

Review Commission Overcomes Outdated Elements-of-Violation Mantra to Find No Employer Knowledge of Violative Condition Resulting From Unforeseen Employee Action

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Decisions resolving litigation of citations issued by Occupational Safety and Health Administration (OSHA) frequently state the well-known mantra that, to establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence:

- (1) that the cited standard applies;
- (2) there was a failure to comply with the standard;
- (3) employees were exposed to the violative condition; and,
- (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence.

Where an OSHA standard requires the employer to ensure a condition does not occur and the prohibited condition exists for some meaningful period of time (e.g., a point of operation remains unguarded), or a standard requires the employer to take some affirmative action and the employer fails to take that action for a meaningful period of time (e.g., provide the required training), that mantra is generally appropriate.

On the other hand, where the violative condition occurs in a brief moment of time, due to the improper action of a single individual -- raising a bucket lift into the path of an energized high voltage electrical conductor, or reaching into the point of operation of a machine before controlling the hazardous energy sources -- that mantra is an unfortunate and misleading fiction. In a recent case, the Review Commission properly overcame that mantra to come to a well-reasoned decision that the Secretary may not rely on a supervisor's knowledge of a recognized and readily observable hazard to establish employer knowledge of the unanticipated/unforeseen, improper, affirmative action of the injured employee in exposing himself to that hazard. (*Secretary of Labor v. Armstrong Utilities, Inc.*, OSHRC Docket No. 18-0034 September 24, 2021).

In *Armstrong*, a lineman with 23 years of experience was in the bucket of a bucket lift stringing fiber optic cable on a series of utility poles over a run of approximately one mile on uneven and partially wooded terrain. The lineman was working in trees between two poles where the vertical distance between the fiber optic cable and the primary power line sharing the poles dropped from approximately 11 feet to 5 feet, which the Administrative Law Judge (ALJ) found to be easily

observable. The lineman accidentally raised the bucket lift and made contact with the power cable, sustaining electrical shocks and burns. At the location where the incident occurred, the vertical distance between the fiber optic cable and the primary power line was approximately 8 feet, and the minimum required approach distance was 24 inches.

The Review Commission found, or relied on the ALJ's finding, that:

- (1) Armstrong (the employer) had a clear and appropriate work rule on approach distances;
- (2) Armstrong's employees were experienced with these working conditions and trained to avoid electrical lines;
- (3) the foreman had conducted an adequate pre-work inspection and meeting;
- (4) the change in the distance between the power and fiber optic lines was easily observable; and,
- (5) the injured lineman was in the best position to assess the vertical distance between the lines.

Based on those findings, the Review Commission concluded that Armstrong had exercised due diligence and, therefore, the Secretary failed to establish employer knowledge of the violative condition.

At the underlying trial, the ALJ found that the injured lineman's conduct was unforeseeable, but nevertheless found the employer liable after imputing liability based on the supervisor's knowledge of the hazard rather than the violative condition, and concluding the employer did not establish the last element (documented history of disciplinary action for non-compliance) of the employee misconduct defense.

For cases such as this, the Elements-of-Violation Mantra should be revised along the lines of the following:

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence:

- (1) that the cited standard applies;
- (2) there was a failure to comply with the standard;
- (3) employees were exposed to the violative condition; and,
- (4) the employer knew of or should have anticipated the violative condition with the exercise of reasonable diligence.

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