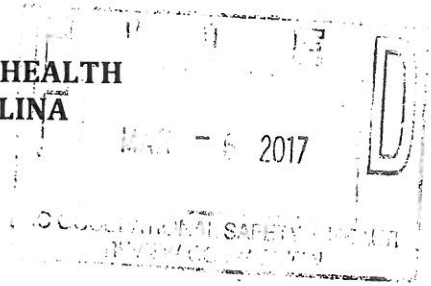


**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

PIKE ELECTRIC CORPORATION
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2012-5403
OSHA INSPECTION NO. 316365170
CSHO ID NO. 12782

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 11th day of October 2016, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Arlene K. Edwards, Chairman, Dr. Richard G. Pearson, and Frank P. Ward, Jr., Members of the North Carolina Occupational Safety and Health Review Commission:

APPEARANCES

Complainant: Cara Byrne, Associate Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: David E. Jones; Ogletree, Deakins, Nash, Smoak & Stewart, Atlanta, Georgia.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission OVERTURNS the Order of Hearing Examiner Gelbin.

DATABASE
BW

ISSUES PRESENTED

- I. **WHETHER THE EMPLOYER HAD KNOWLEDGE OF THE VIOLATIVE CONDITION?**
- II. **WHETHER THE EMPLOYER ESTABLISHED THE AFFIRMATIVE DEFENSE OF ISOLATED EMPLOYEE MISCONDUCT?**
- III. **WHETHER THE HEARING EXAMINER CORRECTLY DETERMINED THAT CITATION ONE, ITEM ONE WAS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE?**

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1926.955(a)(6)(i)

Unless using suitable protective equipment for the voltage involved, employees standing on the ground shall avoid contacting equipment or machinery working adjacent to energized lines or equipment.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act N.C. Gen. Stat § 95-128.
4. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
5. On May 11, 2012, Compliance Safety and Health Officer Shay Wingate inspected Respondent's worksite in Elm City, North Carolina.
6. As a result of the recommendations of the compliance officer, on October 5, 2012, the Complainant issued a citation to the Respondent under 29 CFR 1926.955(a)(6)(i).

7. The Commission adopts the Hearing Examiner's Findings of Facts 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 55, 58, 68, 69, 70, 71, 73, 74, 75, 76, 77.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. The Commissioner of Labor has not proven by the greater weight of the evidence and by substantial evidence that Pike Electric committed a violation of 29 CFR 1926.955(a)(6)(i).

DISCUSSION

I. WHETHER THE EMPLOYER HAD KNOWLEDGE OF THE VIOLATIVE CONDITION?

No, the employer did not have knowledge of the violative condition. Crew Leader Coria put on protective sleeves, rubber gloves, safety glasses, hard hat, and fall protection. Coria entered the bucket and Groundsman Ascencio approached the bucket to hand Coria a shotgun stick. At that time, Ascencio was standing next to the bucket and was some distance away from the truck and was not required to wear overshoes at that point because neither he nor Coria were working around energized equipment or equipment that could become energized. Both Coria and Ascencio were well away from any energized source at that moment. Coria then raised the bucket and began to swing it towards the utility pole where the work was to be performed. After this point, work rules and training required Coria to concentrate on his work task and that Ascencio stay clear of the line truck until Coria was once again away from the primary energized power line.

Once Coria in the bucket came within eight to nine feet of the lines, he turned his head to look at the transformer. Because a line was hanging down, Coria became distracted and he touched the truck's ground to the energized line using the insulated shotgun stick,

causing the truck to become hot for a moment. Coria then looked down and saw Ascencio lying on the ground three to four feet behind the truck. Coria believed that Ascencio had been shocked when the energized line was touched. Coria moved the bucket down to the ground, called the General Foreman, and performed CPR on Ascencio.

Coria and Ascencio had worked as a team for 14 years and Coria testified that he had never known Ascencio to forget to wear his overshoes in that time. This was their third similar job of the day. At both previous jobs, Ascencio was wearing overshoes. Once the pair arrived at this job site they held the required pre-job briefing. It was reasonable for Coria to believe that Ascencio would take necessary precautions. Ascencio had long term experience, had a history of wearing his overshoes, had been trained and had discussed use of proper PPE in the pre-job briefing. It was only after Coria accidentally bumped the energized line and looked down to see Ascencio that Coria realized that Ascencio must have violated policy by approaching the ungrounded truck without overshoes.

The order of our Hearing Examiner found that Coria was a supervisor. We do not find it necessary to make a determination of whether he was a supervisor because the element of knowledge of the violative condition was not met (therefore there is no knowledge to input to the employer). Assuming arguendo that Coria was a supervisor, Coria still had no knowledge that Ascencio approached the line truck while Coria was attempting to attach the truck ground to the neutral line. In the last moment that Coria saw Ascencio, he was a safe distance from any energized or potentially energized equipment and therefore, it was not necessary for Ascencio to wear protective equipment. It was only after Coria rightfully gave his full attention to the task above him that Ascencio must have approached the truck and touched it without protective overshoes.

The last time Coria saw Ascencio before ascending in the bucket, Ascencio was in violation of no standards or work rules of which Coria could have been aware. Once Coria ascended in the bucket, safety rules required him to concentrate on his own task. Coria had no knowledge of the violative condition.

II. WHETHER THE EMPLOYER ESTABLISHED THE AFFIRMATIVE DEFENSE OF ISOLATED EMPLOYEE MISCONDUCT?

No affirmative defense is necessary because we ruled for the employer on the citation in question. Since there is no violation of the OSHA citation, no affirmative defense is necessary.

III. WHETHER THE HEARING EXAMINER CORRECTLY DETERMINED THAT CITATION ONE, ITEM ONE WAS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE?

No, Citation One was not supported by the evidence because the employer did not have knowledge of the conduct that created the hazard.

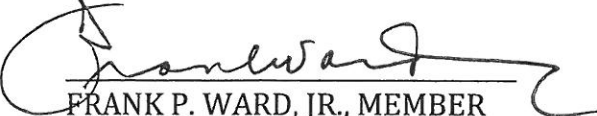
ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's March 23, 2015, Order in this case be, and hereby is, **REVERSED**.

This the 3th day of March 2017.


ARLENE K. EDWARDS, CHAIRMAN


RICHARD G. PEARSON, Ph.D., MEMBER


FRANK P. WARD, JR., MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER OF THE COMMISSIONERS, upon:

DAVID E. JONES
OGLETREE DEAKINS
191 PEACHTREE ST
SUITE 4800
ATLANTA, GA 30303

CARA BYRNE
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

by depositing same the United States Mail, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 9 DAY OF March 2017.

ARLENE K. EDWARDS
CHAIRMAN



Karissa B. Sluss

Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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