

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

VALLEY ELECTRIC COMPANY OF MOUNT
VERNON, and its successors,

Respondent.

OSHRC DOCKET NO. 00-1600

APPEARANCES:

For the Complainant:

Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Aaron K. Owada, Esq., Williams, Kastner, & Gibbs, Tacoma, Washington

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

At all times relevant to this action, Respondent, Valley Electric Company of Mount Vernon, and its successors (Valley), maintained a place of business at Whidbey Island Naval Air Station, Washington, where it performed the electrical work on a remodeling project. Valley admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 26, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Valley's Whidbey Island work site. As a result of that inspection, Valley was issued a citation alleging violation of 29 CFR §1926.403(i)(2)(i) of the Act, and proposing a penalty of \$1,875.00. By filing a timely notice of contest Valley brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

The case was designated for E-Z trial, and on February 9, 2001, a hearing was held in Seattle, Washington. No briefs are required in E-Z proceedings, and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.403(i)(2)(i): Live parts of electric equipment operating at 50 volts or more were not guarded against accidental contact by cabinets or other forms of enclosures, or by any of the following means: (A) by location in a room, vault, or similar enclosure that is accessible only to qualified persons; (B) by partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts; (C) by location on a balcony, gallery, or platform so elevated and arranged as to exclude unqualified persons; (D) by elevation of 8 feet or more above the floor or other working surface and so installed as to exclude unqualified persons:

(a) Third Floor Main Power Distribution Panel, East Wing: On or about July 26, 2000 and at times prior thereto, the electrical power panel was energized at 120/208 volts and the energized parts were covered with cardboard.

(b) Second Floor Main Power Distribution Panel, East Wing: On or about July 26, 2000 and at times prior thereto, the electrical power panel was energized at 120/208 volts and the energized parts were covered with cardboard.

(c) Sub-Basement Main Power Distribution Panel: On or about July 26, 2000 and at times prior thereto, the electrical power panel was energized at 120/208 volts and the energized parts were covered with cardboard.

Facts

OSHA Compliance Officer (CO) David John Baker testified that during his inspection of Valley's Whidbey work site he observed the three cited power distribution panels, which are located in the sub-basement, and in the hallways of the second and third floors (Tr. 13-15; Exh. C-1). Each panel is located in a recessed box or "can" along with bundles of insulated wires (Tr. 84; Exh. C-1). The panels consist of live bus bars, carrying between 100 and 150 amps (Tr. 17-19, 27, 119-21). A dead front shield is firmly screwed into the back of the can over the bus bars. Openings are cut into the dead front; breaker switches protrude through the openings (Tr. 50, 87, 92; Exh. C-1 and R-1, fig. 7). Flipping the breaker switches creates a circuit between the 1/4" lug nut associated with that breaker and the live bus bars (Tr. 50, 53, 56, 100-02, 117-120; Exh. R-1, fig. 7). The lug nut is also located behind the dead front (Tr. 93). If a breaker is closed, its lug nut and any wires or equipment connected to that lug nut are energized (Tr. 117-21).

Alan DeMarco, a journeyman electrician at the Whidbey work site (Tr. 82), testified that, at the time of the inspection, the bus bars were live, and one breaker was closed on each panel (Tr. 84). While the entire panel was shut down, the first 1/4 inch of a single insulated power cord was stripped and the wires attached to the lug nut (Tr. 88). After the circuit was re-energized, the temporary cord provided power and ground fault circuit protection for the renovation project (Tr. 84-86; Exh. C-1, R1-F2 and

R1-F8). Only the point at which the temporary cord was attached to the lug nut was live (Tr. 93). The live connection was located behind the dead front (Tr. 93, 124).

When complete, the recessed panel-boards are covered with a permanent metal cover which can only be opened by removing the screws that hold it in place (Tr. 87, Exh. C-1; R-1, fig. 7). DeMarco testified, however, that permanent metal cover would pinch the power cord running from the panel (Tr. 88). Valley, therefore, tied cardboard flaps over the panel-boards while they were in use (Tr. 14-15, 29, 48; Exh. C-1). The cardboard flaps were marked, indicating that they covered “hot” 120/208 panel boards (Tr. 61; Exh. C-1).

CO Baker testified that the cited panels were not guarded to prevent employee contact with live parts (Tr. 16). CO Baker maintained that employees carrying pipe through the sub-basement, and second and third floor halls could inadvertently knock into the cardboard flaps covering the panels, or pierce the flaps with piping (Tr. 31-34, 69). Baker believed that the employees, or the pipe could come in contact with the energized portions of the power panels (Tr. 31-34). Baker stated that contact with between 100 and 150 amps could result in electrical shock, and burns, and that arcing from the panel could cause combustible materials in the area, including the cardboard flap, to ignite (Tr. 31-34).

Alan DeMarco testified that, with the dead front in place, it was impossible to accidentally access any of the live portions of the panels (Tr. 94-96, 124). On cross examination Baker admitted that an employee could not contact either the live bus bars, or the energized lug, unless the dead front was knocked off, or the employee wrapped his hand around the dead front (Tr. 52, 66, 99). Baker believed a small diameter pipe, 1" to 2", could fit behind the dead front (Tr. 52, 66); however, Valley demonstrated at the hearing that it would be impossible for the six to eight foot sections of pipe being installed to inadvertently slip behind the panel-board in its recessed can (Tr. 66-67, 96, 98). Only the dead front and the back of the can are accessible (Tr. 96). DeMarco testified that there is no way for the back of the can to become energized without shorting out the entire panel (Tr. 97).

Discussion

The cited standard provides:

Guarding of live parts. (i) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by cabinets or other forms of enclosures, or by any of the following means. . .

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either

knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 1991-93 CCH OSHD ¶29239 (No. 87-1359, 1991).

It is undisputed that the cited standard applies, in that live electrical equipment in excess of 50 volts was in operation behind the panels' dead front. The Secretary has established that the cited standard applies.

It is not clear, however, that Valley's failure to use a plywood¹, or metal cover over the dead front constitutes a violation of the cited standard. The dead front on the panel board, though neither a cabinet or enclosure, did provide protection against accidental contact with any of the panel boards' live parts. The definition of "dead front," found at §1926.449 **Definitions applicable to this subpart**, is "Without live parts exposed to a person on the operating side of the equipment."

Assuming, arguendo, that the standard specifically requires guarding by means of a cabinet or enclosure, the Secretary must still establish that employees were within the "zone of danger" posed by the hazardous condition ". . .in the course of their assigned work duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned work places. . ." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448 (No. 504, 1976); *see also, Armour Food Co.*, 14 BNA OSHC 1817,1824, 1990 CCH OSHD ¶29,088(No. 86-247, 1990). Valley established that the possibility of an employee accidentally contacting a live part was non-existent. It was demonstrably impossible for an employee to get a piece of pipe into the can behind the dead front. In order to contact either a bus bar or the single energized circuit, an employee would have to deliberately reach behind the dead front. A violation cannot be based on the possibility of such idiosyncratic behavior on the part of an employee.

Because the evidence establishes that employees working in the area were not exposed to the danger of accidentally contacting any of the cited panel's live parts, the cited violation must be vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.403(i)(2)(i) is VACATED.

Benjamin R. Loye
Judge, OSHRC

Dated:

¹ The proposed abatement method was substitution of stationary plywood for the cardboard flaps (Tr. 68).