COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4712-09

SECRETARY OF LABOR,
KENTUCKY LABOR CABINET — COMPLAINANT

v

BOWLIN GROUP, LLC. — RESPONDENT

* * * * * * * * * *

David N. Shattuck, Frankfort, for the Secretary. Robert A. Dimling, Cincinnati, for Bowlin Group.

DECISION AND ORDER OF THIS REVIEW COMMISSION

We received Bowlin's timely petition for discretionary review on December 20, 2010; we then received labor's timely response on December 21. We called this case for review and asked for briefs. Sections 47 (3) and 48 (5), 803 KAR 50:010 (ROP 47 (3) and 48 (5)).

Labor issued one serious citation to Bowlin for not protecting its employees from accidental electrical shock by either grounding the electrical conductor or insulating or isolating employees from the hazard. Patrick Haste, a Bowlin employee, was injured when he contacted an energized tensioner. A tensioner, mounted on the back of a truck, is a machine used to keep taut a new wire the company was pulling onto existing telephone poles. Bowlin was replacing old copper wire with new aluminum wire capable of carrying more kilowatts. A foreman noticed the new wire

did not have enough tension; he directed that someone in his crew go to the truck to increase the tension on the line. A new line must be kept taut so it does not sag. When Lineman Haste touched the tensioner, he received serious electrical burns. He survived but lost his arm. Mr. Haste testified at the trial.

Our hearing officer affirmed the one serious citation which carried a $3,500 penalty.

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 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."

The testimony

Labor called Compliance Officer Andrew Rapp as its first witness. Mr. Rapp holds "two certifications from the Board of Certified Safety Professionals." He is certified as a technician and a safety professional. Transcript of the evidence, page 18 (TE 18). Mr. Rapp attended the OSHA training institute in Illinois and receives forty hours of additional training yearly. TE 19. Mr. Rapp has a bachelor's degree in anthropology from Eastern State University. TE 65.

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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. *Graham* was abrogated on other grounds by *Hoskins v Maricle*, Ky, 150 SW3d 1 (2004).

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

Mr. Rapp visited the Bowlin Group work site to conduct an accident investigation after his office received a report of the amputation. TE 19 - 20. Following his opening conference, CO Rapp began to conduct his inspection; he discussed the accident with Mike Gibson who is the company's safety consultant and trainer. Because of the accident no Bowlin employees were on site. TE 21. Mr. Rapp learned Bowlin, at the time of the accident, was installing new distribution lines on telephone poles along Highway 79/259. This meant the company was stringing new aluminum wire which was not carrying electricity next to existing copper lines which were energized. TE 23 and 24.

Photographic exhibit 6, taken by Mr. Rapp during his inspection, shows the wire spool and the tensioner sitting on the back of the truck. Mr. Rapp said he did not know where or how "the new line made contact with..." an energized wire. TE 24. Even though no witness testified about how electric power found its way to the inert aluminum wire, the proof shows the new wire became energized, causing electricity to flow on the new wire which led back to the tensioner. TE 25.

Before he was injured, Bowlin employee Patrick Haste testified he had been working from a bucket, a man lift, to prepare the telephone poles to accept the new wire. See photographic exhibits 2, 3 and 4 which depict the pole adjacent to the truck with the spool and tensioner. On this pole Bowlin employees had installed "rollers," Mr. Rapp called them "pulleys or sheaves," to facilitate pulling the rope and the new wire. TE 32 and 94 – 95. Mr. Haste said he "started putting the

fiberglass arms[3] on to lay all the hot wires out." TE 94. By this Mr. Haste meant the old, energized wires were shoved to one side so the aluminum wire could be pulled onto the poles. TE 94 – 95 and exhibits 2, 3 and 4. When the "foreman called out that there was some slack on the line...Mr. Haste went over to apply the tension." TE 28. Although another Bowlin employee was close by the truck, Mr. Haste said:

> I hollered at him and said, no, don't worry about it; I'm closest. So I put my water down and went over there, and when I reached into the tensioner it done got into something hot, and it come in this arm and blowed out here in my foot.
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> TE 97 – 98

We find when Mr. Haste said "it done got into something hot," he meant the new wire had become energized as it was being pulled onto the telephone poles in proximity to the old, energized wire.

Mr. Rapp said he recommended the issuance of the citation because:

> where a conductor can become energized, the standard allows three options: To either ground the vehicle to provide a safe path for the current to travel away, or to isolate the equipment, which would mean that there would be no chance of electricity energizing the equipment, or they could insulate, which would provide a barrier of an insulated material that would not conduct electricity.
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> TE 26 (emphasis added)

Compliance Officer Rapp said "none (grounding, isolating or insulating we infer) of those were employed at the time of the accident." TE 26. Here is the cited standard:

> 1926.955 (c)[4] **Stringing or removing deenergized conductors.** (1)

[3] Long fiberglass poles which do not conduct electricity.
[4] Adopted by 803 KAR 2:421, section 2 (2).

> When stringing or removing deenergized conductors, the provisions of paragraphs (c) (2) through (12) of this section shall be complied with...
> 1926.955 (c) (3). Where there is a possibility of the conductor accidently contacting an energized circuit or receiving a dangerous induced voltage buildup, to further protect the employee from the hazards of the conductor, the conductor being installed or removed shall be grounded or provisions made to insulate or isolate the employee.
>
> (emphasis added)

During employee interviews, permitted by KRS 338.101 (1) (a) and KRE 508 (a) and (b), Mr. Rapp learned employees were "not aware of any grounding system that could be installed on this piece of equipment. And it was also reported there was no other means...as far as insulation or isolation that was utilized on that day of the accident." TE 27. After the photographic exhibits (1 through 11), labor introduced the citation through Mr. Rapp. Exhibit 12. The citation says:

> 29 CFR 1926.955 (c) (3): Where there is a possibility of the conductor accidently contacting an energized circuit or receiving a dangerous induced voltage buildup, to further protect the employee from the hazards of the conductor, the conductor being installed or removed shall be grounded or provisions made to insulate or isolate the employee:
> a. On August 12, 2009, employees reconductoring distribution lines along KY Hwy 79/259 South in Harned... were not protected from electrical shock from accidental contact by grounding the conductor, or insulating the employees, or isolating the employees.

This serious citation carried a proposed penalty of $3,500.[5]

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[5] On direct examination Mr. Rapp said he rated the violation as high serious because of the amputation. He found greater probability because the alleged violation did result in the injury. He said the high serious, greater probability factors produced a $5,000 unadjusted penalty. He awarded the company twenty percent credit for size and ten percent for history because the company had not received a serious citation, reduced to a final order, within the prior three years. TE 49 – 50. He said the company would not qualify for a good faith credit because of the high serious/greater probability rating. TE 50 – 51.

Before his accident, Mr. Haste wore rubber gloves and sleeves while working in the bucket. TE 95. He then came down to the ground, exited the bucket and removed his gloves and sleeves. Mr. Haste then said "they hollered at the other end it was getting loose." Mr. Haste said "I'm closest" to the tensioner, walked over to it, "reached into the tensioner" and was struck by the voltage. TE 97 - 98.

Mr. Haste said he did not know how the tensioner became energized. "It had to get into a 7,200 line; I mean, it wasn't static or nothing that got it." TE 98. He said the truck with the tensioner was not grounded. TE 100. Mr. Haste said there was no discussion about grounding the tensioner truck. TE 111. He said employees did not wear rubber gloves when operating the tensioner. TE 112. Mr. Haste said his crew had installed one de-energized line and was pulling a second line, the one that needed to be tightened which then led to the accident. TE 115 and 116.

Labor's cited standard is directed toward either an energized circuit or dangerous induced voltage. Mr. Haste, the only person in this case to speak of it, said the tensioner "done got into something hot" which we take to mean an energized circuit and we so find. TE 97 – 98.

Blevins Bowlin testified first for respondent. He said he had worked as a lineman and serviceman for 28 years before starting the company; he bought Richardson Contracting and then changed its name. TE 132. He said at the time of the accident his company was doing work for Meade Rural Electric. TE 133.

Mr. Bowlin said his men were "replacing copper conductor with aluminum conductor on a three-phase line." He said "they were placing all wires with – it was

old copper wire that's probably 50 or 60 years old and had deteriorated..." Mr. Bowlin, describing the job, said "you have three hot phases on top of the pole, and then you have neutral, that's the fourth wire that's on the bottom..." By bottom he meant the neutral was "four feet down from the top phases." TE 134 and exhibit 2. Mr. Bowlin said the four power lines were rated at 7,200 volts. TE 138.

Mr. Bowlin explained that the new wire was pulled onto the poles with rope. At the other end of the rope, away from the tensioner, was "a pulling machine." TE 139. To facilitate the pulling, it was "pretty much standard in the industry" to use "stringing blocks.[6]" TE 139. He said "All the energized lines are insulated," referring to photographic exhibit 3. TE 140.

Bowlin Group's safety director Donald Mullikin testified for respondent; he said foremen will hold tailgate meetings at the beginning of a shift. He defined a tailgate meeting thusly:

> It's a meeting that the foreman holds prior to each shift to go over potential hazards that may come up. He'll give a brief description of the job...its something they may have went over a hundred times, something they do every day, but he just wants to point out any potential hazards.
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> TE 165

Mr. Mullikin conducted periodic safety audits of Bowlin's work crews in the field. Bowlin work crews under the supervision of a foreman are often "way out in the boonies. I got to call the foreman up and say, where are you. We don't have GPS's on our trucks." TE 168. Mr. Mullikin said he had never audited the truck carrying the tensioner: "There's 200 vehicles in the fleet..." TE 169. Mr. Mullikin said it was

[6] Also known as pulleys. TE 200.

company policy "to insulate, isolate, or ground. It's just the foreman makes a decision and tells them what to do." TE 183. We find the foreman was in charge at the job site

After Mr. Mullikin, Bowlin called Michael Gibson who provides "safety technical training and electrical – and consulting in the electrical and construction fields." Mr. Gibson had worked for 30 years for L, G and E and Old Dominion Power before becoming a consultant. TE 188. He said he was a certified safety professional and was "a certified utility – utility safety administrator through the National Safety Council Congress." TE 189 – 190. He served on the "Federal OSHA Best Practice Team, Electrical Safety Best Practices Team for three and one half years." He was appointed to that job by then head of OSHA, Ed Foulke.[7] TE 190. Mr. Gibson said he has conducted safety training for Bowlin and investigated the accident which led to the occupational safety and health inspection and the instant citation. TE 190 and 195.

Mr. Gibson said the "first line of defense" for employees doing electrical work was "rubber gloves and sleeves, having the right class" for the voltage presented to the employees. TE 196. When asked to review photo exhibits 2 and 3 which show the energized wires covered with dielectric hoses and a blanket, Mr. Gibson said the energized lines were properly insulated. TE 201 – 202.

Mr. Gibson then came to the critical point of his testimony. He was asked if the tensioner truck Mr. Haste touched when he was burned was grounded. Mr. Gibson,

[7] In the transcript Mr. Foulke's name is spelled Falk.

we infer he learned this during his investigation, said it was not. He said "Some utilities do and some don't" ground. TE 202. Then Mr. Gibson explained:

> if you're not careful, you can increase the hazard by grounding. The whole reason we ground is to create enough impedance, enough fault current to open a breaker, a protector... With it grounded, you've actually created more of a difference in potential which increases the flow of electrical current. So that's why some companies – you know, every company, it's a different scenario.
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> TE 203 - 204

On cross examination labor asked Mr. Gibson if Bowlin "employees understood that grounding might increase the hazard..." TE 205. Gibson said "this debate goes on in every utility company all across the country." TE 205 – 206. When asked what federal OSHA's position was he said the cited standard required "you either ground...or you insulate, or you isolate." TE 206. That is of course what the cited standard says.

On cross labor then asked Mr. Gibson about Bowlin's policy on grounding trucks. He said the company "is to...follow the OSHA standards," and do a "hazard assessment" which was not exactly an answer to this very important question. When asked about Safety Director Mullikin's statement that Bowlin's policy was to let the foreman on the job decide how to comply with the standard, Mr. Gibson said "It makes sense that everyone use all their – with this type of work." TE 208. As we shall explain, this is a misstatement of the law which requires the employer or the foreman acting for the employer to enforce the occupational safety and health

standards. KRS 338.031 (1) (b). Mr. Gibson said he had never before investigated a "tensioner truck incident." TE 217.

Then labor asked Mr. Gibson if the accident could have been prevented if the foreman had enforced the standard. Here Mr. Gibson prevaricated; he said Foreman Ronald Douglas told him he made it clear to the employees to "put your gloves and sleeves" on "if you go to that truck." TE 210. When asked if he thought Bowlin should have grounded the tensioner truck, Mr. Gibson said "I may have increased the hazard by grounding..." TE 212. At the close of labor's first take on cross examination, Mr. Gibson was asked why Bowlin would ground the bucket trucks, as Mr. Haste testified, but not the tensioner. He said "I can't answer that." TE 214.

Our hearing officer then reminded Mr. Gibson that the "trucks come with grounding...they're set up to be grounded." Mr. Gibson said, without reference to any literature in support of his view, some utility companies had removed the grounds from the bucket trucks. TE 215. Then Hearing Officer Durant said "Mr. Haste was very clear that he wore these gloves from cradle to cradle..." which to Safety Director Mullikin meant "as soon as you get in the bucket, you put them on." TE 175 - 176 and 215. Here we note Mr. Mullikin did not say his employees were to put on the gloves when approaching a tensioner truck. Unspoken but implicit in this cradle to cradle policy is the fact the lineman does not need to wear his rubber gloves when climbing onto or off of the truck bearing the man lift resting in its cradle.

When asked about Haste's testimony that tension needed to be applied to the wire being pulled onto the poles, Mr. Gibson said "The call came out someone needs to tighten the tensioner; it wasn't given directly to Mr. Haste." TE 216. What Mr. Haste said was "they hollered at the other end it was getting loose." TE 97.

Ms. Durant asked Michael Gibson where "it would have directed a person...to put the gloves on before they approach the tensioner truck." TE 218. Mr. Gibson pointed to page 39 of exhibit 22 which says "gloves and sleeves are our first line of defense. "And in this case, dielectric boots...that isolates you from the ground..." TE 220. Page 39, however, makes no reference to tensioner trucks or boots. Page 39 has four photos. Two show linemen in the air working on telephone poles. A third shows a lineman or ground man fastening one wire to another; the fourth shows a worker putting on what appear to be gloves and sleeves. Then Hearing Officer Durant asked Mr. Gibson if Mr. Haste would have gone home "If you grounded your truck...?" Mr. Gibson said "I can't guarantee you that..." TE 222. Again our hearing officer asked Mr. Gibson why the company was still grounding its bucket, man lift, trucks. He said "...you'll have to talk to them about that..." TE 223.

On recross examination labor asked Mr. Gibson if "foremen are ultimately responsible for enforcing safety rules at job sites...?" He said:

> It is my understanding that every employee is responsible for and has to be in these scenarios to watch out for each other... The foreman's responsibility is the same as everyone else...
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> TE 230 – 231

Mr. Gibson's testimony again ignores an employer's duty to enforce the occupational safety and health standards. KRS 338.031 (1) (b). In the case before us Foreman Ronald Douglas was Bowlin's senior representative on site at the time of the accident.

What Mr. Gibson said about individual responsibility for safety on the job site is not the law. In *Pace Construction Corporation,* CCH OSHD 29,333, page 39,427, BNA 14 OSHC 2216, 2218 (1991), the federal review commission said "The decision whether to comply with company safety rules which reflect OSHA requirements cannot be left to the employee's discretion."

Mr. Douglas, Bowlin's on site foreman, was the next witness. TE 240. According to Mr. Douglas, Bowlin had already pulled one aluminum conductor and was in the process of "pulling the second when the accident happened." He said the energized wires were protected by rubber hose and blanket insulation. TE 248. Mr. Douglas said he told the crew "we needed more tension on the puller." TE 250. "To add tension, you have to crank a lever down on the tensioner." TE 251. He could not see the victim prior to the accident because Mr. Haste was behind a truck but was, we find, in plain sight. TE 255.

Mr. Douglas said he was demoted to lineman after the accident because he "Didn't have the truck grounded." TE 253 and 255. He said he had used the tensioner truck previously and it was not grounded then either: "Not on that one, no." TE 254. We find Mr. Douglas was not demoted for his failure to require employees to wear gloves when working at the ground level or to isolate the truck.

From Mr. Douglas we get a very good definition of the term cradle to cradle. Mr. Douglas said when an employee gets into the bucket, the boom is resting on the cradle on the truck. At that time the employee puts his gloves on:

> When it leaves that cradle, they're supposed to be on [the gloves] until it gets back into that cradle and secured.
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> TE 257

Then Hearing Officer Durant asked Mr. Douglas if that rule applied to linemen and helpers when they were on the ground. "So it doesn't say anything about when you're on the ground, just cradle to cradle." Mr. Douglas replied "Cradle to cradle." TE 257. Here we find company policy was for its linemen to put on gloves cradle to cradle but this rigid safety policy did not apply to employees working on the ground whether they be linemen or ground men.

Bowlin called groundman Jerry Condor as its last witness. TE 260. He said he heard Foreman Douglas call for more tension; he said he was going to get his gloves but then heard the noise of the accident. TE 263 – 264. He said he was disciplined after the incident, a thirty day suspension, because "I guess not having that truck grounded is about all I know." TE 265. He said grounding the truck "might have helped some, but I don't think it would have helped completely." TE 267. He said he, as a groundman we infer, always grounded the bucket trucks. TE 260 and 269. He said he didn't wear his gloves if he didn't have to. "They are hot, and yeah, they're clumsy, too." TE 269.

our hearing officer's recommended order

We adopt our hearing officer's findings; we will summarize some of her findings which are essential for our decision.

Mr. Gibson said that some companies ground vehicles while others do not. For this critical point he referenced no authority or OSHA interpretation in support of his testimony. This is a significant because the cited standard lists grounding as one choice for protecting employees against the hazard of unanticipated electric current. Mr. Gibson would not or could not answer questions about Bowlin's decision to ground its bucket trucks but not the tensioner truck. He said "I can't answer that" when asked why Bowlin grounded the bucket trucks but not the tensioner truck. TE 214.

Mr. Gibson said it was up to employees to decide, based on their training, whether to wear gloves and sleeves. This ignores Safety Director Mullikin's statement that the foreman is in charge of the site which is a correct understanding of the law. Mr. Gibson said page 39 of exhibit 22 required rubber gloves before approaching the tensioner truck even though that page makes no reference to tensioner machinery, pullers or trucks. Bowlin's policy was gloves were to be used cradle to cradle but it had no such policy for its employees while working on the ground.

Our hearing officer found the decision whether to ground the tensioner truck was in the hands of Bowlin's foreman who did not ground it. Recommended order, pages 4, 7 and 8 (RO 4, 7 and 8). When our hearing officer affirmed the citation, she at the same time rejected Bowlin's employee misconduct defense. She pointed out a

foreman was present at the time of the accident and directed an employee to apply more tension to the new line. She said Bowlin had a policy to wear gloves cradle to cradle but not necessarily to wear them when approaching the trucks, including the tensioner. RO 3, 4, 7 and 8.

Our hearing officer found Mr. Gibson's "testimony was evasive and unconvincing." RO 5. We agree and incorporate her findings as our own.

Hearing Officer Durant said she could find no indication in the company's safety manual that dielectric boots were to be worn at all times, one of the reasons she rejected expert Gibson's testimony. RO 8. Again, we agree. Our hearing officer affirmed the serious citation and the $3,500 penalty as shall we.

Bowlin's brief on review

Bowlin says the hearing officer incorrectly focuses on the company's failure to ground the tensioner truck. As Bowlin points out, the cited standard says it may ground, isolate or insulate which is true. Bowlin says Mr. Haste was injured because he failed to don rubber gloves and insulate himself before he approached the tensioner truck. Bowlin says its foreman instructed employees to wear gloves "throughout the day." Brief, page 3. But Mr. Haste said employees did not wear rubber gloves when operating the tensioner. TE 112. He said the policy was wearing gloves cradle to cradle. RO 7 and TE 111. When it decided to discipline employees after the incident, Bowlin cited to its employees' failure to ground the truck, ignoring glove insulation and employee isolation. We find Mr. Haste's testimony about glove use and the discipline Bowlin meted out to its employees negates

Bowlin's argument it instructed its employees to wear gloves throughout the day. Similarly, our hearing officer observed that no witness discussed the possibility of isolating the tensioner truck which eliminates that potential defense. RO 5, paragraph 11, and TE 117 – 118.

Bowlin correctly observes the hearing officer failed to determine whether the company had knowledge of the violation. Bowlin argues its foreman had no knowledge of the violation because he did not, could not, see Haste was not wearing gloves when he went to the tensioner truck. Mr. Haste was behind a truck when the foreman gave the order to tension the outgoing line. TE 255. As we shall explain, we find Bowlin had constructive knowledge of the violation because Foreman Douglas failed to anticipated hazards to which his employees may be exposed and take measures to prevent the occurrence of violations. *Precision Concrete Construction*, CCH OSHD 32,331, BNA 19 OSHC 1404 (2001).

Bowlin place a commendable emphasis on training. But Bowlin had no policy to wear gloves when approaching the tensioner truck. Bowlin had no policy for grounding the tensioner truck either, just the bucket trucks. Although Foreman Douglas testified he instructed all employees to wear rubber gloves, Mr. Haste, who apparently no longer works for the company, said there was no policy for wearing gloves when approaching the tensioner truck. Bowlin said it insulated its employees which, it argues, means the citation should be dismissed. But while Bowlin had a cradle to cradle policy, it had no such policy for wearing gloves when approaching the tensioner, despite the foreman's testimony to the contrary.

Bowlin's employee
misconduct defense

Bowlin's second line of defense is employee misconduct. In *Jensen Construction Co*, CCH OSHD 23,664, page 28,695, BNA 7 OSHC 1477, 1479 (1979), the federal commission set out four elements the employer must prove to establish the defense; an employer must show:

> it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.

Before wading into the particulars of Bowlin's employee misconduct defense, we must first discuss the company's argument which suggests we add an additional element to the *Jensen* four element defense. In its brief Bowlin argues the "Secretary bears the burden of proving the inadequacy of the employer's safety program." Page 11. Bowlin cited to *Cerro Metal Products Division, Marmon Group, Inc*, CCH OSHD 27,579, page 35,829, BNA 12 OSHC 1821, 1822-23 (1986). In this case the federal commission's analysis, Commissioner Robert Rader who served for one year under a recess appointment joined the majority for *Cerro,* mixed a discussion of the general duty clause with the inadequacy of the employer's safety program, an element not found in *Jensen. Cerro* did not cite to *Jensen, supra*, or its progeny. We reject Bowlin's *Cerro* argument. *Jensen* sets out a detailed regimen an employer may follow which, if faithfully adhered to and proved at the trial, will lead to a dismissal of a citation. To get to that point, an employer must have rules, tell his employees about those rules, look for violations of those rules and discipline for

violations. *Cerro* simply confuses this rational process which tells the employer where he stands and what he must do. *Cerro* adds an unnecessary element not required by *Jensen*.

Bowlin did a good job communicating its rules to its employees. It gave classes where it took attendance; Mr. Haste attended these classes. Bowlin conducted toolbox talks on the job sites; here again Mr. Haste was in attendance. Bowlin proved this element.

Bowlin then argued it had a system for enforcing its rules through discipline. Exhibit 19 is a list of discipline meted out. Exhibit 20 consists of individual sheets memorializing discipline received by members of the crew present on the date of Mr. Haste's accident. We will not consider this contemporaneous discipline of employees present when Mr. Haste was injured as we decide whether the company had a policy of disciplining for infractions of its rules. Use of contemporaneous discipline by the commission when considering an employee misconduct defense encourages, we think, the employer to discipline himself out of a citation. We find it makes more sense to focus on discipline issued prior to the citation because there is no factual interference between the instant citation and a history of prior discipline.

In exhibit 19, there are thirteen instances of discipline; six are for safety related matters. Exhibit 19 covers a period of two and one half years. There is one termination, one suspension and four written warnings. While these examples of discipline may be few, they are focused on safety issues. Labor made no attempt to

challenge Bowlin's proof. We find Bowlin made its case – it proved it disciplined employees when it discovered violations of its safety rules.

Next, we examine whether Bowlin had a system for detecting violations of its rules. This is often the most difficult element for a respondent company to prove. Safety manager Mullikin said he inspected work sites from January 09 through July 14, 09, a period of six and one half months, and introduced copies of his inspection reports. TE 167 and exhibit 17. We count 31 reports; in those reports Mr. Mullikin said he inspected Ronald Douglas's crew five times within the six and one half months of inspections. Labor in its brief has argued that we in *Bowlin Energy*, KOSHRC 4444-07, said "quarterly inspections, or even a couple of times a month, is not exercising reasonable diligence." *Bowlin*, page 25.

In the case at bar Mr. Mullikin, discussing his safety inspections, said he regularly had to call the foreman ahead of time because he did not know where the crews were located; "they are way out in the boonies." TE 168. We do not know if any of Mr. Mullikin's safety audits were unexpected.

We compare Mr. Mullikin's safety audit record with that found in *Brand Scaffold Builders, Inc*, CCH OSHD, 32,287, page 49,286, BNA 19 OSHC 1366, 1367 (2001), where the federal administrative law judge upheld an employee misconduct defense; "the supervisor did visual inspections of the work site during the day" where the work site was inspected several times a day and violators were promptly disciplined. Then in *Field & Associates*, the employer's safety director conducted random inspections of each work site. CCH OSHD 32,295, page 49,326, BNA 19

OSHC 1387, 1393 (2001). We do not know if Mr. Mullikin actually conducted any random, unexpected audits. We do know, however, that Mullikin did not conduct daily audits or anything approaching that.

We find Bowlin did not have a system for detecting violations. To prevail in its employee misconduct defense, Bowlin must prove all four *Jensen* elements.

Finally, we consider whether Bowlin proved it has rules designed to prevent the alleged violation. Bowlin produced persuasive testimony it required its linemen to wear rubber gloves cradle to cradle. TE 175, 215 and 257. But Bowlin had no similar, inflexible policy requiring its linemen and ground men to wear rubber gloves while working at ground level. Mr. Gibson said he, at the ten hour OSHA course, instructed Bowlin's employees to wear rubber gloves. See exhibit 22, page 39, slide 81. But this slide does not say under what circumstances the gloves shall be worn. Mr. Condor, a Bowlin groundman, was the company's last witness. He said he received training about wearing gloves on the job. He said he knew he could be disciplined for violating the company's rules. TE 262. Mr. Condor said he went to the digger truck to get his gloves when he heard his foreman asking someone to go to the tensioner to apply tension to the conductor. He then heard the noise generated by Mr. Haste's accident. TE 263 - 264. Mr. Condor said wearing gloves "might have helped some, but I don't think it would have helped completely." TE 267.

Patrick Haste said employees did not wear rubber gloves when operating the tensioner. TE 112. Foreman Douglas was not demoted for his failure to require

employees to wear gloves when working at the ground level and neither was Mr. Condor.

Hearing Officer Durant asked Mr. Douglas if the company's cradle to cradle rule applied to linemen and helpers when they were on the ground: "So it doesn't say anything about when you're on the ground, just cradle to cradle." Mr. Douglas replied "cradle to cradle." TE 257. We have found company policy was for its linemen to put on gloves cradle to cradle but this well understood rule did not apply to employees working on the ground whether they are linemen or ground men. Based on Mr. Douglas's demotion for failure to ground the tensioner truck and his admission the company's cradle to cradle policy went only so far, we find Bowlin had no rule for requiring employees working on the ground to wear gloves. RO 7. As Mr. Condor put it when asked by our hearing officer if he wore his gloves all the time when working at the ground level: "Most of the time, yes, if it was – you know, if we thought there was danger of getting anything hot, yes." TE 268. He said he did not wear his if "I don't have to." TE 269.

Because Bowlin failed to prove it had a rule for its employees to wear gloves when working at the ground level, and especially when approaching the tensioner truck, and because Bowlin also failed to prove it had a system for detecting violations of its rules, Mr. Mullikin's announced audits, we deny Bowlin's employee misconduct defense. *Jensen, supra.*

Labor's brief

Labor said failing to ground the tensioner was a violation of company safety policy. This is true because page 96 of exhibit 22, the company's ten hour OSHA course it had just given to its employees some days before the accident, had two diagrams of grounding trucks carrying a line tensioner and a line puller. On page 96 of exhibit 22 we see diagrams of a puller, slide 125, and a tensioner, slide 126. Both sit on a truck or trailer. These diagrams show the "running ground" is attached to the pulling line for the puller and the conductor for the tensioner. For each diagram, the running ground leads to the trailer, or truck, and finally to a ground source (a rod driven into the earth). We see no mention in the OSHA ten hour course of any hesitancy to ground as Mr. Gibson had asserted. Exhibit 22. This is significant because consultant Gibson said some companies did not ground their trucks. On page 99 of the ten hour course, the wire stringing section, slide 134 depicts a splicing truck which is also grounded. From this and slides 125 and 126 on grounding tensioners and pullers, we infer the employees taking the course were instructed to ground trucks or trailers engaged in wire stringing operations. Exhibit 22, pages 96 and 99.

As labor pointed out, Bowlin did not routinely ground its tensioner trucks while it did ground the trucks which carried the man lifts, the bucket trucks. Labor said Bowlin violated the standard because it failed to ground the tensioner truck; actually what it said was "the violative condition was that the tensioner device itself was not grounded." Brief at page 6.

Labor makes an interesting argument. It says the cited standard has a preference for grounding. Let us quote the applicable portions of the 1926.955 (c) (3) standard:

> Where there is a possibility of the conductor accidently contacting an energized circuit...to further protect the employee from the hazards of the conductor, the conductor being installed or removed shall be grounded ***or provisions made*** to insulate or isolate the employee.
>
> (emphasis added)

Here labor is correct. The phrase "or provisions made" coming after the conductor shall be grounded language means there is a preference for grounding in the standard. "Or provisions made" separates grounding from insulating or isolating, placing emphasis on the former; the regulation says "shall be grounded" but shall be isolate or shall be insulate is not even grammatically correct. In other words, the standard can be read to say "the conductor shall be grounded or other provisions made..." The word other is implied or understood. But even though the standard has a preference for grounding, respondent may still elect to insulate or isolate instead. Bowlin did not isolate the truck, employees had free access to it, and it had no rule for its employees always to wear rubber gloves when working at the ground level, on their feet, as it did for cradle to cradle work.

Labor said Bowlin had knowledge of the violation; this is the key issue in this case. Bowlin's foreman and his men knew the tensioner was not grounded. Labor also said Foreman Douglas knew the crew was not isolated from the tensioner or for that matter insulated because the crew that day did not have on dielectric boots and

did not uniformly wear rubber gloves when working at the ground level. As labor pointed out, Foreman Douglas told the compliance officer he was not aware of any set up; we infer he meant grounding or any insulation, meaning personal protective equipment or mats. TE 54.

Labor said Bowlin failed to prove its employee misconduct defense because the company failed to establish work rules to prevent the violation. We have agreed. Bowlin was not doing anything different on the day of Haste's injury than it had done earlier. One, the tensioner was never grounded. Two, no one had dielectric boots on the day of Haste's injury. TE 236 – 237. Three, their work rules did not require the wearing of rubber gloves when working at ground level, unlike its cradle to cradle policy which was very clearly stated and understood by employees. Employee Condor said there was no reason to have rubber gloves on because "nobody was doing anything." TE 268.

Labor cited to *Green Mountain Power Corporation v Commissioner of Labor and Industry*, 383 A2d 1047,1053 (Vt 1978), CCH OSHD 22,629, BNA 6 OSHC 1499, for the proposition that Bowlin's foreman had a duty under the act to enforce the wearing of protective equipment because the tensioner was not grounded and everyone on site knew it. We agree with this argument but we cannot place much reliance on *Green Mountain* because it was a general duty clause case while Bowlin's citation was standards based and the Vermont supreme court was not presented with an employee misconduct defense as such.

Green Mountain asserted it was up to an experienced linemen to decide when to insulate exposed wires, an argument the Vermont supreme court properly rejected as shall we. In our case Bowlin's safety director said it was his foreman's duty to decide whether to "insulate, isolate, or ground...whatever the foreman deemed necessary at the time." TE 183 - 184.

Labor asserts that when the standard says the employer has the option of insulating the employee from the hazard, it means rubber blankets and rubber guts placed on the wires, not the employees wearing gloves. This is a clever argument but false as we shall explain in our discussion of Bowlin's reply brief.

Bowlin's
reply brief

Bowlin cites to two sentences found in the power transmission and distribution section, the same section where cited 1926.955 is found. These sections state as follows:

> **1926.950 (c) (1)** No employee shall be permitted to approach or take any conductive object without 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...
>
> (emphasis added)

This puts labor's rubber blankets and guts argument to rest. Gloves and sleeves worn by employees are considered by the standards to be insulation.

Bowlin argues, correctly, that the standard's preference for grounding when stringing line is of little or no consequence. While the standard does prefer grounding to prevent accidental electrical injury, the standard still gives the employer the options of insulating or isolating its employees. Bowlin argues that it did not ground the tensioner truck but instead elected to insulate the employee with gloves. But as we have discussed elsewhere, Bowlin had no rule for employees to wear gloves while working at ground level; it did, however, have a firm policy for using gloves cradle to cradle.

Bowlin argues its employee misconduct defense is effective because it never based that defense on grounding the tensioner truck. This is true so far as it goes; Bowlin, we have found, had no gloves policy for its employees working at the ground level but did for cradle to cradle work.

Discussion

Our hearing officer wrote a fine decision but did not discuss labor's ability to prove the elements of the violation. 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,[8] or with the exercise of reasonable diligence, could have known of the violative conditions.

[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.

Certainly, the standard applies. It is found in the power transmission and distribution section of the construction standards; that describes Bowlin's business. TE 133. In fact the cited standard charges the company with not protecting its employees from the hazards of a "conductor accidentally contacting an energized circuit or receiving a dangerous induced voltage." 1926.955 (c) (3). Mr. Haste, as well as the other employees at the work site where the accident occurred, worked for Bowlin Group. TE 92 and 134. These Bowlin employees had access to the cited condition: they were not protected from accidental contact with the energized conductor.

Labor proved Bowlin violated the terms of the standard. The truck where the tensioner was found was not grounded. TE 100. Mr. Haste at the time of his accident had no difficulty approaching the truck; he was not wearing rubber gloves and so was not insulated from the tensioner. TE 112. Mr. Haste, unfortunately, could touch the tensioner on the truck; it was not isolated to prevent contact.

Did labor prove
Bowlin had knowledge
of the violation?

The principal question before us is whether Bowlin knew of the violative conditions? First of all, the standard lays out a precondition; it says in part "Where there is a possibility of the conductor [the new aluminum wire] accidently contacting an energized circuit." We find Bowlin knew there was a possibility of the conductor accidently contacting an energized circuit - that is why Bowlin took precautions. The new wire was going in right next to the old, energized wire. Bowlin

used hot sticks to move the old, energized wire to one side. Bowlin employees covered the energized wire with rubber blankets and rubber guts. Mr. Haste took part in the company's efforts to insulate the energized wire and move it to the side on the telephone pole cross beam; he used his rubber gloves for that work.

Bowlin knew the tensioner truck with the conductor was not grounded. We know this because while Bowlin had a policy for grounding the bucket trucks, that policy did not apply to the tensioner truck. Foreman Douglas said he had used the tensioner truck previously but had never grounded it. TE 253 – 254. And the tensioner truck had not been grounded even though that very thing was a subject in the OSHA ten hour training class. See exhibit 22, page 96, where it recommended both the tensioner truck and the puller truck should be grounded and showed how to do it. Based on exhibit 22, page 96, we find Mr. Douglas with the exercise of reasonable diligence would have seen to it the tensioner and puller trucks were grounded. An employer to be reasonably diligent must anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence of violations. *Precision Concrete Construction, supra,* at CCH OSHD 32,331, page 49,552, BNA 19 OSHC 1407.

In *Pride Oil Well Service,* CCH OSHD 29, 807, BNA 15 OSHC 1809 (1992), the federal commission said:

> to prove a violation the Secretary must show that the cited employer had knowledge of the violative condition. She can satisfy this burden by establishing that the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition...The actual or constructive knowledge of the employer's foreman

or supervisor can be imputed to the employer.

CCH page 40,583, 15 OSHC 1814

On this subject the federal commission in *Precision Concrete Construction, supra*, citing to *Pride Oil Well Service*, said

> Whether an employer was reasonably diligent involves a consideration of several factors, including an employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

CCH page 49,552, 19 OSHC 1407

Foreman Douglas was not reasonably diligent. He did not anticipate hazards his employees could be exposed to, the hazard of an ungrounded tensioner. He should have known because he just received that grounding training in the OSHA ten hour course. Exhibit 21 and exhibit 22, page 96. Mr. Douglas failed to anticipate this hazard and take corrective measures – ground the tensioner truck.

When Foreman Douglas gave the order to tighten the tension, the tensioner was not grounded and his linemen and ground men were not wearing their gloves. Mr. Condor said he was going to get his when Haste was badly injured. Foreman Douglas failed to anticipate this hazard, the ungrounded tensioner, and take corrective measures. He could have done so, he had the opportunity, when he gave his order.

Because Foreman Douglas was Bowlin's on site supervisor and was out in the "boonies" with his crew, his conduct can be imputed to Bowlin Group. In *Par*

Electrical Contractors, Inc, CCH OSHD 32,709, page 51,793, BNA 20 OSHC 1624, 1627 (2004), the federal commission said:

> The knowledge of a supervisory employee may be imputed to his or her employer...The judge found that PAR had constructive knowledge of the condition imputed from working foreman Frank, whose supervisory status is not disputed.

We find that Bowlin through its foreman failed to exercise reasonable diligence when it failed to anticipate the hazard of not grounding the tensioner and puller trucks and take precautionary measures. Exhibit 22, page 96, and *Precision Concrete, supra.* When labor proves an employer has failed to exercise reasonable diligence, it has proved constructive knowledge.

Labor also proved actual knowledge. KRS 338.991 (11). Bowlin had actual knowledge it failed to isolate its employees from hazards arising from the tensioner truck. Mr. Haste, and any other employee, could walk right up to the tensioner truck. Bowlin had actual knowledge it had no policy for its employees to wear rubber gloves when standing and working on the land, adjacent to electrical hazards. Mr. Haste proved that. *Pride Oil Well Service* and *Ormet, supra.*

We affirm our hearing officer's recommended order which in turn sustained the serious citation and penalty[9] of $3,500. KRS 338.081 (3).

It is so ordered.

March 6, 2012.

[9] Neither party made the amount of the penalty an issue.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Certificate of Service

I certify a copy of this review commission decision for *Bowlin Group* was served this March 6, 2012 on the parties in the manner indicated:

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