

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner
Department of Labor and Industry,
State of Minnesota,
Complainant,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

v.

Wright Electric, Inc.,
Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Lucinda E. Jesson on March 17, 2006, at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing record closed on April 17, 2006, with the receipt of the last post-hearing brief.

Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Commissioner of the Department of Labor and Industry (“Complainant” or “Commissioner”).

Gregg J. Cavanagh, Esq., 13277 94th Avenue North, Maple Grove, MN 55369, appeared on behalf of Wright Electric, Inc. (Respondent).

NOTICE

Notice is hereby given that under Minn. Stat. § 182.664, subd. 3 (2004), this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision. The procedures for appeal are set out at Minn. Rule Ch. 5215.

STATEMENT OF ISSUES

1. Did the Respondent violate 29 C.F.R. § 1926.405(d), which required that electrical boxes be accessible only to qualified persons and be covered with a “dead front?”

2. Did the Respondent violate Minn. Rule 5207.1000, subp. 4 which requires that employees exposed to mobile earthmoving equipment be provided with and wear high visibility garments?

3. Did the Respondent establish the affirmative defense of unpreventable employee misconduct for either citation?

4. Did the Complainant properly calculate penalty amounts for the citations?

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In the summer of 2003, an addition to an existing Wal-Mart store in Buffalo, Minnesota was under construction at 1315 Highway 25 North, Buffalo, Minnesota (the worksite). The addition under construction was not open to the public. Several employers had employees on the worksite. The Respondent was the electrical subcontractor on the worksite.

2. On August 28, 2003, Occupational Health and Safety Investigator Zane Nevala conducted an inspection of Respondent's worksite at the Wal-Mart addition. Nevala conducted an opening conference with both the General Contractor and Leon Schumacher, Foreman for Respondent. Following the conference, Nevala conducted a walk around inspection which he completed that day. Photos were taken and employee interviews conducted during the walk around inspection.¹

3. During his inspection Nevala observed a pre-existing Wal-Mart electric panel which was being used as a temporary electric panel to supply electricity to construction workers. Respondent had removed the unit from the wall and propped it up for construction purposes.² The temporary electric panel was located in the pharmacy area of the building. The panel board was contained in a metal cabinet with a cover. When the cover door was opened, the face plate surrounding the circuit breakers was in place, but a single-pull breaker was missing, leaving an opening in the face plate.³ There was neither a breaker blank nor a circuit breaker switch (either of which would have provided the necessary protective cover) in the opening. The opening was approximately ¾ inches high by 3 inches wide.⁴ There were no live electrical parts on the flat front of the panel box, but live parts were recessed approximately two to three inches

¹ Zane Nevala testimony; Ex. 1.

² Thomas Clifton testimony.

³ Nevala testimony; Ex. 3.

⁴ Nevala testimony; Ex. 2, Ex. 6.

into the opening.⁵ At a minimum, 120-volt electricity was supplied through the wires recessed into the open panel.⁶

4. The temporary electrical panel was located in an open, central area, which was covered and generally a dry location.⁷

5. The opening caused by the missing breaker blank was large enough for fingers or tools to reach well into the open panel. An employee who accidentally or purposefully put a finger or tool in the panel opening would experience an electric shock.⁸ The result of such a shock would be severe pain. The pain would be serious physical harm, but not typically fatal.⁹

6. Employees in the area had access to the panel box. These included employees of the General Contractor's subcontractors who would access the panel to plug in electrical extension cords and the three Wright Electric on-site employees. As a result, employees had access to being exposed to live electrical parts.¹⁰

7. The open electrical panel was equipped with a cover that could be locked to limit access. However the cover was not locked at the time of inspection. Nor was there a padlock on the cover.¹¹

8. During the inspection, Nevala further observed a Wright Electric employee using a skid-steer to dig a trench for electrical conduit. Two other Wright Electric employees were following the skid-steer and placing the conduit into the trench.¹² The skid-steer was moving away from the employees during this process.¹³ The employees were not wearing high visibility vests or other high visibility garments. Two of the employees working without high visibility garments were the foreman Leon Schumacher and apprentice Chris Ahlberg.¹⁴

9. Nevala also observed other mobile earth moving machines (including a dump truck and an excavator) in the general vicinity of the employees without high visibility vests.¹⁵

10. Schumacher and Ahlberg told Nevala they were aware of the requirement to wear high visibility vests. There were no high visibility vests at the

⁵ Nevala, Clifton testimony.

⁶ Nevala testimony.

⁷ Nevala, Clifton testimony.

⁸ Nevala, Clifton testimony.

⁹ Nevala testimony.

¹⁰ Nevala testimony.

¹¹ Nevala testimony.

¹² Ex. 2.

¹³ Clifton testimony.

¹⁴ Nevala testimony; Ex. 4.

¹⁵ Nevala testimony; Ex. 4.

worksite. It was a bright day outside and visibility was not restricted by the weather.¹⁶

11. At the end of the inspections, Nevala conducted a closing conference. He described the proposed citations to Respondent. The proposed citations were corrected immediately following the inspection.¹⁷

12. OSHA penalties are assessed by calculating a severity-probability rating for the violation and assigning the corresponding penalty. Following the inspection, Nevala prepared a penalty work sheet for each violation. In calculating penalties, a severity rating is assigned to each violation. Severity is rated on a scale from "A"(violation unrelated to injury) to "F" (violation that could result in severe injury). With regard to the risk of a shock or electrocution from exposure to the unguarded opening on the panel board, Nevala determined that the risk for shock or electrocution was a serious hazard and gave this citation a severity rating of "D". In making this assignment, Nevala relied upon the MnOSHA Citation Rating Guide which identifies the range of severity to be assigned to a particular violation.¹⁸ Nevala also assigned a probability rating of "3" to the panel board violation. Based upon the probability and severity ratings, the unadjusted penalty was \$2,000.00. Respondent received the maximum credit for good faith, safety history and size, which reduced the penalty to \$200.00.

13. Nevala also classified the failure of Respondent's employees to wear high visibility vests in the vicinity of earth moving equipment as a serious violation. He used the Citation Rating Guide to determine the severity rating for this citation as a "D" based upon his assessment that the employees were exposed to the hazard of being run over by one of the machines or trucks in the area and that if an accident had occurred, the result would have been serious injury or death.¹⁹ The citation also received a probability rating of "3" so the unadjusted penalty was \$2,000.00. Respondent received the maximum credit for good faith, safety history and size, which reduced the penalty to \$200.00.

14. Respondent has a policy that employees must wear high visibility vests anytime they are outside with heavy equipment.²⁰ Further, Respondent has a "bonus" safety program wherein employees who comply with the safety rules and attend safety trainings qualify for quarterly bonuses. Respondent also has a policy that anytime a breaker is removed from an electrical panel, a blank is installed in the open spot. These and other safety rules are discussed in a half day annual meeting and in informal "tool box talks" which are scheduled weekly

¹⁶ Nevala testimony.

¹⁷ Ex. 2.

¹⁸ Ex. 5.

¹⁹ Nevala testimony; Ex. 5.

²⁰ Clifton testimony.

at Respondent's worksites.²¹ In addition, Respondent's Safety Manual encourages employees generally to wear personal protection equipment when required.

15. On September 18, 2003, the Commissioner issued the Respondent a citation for alleged violations of 29 C.F.R. § 1926.405(d) (related to the exposure due to the missing breaker blank) and Minnesota Rules part 5207.1000, subd. 4 (related to the failure to wear high visibility vests).

16. On October 8, 2003, the Commissioner received Respondent's Notice of Contest, in which Respondent contested the existence and type of violations and the amount of the penalties.

17. On December 24, 2003, the Commissioner issued a Complaint seeking an order affirming the violations and penalties identified in the citations and notification of penalties. On January 6, 2004, Respondent filed an Answer to the Complaint. On November 23, 2005, the Commissioner issued a Notice and Order for Hearing setting this matter for a contested case hearing.

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 182.661, subd. 3 and 182.664.

2. The Commissioner gave proper notice of the hearing in this matter and has fulfilled all relevant procedural requirements of law or rule.

3. The Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. The Commissioner has the burden of establishing an OSHA violation by a preponderance of the evidence.

5. Minn. Stat. § 182.653, subd. 3, requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Minnesota Statutes Chapter 182.

6. Minn. Rule 5205.0010, subd. 6, incorporates by reference the provisions of 29 C.F.R. 1926.

7. 29 C.F.R. 1926.405(d) provides that:

(d) Switchboards and panel boards. Switchboards that have any exposed live parts shall be located in permanently dry locations and accessible only

²¹ Clifton testimony; testimony of Jeff Vesta, Service Manager.

to qualified persons. Panel boards shall be mounted in cabinets, cutout boxes, or enclosures designed for the purpose and shall be dead front. However, panel boards other than the dead front externally-operable type are permitted where accessible only to qualified persons. Exposed blades of knife switches shall be dead when open.

8. The electrical panel board had exposed live parts and was accessible to unqualified persons.

9. The panel board was not dead front because the opening on the face of the unlocked panel allowed access by employees of the worksite who were exposed to the hazard of shock or electrocution due to the panel board having an unguarded opening.

10. The Commissioner established by a preponderance of the evidence that Respondent violated 29 C.F.R. § 1926.405(d).

11. Minn. Rule 5207.1000, subd. 4 requires that employees exposed to mobile earth moving equipment be provided with and required to wear a high visibility vest or other high visibility garment. Respondent's employees worked in close proximity to this type of heavy equipment without wearing high visibility garments as required by Minn. Rule 5207.1000.

12. The Commissioner has established by a preponderance of the evidence that Respondent violated the standards of Minn. Rule 5207.1000.

13. To establish the affirmative defense of unpreventable employee misconduct, Respondent must show that it 1) established a work rule to prevent the unsafe condition from occurring; 2) adequately communicated the rule to its employees; 3) took steps to discover incidents of noncompliance; and 4) effectively enforced rules whenever employees violated them.²² Respondent demonstrated that it had specific safety work rules in place which were communicated to employees to prevent the unsafe conditions, but failed to show that it either took proactive steps to discover violations of these rules or that it disciplined employees who violated company safety policies. Respondent fails to establish by a preponderance of the evidence the affirmative defense of unpreventable employee misconduct with regard to either citation.

14. Under Minn. Stat. § 182.666, the Commissioner has authority to assess fines giving due consideration to the appropriateness of the fine with respect to the size of the business and the employer, the gravity of the violation, the good faith of the employer and the history of previous violations.

15. The evidence in the record supports the Commissioner's penalty calculation regarding severity and probability of harm from exposure to the

²² New York Electric State and Gas v. Secretary of Labor, 88F.3d 98(2nd Cir. 1996).

unguarded opening in the electrical panel. Adjusting the penalty calculation for the appropriate severity and probability of harm by crediting for size, history and other factors results in a penalty of \$200.00.

16. The evidence in the record supports the Commissioner's penalty calculation regarding the failure to wear high visibility vests. Adjusting the penalty calculation for the appropriate severity and probability of harm by crediting for size, history and other factors results in a penalty of \$200.00.

17. The foregoing Conclusions of Law are based on the reasons set out in the Memorandum which follow and which is incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The citations are AFFIRMED.
2. The Respondent shall forthwith pay to the Commissioner of Labor and Industry the sum of \$400.00.
3. If the penalties are not paid within 60 days after the fine becomes a final order, it must be increased to 125 percent of the originally-assessed amount. Furthermore, after 60 days, the unpaid fine shall accrue an additional penalty of 10 percent per month compounded monthly until the fine is paid in full as required by Minn. State. § 182.666, subd. 7.

Dated this 15th day of May, 2006.

s/Lucinda E. Jesson
LUCINDA E. JESSON
Administrative Law Judge

MEMORANDUM

The facts underlying the citations are generally uncontested. In violation of Respondent's stated (but unwritten) safety policies, there was an uncovered panel opening on a panel box that held exposed live electrical parts. Moreover, employees were not wearing high visibility vests in the presence of earth-moving machinery. At the hearing, however, Respondent sought to avoid the citations for four reasons.

First, Respondent claimed that the construction workers at the site (which was not open to the public) were all "qualified persons" so that it did not have to ensure that the electrical panel was dead front. Clearly, the personnel of other subcontractors at the worksite were not "qualified persons" within the meaning of the electrical standards. The painters, carpenters and other subcontractors were not trained in the operation and structure of electrical panels.²³ Neither the fact that, in general, construction workers will be aware that there is a potential for live electrical in panels nor the requirement that construction industry employers train their employees generally regarding hazards in the workplace,²⁴ relieves an employer from obeying specific OSHA statutes—including the requirement that switchboards that have any exposed live parts "shall be located in permanently dry locations and accessible only to qualified persons."²⁵

Nor was the panel board in this case "dead front", as Respondent next argues. Dead front means "without live parts exposed to a person on the operating side of the equipment."²⁶ The question this definition raises is when an employee is "exposed" to live parts. Respondent points to the evidence that a person could not come in contact with live parts "merely by bumping into or brushing up against the panel." Rather, a person would have to insert fingers or a tool into the opening on the faceplate.²⁷ Even accepting this as true, this constitutes "exposure to live parts" because employees had access to the hazard.²⁸

In a third argument, Respondent attacks Minn. Rule part 5207.1000 subp. 4 as both constitutionally infirm and as inapplicable in this case because no employees were "exposed" to mobile earth-moving equipment. An Administrative Law Judge lacks the authority to declare a statute unconstitutional.²⁹ That argument must be brought to another forum. With regard to the issue of whether employees were "exposed", the two employees were working close to a Trac skid-steer and a small excavator. Nevala also observed a grader working in the area. It is true that at the time of the inspection,

²³ 29 C.F.R. 1910.399, definition of "qualified person."

²⁴ Minn. Stat. 182.653.

²⁵ 29 C.F.R. 1926.405(d).

²⁶ 29 C.F.R. 1926.449.

²⁷ Respondent's brief at p. 8.

²⁸ Donovan v. Adams Steel Erection, Inc., 766 F.2d 804,811 (3rd Cir. 1985).

²⁹ In the Matter of Rochester Ambulance Service, a Division of Hiawatha Aviation of Rochester, Inc., 500 N.W.2d 495, 499-500 (Minn. App. 1993).

the weather was clear and the skid-steer (which was the piece of equipment closest to the employees) was moving slowly away from them. However, given the proximity attested to by both Nevela's testimony and the picture of the employees at work without the vests, the employees were in the area of several machines which had the capacity to quickly reach them. The lack of high visibility vests exposed the employees to an increased chance of a serious accident.

Finally, while Respondent established that it promulgated and communicated safety policies regarding both the use of breaker blanks and high visibility vests, it failed to produce evidence that it effectively enforced these policies. There was little evidence that the Respondent investigated for safety noncompliance. There was no evidence that individual employees were ever disciplined for safety violations. The fact that there were no high visibility vests at the worksite and that a foreman was present while this work rule was violated mitigate against the defense as well.

L.E.J.