

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2934-96

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

READY ELECTRIC COMPANY, INC.

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

Winstead, Robert M., chairman, and Bovitz, Thomas M., member:

This case comes to us following respondent Ready Electric's petition for discretionary review (PDR).¹ Because we shall, as explained below, affirm items 2 and 3, we deny Ready's PDR. Instead we call this case for review under our authority contained in ROP (rules of procedure) 47 (3).² According to KRS 338.071 (4) this commission bears the ultimate responsibility to hear and rule on appeals from citations.

Ready Electric worked at old Methodist Hospital in Louisville installing electrical equipment. Following an investigation of an electrical explosion, the secretary of labor (the enforcer of Kentucky's occupational safety and health act) issued citations to Ready charging it with permitting its employees to work in proximity to live electric circuits without protection and with handling long dimensional conductive objects, also without

¹ Enacted as section 48 (1), 803 KAR 50:010.

² Enacted by 803 KAR 50:010.

protection. After a trial on the merits, our hearing officer sustained both citations and the penalties of \$3,500 for each violation. While reviewing the order of our hearing officer, we shall discuss the salient points raised by Ready in its PDR.

In its case in chief the secretary of labor moved to introduce an arson investigation report prepared by Sergeant Albert J. Naiser of the Louisville division of fire. Exhibit 3. Our hearing officer admitted the report into evidence in part. Transcript of the evidence (TE) 50. But after the hearing, our hearing officer reversed himself and admitted the report in full, citing KRE 902. Recommended order pp. (RO) 8 and 10.³ But KRE 902 makes no mention of police and other law enforcement personnel, while KRE 803 (8) (A) is quite specific:

The following are not within this exception
to the hearsay rule:
(A) Investigative reports by police and other
law enforcement personnel;

Faced with the specific language contained in KRE 803 (8) (A), we conclude the arson investigation report is inadmissible and reverse our hearing officer on the issue.

The question then is whether citation 1, items 2 and 3 are supported by the evidence presented at the hearing? We conclude they are.

Item 2 charged the employer with permitting employees "to work in proximity" to energized electric power circuits while the

³ Ready's PRD makes the argument it should have been allowed the opportunity to discredit the arson report admitted as evidence by the hearing officer after the hearing.

employees were not protected against electric shock by "deenergizing and grounding the circuits or effectively guarding the circuits by insulation..."

The cited standard says:

No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation...

(emphasis added)
1926.416 (a) (1)

In its PDR Ready Electric complains the word "proximity" is vague. We conclude it is not since the standard itself says "...in such proximity...that the employee could contact the electric power circuit..." Thus an employee is "in such proximity" when he "could contact" the circuit whether he actually comes in contact or not. The standard itself defines what it means by proximity: if the employee could contact the circuit, he is in proximity.

We must keep in mind that occupational safety and health (OSH) standards "are preventative and remedial in nature..." and that the focus in OSH cases must be on the exposure to hazards and not necessarily an accident.⁵

Stated another way, an employer may be cited and the citation upheld when employees are exposed to a hazard whether an accident

⁴ 29 CFR 1926.416 is incorporated by reference in 803 KAR 2:410.

⁵ Hurst-Roche Engineers, Inc., KOSHRC 809, reversed on other grounds by Star, Inc., KOSHRC 2694-95.

occurs or not or whether, under the cited standard, an employee actually came in contact with the live electrical power circuit. Under the standard it is sufficient "...that the employee could contact the...circuit..." In Bethlehem Steel Corporation v. OSHRC⁶, 607 F.2d 1069, 1073 (CA3 1979), CCH OSHD 24,000, p. 29,128, the court said:

The accident itself need only be possible, not probable. The probability requirement in the statute⁷ of death or serious physical injury makes it unnecessary for the Government to show that actual injury did in fact occur.

Applying that rationale to the case at bar, Ready Electric may be cited for permitting its employees to be in "proximity" to electric power circuits without taking some protective measures regardless whether the employees actually contacted the electric circuit.

Proximity means that an employee was close enough that he could contact the power circuit.⁸ Let us be clear about this. Under the standard, an employer will be liable if he permitted employees to be close enough to contact the power circuit, not that employees necessarily did come into such contact.

First of all, who of Ready's employees might have been in proximity? Let us review the evidence. Except for those found in the excluded arson investigator's report, we adopt the findings of

⁶ As a state OSH program, we do not look to federal decisions as binding precedent but often find the cases persuasive as we do here.

⁷ In Kentucky the statute is KRS 338.991 (11).

⁸ Cleveland Consolidated, Inc., a federal review commission decision, CCH OSHD 27,829, p. 36,427, 13 BNA OSHC 1114, makes the same point about a different but similarly worded standard.

our hearing officer.

Ready Electric is an electrical contractor. On August 4, 1996 its employees began the final stage of a year long project, the culmination of which required that one electric switch gear be connected to a new switch gear with a bus duct. Recommended order p. 3 (RO 3). In order to make the connection, Ready needed to de-energize the switch gears (RO 3 and 4); these switching gears were contained in two large cabinets 7 and one half feet high and 16 feet long. RO 4. To connect the two gears, a bus duct fit between two elbow joints. Exhibit 12 is a CAD drawing of the two electric switches with the yet to be connected bus bar sitting to the left of the gears. TE 125-126. Three Ready Electric employees, Donald Rutledge, superintendent and supervising electrician, Donald Sperzel, project manager and electrical engineer and Dave Oberst, a journeyman electrician, worked near the two switch gears depicted in exhibit 12 at the time of the electrical explosion. RO 4 and 6.

Mr. Oberst and Mr. Sperzel received serious burns following an electrical explosion. TE 209-210. Mr. Oberst later died of his burns. TE 28. Just prior to the electrical explosion, Mr. Oberst asked his helper to hand up a "stick rule." TE 206. This stick rule had a metal tip. TE 32 and exhibit 2D. Oberst, Sperzel and Rutledge wanted to make sure the bus duct would fit between the two elbow joints shown on exhibit 12. TE 175-180. These elbow joints on exhibit 12 are shown as "L" shaped objects facing each other and sitting on top of each switching gear.

At the hearing it was said employees Oberst, Sperzel and

Rutledge were up on the energized switching gear to make sure the bus duct, manufactured to fit between the already installed elbows on the switching gear, would actually fit. TE 173. This would, of course, require that measurements be taken. But it was also said the employees, at the time of the electrical explosion, were simply ascertaining whether the elbows on each switching gear were of the correct type to accept the manufactured bus duct as one elbow was male and the other female. TE 175-180. In any event, the employees removed an insulating blanket from the energized bus elbow. Mr. Rutledge testified he removed the insulating blanket from the energized elbow or did it with the two others. TE 175. We find the removing of the blanket from the energized bus elbow by Rutledge by himself or with the assistance of Oberst and Sperzel put the employees in such a proximity to the energized bus elbow that they "could contact" it.

For the purposes of the standard, it makes no difference if the employees, at the time of the explosion, were preparing to measure or observe the energized bus elbow. What is important is whether the employees were "...in such proximity..." that they "...could contact the electric power circuit in the course of work..."

Mr. Oberst and Mr. Sperzel received very serious burns. The explosion occurred very soon after Mr. Oberst asked his helper to hand his ruler to him. After the explosion, the ruler was found on the floor badly burned. Dave Oberst and Don Sperzel were on top of the switching gear when the explosion happened (TE 205), or perhaps

Mr. Sperzel was on a ladder next to the switching gear. TE 207.

We infer Mr. Oberst had the ruler in his hand when the explosion occurred as he had just asked for it before the explosion and the ruler was found badly burned after the explosion. We infer Mr. Oberst and Mr. Sperzel were sitting next to the energized elbow joint on the switching gear (or Mr. Sperzel was on the ladder) when the explosion occurred. We know from the testimony that Mr. Oberst was fatally burned while Mr. Sperzel seriously so. We infer the energy source for the burns the two men experienced was the energized bus elbow (photographic exhibits 2A and 2B entered at TE 30-31 which show burned electrical parts).

We make the following findings: Mr. Sperzel and Mr. Oberst were sitting on or standing on a ladder next to the switching gear which had the energized bus elbow on top. They were in the process of either measuring the space between the two elbows or ascertaining whether the energized elbow was of the right configuration to accept the manufactured bus duct. Mr. Oberst had just taken the ruler from his helper (and the ruler was found burned after the explosion). Both employees were badly burned by the explosion at the bus elbow. The two employees were in such a position they could come into contact with the electric power circuit.

Safety standard 1926.416 (a) (1), the basis for citation 1, item 2, says that employees may not work in such proximity to electric power circuits that they could contact the circuits unless the employee is protected by 1) deenergizing the circuit (turning

it off), 2) grounding it or 3) guarding it by insulation or other means.

We accept our hearing officer's findings that measuring the gap between the two bus elbows would be difficult and impracticable but not impossible. RO 6. We also find from the time that Mr. Rutledge (and likely Mr. Oberst and Mr. Sperzel) removed the insulation blanket from the live bus elbow, the live electric bus elbow was not deenergized, grounded or guarded by insulation. RO 7.

If Ready Electric had the hospital's permission to deenergize the circuit long enough to connect the bus duct from one switching gear to the other, and they did (TE 190), we find the company could have measured the distance between the two bus elbows to within one inch tolerance and visually inspected the energized elbow within that same down time. There is no showing in this case that the visual inspection and measurement would take a great deal of time. According to the testimony of Mr. Rutledge, the circuit was to be deenergized for 45 minutes to one hour. TE 190-191. He said the measurement and inspection could not have been included in the down time (when the circuit was deenergized) "Because if it didn't fit, we'd have to make adjustment." TE 191. But that overlooks the fact that the bus duct was manufactured to fit between the two bus elbows. Measurement and observation of the bus elbows and bus duct would not take the two to three hour shutdown that would be necessary if the bus duct did not fit. TE 191.

What we do know is measurement with the energized bus elbow

covered with insulation would be difficult but not impossible. We conclude therefore that Ready Electric violated the standard by permitting its employees to work in such proximity to live electric parts without protection by guarding or deenergizing.

Ready Electric in its PDR complains the hearing officer improperly shifted the burden of proof on the issue of feasibility from the secretary to the company; that is not true. In Diebold, Incorporated. v. OSHRC, 585 F.2d 1327, 1333 (CA6 1978), CCH OSHD 23,124, p. 27,940, the court pointed out that where a standard imposes a duty without specifying a means of compliance (not our case), the secretary has the burden of showing feasibility. But, the court added,

...where the regulation itself specifies
the means for compliance, the burden rests on
the employer to show the technological
impossibility of the specified means.
(emphasis added)

Had, in our case, the cited standard stopped after it said employees may not work in such proximity that they could contact live electrical parts, we would have a different case before us. But 1926.416 (a) (1) specifies three means of abatement: deenergizing, grounding or guarding. We have found that guarding was difficult but not impossible and that deenergizing was possible, at least the limited time it took to observe and measure the space between the elbows. Ready, then, failed to prove technological impossibility.

Item 3 charges the employer with not instituting "...work practices to minimize the hazard of electrical contact of an

energized panel." The cited standard reads in part:

Conductive materials and equipment that are in contact with any part of an employee's body shall be handled in a manner that will prevent them from contacting exposed energized conductors or circuit parts. If an employee must handle long dimensional conductive objects...the employer shall institute work practices (such as the use of insulation, guarding, and material handling techniques) which will minimize the hazard.

1926.416.(g) (5)

We find that employee Oberst had the metal tipped stick ruler in his hand when the explosion occurred. TE 206 and photographic exhibits 2 D, E and F. We have already determined the energized bus elbow was not guarded or insulated in any way while the employees worked near it. We find Ready Electric employed no "material handling techniques" which Mr. Oberst could use to minimize the hazard of electric shock while handling the metal tipped rule. TE 115-116. We conclude, therefore, that Ready Electric violated the cited standard when its employee handled the metal tipped ruler, a long dimensional conductive object, "...in areas with exposed live parts..." without the use of insulation, guarding or material handling techniques.

In its petition for discretionary review, Ready Electric did not contest either the seriousness of items 2 and 3 or the calculation of their penalty. We find both items to be properly classified as serious violations. KRS 338.991 (11). We find the proposed penalties reasonable.

We affirm the recommended order to the extent it is consistent with this decision. Specifically, we affirm citation 1, items 2

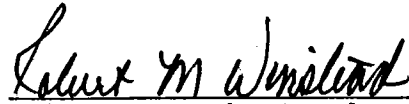
and 3, and the penalty of \$3,500 for each violation.

If abatement has not already been accomplished by respondent, we order it to do so within 30 days.

It is so ordered.

Entered November 11, 1997

FOR THE COMMISSION:

A handwritten signature in cursive script, reading "Robert M. Winstead", is written over a horizontal line.

Robert M. Winstead
Chairman

CERTIFICATE OF SERVICE

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

HON. JOHN PARSONS
OFFICE OF GENERAL COUNSEL
LABOR CABINET
1047 U S 127 SOUTH STE 4
FRANKFORT KY 40601

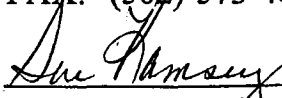
(MESSENGER MAIL)

WALTER L SALES
ODGEN NEWELL & WELCH
1200 ONE RIVERFRONT PLZ
LOUISVILLE KY 40202-2973

(CERT MAIL P 059 750 377)

This 12th day of Nov. 1997.

KOSH REVIEW COMMISSION
#4 Millcreek Park
Route #3, Millville Road
Frankfort, KY 40601
PH: (502) 573-6892
FAX: (502) 573-4619


for Jacques J. Wigginton
Executive Director