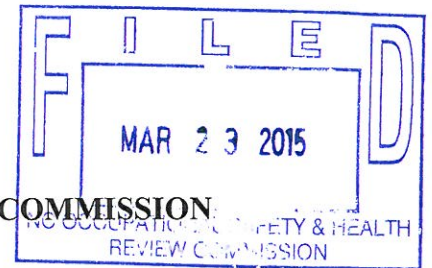


**BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NC**



COMMISSIONER OF LABOR FOR)
THE STATE OF NORTH CAROLINA,) OSHANC NO. 2012-5403
Complainant,) INSPECTION NO. 316365170
) CSHO NO. 12782
v.)
)
PIKE ELECTRIC, L.L.C,) HEARING ORDER
and its successors,)
Respondent.)

This matter came on to be heard and was heard before Ellen R. Gelbin, the undersigned Administrative Law Judge, on April 10 and 11, 2014, in Raleigh, North Carolina. Complainant was represented by Linda J. Kimbell, Assistant Attorney General, the North Carolina Department of Labor (NCDOL) and called as its witness, Safety Compliance Officer (SCO) Shay Wingate.

Respondent Pike Electric (Pike) was represented at the hearing by David E. Jones, appearing *Pro Hac Vice* from Atlanta, Georgia, and John A. Shedden from Charlotte, North Carolina, both of the firm of Ogletree, Deakins, Nash, Smoak, & Stewart, P.C. Respondent called to testify Area Supervisor Mark Sams and Crew Leader Jorge Coria. Other Pike employees attended the hearing, to wit: Safety Director and Trainer Bud Bondurant, Safety Director Kevin Watson, General Foreman Vic Smothers, and Crew Leaders Tim Carpenter, Abel Suriel, and Pituio Villanueva.

AFTER REVIEWING AND CONSIDERING the record file, pleadings, hearing testimony, transcript, exhibits, the parties' briefs and attached authorities (which were filed on or before August 1, 2014) and after researching other relevant legal authorities, the undersigned makes the following:

I. FINDINGS OF FACT

A. The Fatal Accident, May 10, 2012

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C.G.S. §§95-126 *et. seq.*, the Occupational and Safety and Health Act of North Carolina (the Act).
2. Pike is subject to the Commission's jurisdiction because it is a North Carolina (NC) corporation, duly organized and existing under NC laws, contracting commercial and residential electrical utility work in NC, with a primary place of business in Mt. Airy, NC.
3. Respondent's employees frequently worked with energized high voltage systems requiring skill and care to protect the lives of themselves and others.

4. Respondent's Crew Leader Jorge Coria and Groundsman Victor Ascencio (the pair) were hourly crew mates at Pike for over 14 years.
5. As Pike's underground Crew Leader, Mr. Coria was in a skilled position in the maintenance and repair of electrical underground distribution systems.
6. As Crew Leader, Mr. Coria was capable of leading and training lower-skilled employees in safe and productive work procedures.
7. As Crew Leader, Mr. Coria was capable of conducting Pre-Job Briefings and supervising Mr. Ascencio. (Complainant's exhibits C10, 11)
8. On May 10, 2012, General Foreman Vic Smothers gave three work orders to the pair.
9. For the first two jobs of the day, they safely tacked electric lines up existing utility poles and tied them into the distribution system.
10. The third job, located at 9210 Highway 58 South, Elm City, NC (jobsite), was also to tack up and energize a line from a utility pole to utility boxes in two tobacco barns.
11. They backed up the line truck to within 30 feet of the utility pole with the front of the truck in the direction of the barns. They set the truck's stabilizing outriggers, pinned the utility bucket to the boom, extended the boom over the driver's side door, and set the bucket on the ground about 15-20 feet from and perpendicular to the truck.
12. The pair held their mandatory Pre-Job Briefing during which Mr. Coria discussed with Mr. Ascencio the job tasks, potential hazards, appropriate personal protective equipment (PPE) for that job, completed a form checklist and obtained Mr. Ascencio's signature of attendance.
13. The pair should have begun work immediately after the Pre-Job Briefing while the information was still on their minds. Instead, the pair took a 30 minute lunch break and did not revisit the Pre-Job Briefing checklist before beginning actual work.
14. Per the checklist, Pike provided its employees with safety gear (i.e. special insulated rubber outerwear) whenever they were "in the vicinity of energized work or work that may become energized." Mr. Ascencio's PPE that day required safety glasses, a hard hat, and insulated rubber outerwear, including overshoes resistant to electrical current.
15. Overshoes do have limitations if they are old, cracked, holey or if the jobsite grass is tall, dirty, and/or wet, making any grass which is deep enough to cover the overshoe a good electrical conductor to ground. The special insulated rubber overshoes provided by Pike were suitable for the voltage involved and were suitable to isolate an employee from a catastrophic event as occurred.
16. Mr. Coria testified that Mr. Ascencio usually wore his overshoes at all worksites but usually removed them while riding in the truck and during lunch breaks.

17. Mr. Coria also testified that Mr. Ascencio was not wearing his rubber overshoes while riding in the truck to the third jobsite that day or during lunch after the Pre-Job Briefing.
18. After their lunch break, Mr. Coria did not do the following:
 - a. He did not reassess job hazards, including if the grass was too tall, dirty, and/or wet;
 - b. He did not reiterate the Pre-Job Briefing checklist with Mr. Ascencio prior to beginning work in order to refresh their memories; and,
 - c. He did not check Mr. Ascencio's PPE and did not remind him to stay clear of the truck during the truck grounding process.
19. Immediately after lunch, Mr. Coria got into his bucket and fitted his own PPE.
20. Before working with live wires, respondent's employees use a shotgun stick to ground the metal truck or equipment. A shotgun stick is an 8 foot bundle of wire connections, sheathed and insulated everywhere except the metal clamp at each end. The bucket man clamps one end to the low (neutral or grounding) wire and the other to the bucket.
21. The utility pole was 25 feet high with the energized (hot or live) wire strung about 20 feet from the ground and the ground wire strung 5 feet below it, at about 15 feet from the ground.
22. To ground the truck, Mr. Coria's usually raised himself up in the bucket to about 14 feet in order to situate himself about 1 foot below the ground wire and 6 feet below the hot wire. Usually, he then reached up and clamped the shotgun stick onto the neutral wire first and then to the common neutral on the aerial bucket.
23. With the truck properly grounded, the pair could tap the new transmission lines into an updated transformer, thus stepping down the voltage before running wires to the barns.
24. The existing top wire was energized with high voltage of 12,400 kilovolts (kV or kVA).
25. The existing transformer had been de-energized and its old-school stinger wire (which used to connect the transformer to the live wire) was disconnected and dangling.
26. The pair's pattern and practice was for Mr. Ascencio to stand between the truck and the bucket and hand Mr. Coria the "shotgun stick."
27. When Mr. Ascencio was close enough to hand the shotgun stick to Mr. Coria (who was in the utility bucket), the grounds man was standing 15-20 feet from the truck on the inner edge of the "safety zone" (20 or more feet from the truck).
28. Before Mr. Coria lifted the bucket towards the energized wire, both he and Mr. Ascencio knew, or should have known, the proper safety protocol.

29. While in the bucket, Mr. Coria was required to give his full attention to positioning it “about a foot” below the neutral wire while keeping a horizontal distance of 9 feet between the bucket and the wires.
30. Once aloft, Mr. Coria’s required primary focus was safeguarding the stick from the top wire.
31. If Mr. Coria accidentally bumped into or tried to clamp the stick to the live wire, the insulated bucket would protect him from electrocution; but the current would travel through him into the bucket truck and into the ground *via* the shortest path.
32. To ground the truck, Mr. Coria would normally move the bucket horizontally towards the wires until he was close enough to reach up “about a foot” to clamp one end of the stick to the low wire. He would then clamp the other end of the stick to the bucket effectively grounding the truck and making it safe to approach and touch.
33. On the day Mr. Ascencio died, the pair veered from their pattern and practice. Mr. Coria accidentally leveled his bucket above the neutral wire and about a foot below the hot wire because he repeatedly was distracted by a stinger wire dangling from the old transformer.
34. When Mr. Coria returned to his task of grounding the truck, he momentarily forgot that his bucket was higher than usual. When he reached up to clamp the stick to what he thought was the neutral wire, he inadvertently tried to the hot wire just above him, opening the circuit between the live wire and the truck.
35. Mr. Coria and Mr. Ascencio both knew that if a grounds man comes into contact with a line truck while he is not wearing his required PPE and the truck becomes energized, the grounds man will be fatally electrocuted.
36. Nevertheless, without outfitting himself with his required PPE, Mr. Ascencio ,entered the danger zone, leaned with his left hand against the truck. When Mr. Coria accidentally touched the shotgun stick against the live wire, Mr. Ascencio’s body completed the circuit from the truck to the ground and was fatally electrocuted.
37. Just after clamping the hot wire, Mr. Coria heard a buzz, let go of the stick to break the electrical circuit, and saw Mr. Ascencio shaking on the ground a few feet behind the truck.
38. The forensics listed below proved that Mr. Ascencio died from electrocution:
 - a. There were burns on the live wire where the stick touched it;
 - b. There were burns on the stick clamp where it touched the primary wire;
 - c. There were scorch marks on the ground beneath the truck tires;
 - d. Mr. Ascencio’s left hand and foot were burned; and,
 - e. There were scorch marks on the ground beneath where he had been standing.

39. The 24,000 kV of electricity had traveled from the hot wire, through the shotgun stick, through Mr. Coria (who was protected by his PPE and his insulated bucket up off the ground), and energized the truck. The electric shock entered Mr. Ascencio's left hand with which he was leaning against the line truck. The energy then shot through Mr. Ascencio's body and out his left foot, burning the ground beneath him. The shock also went through the truck and scorched the ground beneath it.
40. Mr. Ascencio's Pike-provided PPE, including his overshoes, were found in the truck after his death.
41. Mr. Ascencio's gear complied with OSHA standards and Pike safety work rules.

**B. The NCDOL OSHA Investigation
May 11, 2012 through October 5, 2013**

42. The previous paragraphs are incorporated by reference as if fully set forth herein.
43. On May 11, 2012, the next morning at the jobsite, SCO Shay Wingate met with Pike's Safety Director Kevin Watson and Pike's attorney Kevin Joyner of Ogletree, Dinkins.
44. The SCO presented his credentials, explained the scope of the fatality investigation, and received permission to conduct a partial inspection.
45. During the inspection, the SCO took photographs, obtained documents, interviewed employees, and collected other evidence.
46. Pike employs approximately 4,752 workers.
47. The SCO held a closing conference *via* telephone with Mr. Watson and Pike's Vice President Ken Fletcher.
48. The SCO recommended that a citation and notification of penalty be issued and was issued on October 5, 2012.

C. The Issuance of Citation 1, Item 1

49. The previous paragraphs are incorporated by reference as if fully set forth herein.
50. OSHA regulations and Pike's Safety Program are meant to protect employees on the ground in the event an employee in the bucket accidentally touches the stick to a hot wire.
51. Citation 1, Item 1 charged respondent with a serious violation of 29 CFR 1926.955(a)(6)(i), which, as amended by the SCO during the hearing, reads as follows:

Unless using suitable protective equipment for the voltage involved, employees standing on the ground shall avoid contacting the equipment or machinery working adjacent to energized lines or equipment. (Tp 27, 110)

52. Mr. Ascencio was not wearing his PPE, specifically his rubber shoes, when he leaned on the truck with his left hand during the grounding process.
53. Mr. Ascencio's failure to remove himself to a distance of more than 20 feet from the truck and pole and/or his failure to wear his rubber protective shoes during the grounding process created a hazard: to wit, being electrocuted if the shotgun stick accidentally came into contact with the live wire.
54. AMr. Coria was Mr. Ascencio's supervisor. As crew leader, Mr. Coria knew, or should have known, that before raising the bucket towards the live wire, it was his job to ensure that Mr. Ascencio was either wearing his required PPE or that he remind Mr. Ascencio to stand 20 feet or more from the truck (i.e. reiterated the Pre-Job Briefing).
55. Before reaching up to clamp on the shotgun stick, Mr. Coria did not double check to be sure the wire he was about to contact was the ground wire.
56. Before reaching up to clamp the shotgun stick, Mr. Coria did not verbally confirm that Mr. Ascencio was clear from the truck.
57. Mr. Ascencio was the only employee exposed to the risk of electrocution.
58. The substantial probable result of electrocution with 24,000 kV is death.
59. Complainant proved Citation 1, Item 1 by a preponderance of the evidence.
60. The severity assessment was high due to the high probability of death.
61. The probability assessment was greater due to the proximity of Mr. Coria and the shotgun stick to the energized wire during the grounding process.
62. Respondent is not eligible for a size credit due to the greater number of employees.
63. Respondent is not allowed credit for good faith (i.e. safety and health programs) because of the high severity.
64. Respondent is eligible for a 10% credit for cooperation.
65. Respondent is not eligible to a credit for history because it had a Serious citation issued in the previous three years and due to the high severity of an accident.
66. The Gravity Based Penalty (GBP) for a violation with a high severity assessment and a greater severity assessment is \$7,000 (Seven Thousand Dollars).

67. Applying the 10% credit for cooperation, the SCO properly calculated the penalty as \$6,300 (Six Thousand Three Hundred Dollars).

**D. Respondent's Evidence of
Safety Programs, Audits and Discipline**

68. Pike has extensive training materials and provides echo training to its employees to test their substantive understanding, communicates its work standards to employees, and documents training as follows:
- a. The Leadership Academy is a week-long class to teach future leaders in the Company with safety being a part of each component. Two days of the week are spent in practical skills training of "unsafe" situations. The trainers evaluate each employee's identification and reaction to scenarios in the field as a launch for teaching points;
 - b. Respondent created the "The Stay Safe Program, Alive with Five" (Alive with Five) which presents the five greatest hazards to worker safety in an "easy-to-remember" manner to educate new hires and to re-educate existing employees;
 - c. Chairman and CEO Eric Pike holds weekly Friday telephone conference calls with respondent's upper management, including Pike's safety personnel, vice presidents, and area supervisors, in which they increase safety awareness, discuss industry news, events, recent incidents, and "near-misses" (safety updates);
 - d. Area Supervisors relay the Friday safety updates to the General Foremen and all crews in a Monday morning safety update. He may also review basic safety training including proper work procedures, safety issues arising from the previous week's work, personal protective equipment and other protective measures;
 - e. Area Supervisor Mark Sams holds an annual January "Safety Stand-Down" meeting with the Raleigh, North Carolina, based crews;
 - f. Crew Leaders share safety protocol with crew members in every Pre-Job Briefing;
 - g. Respondent provides to its management supervisors a federal and state certified volunteer Career Development Program which teaches practical skills and safety training as well as administering tests and performing assessments;
 - h. In an Electrical Transmission & Distribution Partnership with OSHA, Pike generated the following courses:
 - i. A 20-hour course for all supervisory level management employees covering OSHA and other work standards in the electrical utility contractor industry; and reviewing topics related to supervision such as training general foreman and handling catastrophic events;

- ii. A federally certified OSHA 10-hour training course given every five (5) years to all Pike employees which covers industry specific safety issues including general electrical safety, personal protective grounding, lifting and rigging, personal protective equipment, job briefings, trenching and excavations, confined/enclosed spaces, and fall protection; and,
 - iii. Pike provides the OSHA 10 hour training to other organizations including North Carolina OSHA;
 - i. The pair were “qualified employees,” who Pike sent to "qualified employee" training every year before authorizing employees to climb or change locations on poles, towers, or similar structures;
 - j. Respondent sends all of its employees, including the pair, through the Progress Energy’s Insulate and Isolate Program which emphasizes safe procedures to minimize the chance that field workers will receive an electric shock; and,
 - k. Respondent’s employees benefit from “The Human Performance Common Cause Assessment Mitigation and Action Plan,” which is a behavioral assessment of actions and events in the field and common causes for accidents or injuries. Pike uses the data to train workers in "best behaviors" for safe practices.
69. Pike’s safety rules require all employees to watch out for each other’s safety.
70. Respondent’s safety programs include rules and disciplinary punishments as follows:
- a. The first violation of the Pike’s rubber glove rule results in termination, “considering the circumstances” (C11)
 - b. All supervisors, including crew foreman, will enforce safety rules (C8)
 - c. It is ‘the **responsibility** of the **foreman or employee in charge** to see that employees under their supervision follow all Pike Safety Rules and correct any violations observed), (C11) (Emphasis original)
 - d. The bucket man shall give his full attention to the hot wire once he lifts his bucket off the ground. (C8)
71. Respondent monitors adherence to its work rules and enforces those rules as follows:
- a. Respondent charges each employee with assessing hazards and being mindful of their own and each other’s safety on the job sites;
 - b. Any auditing employee has authority to stop work, retrain employees, and, if necessary, discipline employees for poor compliance with safety or work rules;

- c. Respondent's field safety audits are performed by three or more levels of management:
 - i. Corporate Safety and Training Director Kevin Watson and his safety staff are required to conduct twenty (20) crew safety audits in the field every quarter;
 - ii. Area Supervisor Mark Sams performs field safety assessments, refreshes crews on safety protocol, completes comprehensive checklists on the "Pike Electric Crew Safety Audit Forms," compiles the data into a "Safety Audit Report," and summarizes the data from all previous audits of the same crew; and,
 - iii. Respondent's General Foreman Vic Smothers does safety assessments with each crew about three times a week on average. If he finds safety issues, he orders the men to cease working until after he re-trains the crew on safety protocol, disciplines violating employees, abates the issue(s), and properly completes the Pre-Job Briefing form(s);
 - d. Safety personnel use algorithm-based electronic Safety Audit Forms on an iPad which will not permit proceeding with the safety assessment until necessary retraining is provided to crew members;
 - e. Auditors satisfy themselves that the field Crew Leader properly identified job hazards, held a Pre-Job Briefing, correctly completed the Pre-Job Briefing Form reflecting each unique job (i.e. not filled in by "rote"), and obtained attendees signatures;
 - f. On site auditors interview crew members to confirm their participation in and to test their understanding of the Pre-Job Briefings; and,
 - g. Area Supervisor Mark Sams does safety assessments of field crew by completing checklists on the "Pike Electric Crew Safety Audit Forms." The forms are used to refresh crews on safety protocol and to compile data into a "Safety Audit Report" for every crew. With these Reports, he can compare crew histories. Violations of safety procedures that are discovered can lead to disciplinary action.
72. Respondent imbues each Crew Leader, Foreman and Employee in Charge with supervisory responsibilities for their crew members and themselves on each job as follows:
- a. The duty to pre-assess each job for hazards;
 - b. Before allowing work to begin — or after a change in the work environment — the duty to discuss the hazards and safety protocol with each crew member; and,
 - c. Before allowing work to begin or after a change in the work environment, the duty to complete a Pre-Job Briefing Form identifying hazards; discussing protection from each hazard with his crew; and obtaining the signature of all discussion attendees.

73. Respondent conducts annual internal reviews and produces annual safety reports which purport to currently rank Pike more favorably than the industry average.
74. Respondent's Safety Program also includes bilingual employees who translate to and interpret the safety information for their Spanish-speaking co-workers.
75. Respondent enforces its work rules, including taking action to discover violations of such rules by monitoring employees' adherence to safety rules.
76. As further evidence of the combined experience of the pair, respondent documented that:
 - a. Since 1998, the pair signed attendance sheets for 1,084 training opportunities;
 - b. Since 1998, the pair signed over 100 attendance forms evidencing their presence at training on topics relevant to the May 10, 2012, fatality;
 - c. The pair was subject to thirteen (13) formal audits since 2008, including four (4) audits in 2011, shortly before the fatality;
 - d. Respondent's Safety Audit history shows the crew was "safe" during all but one of the overshoe audits;
 - e. General Foreman Smothers gave Mr. Ascencio high safety marks after 2000;
 - f. General Foreman Smothers credibly testified that, based upon his twelve (12) years of supervising Messrs. Coria and Ascencio, he believed that they were "very thorough" in filling out Pre-Job Briefing Forms;
 - g. Pike issued two Disciplinary Action Forms to Mr. Ascencio for failure to wear proper PPE and disciplined him in 2004 for failure to wear his rubber overshoes;
 - h. In 2004, Pike disciplined Mr. Coria as foreman or crew leader because he did not take "the proper action to ensure employees who were working for him were following Pike's safety rules;" (Emphasis added)
 - i. The pair filled-out three similar Pre-Job Briefing Forms, one before each job on the day of the fatality, because each was essentially the same type of work; and,
 - j. Crew Leader Coria noted on each Pre-Job Briefing Form during the day of the fatality that he and Mr. Ascencio needed to: "wear all PPE" for each job.
77. Respondent has invested time, effort, emphasis, repetition, and underwriting in its safety programs and employee education.

DISCUSSION

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the NCOSH Rules of Procedure. In order to prove that the respondent committed a serious violation of a specific standard, the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

1. A hazard existed
2. Employees were exposed
3. The hazard created the possibility of an accident
4. The substantial probable result of which would be death or serious physical injury
5. The employer knew, or should have known, of the violative condition or conduct that created the hazard by applying the reasonable man test developed by the Court of Appeals in *Daniel Constructon*, 2 OSHANC 211, 73 N.C. App. 426 (1984)

As outlined in paragraphs 1-77 above, complainant successfully presented a *prima facie* case on each element necessary to affirm Citation 1, Item 1. Therefore, respondent's defenses must be considered.

RESPONDENT'S ARGUMENTS

Respondent argues that complainant's case is fatally flawed for the following reasons:

- A. **Rubber overshoes are not "suitable protective equipment," within the Act**
- B. **Respondent may not be successfully cited for violation of a "mere work rule"**
- C. **Complainant failed to prove Pike had knowledge of the hazard**
- D. **The pair's violations of the Act constituted an Isolated Act of Employee Misconduct (unforeseen action), which is an affirmative defense to the Citation**

A. Whether Rubber Overshoes Were Suitable Protective Equipment Within the Meaning of the Act Is Not the Issue at Bar

Pike argues that "the Commissioner relies upon the presumption that Ascencio caused a violation of the Code of Federal Regulations §1926.955(a)(6)(i) when he failed to wear safety overshoes before approaching the line truck." Respondent asks that Citation 1, Item 1 be dismissed because "overshoes fail to be the sort of equipment contemplated by the ... statute." This argument lacks merit. It was Mr. Ascencio's failure to keep clear of the truck that gave rise to the citation which was worded as follows:

1926.955(a)(6)(i): When not using suitable voltage equipment for the voltage involved, employee(s) standing on the ground shall avoid contacting equipment or machinery working adjacent to energized lines or equipment:

(Emphasis added).

Chapter 95 §127(18) of the Act deems a serious violation to exist, if there is:

...a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.
(Emphasis added)

The Second Circuit Court of Appeals held that complainants need only to prove "that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer" *Underhill Construction*, 513 F.2d at 1038. It is the possibility of exposure that is at issue. *B&E Auto Paint Co., Inc./Maaco Auto Painting*, OSHANC No. 79-449, 1 NCOSHD 449, (April 6 1979); See also, *Budd-Piper Roofing Co., Inc.*, OSHANC No. 80-639, 2 NCOSHD 323, 327 (1983).

To emphasize the seriousness of the Act and prevent foreseeable accidents, the NC Review Commission's access test is predicated on the recognition that "employees may not be restricted to specific paths or movements about their workplace [and] . . . [s]ome carelessness and negligence is anticipated and expected." See, *Budd-Piper*, 216 NCOSHD at 327

The Court of Appeals in *Daniel Construction* concluded that "human error is not a rare phenomenon. A mark of ordinary prudence, we believe, is to anticipate human errors that are likely to injure people ... and take precautions against them before, rather than after, injuries occur." *Id.*

Complainant cited respondent for violation of this regulation because – without his PPE, specifically his rubber overshoes – Mr. Ascencio “did not avoid contacting equipment or machinery that was working adjacent to energized lines or equipment.”

There was no mention on the Pre-Job Briefing that Mr. Ascencio’s overshoes were in disrepair or that, at the time of his death, the grass was so tall, wet or dirty that his overshoes would not have isolated Mr. Ascencio from being part of the ground and, therefore, from becoming energized.

Even if his failure to wear overshoes was the basis of the citation, in this case, the rubber overshoes Pike provided were suitable for the voltage and may have saved Mr. Ascencio’s life.

B. Whether Complainant Only Cited Respondent for Violation of Mere Work Rules?

The hazards which gave rise to the Citation 1, Item 1 were also violations of the following pertinent parts of Pike’s safety policies (C6):

- a. Before performing any work, the machinery and equipment should be grounded;

- b. When working in close proximity to energized circuits or service that may become energized, the metal parts of all mobile equipment (the truck) shall be grounded;
- c. Mobile equipment grounds shall be placed on the common neutral from the aerial bucket by using an improved live line shotgun stick. The shotgun stick would then be clamped to the neutral line;
- d. Any ground employee ought to be away from the truck approximately about 20 feet during [the grounding] process;
- e. “One of your primary means of keeping safe is utilization of PPE ... remember every job at Pike will require some form of PPE and that you must protect it so it can protect you;” (C7-11)
- f. When an employee is in the “vicinity of energized work,” he must wear a hard hat, rubber sleeves, rubber gloves, leather over-glove protectors, ankle-high work boots, safety glasses, fire resistant pants, Pike’s fire resistant shirt, and “approved overshoes/rubber boots (4 buckles);” (C7-11)
- g. Pike’s goal “is to perform safe quality work every day:”

No job is so urgent that an employee cannot take the necessary time to perform it safely. It is the responsibility of the foreman or employee in charge to see that employees under their supervision follow all Pike safety rules and correct any violations observed.

(C11)(Emphasis added); and,

- h. “It is the responsibility of each grounds man to perform their work safely. (C11)

Pike generated safety rules to: (1) reduce the risk of a fatal employee electrical shock, and 2) keep Pike in compliance with the Act. The two are not mutually exclusive as the latter informs the former.

Respondent’s safety programs contain more than “mere work rules.” The pair violated Pike’s vital safety rules meant to keep field crews alive and to keep Pike from violating some of the most serious OSHA’s federal and state regulations and safety standards.

C. Whether Complainant Proved Pike Had Knowledge of the Hazard?

The pair were “qualified employees,” who Pike sent annually through Progress Energy’s Insulate and Isolate Program, before authorizing employees to climb or change locations on poles, towers, or similar structures.

Pike’s Crew Leaders are not “management” in that they do not make policy, set rules, earn a salary, or hire/fire employees. However, Pike places a higher duty on Crew Leaders (than it does on the grounds men) to perform a Pre-Job Briefing with the crew and to ensure that all Pike employees, including himself, comply with Pike’s safety rules and thus, the Act.

Mr. Coria was Pike's Crew Leader, qualified employee, Foreman, and Person In Charge on his crew's job site. (R2, 14)

As Pike's underground crew leader, Mr. Coria was in a skilled position in the maintenance and repair of electrical underground distribution systems and was capable of leading and training lower-skilled employees in safe and productive work procedures. (C10, 11)

As such, Mr. Coria knew and understood Pike's safety rules, including: (a) staying clear of the truck when near energized conductors, and (b) the proper time to wear his PPE.

Although the pair had been long-time working partners and knew, or should have known, how to avoid the regular and life-threatening hazards of their job, Crew Leader Coria was to conduct Pre-Job Briefings and supervise Mr. Ascencio. (C10, 11)

As the Crew Leader, Foreman and/or Employee In Charge on the day Mr. Ascencio died, Mr. Coria should have reviewed the Pre-Job Briefing before beginning work (getting into the bucket truck) to ensure that Mr. Ascencio was wearing his PPE and/or that he was reminded to stand clear of the truck during grounding.

Once Mr. Coria climbed into the bucket and ascended, his focus of attention had to be trained on the powered electrical line.

Based upon the foregoing findings of fact, Mr. Coria's knowledge should be and is hereby imputed to respondent.

D. Whether the pair's violations of the Act constituted an isolated act of employee misconduct (Unforeseen Action).

Respondent argues that even if Mr. Coria was a supervisor and even if he had knowledge of the violative condition, Pike may defend against the violation by showing that the violation was unpreventable. *DWH Painting Company, Inc.*, OSHANC 04-4356 (ALJ. Jan. 7, 2005)

Federal OSH Review Commission has held that once employer knowledge is shown (now established by imputation), then the employer may rebut that evidence by showing that the employer took reasonable measures to prevent the occurrence of the violation. In particular, it states that the employer must demonstrate that 1) it had prescribed work rules that satisfy the requirements of the cited standard, 2) it had adequately communicated, and 3) enforced such rules, including taking action to discover violations of such rules by monitoring employees' adherence to safety rules.

In *O. S. Steel Erectors v. Brooks*, the NC Court of Appeals held:

In order to show that the safety violation was the result of isolated employee misconduct, the employer must show that it had taken all feasible steps to prevent an accident from occurring; that the employee action was contrary to an effectively communicated and enforced work rule; and that the employer had neither actual nor constructive knowledge of the violation. 84 NC App 630, 635, 353 S.E.2d 869, 873 (1987). (Emphasis added) This burden includes:

1. The employer had work rules designed to prevent the violation
2. The employer had adequately communicated the rules to the employees
3. The employer had taken steps to discover violations of work rules
4. The employer effectively enforced the rules when violations had been discovered

Commissioner v. DWH Painting Co. Inc., OSHANC 2004-4356 (2005). On the other hand, the courts have recognized that even if the employer complies with *DWH Painting*, some degree of employee negligence or carelessness must be expected." *Brooks v. Budd Piper Roofing Company. Inc.*, OSHANC 80 1039 (RB 1985). "Only when an employee's conduct is so extraordinary that it cannot be conceivably considered ordinary conduct on the job and must be considered intentionally dangerous can the defense succeed." (Emphasis added) *Stone Restoration of America*, OSHANC 2000-3944 (2001), *see also*, *Brooks v. Rebarco, Inc.*, OSHANC 83-1039 (RB 1985)

The employer must demonstrate a more rigorous level of proof for this defense when a supervisor's misconduct is at issue. Where a supervisory employee is involved, the proof of "unpreventable employee misconduct" is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *DWH Painting Co. Inc.*, OSHANC 2004-4356 (2005).

29 C.F.R. §1910.132(a) imposes upon employers a "generalized duty to protect employees by the use of whatever personal protective equipment is necessary by reason of certain hazards. *Owens Corning Fiberglass Corp.* 79 OSAHRC 26/D6, 7 BNA 1291, 1295(No. 76-4990, 1979). The Employer must assure that appropriate equipment is used. *The Budd Co.*, 74 OSAHRC 12/A2, 1 BNA OSHC 1548, 1973-74, *aff'd* 513 F.2d 201 (3 Cir. 1975).

Employers are charged with the duty of keeping their employees from "contacting equipment or machinery working adjacent to energized lines or equipment." 29 CFR 1926.955(a)(6)(i) The purpose of the Act and Pike's work rules are not only to protect employees from known and unknown hazards, but to protect employees from their own human frailties.

Crew leaders do Pre-Job Briefings before each and every job in recognition of simple human error. Despite years of education, training, and experience, exposed employees may be ill-educated or may become unaware, out-of-date, complacent, negligent, forgetful, over-worked, stressed-out, tired, distracted, harried, or hurried and absent-mindedly electrocute themselves to death.

As an example of "isolated incident of employee misconduct," the NCDOL's Field Operations Manual describes a CSHO driving down the highway observing an employee working on a billboard without proper fall protection. The affirmative defense would most likely succeed, "[i]f this is the only employee, the necessary fall protection is on the truck, the company has rules, training and disciplinary procedures set up, and the employee states, "I'm going to be fired."" (Emphasis added)

Respondent's evidence does not rise to the level of isolated employee misconduct because 1) each employee was well aware of and understood the import of Pike's safety rules; 2) Mr. Ascencio was not the only employee involved in the misconduct; 3) The "other" employee (Mr. Coria) was in a supervisory position; and, 4) Mr. Coria could have abated the hazard by conducting his Pre-Job Briefing after lunch and just prior to work beginning or by other feasible methods (signs/barricades).

Respondent failed to prove the following by a preponderance of the evidence:

1. That it took all feasible steps to prevent an accident;
2. That Mr. Ascencio was the only employee who participated in the misconduct;
3. That Mr. Coria was not imbued with supervisory responsibilities for Mr. Ascencio;
4. That it did not know or with reasonable diligence could not have known that the violative condition existed; and,
5. That Mr. Ascencio's conduct in absent-mindedly leaving the safety zone to lean against the truck during the grounding process was unforeseeable, idiosyncratic, or so extraordinary that it cannot be conceivably considered ordinary conduct on the job and must be considered intentionally dangerous.

Based upon the foregoing FINDINGS OF FACT and DISCUSSION, the undersigned makes the following:

II. CONCLUSIONS OF LAW


1. The foregoing Findings of Fact and Discussion are incorporated herein by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. Complainant met its burden of proving that respondent violated 29 CFR 1926.955(a)(6)(i).
4. The CO properly found a serious violation because there existed a substantial probability that death or serious physical harm could result from Pike's failure to keep their unprotected employees from "contacting equipment or machinery working adjacent to energized lines or equipment."
5. Respondent failed to establish a *prima facie* case supporting the elements of the affirmative defense of isolated incident of employee misconduct or any other defense.
6. Complainant carried its burden of proving by a preponderance of the evidence that: (1) respondent did not take all feasible steps to prevent an accident; and (2) respondent had actual knowledge of the hazard.

7. Complainant properly calculated the proposed penalty.

BASED UPON the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, and DISCUSSION, IT IS HEREBY ORDERED as follows:

1. Citation 1, item 1, is hereby **AFFIRMED**;
2. Respondent shall pay the as \$6,300 (Six Thousand Three Hundred Dollars) in penalties set forth above; and,
3. The penalties shall be paid within ten (10) days of the filing of this Order.

This the 19th day of March, 2015.



Ellen R. Gelbin
Administrative Law Judge

CERTIFICATE OF SERVICE

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

DAVID E JONES
OGLETREE DEAKINS
191 PEACHTREE STREET NE
SUITE 4800
ATLANTA, GA 30303

JOHN A SHEDDEN
H BERNARD TISDALE III
OGLETREE DEAKINS
201 S COLLEGE STREET
SUITE 2300
CHARLOTTE, NC 28244

NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH, NC 27602-0629

by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, 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 _____ DAY OF _____ 2015.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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