COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4665-09

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

PIKE ELECTRIC, INC — RESPONDENT

* * * * * * * * * *

Melissa Jan Williamson, Frankfort, for the secretary. Eugene L. Mosley, Louisville, Nicole Smith, Washington, DC, and Nicholas R. Hankey, Washington, DC, for Pike Electric.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case comes to us on respondent Pike Electric's petition for discretionary review. 803 KAR 50:010, section 47 (3) (ROP 47 (3)). Our hearing officer affirmed one serious citation alleging a violation of an electrical power generation, transmission and distribution standard. A lineman fell while climbing a pole. Labor's citation alleged the company did not require fall protection when the lineman was repositioning himself on the ice covered pole.

KRS 336.015 (1) charges the secretary 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 commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner 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 Glass*,[1] 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..."[2]

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

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[1] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), 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.

[2] See federal commission rule 92 (a), 29 CFR 2200.

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."

Pike Electric is a construction company engaged in the electric power transmission and distribution business. Richmond suffered a major ice storm and Pike came to repair lines and restore electric power. The storm covered the utility poles with ice which was two inches thick, at least on three sides.

Linemen use spikes strapped to their boots, they call them gaffs or hooks, to climb a wooden pole. Transcript of the evidence, page 89 (TE 89). Several Pike employees and a Pike expert witness testified they ordinarily climb the poles using the gaffs on their boots and their hands to grip the pole. When they reach a place where work needs to be done, they keep their place on the pole with a safety strap which is attached to a belt worn at the waist. TE 40. The strap goes around the pole. TE 44.

Lineman Geremy Hawkins (TE 58) climbed up the ice covered pole which was approximately 34 feet and 9 inches tall. According to Compliance Officer Andrew Rapp, it was a 40 foot pole with 5 feet buried underground. TE 39. On this pole starting at the bottom was first a TV cable and a telephone line; above that was a neutral electrical line and above that an energized line. TE 26 and 30. Mr. Hawkins, he had suffered a broken sacrum and a concussion (TE 42 – 43), fell while trying to cross the neutral line. Mr. Hawkins had gaffs on his boots, a belt on his waist and a single strap. TE 40. This particular pole is depicted in photographic exhibit 2a. TE

25. We do not know how Mr. Hawkins got past the TV cable and telephone lines. Hawkins, to get around the neutral wire, unhooked his strap with the intention of rehooking it above the neutral line. TE 40. When employees came to Mr. Hawkins aid after his fall, his strap was only hooked to one side of his belt. TE 163. From this we infer Hawkins had unhooked one side of his strap to maneuver past the neutral wire.

Employees about to climb a pole poke holes to test it for dampness. This pole was suitable for climbing. TE 29.

The very next day after the accident Foreman Trent climbed the same icy pole to make the repairs; he said he used gaffs, a safety belt and two straps. He climbed up to the neutral line using one strap and then while at that location put his second strap beyond the neutral obstruction and only then unclipped the strap below the neutral line. He said "Well, I just didn't want two people falling off the same pole one day right after the other." TE 158.

Here is the citation:

> 29 CFR 1910.269 (g) (2) (v)[3]: Fall arrest equipment, work positioning equipment, or travel restricting equipment shall be used by employees working at elevated locations more than 4 feet...above the ground on poles, towers, or similar structures if other fall protection has not been provided. Fall protection equipment is not required to be used by a qualified employee climbing or changing location on poles, towers, or similar structures, unless conditions, such as, but not limited to, ice, high winds, the design of the structure (for example, no provision for holding on with hands), or the presence of contaminants on the structure, could cause the employee to lose his or her grip or footing:
>
> a. Fall protection equipment was not used at all times when an employee had to reposition himself when climbing a utility pole with

[3] Adopted by 803 KAR 2:317, section 2.

ice accumulations at 313 Wildwood Drive in Richmond, Kentucky.

Exhibit 4

This serious citation carried a proposed penalty of $4,500.[4]

The first paragraph of the citation is an exact quotation of the cited standard. As Compliance Officer Rapp[5] explained, the two sentences of the cited standard refer to two different things. While the first sentence in the standard is directed to performing work when strapped to the pole, the second deals with climbing the pole. TE 77. When working on the pole, the employee stands on his gaffs which are stuck into the pole. With his strap around the pole, the lineman leans backward to put tension on the strap; this position frees the lineman's hands so he can work.

The hearing officer's recommended order

the hearing officer's findings of fact

Our hearing officer affirmed the serious citation and the penalty. Labor argued the lineman, who at the time was climbing an icy pole, fell because he unhooked his safety strap to climb past an obstruction, the neutral line. Pike said industry custom does not require a lineman to have his safety strap attached at all times. Recommended order, page 1 (RO 1). Foreman Trent told Geremy Hawkins to climb

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[4] The violation was high serious because the injured employee required hospitalization and had a concussion. TE 70 and 71. Gravity of the violation was greater because there was an accident. TE 71. Pike got no credit for size because it had over 250 employees. TE 72. Pike got no good faith because the violation was rated high serious and greater probability. TE 72. Then Pike got ten percent for history because it had not, in Kentucky, had a citation within three years of the inspection. TE 72. Because of the high serious and greater probability rating, the gravity based penalty was $5,000. TE 71. $5,000 less ten percent credit is a penalty of $4,500. TE 73.

[5] Mr. Rapp is a certified safety professional and an occupational safety and health technologist. TE 17.

the icy pole to repair a broken wire; he told Hawkins to use his gaffs, body belt and safety strap. Trent said he heard Mr. Hawkins, on the pole, say he was having trouble. Hawkins fell while Foreman Trent "was putting on my tools" so he could climb up to help. RO 4 and TE 160.

Hearing Officer Head said linemen climbing up the icy pole use their gaffs and move the strap, which is attached around the pole, up the pole with their hands. When a Pike lineman in icy conditions encounters an obstruction such as a wire or cross piece on the pole, he unclips one end of his strap so he can climb over the obstruction and then reattach his strap above the obstacle. TE 45 – 51 and RO 4.

As Mr. Head put it:

> Labor charged Pike Electric with violating the fall protection standard because an employee-lineman fell while ascending an icy utility pole when he unhooked his sole safety strap to climb past an obstruction.
>
> RO 1

Labor's cited standard says qualified lineman are only required to use some sort of fall protection during icy and windy conditions. In fact CO Rapp said linemen may free climb under normal conditions, meaning they may climb with gaffs on their boots and their hands on the pole. TE 64. But the CO said ice was a condition, according to the standard, which required the use of fall protection equipment. Mr. Rapp said when the injured employee, and the foreman the next day, climbed the icy pole they would not have needed the second strap until they got to the neutral line obstruction.[6] TE 51. As labor interprets the cited standard, an employee, Mr.

[6] This ignores the TV and cable lines about which we know nothing.

Hawkins, climbing the ice covered pole to the neutral line with his strap and then unclipping to maneuver over the neutral line, was at that time without fall protection in the icy conditions and the company was in violation of the standard. TE 61. This was the conclusion our hearing officer reached when he affirmed the citation. RO 13 - 15.

Mr. Head said "the standard as interpreted by the Labor Cabinet does not conform to industry custom." RO 5. Pike's safety supervisor Steve Bryant said he had never used two straps on a safety belt to climb past an obstruction. RO 5, TE 98 - 100, 104 and 110. Pike's expert then said in his 30 years of experience he had never used two straps or seen anyone use two. RO 6 and TE 123 – 124. Mr. Head said he found this testimony "suspect" because the compliance officer said he had spoken privately, as is his statutory right,[7] with two Pike employees who were familiar with the two strap method of climbing. RO 6 and TE 54. Then our hearing officer said the foreman's use of two straps to climb over the obstruction when the pole was icy proved using a second strap was not so "cumbersome" as the expert had claimed. Mr. Head dismissed the expert's contention that using two straps would cause the lineman to burn the pole.[8] Head said it was the gaffs which prevented a linemen from sliding down the pole with the strap still around it and we so find. RO 7.

Our hearing officer said he found the Pike foreman's testimony incredible, Trent had also disparaged the use of two straps, because, one, Mr. Trent himself had used

[7] KRS 338.101 (1) (a).

[8] Burning the pole means the lineman slides down close to the pole with his strap still attached. As one might expect, this accident can lead to very serious injury.

two straps to get around the neutral line the day after the accident and, two, the Pike employees who told the CO compliance officer they had heard of the practice. RO 7.

Mr. Head said the testimony about two inches of ice on the pole, Mr. Hawkins's statement to the compliance officer that he recalled "having difficulty with ice accumulations on the utility poles that day"[9] and Foreman Trent's use of two straps to climb the icy pole and maneuver over the neutral line convinced him the pole was hazardous and triggered the application of the cited standard. He also found the icy conditions caused Mr. Hawkins's fall – but recall, an accident is not necessary to prove a hazard. RO 8. "One purpose of the Act is to prevent the first accident." *Lee Way Motor Freight Inc v Secretary of Labor*, 511 F2d 864, 870 (CA10 1975), CCH OSHD 19,320, page 23,093, BNA 2 OSHC 1609, 1613.

Then the hearing officer got to the point of his recommended order:

> The Hearing Officer infers that linemen are part of a culture of workers who have inflated self-confidence in their ability, so much that they eschew safety precautions required by law. This behavior does not establish that there is no risk that a lineman will lose their grip when climbing an icy utility pole, only that the risk is ignored.
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> RO 9

the hearing officer's
conclusions of law

Labor says employees in icy conditions were required to keep a strap around the pole at all times. When the lineman disconnected his strap to maneuver over the neutral line, the obstruction, Pike was in violation of the cited standard. RO 12. Our

[9] TE 43.

hearing officer said the plain meaning of the standard was that a lineman had to have a strap around the pole in icy conditions. RO 12. That meant two straps were necessary to get around obstacles. We agree.

Hearing Officer Head rejected the industry custom of only using one strap, regardless of the conditions.[10] Mr. Head said the standard was unequivocal: that one strap had to be attached at all times in icy conditions. RO 13. To arrive at his conclusion, Mr. Head also rejected Pike's argument that industry custom could be relied upon to clarify what it called a vague and ambiguous standard because, he said, the standard on this score was neither. RO 13. We find testimony about the use of straps as fall protection, and especially Foreman Trent's use of two straps to work past the neutral line during icy conditions, clears up any potential ambiguity found in the standard. In *Lombard Brothers, Inc*, CCH OSHD 22,051, page 26,562, BNA 5 OSHC 1716, 1717 (1977), the federal review commission said:

> Whether the standard provides fair notice to the employer cannot be determined solely from the face of the standard and without any reference to the concrete facts of a case. *Brennan v OSHRC and Santa Fe Trail Transport Co*, 505 F2d 869 (10th Cir 1974)

Mr. Head said Foreman Trent's use of two straps on the icy pole disproves Pike's theory that the industry custom of linemen wearing only one strap absolves it from any liability under the standard in the icy conditions:

> The proof showed only that the macho culture of linemen led them to ignore the hazard of losing their grip on an icy utility pole. Widespread disregard of a risk does not establish a viable defense even if the standard were vague or ambiguous, which it is not.

[10] Mr. Hawkins fell from the icy pole when he disconnected his one strap to get around the neutral wire obstacle.

Mr. Head rejected Pike's argument that two straps were technologically infeasible because labor, and Foreman Trent, proved use of two straps was feasible; this proof came in through the compliance officer's testimony about his conversations with two Pike employees who said they had heard of the use of two straps and Mr. Trent's use of two straps the day after the accident. RO 7.

Finally, Head rejected Pike's argument that two straps cannot be required because linemen can still fall if their gaffs, spikes, lose their grip on a pole. Mr. Head said using two straps addresses the hazard of an employee losing his hand grasp of the pole, not the hazard of the gaffs losing their hold on the icy pole. RO 14.

Labor's brief to the commission

Labor's brief to the commission was not particularly helpful; it cited to no applicable case law.

Pike Electric's brief to the commission

Pike attached a "Bashlin Lineman's Climbing Equipment" brochure to its brief as well as to the hearing officer's. This brochure was not introduced into evidence and thus is not before the commission. We will not consider any arguments based on the brochure. ROP 36 and 42.

Pike says the cited standard is vague and so we should look to industry custom to interpret the standard – in fact Pike's principal argument is industry custom. To Pike, the testimony it elicited from its witnesses, its employees and its

expert that they never used more than one strap to climb proved there was no violation.

Pike's testimony was to the effect that linemen regularly unclipped their one safety strap when maneuvering over a obstacle, here the neutral line.

Pike says the cited standard does not explicitly require the use of two safety straps which is true. On the other hand, the standard does say a qualified employee must use fall protection when working on an icy pole:

> Fall protection equipment is not required to be used by a qualified employee climbing or changing location on poles, towers... unless conditions, such as...ice...could cause the employee to lose his or her grip or footing.
>
> 1910.269 (g) (2) (v)

We find when lineman Hawkins on the icy pole unclipped to get past the obstacle he was not, at that time, using fall protection which is a violation of the standard. Labor's cited fall protection standard, in the icy conditions, required two straps to maneuver past the neutral line; using a single strap in the icy conditions which would have to be unhooked to get past the neutral line meant the lineman was, at that critical point, without fall protection on the icy pole.

Pike argues the gaffs are fall protection, citing to a standards interpretation, exhibit 8, which is titled "Payment for body belts, positioning straps, and pole and tree climbers [gaffs or hooks]." This interpretation says employers must pay for gaffs, belts and straps. Citing to this standard interpretation[11] Pike says because gaffs are fall protection and Mr. Hawkins was wearing them when he fell, Pike did

[11] We find this interpretation is about what equipment an employer must provide and is not about fall protection per se.

not violate the standard which requires fall protection when the pole is icy. But this argument overlooks some facts and law: first of all, the cited standard says fall protection for qualified employees, and we find Mr. Hawkins was a qualified employee, is not required "unless conditions, such as...ice...could cause the employee to lose his or her grip or footing." According to the standard, fall protection is not required when qualified employees are climbing, except when ice or high winds are present.

Then Mr. Gibson says without gaffs, "you couldn't climb the pole and you'd, for sure, fall" TE 144. He says if an employee cannot hold onto the pole in some way, he cannot climb. He also is asked "So, when you can't hold on to the pole, you do have to use fall protection?" His answer: "Right." TE 138.

Mr. Gibson said gaffs are fall protection. TE 127. This does not surprise us because Pike's defense was, in part, that Mr. Hawkins wore fall protection when he fell – gaffs and a single, unhooked strap to get around the obstacle, the neutral wire. Pike's safety supervisor says "if you don't have the gaffs on, you can't get off the ground." TE 108.

Pike's argument that gaffs are fall protection is not persuasive. The cited standard, again, says in part:

> Fall protection equipment is not required to be used by a qualified employee climbing or changing location on poles, towers, or similar structures unless conditions, such as...ice...could cause the employee to lose his or her grip or footing.
>
> 1910.269 (g) (2) (v) (emphasis added)

In the absence of ice or high winds a qualified employee may free climb without fall protection; but we find gaffs are necessary to move up the pole, even when free climbing. This standard, by its very terms, says gaffs are not fall protection because fall protection is only needed for ice or high wind. And yet, without gaffs a lineman cannot climb a wooden pole, cannot free climb during which the standard does not require fall protection.

We find gaffs, according to the language of the standard, are not fall protection which must be used when the pole is icy.

Pike's fair notice argument

Citing to *Seyforth Roofing Co, Inc*, a federal administrative law judge order, CCH OSHD 31,968, page 47,549, BNA 18 OSHC 2038, 2039 (1999), Pike argues nothing in the cited standard gives the employer fair notice as to what is required of the employer. But *Seyforth* is inapposite to Pike's aspirations for it because the ALJ found the company to have violated the "broadly worded standard;" the ALJ said in part, "Seyforth's own safety rules required the tank to be secured..." ALJ Barkley said Seyforth "was aware that some kind of physical precaution...was required."

In the case at bar, Pike was aware its linemen needed gaffs and their hands to climb poles. Pike was also aware its linemen needed straps and gaffs to hold their positions on poles to do their work. Pike's expert, however, said a lineman could climb an icy pole with a strap, unhook the strap to maneuver over an obstacle, rehook the strap above the obstacle and keep moving upward. Where Pike and the secretary parted company was when Pike asserted it could, in icy conditions,

unhook the one strap to clear an obstacle. Our hearing officer ruled the cited standard requires that a lineman have fall protection at all times in icy conditions, the conditions present when Mr. Hawkins fell while using one strap and Foreman Trent did not fall when climbing in the same circumstances but with two straps. "Well, I just didn't want two people falling off the same pole one day right after the other." TE 158.

We find the facts of the case before us prove that Pike understood the operation of the cited standard; it just did not agree, despite what the standard says, that linemen were required to have fall protection at all times when working on wooden poles in icy conditions.

Our hearing officer addressed himself to Pike's claim the standard does not mention that any particular equipment must be used. He said "the plain meaning of the standard requires linemen's safety strap to be connected when conditions, such as ice, could cause the linemen to lose their grip when climbing the pole." RO 12.

Pike, citing to *Seyforth*, argues the standard is unconstitutionally vague. In his recommended order our hearing officer rejected that argument. He said "the plain meaning of the standard is that whenever ice could cause linemen to lose their grip, linemen ascending icy poles must use fall equipment at all times. Obviously, Pike Electric's linemen were wearing fall protection, but they unhooked their fall protection when they climbed past an obstruction..." RO 12. What our hearing officer refers to is Mr. Hawkins's fall from the icy pole when he unhooked his single strap to maneuver over the neutral line and Foreman Trent's use of two straps the

next day to get past the same neutral wire. Pike's safety expert said lineman needed one strap to get around an obstacle, even in icy conditions. TE 125. This, our hearing officer found, is an admission Pike violated the standard.

While we agree with our hearing officer's estimation the cited standard, in the context of the facts of the case, overtly requires fall protection for a lineman working on a wooden pole covered with ice, or in the presence of high winds for that matter, we will for completeness on this issue rehearse the "vagueness issue"[12] and the reasonable person test followed by a majority of the federal circuit courts. In *Ryder Truck Lines, Inc v Brennan*, 497 F2d 230 (CA5 1974), CCH OSHD 18,238, BNA 2 OSHC 1075, the court was faced with a situation where the federal department of labor had issued a personal protective equipment based citation because Ryder did not require its loading dock workers to use foot protection; dock workers loaded and unloaded freight "some of which weighed as much as 100 pounds." Ryder claimed the standard,[13] which did not refer to foot protection, was "unconstitutionally void for vagueness." In its decision the court rejected the defense; it said:

> ...we think inherent in that standard is an external and objective test, namely, whether or not a reasonable person would recognize a hazard of foot injuries to dockmen, in a somewhat confined space, from falling freight and the rapid movement of heavy mechanical equipment...So long as the [OSH law] mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster.
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> At 497 F2d 233, CCH pages 22,389 – 22,390, 2 OSHC 1077 (emphasis added)

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[12] Mark A. Rothstein, *Occupational Safety and Health Law*, 2010 edition, page 206.
[13] 1910.132 (a) requires personal protective equipment for eyes, face, head and extremities but provides no examples of what specific equipment it required.

In the case before us, Pike understood its linemen would use gaffs, belts and straps to work on telephone poles. Pike's Foreman Trent recognized the hazard of climbing on the icy pole and unclipping his strap to cross the neutral line and so used two straps. The cited standard requires the use of fall protection for linemen working on an icy pole. Mr. Trent was that reasonable person who recognized the hazard and followed the mandate of the standard; when Mr. Trent crossed the neutral line, using two straps, he was using fall protection the entire time. As did our hearing officer, we reject Pike's fair warning argument because Mr. Trent knew how to comply with the standard.

Industry practice or a reasonably prudent employer

Pike relies on the fact that expert Gibson testified "the widespread, prevailing practice in the industry when a lineman climbs an electric pole in icy conditions is to hitchhike[14] up the pole wearing climbing gaffs, a safety belt, and a single strap, and to unhook the safety strap when crossing the neutral wire, just as Hawkins did on the day of the incident." Brief at 8, TE 122 and 124. This testimony underscores why our hearing officer ruled as he did and as we shall as well. Pike's expert says it is industry practice to violate the standard during icy conditions, to work without fall protection even though the standard requires just that. This is why our hearing officer found Pike's witnesses incredible, their testimony unconvincing. Mr. Head said Foreman Trent's use of two straps on the icy pole discredits Pike's theory an

[14] Hitchhike is a term which means the lineman uses his gaffs and strap to climb; he pushes the strap up the pole while climbing.

industry custom of linemen wearing only one strap proves there was no violation of the standard. RO 13. We agree.

Pike says "Where a standard is not clear on its face," the federal commission "routinely examines industry custom." Brief at page 6. This is not always the case; the federal courts have found industry custom or practice to be less than reliable. For example, there has been considerable litigation about another general standard, 1926.28 (a), which says:

> The employer is responsible for requiring 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.

Defense lawyers challenged 1926.28 (a), claiming it was vague and therefore unconstitutional. Courts first found it was not unconstitutional by saying they would look to the custom and practice of the industry when an employer in that industry was cited.

Soon thereafter, a majority of the federal courts of appeals held 1926.28 (a) should 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 (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.[15] In its decision the fourth circuit said:

> We agree with the First and Ninth Circuits that the reasonable man test should not be limited to the custom and practice of the industry.[16] 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.
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> 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 depends on what the particular industry thought was required. At 583 F2d 1370, CCH page 27,999, 6 OSHC 2066 – 2067. But the fourth circuit in *Bristol Steel* said an industry's safety practices could be very lax; and so it said the standard should be whether a reasonably prudent employer, for our case a power transmission contractor, would have protected his employees with PPE.

Our hearing officer found Pike's custom and practices to be lax and we agree. We reject Pike's reliance on custom and practice. We adopt the reasoning of the fourth circuit in *Bristol Steel and Iron Works.* As we have said, Foreman Trent was the

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[15] *B and B Insulation, Inc v OSHRC and Marshall,* 583 F2d 1364 (CA5 1978), CCH OSHD 23,151, BNA 6 OSHC 2062.

[16] *Cape and Vineyard Division v OSHRC,* 512 F2d 1148 (CA1 1975), CCH OSHD 19,378, BNA 2 OSHC 1628, and *Brennan v Smoke-Craft, Inc and OSHRC,* 530 F2d 843, 845 (CA9 1976), CCH OSHD 20,439, BNA 3 OSHC 2000.

reasonable person contemplated by the fourth circuit when he, the day after Mr. Hawkins's fall, used two straps to climb the icy pole and negotiate his way over the neutral line.

Did the secretary prove the alleged violation?

Pike says there is insufficient evidence to support the hearing officer's findings of fact. We disagree. Pike says the undisputed evidence was that two straps increase the risk of a fall; but the facts of our case say otherwise. Hawkins fell when he was using one strap on the icy pole and unhooked his strap to cross the neutral line. Foreman Trent did not fall the next day when he climbed the same icy pole with two straps and used both of them to cross the obstacle.

Mr. Head said he found the expert's testimony incredible because if a lineman has two straps on the pole, one above and one below the obstruction, and then unclips the wrong one as the expert feared he might, he still was held to the pole by the other strap. RO 6. Expert Gibson had asserted a lineman using two straps could unhook the wrong strap and fall.

Pike argues Mr. Hawkins was using fall protection when he fell. Here Pike is thinking about Hawkins's use of gaffs when he climbed the pole. But as we have found, gaffs are not the fall protection contemplated by the standard.

In *Ormet Corporation,* CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), 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,[17] or with the exercise of reasonable diligence, could have known of the violative conditions.

The cited standard, 1910.269 (g) (2) (v), was promulgated for the electric power generation, transmission and distribution industry, Pike's industry. Mr. Hawkins was positioned at the neutral line on a wooden pole when he fell and so was his foreman Mr. Trent the day after the fall. Photographic exhibit 2a. The pole was 34 feet tall. TE 39. We find the standard applies to the facts before us. Because Mr. Hawkins, at the time of his fall, was not using fall protection, that is he did not have a strap around the pole when he fell, Pike violated the terms of the standard. A Pike employee, Mr. Hawkins, had access to the cited hazard when he was in the act of climbing the pole in icy conditions but without fall protection. At the hearing the proof showed Pike employees routinely climbed icy telephone poles and when they were required to maneuver past an obstacle, a wire or a cross member attached to the pole, see photographic exhibit 2a, unhooked the single strap they were using and proceeded upward on the icy pole without the benefit of the required fall protection. We find Pike had actual knowledge of the hazard.

We affirm the hearing officer's recommendation to sustain the serious citation and the $4,500 penalty. We adopt as our own our hearing officer's findings of fact and conclusions of law.

It is so ordered.[18]

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[17] 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.

January 5, 2012.

Michael L. Mullins
Commissioner

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of the above decision and order of the review commission was served this January 5, 2012 on the parties in the manner indicated:

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[18] Chair Faye S. Liebermann took no part in this decision.

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