

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4299-05

COMMISSIONER, DEPARTMENT OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v

PREMIER FIRE PROTECTION, INC
dba WESTERN KY SPRINKLER CO, INC

RESPONDENT

* * * * *

Susan L. Draper for the commissioner. David L. Kelly for Premier Fire Protection.

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us on Premier Fire's petition for discretionary review (PDR). Section 48 (1), 803 KAR 50:010. After we granted review, the parties filed briefs. Premier Fire in its PDR says the sole issue is whether the hearing officer should have affirmed serious citation 1, item 2, which alleges the company exposed its employees to live electric parts. 29 CFR 1926.403 (i) (2) (i).¹

KRS 336.015 (1) charges the commissioner of labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the executive director of the office of occupational safety and health compliance issues citations. KRS 338.141 (1). If the cited employer notifies the executive director of his intent to challenge a citation, the Kentucky occupational safety and health review commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

¹ 29 CFR 1926.403 (i) (2) (i) is incorporated by reference in Kentucky by 803 KAR 2:410, section 1 (1). We shall use the terms standard and regulation interchangeably.

The Kentucky General Assembly created the review commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the commission; the review commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the commission takes a case on review, it may make its own findings of fact and conclusions of law. In Brennan, Secretary of Labor v OSHRC and Interstate Glass,² 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799, page 21,538, the eighth circuit said when the commission hears a case it does so "de novo." See also Accu-Namics, Inc v OSHRC, 515 F2d 828, 832-833 (CA5 1975), CCH OSHD 19,802, page 23,611. After a hearing on the merits, this commission has the authority to sustain, modify or dismiss a citation or penalty. KRS 338.081 (3).

At the time of the general scheduled inspection³ in this case, two Premier Fire employees were installing a fire suppression sprinkler system at the Hopkinsville First Baptist Church. TE 83 and recommended order (RO) 2. Seven contractors, including Premier, worked on the renovation of the church. TE 14.

After its inspection of the work site, the department of labor issued Premier Fire three nonserious citations with no proposed penalties. Premier did not contest these citations and they are now final, enforceable orders.⁴ RO 14 and KRS 338.141 (1).

² In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2000), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act. The court said the review commission is the fact finder.

³ Transcript of the evidence (TE) 12.

⁴ Our hearing officer's recommended order sustained these three nonserious citations; we affirm his decision on these three citations.

Labor also issued three serious citations to Premier for electrical violations. Serious citation 1, item 1, alleged a Porter Cable portable band saw had a defective electric cord. This citation carried a proposed penalty of \$1,250. Serious citation 1, item 3, alleged the same saw did not have a grounding plug; the proposed penalty for this citation was \$1,250 as well. Although Premier contested serious citation 1, items 1 and 3, the company at the hearing did not challenge either item. RO 5 and 7. During the hearing the parties conferred and then agreed serious items 1 and 3 would be grouped into one serious violation with a single penalty of \$875. TE 79 and 80. The parties also agreed a penalty for citation 1, item 2, would be reduced from \$1,250 to \$875.

Compliance officer Porter testified at some length about the proposed penalty for item 1; he then applied the same rationale to the other two items. Mr. Porter first determined an unadjusted penalty which we know from our experience with these cases is also known as a gravity based penalty. TE 23. Mr. Porter used two factors to calculate the unadjusted penalty: the seriousness of a potential injury and the probability of an injury. TE 22 and 23. The severity and probability factors are found in the statutory definition of a serious injury:

...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result from a condition which exists...unless the employer did not, and could not with the exercise of reasonable diligence, know of the existence of the violation. (emphasis added) KRS 338.991 (11)

Mr. Porter said exposure to the unprotected live electrical parts, that is employee contact with the parts, could result in electrocution which he said would give the violation a rating of high serious. TE 22 and 23. Although Mr. Porter had said the severity rating might be high serious to lesser (TE 20), he did not explain the graduations of severity

which are available to the compliance officer. We agree with Mr. Porter's assessment of the seriousness of the electrical hazards in this case.

As Mr. Porter then testified, the second factor which produces the unadjusted penalty is the probability of an injury which could be greater or lesser. TE 20 and 21. Mr. Porter said he found the probability factor for item 1 to be lesser because the two Premier employees had access to the band saw but did not use it continuously. TE 23. The severity and probability factors, Mr. Porter said, produced an unadjusted penalty of \$2,500. TE 23. While KRS 338.991 (2) sets the maximum penalty for a serious violation at \$7,000, the trial record contains no indication how the severity and probability factors combined to result in a \$2,500 unadjusted penalty. This omission, however, does not affect the validity of the \$875 penalties for the serious items contained in the hearing officer's recommended order (RO 14) because the parties in the midst of the hearing agreed upon the figure for all serious items. TE 79-80.

Once the compliance officer fixed the unadjusted penalty of \$2,500 for item 1, he then explained the employer could receive credits or adjustments; these adjustment factors were the size of the company "depending on the number of employees," the company's "overall safety program" and the company's history of prior violations. TE 21-22. Here again, although 803 KAR 2:115 (2) says the commissioner will give consideration to the size of the employer, the employer's good faith and the employer's history of prior violations, the trial record contains no indications of the source of the numerical credits actually given for each category.

Mr. Porter said the company could receive a size credit ranging from 60 percent to zero if the employer had 250 or more employees. Mr. Porter said Premier should

receive 40 percent because it had 40 employees. TE 23. The company would receive no credit for its safety program since it was not at the time of the inspection able to produce any written material documenting a program. TE 23-24. Then the company qualified for a 10 percent credit for history because it had not had any serious, repeat or willful violations within the last three years. TE 24. Fifty percent credit, applied to the unadjusted penalty of \$2,500, resulted in the penalty proposed at the time the citations were issued of \$1,250. After a recess at the hearing the parties told the hearing officer they had agreed on a 15 percent credit for the company's safety program which produced a penalty of \$875⁵ for grouped serious items 1 and 3; our hearing officer then adopted the \$875 penalty in his recommended order. TE 79-80 and RO 14. At the same time the parties agreed the \$875 penalty would be applied to serious citation 1, item 2. TE 79-80. RO 5 and 14.

Based on the representations of the parties at the hearing and our hearing officer's recommendations, we sustain serious citation 1, items 1 and 3, with a grouped penalty of \$875. KRS 338.081 (3).

We turn then to the issue brought to us by Premier's petition for discretionary review, serious citation 1, item 2, which charges the company with not guarding live electrical parts to prevent "accidental contact" by its employees. In his recommended order our hearing officer sustained this citation and a serious penalty of \$875. RO 14.

Citation 1, item 2, says:

29 CFR 1926.403 (i) (2) (i)⁶: Live parts of electrical equipment operating at 50 volts or more were not guarded against

⁵ \$2,500 times (.50 + .15) = 1,625. Then 2,500 - 1625 = \$875.

⁶ This federal regulation is incorporated by reference in Kentucky by 803 KAR 2:410, section 1 (a). 29 CFR 1926 regulates the construction industry. Renovation of the Hopkinsville First Baptist Church is construction work.

accidental contact by approved cabinets or other forms of approved enclosures, or other means listed under this provision:
A. Live parts in the 120/208 volts "Square D" breaker box, located in the Old Kitchen, were not guarded from employee contact.

Then the cited standard reads in part:

1926.403 (i) (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...

For the commission to sustain a citation, the department of labor must prove the standard applies, the standard was violated, one or more employees were exposed to a hazard and the employer knew or could have known of the violation with reasonable diligence. Ormet Corporation,⁷ CCH OSHD 29,254, page 39,199, a federal review commission decision. Photographic exhibit 5 shows the uncovered breaker box which proves the standard was violated. The cited standard was appropriate because Premier employees did not do electrical work so any contact they might have with the open breaker box would be accidental. Because the open breaker box was located on a wall in the old kitchen, the employer with the exercise of reasonable diligence would have seen it and discovered it was uncovered. While on the subject of reasonable diligence, an employer cannot manage his work in such a way that he remains unaware of the potential hazards to which his employees may be exposed and thereby escape liability. In Automatic Sprinkler Corporation of America,⁸ CCH OSHD 24,495, page 29,926, the federal review commission said:

The Commission has held that an employer must make a reasonable effort to anticipate the particular hazards to

⁷ Go to oshrc.gov. Click on decisions. Click on final commissions decisions and select 1991.

⁸ Click on final commission decisions and select 1980.

which its employees may be exposed in the course of their scheduled work. Specifically, an employer must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area...

In the case at bar Premier superintendent Pat Miller said he did not know of the open breaker box until the compliance officer pointed it out to him. TE 87. Hearing Officer Scott Majors correctly found the employer should have been aware of the violation. RO 9.

According to Premier's petition for discretionary review and its brief filed with the commission, the issue before us is whether the department of labor proved employee exposure. Labor may prove an employee was directly exposed to a hazard or an employee had access to the hazardous condition.

...we hold that to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer or those of other employers engaged in a common undertaking.

Brennan, Secretary of Labor v Occupational Safety and Health Review Commission and Underhill Construction Corporation, 513 F2d 1032, 1038 (CA2 1975), CCH OSHD 19,401, page 23,165.

There is no proof Premier employees worked on the open box which contained live electrical parts. Rather, Premier employees were trained not to do electrical work but instead to seek out an electrician when such work presented itself. TE 82-83. Therefore, the issue in this case is whether Premier employees had access to the open electrical box containing live parts.

In Donovan v Adams Steel Erection, Inc., 766 F2d 804 (CA3 1985), CCH OSHD 27,326, page 35,340 to 34,341, the court reversed the review commission and affirmed a

hard hat citation. The federal court said employees traveled about a steel structure under construction and in doing so moved into and out of areas where stored materials above them could fall on them, necessitating the use of hard hats. The court said:

Imminent risk of injury or death to employees should not be required before the Secretary can compel protective action...we hold that 'access' not exposure, to danger is the proper test...the Secretary need only prove that employees have access to an area of potential danger.

766 F2d at 811-812
CCH page 35,340

In the case at bar the interior of the open breaker box was the area of potential danger. Premier employees were installing a sprinkler system; they were not doing electrical work at the box or elsewhere. Labor's citation said in part: "Live parts of electrical equipment operating at 50 volts or more were not guarded against accidental contact..." (emphasis added). Whether the open electrical box was constructed and situated in such a way that Premier employees had access to it is the ultimate question for us.

Premier argues the department of labor did not prove Premier's employees had access to the hazard presented by the live electrical parts found within the box. Labor says it must prove the employees had access to the hazard presented, not actual exposure, and we agree.

Labor, of course, bears the burden of proof in these cases. 803 KAR 50:010, section 43 (1). We will turn our attention to the facts of the case to answer the question whether the department of labor proved Premier employees had "access to an area of potential danger," the interior of the open breaker box. Adams Steel, supra.

Two Premier employees worked on the sprinkler installation some 20 feet from the open box. TE 52. These employees stored tools and two nonconductive fiberglass

ladders in the old kitchen where the open box was found. TE 54 and 62. The compliance officer during his inspection had seen a Premier employee in the old kitchen. TE 47. Mr. Porter determined one of the ladders was at least seven feet from the box with the live electrical parts. TE 63. Mr. Porter, however, did not see any Premier employee use a ladder or the tools in the old kitchen area where the open breaker box was found. TE 54. Because of the presence of the Premier employees in the old kitchen, confirmed by the compliance officer's personal observation and the storage of Premier's tools and ladders in the old kitchen, our hearing officer concluded the department of labor proved employee access to the hazard and thus employee exposure. RO 13. Given that exposure to the live electrical parts could produce permanent injury, the hearing officer sustained the serious characterization of the citation. RO 14.

Photographic exhibit 5 shows the electrical box, cover removed, installed on a wall. From the perspective of the photographer, an icemaker is to the right of the electrical box. The icemaker was not flush with the wall. TE 37. Photograph 5 shows the upper left corner of the icemaker blocks the view of the lower right side of the open electrical box. From this photograph we infer the left hand side of the icemaker stood in front of the right side of the electrical box. Photographic exhibit 6 shows a detail of the right hand side of the interior of the breaker box. Inside the box, wires are led to the right hand side of electrical switches; these wires are attached to the switching mechanism with slotted screws. The wires are insulated and so accidental contact with the wires would not result an electrical shock. TE 56-57. The only live electrical parts in the open box are the slotted screw heads or head. Photographic exhibit 6 and TE 57. The box

shown in photographic exhibit 5 is "recessed or indented into the wall." No live parts extended beyond the box. TE 56.

Chris Nelson testified for Premier. The hearing officer accepted Mr. Nelson as an expert on the occupational safety and health regulations (TE 98) and permitted him to offer opinions. TE 100. Mr. Nelson confirmed that only the screw heads carried electricity. He said the screws were recessed within the breaker box assembly itself. TE 105. A careful examination of photographic exhibit 6 confirms Mr. Nelson's testimony the screw heads were recessed within the breaker box; a shadow falls on the screw heads for switches marked with the numbers 16 and 14 and the screw head just above number 14. We find the open breaker box was recessed within the wall. We find the live screw head, or heads perhaps, was recessed within the breaker box assembly.

Compliance officer Porter testified he had unimpeded access to the open electrical or breaker box. TE 38-39. Pat Miller, Premier's superintendent, on the other hand said an employee would have "to make a path" to the open electrical box because of the appliances placed to either side of the box. TE 93. Chris Nelson said the icemaker to the right of the electrical box and refrigerator to the left "made access difficult. TE 101. Based on the testimony of Mr. Miller and Mr. Nelson and confirmed by photograph 5 showing the icemaker somewhat blocking access to the right hand side of the open breaker box, we find the icemaker impeded access to the right hand side of the breaker box and reverse the hearing officer on this point.

Photograph 6 shows the compliance officer holding his voltage tester to a wire leading to the box. He found a wire carrying at least 50 volts to a screw head. TE 36. From Mr. Porter's testimony we know at least one wire carried electricity to a screw head

on the breaker box. That test is depicted in photograph 6. We do not, however, know if any other screw heads carried voltage. Photograph 6 shows toggle switches marked with the numbers 16 and 14 and two more above number 14. Three of these toggle switches are thrown to the right hand side of the box and the one directly above number 14 is thrown to the left. Next to 16, 14 and the topmost switch, we see the letters ON which we infer means "on." The toggle switch second from the top in photograph 6 is thrown toward the left, the on position, while the other three are thrown to the right and away from the on position.

We mention the position of the switches because it is not clear from the record whether the screw heads attached to the switches thrown to the right are carrying voltage. The record, however, shows the screw head directly above number 14 carries voltage as that is where the inspector put his voltage tester. TE 36. In other words, we know the screw head to the right and just above number 14 carries voltage. Given that the other toggle switches in exhibit 6 are thrown away from the on position, we are left in the dark about whether any screw heads other than the one directly above number 14 carries voltage. We do not know if there are screw heads on the left hand side of the breaker box or, if they exist, whether they are exposed or carry voltage.

Because of the particular facts of this case, the testimony and the photographs, we find the department of labor has failed to prove Premier employees had access to the live electrical parts within the breaker box; we reverse our hearing officer on this point. The trial record in this case tells us at least one unprotected screw head on the right hand side of the breaker box carries 50 or more volts. The breaker box is recessed into the wall and the screw heads themselves are recessed within the breaker switching mechanism. See

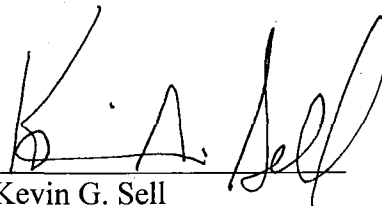
photographic exhibit 6. It is unclear from the record whether any screw heads other than the one directly above number 14 carries voltage. An icemaker stands to the right side of the breaker box and partially obstructs access to the right hand side of the breaker box. A refrigerator stands to the left of the box. TE 37. Placed as they are adjacent to the breaker box, the refrigerator and icemaker restrict access to the breaker box. See the testimony of Pat Miller and Chris Nelson. Given the placement of the icemaker relative to the breaker box as confirmed by photographic exhibit 6, we find their testimony more credible than that of the compliance officer on this point. TE 93 and 101. The record says nothing about the composition of the floor in the old kitchen area, whether it is a good conductor of electricity. We do not know if the floor in the old kitchen was slippery or whether tripping hazards were present. The wires leading to the box were insulated to prevent electric shock. TE 57. We infer the metal box did not carry voltage.

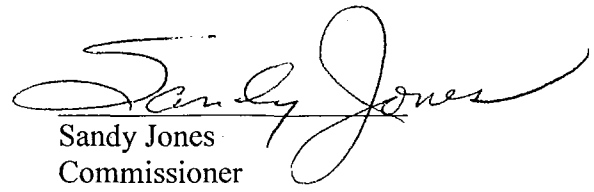
Since the department of labor has failed to prove Premier employees had access to the live parts within the breaker box, an element necessary to prove a violation, we dismiss serious citation 1, item 2.

Serious citation 1, items 1 and 3, are grouped with a total penalty of \$875 and sustained.


It is so ordered.

June 5, 2007.


Kevin G. Sell
Chairman



Sandy Jones
Commissioner



William T. Adams, Jr.
Commissioner

Certificate of Service

I certify a copy of the foregoing decision has been served on the following individuals in the manner indicated on June 5, 2007:

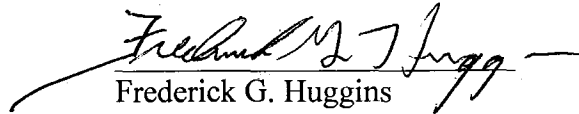
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