bowlin Energy permitted Mr. Taylor to approach the 7,200 volt energized wires closer than permitted by the power transmission regulation. Table V-1 sets out permissible distances from live electric parts at which employees may work; serious citation 8 says that distance was two feet. Here is the cited standard:

1926.950¹⁸ (c) (1) No employee shall be permitted to approach or take any conductive object with an approved insulating handle closer to exposed energized parts than shown in Table V-1, unless:

1926.950 (c) (1) (i) The employee is insulated or guarded from the energized part (gloves or gloves with sleeves rated for the voltage involved shall be considered insulation of the employee from the energized part), or

1926.950 (c) (1) (ii) The energized part is isolated, insulated or guarded from any other conductive object(s), as during live-line bare handed work.

¹⁸ 1926.950-960 are adopted by 803 KAR 421, section 2 (2).

Then the citation, serious item 8:

...1926.950 (c) (1): Employees were permitted to approach and take conductive objects closer to exposed energized parts than shown in Table V-1 without approved insulating handle:

- a. An employee working from a "Ford" Model 800 Truck with a "Telelect" Model I-4042 aerial lift, operated on a job site at or near 12025 Hwy S 261, took a conductive guy wire, closer than shown in Table V-1, within 2 feet of energized parts in the 12,4270 volt range, phase to phase.

This also carried a \$3,500 proposed penalty.

Our hearing officer dismissed the citation, referring to the same reasoning he used to dismiss serious item 1, instance a, that being lack of employee knowledge, actual or constructive, and employee misconduct. The hearing officer's dismissal depends on Mr. Bowlin's testimony that Foreman Henson did not see Mr. Donald Taylor ascend toward the live power lines without his rubber gloves and sleeves. David Poe's investigation, we recall, said other employees went to trucks for a hand line and Foreman Henson saw Taylor without the gloves and sleeves and ascending in his boom. Mr. Bowlin also testified he fired all of his workers who were in the vicinity of Mr. Taylor's truck because they saw him go up in his bucket without gloves and sleeves. As our hearing officer observed in his recommended order, an employee may approach the live electrical parts, the wires, closer than the minimum safe distance if he has rubber gloves and sleeves which Mr. Taylor most assuredly did not.

Bowlin's brief to the commission discusses items 1, 4 and 8 in terms, they argue, of lack of knowledge of the violation and their employee misconduct defense. We have rejected this argument.

Labor then argues the violation, Mr. Taylor without gloves or sleeves, was in plain sight. Kokosing and Hackensack, *supra*. Certainly the violation was in plain sight since Taylor was working from an open bucket, up in the air.

In PAR Electrical Contractors, Inc, CCH OSHD 32,709, BNA 20 OSHC 1624 (2004), the federal commission affirmed a citation alleging a violation of 1926.950 (c) (1) (i); two linemen, in a bucket, were working on non energized power lines but near other lines rated at 12,470 volts. A third lineman, the working foreman, "stayed on the ground at the truck." CCH page 51,791, 20 OSHC 1625. The closest energized line had been pushed out of the way of the work with a hot arm, Mr. Taylor's situation. The two linemen decided they would not need rubber gloves or sleeves. While one lineman in the bucket was putting an insulator boot on the deenergized line, he felt heat, heard an explosion and fell to the bottom of the bucket. Mr. Vanover, the lineman working behind him, was electrocuted. An autopsy disclosed the entrance wound was on the palm of Mr. Vanover's left hand. CCH page 51,791, 20 OSHC 1625.

The commission said "At the time of the accident, working foreman Frank was in the truck preparing cut outs and not observing the work." CCH page 51,792, 20 OSHC 1625. A PAR safety director testified the two linemen should have been wearing rubber gloves and sleeves which is the same thing Mr. Bowlin said. CCH page 51,793, 20 OSHC 1628.

At the trial it came out the two PAR linemen were attaching a piece of equipment to a newly installed telephone pole and the work would take place within several inches of the two foot separation rule found in table V-1. Based on these facts, the federal commission said PAR had constructive knowledge of exposure to the hazard through working foreman Frank, despite the fact the foreman was not present at the time of the accident. CCH page 51,793, 20 OSHC

1627. In its decision the federal commission said with reasonable diligence the foreman could have known of the violative condition. Ibid.

In PAR the federal commission said the foreman had knowledge the two linemen in the bucket were working in close proximity to live power lines without gloves and sleeves and thus had constructive knowledge which the federal commission imputed to the company. Compare PAR with our case where Mr. Taylor without gloves and sleeves was on his way up toward the live power lines with the steel cable in his hand. Foreman Henson knew Taylor had no PPE and was heading up toward the live lines. We find Foreman Henson had actual and constructive knowledge of Taylor's exposure to the hazard of the live electric lines. The commission imputes that knowledge to Bowlin Energy because Mr. Bowlin was some four hours away from the work site and Foreman Henson was in charge on behalf of the company.

The standard applies because it comes from the power transmission section; Bowlin violated its terms because Mr. Taylor came into contact with a live wire as can be seen from his burned glove. Mr. Taylor was a Bowlin employee. Ormet, supra.

We reverse the hearing officer and affirm serious item 8 and the proposed penalty. These facts are convincing proof the company failed to prove the third element of the employee misconduct defense, that is it failed to detect violations. Jensen, supra.

serious item 9

Mr. Bowlin said his linemen were supposed to use insulated rubber gloves when working around the live wires carrying 7,200 volts. When Mr. Taylor died, he was not wearing rubber gloves or sleeves. The power transmission standards say these rubber gloves must be regularly tested to make sure they have no holes in them which would permit the passage of electricity.

The cited standard says:

1926.951 (a) Protective equipment. (1) (ii) Rubber protective equipment shall be visually inspected prior to use.

1926.951 (a) (1) (iii) In addition, an "air" test shall be performed for rubber gloves prior to use.

This standard does not define an air test; neither does the citation except that it says the Salisbury "directions"¹⁹ must be followed; the citation says:

...1926.951 (a) (1) (iii): An "air" test was not performed for rubber gloves prior to use;

- a. Employee interviewed and Mr. Blevins Bowlin, Chairman, were unable to demonstrate the proper glove inflation test as stated in the "Salisbury" General Care & Inspection directions.

This citation carried a proposed penalty of \$1,750.²⁰

Labor's citation says Bowlin failed to perform the air test prescribed in a manufacturer's poster. Exhibit 23. This poster is not a regulation; there is no proof anyone with Bowlin Energy had ever seen the poster. Even though the citation characterizes the Salisbury poster as being a direction, it is not. It is just a poster.

Mr. Bowlin and others who testified for the company said the air test meant the sleeve of the glove would be rolled up, capturing air within the glove. Then pressure is put on the inflated glove and the tester determines, just like gently squeezing a balloon, if there are any leaks. This is done by a visual inspection. Then the tester listens for the presence of any leaks. Finally, the tester holds the glove to his face to see if he can feel a stream of air on his face. This, for the company witnesses, is an air test of the rubber gloves.

¹⁹ Labor's use of the word directions is clever by half. Federal OSHA regularly issues directives and interpretations of its standards, but not one for the rubber gloves. This Salisbury poster is not a directive.

²⁰ This was rated as high serious but lesser probability of an accident for a gravity based penalty of \$3,000, less the 30 % credit.

Through Compliance Officer Seth Bendorf, labor introduced exhibit 23 which is a Salisbury Lineman Safety Products poster. Mr. Bendorf testified this poster says the air test should be performed as above and then repeated with the glove turned inside out.

Ronald Douglas testified he was a crew foreman for Bowlin; he had worked for Bowlin for some 28 years. III TE 361. He worked as a lineman before becoming a foreman in 1989. III TE 362. He described a air test; he said "you can make an air tight seal and you roll it up and you look for abrasions and for puncture wounds and feel for any air releasing... You put it up close to you." III TE 367. When he was asked about turning the gloves inside out to test them, he said "Never have heard of turning them inside out to test them." III TE 368.

Then Jerry Condor testified for Bowlin; he had been a ground man and equipment operator for thirty years. III TE 371. When asked about testing gloves, he said "You roll them up and air test... Look at – you look at them and listen for it, feel for it." He said, when asked about testing the gloves by turning them inside out, "I never did know there was no such thing to do. No. Wasn't supposed to." III TE 377. Then he was asked if turning them inside out might be difficult; he said "They're made so you can't hardly turn one inside out." III TE 377.

The first question for us, not answered by case law for this particular standard, is whether this air test regulation is to be interpreted according to the rule laid down for the general regulation cited for serious item 1, 1926.28 (a). L. R. Willson, supra, says labor must produce testimony from "*persons qualified to express such opinions* that, absent the specified protective equipment, the hazard was likely to occur." Section 1926.28 (a) is such a general standard; it gives no clue what equipment might be required for what hazards. Our cited standard here, however, applies specifically to the power transmission industry and says an air test must be performed before use; it just does not define the test. From our research, we have been unable

to find any case law which applies the Willson rule to a power transmission standard which specifies a particular test.

When the language of a standard fails to provide an unambiguous meaning, we look to the standard's legislative history.

United States Postal Service, a federal review commission decision, CCH OSHD 32,909, BNA 21 OSHC 1767, 1770 (2006).

We have found no legislative history for this poorly written air test standard.

In Postal Service the commission was writing about 1910.132 (a), a personal protective equipment standard which is somewhat different than that cited for an air test on a power transmission construction site. Nevertheless, both 1910.132 (a) and 1926.951 (a) impose specific requirements, unlike 1926.28 (a). We therefore find Postal Service to be persuasive:

Because the phrase 'protective equipment' is ambiguous, and because the legislative history does not directly and explicitly clarify the issue, we must evaluate whether the Secretary's interpretation of the phrase is reasonable...

In assessing the reasonableness of the Secretary's interpretation, we consider whether her interpretation 'sensibly conforms to the purpose and wording of the regulation,' taking into account 'whether the Secretary has consistently applied the interpretation embodied in the citation,' 'the adequacy of notice to regulated parties,' and 'the quality of the Secretary's elaboration of pertinent policy considerations.'

Postal Service at CCH page 53,451, 21 OSHC 1770

The only proof we have of an inside out air test comes from a Salisbury rubber glove poster. Exhibit 23. Labor's compliance officer gave us no discussion of any policy considerations and did not attempt to interpret the standard; neither did the citation. And in any event, Mr. Bowlin said he bought gloves from Salisbury and other suppliers:

Q Is your knowledge [of the Salisbury inside out air test] based on just on what Mr. Bendorf [the CO] testified to and not your actual personal knowledge?

A Yes. Because we don't only buy Salisbury gloves. We buy - there's other manufacturers and their product books might not say

the same thing.

III TE 285

Although admittedly Mr. Bowlin's remark about what other product literature might say was not helpful, neither labor nor Bowlin produced any other product information about air tests. We can infer Mr. Bowlin did not know what other manufacturers might say about inside out testing, if anything.

Mr. Bowlin said he had been a lineman for 28 years. III TE 260. He was apparently quite familiar with the air test:

You take the rubber glove, roll up the end of it. These are preformed rubber gloves and you roll the end of it up. And, then either listen or feel for any air coming out of it. Its not always a visual or a listen test, because if you're hard of hearing or deaf, you cannot – you wouldn't be able to – you wouldn't be able to hear it. So, the – you're taught to hold it up next to your cheek so you can feel it.

III TE 261

Postal Service says the secretary's interpretation, to be given credence, must be "consistently applied." Consistently applied means citations issued to other employers which incorporate the inside out air test. But all we have from the secretary is a poster. No federal interpretations for the standard at issue were introduced and we have failed to locate any. Apparently, labor cannot produce any Salisbury poster based citations; they should have. "[W]hen embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress." Martin v Occupational Safety and Health Review Commission and CF and I Steel, 499 US 144, 157, 111 SCt 1172, 1179, 113 LEd2d 117 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097. When the US Supreme Court says an interpretation may be found in a statutorily authorized citation, the court meant the citation must contain some interpretation. For

example, in our case the citation should have been written in such a way to indicate what was meant by an air test, given the secretary's experience. We can only surmise the secretary in our case had no opinion.

For any safety regulation to be upheld, it must notify an employer about what conduct is required – it must provide notice of what is required by the standard. In our case, the standard did not define an air test. The citation did not define an air test and neither did the compliance officer except to refer to a poster.

Bowlin said its employees regularly conducted air tests on its rubber gloves – at least Bowlin employees knew how to perform the test. The compliance officer never saw any actual electrical work during his inspection and so there was no occasion for the employees to perform the test except as perhaps a demonstration for the CO.

Ormet, supra, first asks if the standard applies; it does. Mr. Bowlin testified that Donald Taylor should have been wearing rubber gloves when he ascended toward the 7,200 volt electric lines. The glove test standard is found in the power transmission section. Bowlin Energy is in the power transmission business. Then the question is whether the employer failed to comply with the standard. Bowlin complied with the standard. There is no proof Bowlin ever failed to perform an air test; the question is which air test. Bowlin employees, including Mr. Blevins Bowlin, testified about rolling up a rubber glove to inspect it and feel for leaks. Labor failed to prove its inside out test was reasonable because it failed to prove Bowlin had notice of its interpretation of an inside out air test and also failed to prove its inside out interpretation was consistently applied to other employers. There is no proof of notice or consistent enforcement.

Labor proved Bowlin employees were exposed to the hazard of live electric parts, the wires, and the need for testing the gloves. Bowlin had knowledge of the hazard because it knew

its employees were exposed to the live wires, knew its employees needed to use rubber gloves and knew the gloves needed to be regularly tested. Bowlin proved it complied with the standard; labor, however, failed to prove its interpretation of the standard was reasonable, in fact it provided no interpretation. Postal Service and Ormet, supra.

Our hearing officer dismissed serious item 9 which was the correct decision. He said labor must give an employer "fair warning of the conduct it prohibits or requires," and labor did not. He said the company had been performing air tests for twenty years. RO 42.

We dismiss serious item 9. Mr. Bowlin said he was not aware of an inside out air test and neither were any of Bowlin Energy's other witnesses.

serious item 10

For item 10 labor alleges Bowlin failed to visually inspect the Ford truck with the aerial lift Mr. Taylor was using to access the power lines overhead. This is the same truck labor had previously cited in item 7 because, labor said, it had been modified in such a way which "could have reduced its insulating value." But the proof was the truck had passed its last electrical insulation test.

The citation says:

...1926.952 (a) (1): Visual inspections were not made of the equipment to determine that it was in good condition each day the equipment is to be used:

a. Daily visual inspections were not made on a "Ford" Model 800 Truck with a "Telelect" Model 1-4042 aerial lift, operated at or near 12025 Hwe S 261, that had readily observable damage.

Item 10 carried a proposed penalty of \$3,500.²¹

Then the standard from the power transmission chapter says:

²¹ High serious/greater probability of an injury, less 30 % credit.

1926.952 (a) General. (1) Visual inspections shall be made of the equipment to determine that it is in good condition each day the equipment is to be used.

In Georgia Power Company, CCH OSHD 26,540, BNA 11 OSHC 1349 (1983), the federal review commission dismissed a citation alleging the company, engaged in the power transmission business, failed to make a daily inspection. To prove the violation labor introduced Georgia Power's daily vehicle inspection guide which included such items as checking oil levels in the engine and hydraulic systems and bleeding moisture from air tanks. A compliance officer testified the company had failed to enforce its own inspection procedure. In its decision to dismiss, the commission said federal labor failed to prove "which items on that guide prescribe 'visual inspection' tasks within the meaning of the standard." CCH page 33,868, 11 OSHC 1357.

A number of employees testified that a daily inspection was performed, although at least one employee testified that visual inspections were not routinely performed. In the absence of evidence to establish what visual safety inspections of the truck were required to be made, we cannot find a violation.

Ibid.

We are confronted with the same problem we had with item 9. A requirement for a visual inspection of equipment is easier to understand than an undefined air test of a rubber glove. And yet, the citation does not define a visual inspection and the standard only says the tester must determine the equipment is in good condition . In the Georgia Power case, the commission said federal labor never said what a visual inspection meant and so dismissed the citation. In our case the compliance officer said the truck used by Donald Taylor "had readily observable damage." He said "parts of the truck...had been wired together." II TE 170. But just like Georgia Power, Kentucky's compliance officer never said what was meant by a visual inspection; instead he said he observed damage to the truck. It's not the same thing.

Labor's cited standard said the employer, here his representative in the field, must make a visual inspection; either the employer did so or he did not. Labor's compliance officer said there was observable damage but that does not mean the employer failed to make an inspection. And anyway, the CO's testimony about observable damage to the truck is negated by the company's testimony the truck passed its last electrical insulation test. See our discussion of serious item 7 at page 33.

Our hearing officer dismissed item 10; he said, which is true according to the facts of our case, the truck was in good shape because it had passed its last insulation test. RO 44.

As in Georgia Power, labor's compliance officer did not say what a visual inspection was; according to Georgia Power the department of labor must inject some meaning into the visual inspection standard. Perhaps an example will prove our point. No one asked the CO what he thought a visual inspection was. Then he should have been asked if anyone for Bowlin made a visual inspection that day. That leads to the next question which is 'how do you know whether a visual inspection was made.' Finally, the CO should have been asked what "good condition" means.

What we did get from the compliance officer is this: "there had been damage to a door on the truck containing the grounding equipment. They were unable – the employees were unable to open the door to access the equipment." II TE 171. But no one asked the CO if the damage to the door was visible.

Serious item 11 is about Bowlin Energy's failure to ground the truck when working underneath power lines but that is not the issue for this item 10. Serious item 10 was not well tried. Labor has the burden of proving each citation; an employer may simply sit on his hands

and do nothing when labor fails to prove each element of the citation. It was not up to Bowlin to ask the four questions.

We affirm the hearing officer's recommended order which dismisses this item 10. Labor failed to prove what a visual test was and whether any Bowlin worker performed such a test. Labor failed to prove if the damage to the door containing the grounding equipment was visible or not. Because labor carries the burden of proof, Bowlin was under no duty to ask our questions which might have cleared up the ambiguities. That is not Bowlin's job. Labor failed to prove the terms of the standard were not met. Ormet, supra.

serious item 11

The citation says:

...1926.952 (b) (2): When working near energized lines or equipment, aerial lift trucks were not grounded or barricaded and considered as energized equipment, and the aerial lift truck was not be [sic] insulated for the work being performed:

a. Employees were working near a "Ford" Model 800 Truck with a "Telelect" Model 1-4042 aerial lift, operated near 12025 Hwe S 261, that had not been grounded or barricaded.

This also carried a \$3,500 proposed penalty.²²

The standard reads:

1926.952 (b) (2) When working near energized lines or equipment, aerial lift trucks shall be grounded or barricaded and considered as energized equipment, or the aerial lift truck shall be insulated for the work being performed.

(emphasis added)

Compliance Officer Bendorf said "aerial lift trucks, shall be grounded or barricaded." II TE 177. Grounding to him meant "it's connected to the earth to eliminate a potential difference in voltage." He said a wire could be used for grounding the truck. Then he said barricaded

²² High serious/greater probability of an accident, less the 30 % credit.

meant preventing employees from "approaching the truck. II TE 177. Bendorf was not asked, according to the terms of the standard, if the truck was "insulated for the work being performed."

Mr. Bowlin testified about the insulating quality of the truck. He said "Because he's in a \$100,000 piece of equipment that is insulated from the ground that's – provides much more protection than those insulated boots would." I TE 65. Mr. Bowlin was also asked whether the truck was grounded:

Q The truck being used at the time of Mr. Taylor's accident, at that time, would you consider that truck to have been appropriately grounded?

A No...

Q Why not?

A There's a grounding device on that truck that should have been attached to the system neutral. When I asked the guys why it wasn't on, they said they had had to move the truck with the bulldozer. They had a bulldozer there. And, the guy running the bulldozer hit the back box and they couldn't get it open.

III TE 293

We recall Mr. Bowlin testified the truck passed its last insulation test. III TE 266. Labor has the burden of proof in these cases. ROP 43 (1). But labor made no independent investigation of the truck's insulating qualities. From the perspective of item 11, labor made no inquiry about what it meant for the truck to be insulated, to have passed its insulation test. Given how the cited standard reads, "or...insulated for the work being performed," this was a critical error.

We know the truck was not properly grounded, Mr. Bowlin admitted that; we also know the company did not barricade the truck because Foreman Henson utilized the lower boom controls to bring the bucket carrying the fatally injured Mr. Taylor back to earth. We infer the truck, at the time of the electrocution, was not energized when Foreman Henson, without injury, operated its lower controls.

We do know the truck was insulated, but to what extent is not clear. Carrying the burden of proof as it does, it was up to labor to distinguish, if it could, what Mr. Bowlin said about the truck passing the insulating test and the standard's requirement that "the aerial lift truck shall be insulated for the work being performed." It is not clear from the standards what "insulated for the work being performed" means and labor provided no explanation.

Our hearing officer dismissed item 11; he said the company may satisfy the standard one of three ways: one, it may be grounded or, two, barricaded or, three, insulated. He said Bowlin Energy proved "the truck was insulated and approved for the work being performed, therefore, it was unnecessary to also ground or barricade the truck." RO 44.

Labor and Bowlin Energy did not address item 11 in their briefs to us.

We affirm our hearing officer's recommended order which dismissed serious item 11. Labor failed to prove Bowlin violated the terms of the standard. The truck was insulated. Ormet, supra. The cited standard gives three options: one, grounding or, two, barricading or, three, insulating the truck. And the proof was the truck passed its insulating test.

**Nonserious citation 2,
item 1**

Because of the complexity of this case and the limited amount of time we have to decide whether to call a case for review, we issued a general call for review rather than a more limited, specific review which Bowlin has urged upon us in its statement in opposition to review. Page 4. See also ROP 47 (3). During the review process, our attention was drawn to the \$3,500 proposed penalty for nonserious item 1, affirmed by our hearing officer, because of the very limited rationale offered for the penalty by the compliance officer.

When asked why this nonserious item carried a penalty, the compliance officer said "This is a regulatory violation. Meaning the OSH program, the Department of Labor have [sic]

determined that a penalty shall be assessed for this violation...regardless of injury to an employee or potential for injury to an employee" II TE 182. He said the penalty would be applied to all employers, we infer in the same situation. In response to a question on cross examination, the CO said it was his understanding the work area had not been cordoned off and employees were worried items might be stolen from their trucks. But he did not say, was not asked, if this interfered with his investigation. II TE 219.

Our hearing officer found Bowlin Energy violated the regulation because it did not make the call within the eight hour period. He affirmed this nonserious item 1 with a penalty of \$3,500. RO 47. With this case under our general call for review, we will now determine if the penalty was reasonable.

Labor's compliance officer said this "regulatory type violation...carries a mandatory unadjusted penalty of \$5,000." He did not explain. He said severity was "minimal" and probability "lesser." II TE 181. On cross examination the CO said he was on site the next day, that is the day after the accident. II TE 214. When asked if the call which was not made within the eight hour period had hindered his investigation, he said only "Because the notice was not given within eight hours of the fatal work place accident." II TE 215.

Here is the citation:

803 KAR 2:180 Section 3 (2): The employer did not orally report to the Kentucky Department of Labor, Office of Occupational Safety and Health, Division of Compliance, at (502) 564-3070 or in the event the employer could not speak with someone in the Frankfort, office, the employer did not report to...1-800-321-6742...any work-related incident which resulted in the death of any employee within eight (8) hours:

a. Richardson Contracting did not notify the Kentucky Department of Labor within 8 hours of a fatal workplace accident at or near 12025 Hwe S. 261 in McQuady, Kentucky.

Then the cited standard says:

Section 3. Reporting Fatalities, Amputations, or In-Patient Hospitalizations. (1) Employers shall orally report to the Kentucky Labor Cabinet, Department of Workplace Standards, Division of Occupational Safety and Health Compliance, at (502) 564-3070, any work-related incident which results in the following:

(a) The death of any employee; or (b) The hospitalization of three (3) or more employees.

(2) The report required under subsection (1) of this section shall be made within eight (8) hours from when the incident is reported to the employer, the employer's agent, or another employee. If the employer cannot speak with someone in the Frankfort office, the employer shall report the incident using the OSHA toll-free, central telephone number, 1-800-321-OSHA (1-800-321-6742).

We are concerned the compliance officer did not more fully explain the imposition of what he described as a mandatory \$5,000 penalty, certainly the regulation does not require one. Of course, no one asked the CO for an explanation. All KRS 339.991 (3) says is the maximum penalty for a nonserious violation is \$7,000. Because of our administrative experience with these cases, we think it likely the CO was relying on his compliance manual which the COs use to guide them when performing inspections, writing citations and fixing penalties; but we do not know because the CO did not mention the manual. In any event, the compliance manual is not a regulation; it is a policy manual written for the use and convenience of the compliance officers.

While we understand the secretary uses the compliance manual to "promote consistency in penalty assessment" as Professor Rothstein puts it,²³ we do not know the source of the compliance officer's penalty calculation because he made no mention of the manual during his discussion of the nonserious penalty. This leaves us with no way to assess whether the \$3,500 penalty for the nonserious violation was reasonable. What then is a reasonable penalty?

²³ Mark A. Rothstein, Occupational Safety and Health Law, 2010 edition, section 15:2, page 458.

David Poe's investigation said the accident took place at 4:15 PM CST. Exhibit 1, page 19. As we said, the compliance officer's inspection began the next day. Labor has not argued either its investigation was impeded or that it was prejudiced in some way.

In John Carter dba JB'S Tree Service, a federal administrative law judge decision, CCH OSHD 31,385, 18 OSHC 1207, 1210 (1997), the ALJ upheld a \$1,500 penalty because the delay, that is the employer's failure to report the incident, "impeded OSHA's investigation." Federal OSHA learned of a fatal accident sixteen days after it occurred and then only from the police. In our case Bowlin Energy reported the fatality the next day.

Then in TraCorp Construction, CCH OSHD 31,770, page 46,484, 18 OSHC 1774, 1776 (1999), the ALJ set a \$100 penalty where the compliance officer "learned of the fatality...from a third party, nearly a month after the incident." In TraCorp some physical evidence, a wire rope, had disappeared by the time the compliance officer arrived to begin his inspection.

We can foresee a set of facts which would call for the imposition of a severe fine for failing to report a fatality and that failure led to a compromised inspection; that is not our case. In a situation where labor could reasonably argue the call came so late that its investigation was hindered or prejudiced in some way, then we think a good case could be made for the mandatory \$5,000 gravity based penalty. John Carter and TraCorp. But those are not our facts.

Because we received no guidance from the secretary about what a reasonable penalty would be for this infraction, or why a \$3,500 penalty was required or appropriate, we looked to the Kentucky occupational safety and health penalty regulations. We found a \$100 penalty for failing to post a citation where employees can see it. 803 KAR 2:125, section 1 (4). We see a penalty of \$100 for failing to report the fatality within the prescribed eight hours to be reasonable


where, in this case, the compliance officer's inspection was in no way impeded or compromised and the CO arrived on site the very next day. KRS 338.081 (3).


We affirm nonserious item 1; we set the penalty for Bowlin's failure to report the fatality within eight hours of its occurrence at \$100.

We adopt the hearing officer's recommended order to the extent it conforms to our decision.

It is so ordered.

February 1, 2011.


Faye S. Liebermann
Chair


Michael L. Mulkins
Commissioner


Paul Cecil Green
Commissioner

Certificate of Service

This is to certify a copy of the above decision and order of this review commission was served on February 1, 2011 on the following persons in the manner indicated:


Messenger mail:

James R. Grider, Jr.
Office of Legal Services
Labor Cabinet
1047 US 127 South - Suite 2
Frankfort, Kentucky 40601

Michael Head
Susan S. Durant
Stuart W. Cobb
Hearing Officers
Administrative Hearings Branch
1024 Capital Center Drive – Suite 200
Frankfort, Kentucky 40601-8204

US mail:

Robert A. Dimling
Frost Brown Todd
2200 PNC Center
210 East Fifth Street
Cincinnati, Ohio 45202-4182


Frederick G. Huggins
General Counsel
Kentucky Occupational Safety and
Health Review Commission
#4 Millcreek Park
Frankfort, Kentucky 40601