



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
EL-O ELECTRIC, INC.
Respondent.

OSHRC DOCKET
NO. 95-1567

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 7, 1996. The decision of the Judge will become a final order of the Commission on April 8, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before March 27, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA
Ray H. Darling, Jr.
Executive Secretary

Date: March 7, 1996

DOCKET NO. 95-1567

NOTICE IS GIVEN TO THE FOLLOWING:

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Nancy J. Spies
Administrative Law Judge
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SECRETARY OF LABOR,
Complainant,

v.

EL-O ELECTRIC, INC.,
Respondent.

OSHRC Docket No. 95-1567

E-Z

Appearances:

Kenneth Walton, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mr. Samuel Frankel, President
EL-O Electric, Inc.
Bedford Heights, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

EL-O Electric, Inc., (EL-O) contests a single-item citation issued to it on September 19, 1995 under the Occupational Safety and Health Act of 1970 (the Act). On September 6, 1995, Occupational Safety and Health Administration (OSHA) compliance officer Thomas Henry conducted a complaint inspection of a school renovation and expansion project in Cuyahoga Falls, Ohio. EL-O was the electrical subcontractor (Tr. 10).

EL-O is a medium-sized electrical contractor, employing 65 persons. It has been in operation for 42 years in the Bedford Heights, Ohio area. The company typically provides electrical installations for new construction and renovation, including installation of power panel boxes, lighting fixtures, and telephone communication equipment (Tr. 28-29).

This case was heard on February 13, 1996, pursuant to the pilot "E-Z" trial procedures set out in Commission Rules 200-211, §§ 2200.200-211. EL-O's president, Samuel Frankel, represented his company at the hearing.

Stipulations

The parties stipulated to jurisdiction and coverage and to the following facts (Tr. 5):

1. Respondent has been in business for 42 years.
2. On the particular work site, EL-O-Electric employed 10 to 12 people.
3. Two of the employees were working on an electrical panel that was being used for "testing out" breakers.
4. There were actually two panel boxes that were open that were next to each other, but only one was a breaker box.
5. There were two signs on the window outside of the boiler room, next to the door. One sign said "Authorized Construction Personnel Only." The other sign said "Visitors Report to Field Office." These two signs were placed there not by EL-O-Electric but by the general contractor. On the panel itself, EL-O-Electric placed a smaller sign which read, "Hot: 208 volts."

Background

Henry began his inspection of the outside of the school building. Finishing this area by mid-morning (10:30 a.m. to 11:00 a.m.), Henry and the general contractor's representative proceeded through an open door from the parking lot into the boiler room (Tr. 11, 21).

The boiler room adjoins the school hall on one side. The room had three doors: a door opening directly to the outside, one at the other end of the room opening into the hall, and a third leading into the contractor's break room. All three doors were secured in an opened position (Exhs. ALJ-1, R-1; Tr. 12). The general contractor's sign (two pieces of paper) which read, "authorized construction personnel only-visitors report to field office" was placed near the hall entrance (Exh. R-1-d). No restriction was posted at the outside door (Tr. 36). Although it was not the main school entrance, because it afforded a direct route from the hall entrance through the boiler room to the outside, the boiler room was regularly used as an access way (Tr. 19).

On the boiler room wall Henry observed two open electrical panels, one of which was the circuit breaker panel box. That electrical panel was normally protected by a cover which was screwed into place (Exh. C-1; Tr. 10-11). Two of EL-O's electricians removed the cover early in the morning so that they could work in the panel. They left it open when they began work in another

area. At some point the electricians placed the small hand-lettered sign on the breaker panel which read, "Hot 208 Volts." None of the electricians were in the area when Henry came into the boiler room (Tr. 15, 21).

At Henry's request, the general contractor's representative left to find the electricians. Henry waited approximately 15 minutes before EL-O's foreman, Michael White, returned to the boiler room. While Henry waited for White, he observed 15 to 20 people coming into and through the boiler room or going in and out of the break room (Tr. 15-16). The break room was half-way between the two exit doors on the same side of the wall as the open panel box (Exh. ALJ-1). Some of the persons passing the open panel box appeared to Henry to be school personnel, such as janitors, or students;¹ some were employees of other contractors involved in the renovation. Henry particularly identified employees of the plumbing contractor. White admitted to Henry that the electricians had worked in the panel earlier in the morning (Tr. 16, 21).

Alleged Serious Citation

Item 1

The Secretary asserts that the electrical panel box was not properly guarded in violation of § 1926.403(i)(2)(i). EL-O contends that the safeguards it utilized constituted appropriate compliance with the standard. The standard provides:

(2) *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:

(A) By location in a room, vault, or similar enclosure that is accessible only to qualified persons. [other exceptions not arguably applicable.]

The Secretary has the burden of proving that EL-O violated § 1926.403((i)(2)(i). To establish a violation of a standard, the Secretary must show that: (1) the cited standard applies, (2) its terms were not met, (3) employees were exposed to or had access to the violation, and (4) the

¹ EL-O asserts that school was not in session and that no students should have been present (Tr. 38). This may well be so, since Henry did not verify the presence of students. In any event, it is the exposure of "employees" which is in issue.

employer knew or could have known of the conditions with the exercise of reasonable diligence. See *Seibel Manuf. & Welding Corp.*, 15 BNA OSHC 1218, 1222 (No. 88-821, 1991).

Application of Standard and Failure to Meet Its Terms

The open electrical panel in the boiler room contained live (or energized) wires and parts, energized at 208 volts (Exh. C-1). The standard applies. The live parts of the equipment were not barricaded or otherwise guarded from contact. Likewise, the parts were not protected by location “in a room, vault, or similar enclosure that is accessible only to qualified persons.” The boiler room was widely accessible. The doors were open, and the sign purporting to restrict access to only “authorized construction personnel” had no apparent affect, especially since the room provided Entry to the contractor’s break room. The electricians, rather than employees in other crafts, were the “qualified persons” referred to in the standard. The requirements of the standard were not met.

Exposure

The school was being renovated and expanded with simultaneous efforts from different crafts. On such multi-employer construction sites, where an employer creates or controls a hazardous condition, it is obligated to protect not only its own employee, but also those of others engaged in the common undertaking. *Flint Engineering & Const. Co.*, 15 BNA OSHC 2052, 2054 (No. 90-2873, 1992); *A/C Electric Co. v. OSHRC*, 956 F.2d 530 (6th Cir. 1991) (violation affirmed for an electrical contractor supplying power at the worksite, although its own employees were not exposed).

EL-O created the hazard. When EL-O’s electricians removed the cover of the breaker panel and left it open, without barricades or other guards, they created the potential for employees to come into contact with energized parts of the panel. The facts establish that these employees were actually exposed as they passed in close proximity to the opened panel while leaving or entering the building and the break room.²

² The parties dispute by how close employees passed the panels. Henry estimated that they came within 6 to 12 inches of the panel (Tr. 17). However, as his estimate of the width of the boiler room access way showed, he may have under-estimated the distances involved. Even a more realistic two-foot distance supports a finding of exposure.

Knowledge

Foreman, Michael White, was aware that EL-O removed the cover of the breaker panel (Tr. 21). His knowledge is properly imputed to the company. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Accordingly, the Secretary has established the four elements of the violation. If an employee contacted the live parts of the panel box, the probable injury from a shock of 208 volts would be first, second, and third degree burns or other serious injury (Tr. 22). The violation is properly classified as serious.

Defenses

EL-O's argument that it substantially complied with the standard must be rejected. As discussed, the general contractor's sign was ineffective. While EL-O appropriately placed a notice to employees that the panel itself was energized, this is not compliance with the standard. The standard seeks not only to advise of the presence of the hazard but to protect against accidental injuries caused by it. For example, employees may be shocked or burned after a trip or fall causes them to contact the panel. Equipment, tools or building material may carry a shock, if inadvertently touched to energized parts of the panel. Further, EL-O is incorrect that because no one was injured, the hazard did not exist. Since the goal of the Act is to prevent the "first accident" the possibility of injury is not diminished by a hindsight observation that no injury occurred. *Williams Enterprises, Inc.*, 7 BNA OSHC 1015 (No 14748, 1978). EL-O's prompt action in abating the condition may also have prevented the occurrence of an injury.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. It must give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

EL-O employed 65 persons, and had no more than 12 electricians at the jobsite (Tr. 24, 31). EL-O's good faith is weighed as a positive factor, which should have been credited more than in

Henry's assessment. Henry reduced the good faith credit because he saw no safety program. In fact, EL-O had an active program (Tr. 23). It conducted weekly safety meetings with the employees at the worksites and had monthly safety meetings with its supervisory personnel. The employer cooperated with the investigation and immediately abated the violation. Given the extent of EL-O's work at the jobsite, the single-item citation indicates general compliance with safety regulations (Tr. 31). EL-O has no previous history of violation under the Act (Tr. 24).

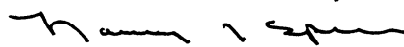
Considerations of gravity include EL-O's efforts, although not fully effective, to notify employees of the hazard. The probability of an accident was heightened because many employees would likely pass near the panel. Also, items such as a pipe, cooler, extinguisher, and miscellaneous materials were on the floor near the panel, creating a tripping hazard (Exh. C-1). Nevertheless, the overall gravity of this violation is not high. All the breakers were in the panel (Exh. C-1-c). Employees spent only a short time passing near the hazard. Based upon these considerations, a penalty of \$400.00 is assessed

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is ORDERED that item 1 of serious Citation No. 1, alleging a violation of § 1926.403(I)(2)(I) is affirmed and a penalty of \$400.00 is assessed.



NANCY J. SPIES

Judge

Date: February 26, 1996
Atlanta, Georgia