

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD  
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2002-4213  
OSHA INSPECTION NO. 305414385  
CSHO ID NO. H1372

v.

A&M ELECTRICAL CONTRACTORS, INC  
*and its successors*

**ORDER**

RESPONDENT.

APPEARANCES:

Complainant:

Linda J. Kimbell  
Assistant Attorney General  
North Carolina Department of Justice

Respondent:

Jay M. Wilkerson  
Conner Gwyn Schenck

BEFORE:

Hearing Examiner: Carroll D. Tuttle

**THIS CAUSE** came on for hearing and was heard before the undersigned Carroll D. Tuttle, Administrative Law Judge for the Safety and Health Review Board of North Carolina on August 8, 2003, at the Safety and Health Review Board, 217 West Jones Street in Raleigh, North Carolina.

The Complainant was represented by Linda J. Kimbell, Assistant Attorney General. The Respondent was represented by attorney Jay M. Wilkerson with the firm of Conner Gwyn Schenck PLLC. Based upon the evidence presented at the hearing and with due consideration of the arguments and contentions of all parties, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

**FINDINGS OF FACT**

1. This case was initiated by a Notice of Contest received by the Complainant, North Carolina Department of Labor, on or about December 17, 2002 contesting the citations issued on December 3, 2002 to Respondent A & M Electrical Contractors, Inc. pursuant to the Occupational Safety and Health Act of North Carolina (OSHANC or Act)(N.C.G.S. §95-126 *et seq.*).

2. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for compliance with the Act and enforcement of the provisions of the Act.

3. Respondent is a North Carolina corporation performing electrical construction work. Respondent maintains its principal office in Raleigh, North Carolina.

4. Respondent is subject to the provisions of the Act and is an "employer" within the meaning of N.C.G.S. §95-127(9).

5. On July 26, 2002, Officer Belvin Horres, a Compliance Safety Officer (CSO) with the Occupational Safety and Health Division, North Carolina Department of Labor, conducted an occupational safety and health inspection of Respondent's worksite located within the Vance Elementary School at 8808 Old Stage Road, Garner, North Carolina. The inspection was the result of a reported fatal accident on that date involving one of Respondent's employees. Respondent had three employees at the worksite.

6. Officer Horres conducted an opening conference with Respondent's representatives and, at that time, presented his credentials and explained the purpose and scope of the inspection. Respondent consented to the inspection. During the inspection, Officer Horres conducted a walk-a-around of the site, took photographs, interviewed witnesses and obtained written statements. Complainant subsequently issued one Citation with three serious items and a proposed penalty in the amount of \$1,900.00.

**Citation One, Item 1**

7. Citation One, Item 1, charges a serious violation of 29 CFR 1926.416(a)(1) alleging that employees were permitted to work in proximity to electric power circuits and were not protected against electrical shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means.

8. On the day of the accident, three of Respondent's employees were working in the cafeteria of the Vance Elementary School. They were in the cafeteria to install the permanent wiring for various lights and outlets in conduit they had previously installed. One of Respondent's employees, James Rouse, was an experienced electrician. The two other employees were helpers who assisted Mr. Rouse. Mr. Rouse was working from an eight-foot ladder on a junction box affixed to the concrete ceiling above a drop ceiling. The conduit entering one side of the junction box contained energized wires. Mr. Rouse was working on the new wiring which entered the junction box through conduit perpendicular to the conduit containing the energized wires. At some point while Mr. Rouse was working at this junction box the energized wires shorted out causing a bright flash and an extremely loud noise. The helpers observed the flash, heard the noise and observed Mr. Rouse falling off the ladder and onto the floor. Mr. Rouse died a short time later. An autopsy was performed; however, the Medical Examiner could not determine a point of entry or exit for an electrical shock. The Medical Examiner concluded, based upon the circumstances of the accident, that the cause of death was hypertrophy, left ventricular myocardium hepatic steatosis.

9. Mr. Rouse working in proximity to the energized wires without such wires being de-energized, insulated or guarded by other means, presented the possibility of an accident. The hazard associated with this condition is electrical shock or falling off the ladder as the result of the flash and noise caused by the energized wires shorting out. The most probable injury from such an accident would be death or serious injury. Mr. Rouse was exposed to this hazard.

10. Mr. Rouse was the crew foreman. He either observed the cited condition or with reasonable diligence could have observed the condition. Respondent, therefore, had knowledge of the violative condition. As a result, Respondent was in violation of 29 CFR 1926.416(a)(1) and that violation was properly characterized as serious.

11. Complainant calculated the penalty for Citation One, Item 1 in accordance with the North Carolina Operations Manual. The cited condition was rated as high severity and medium probability resulting in a gravity based penalty in the amount of \$3,500.00. Complainant adjusted the gravity based penalty downward by 50% for size, 10% for safety and health program, 10% for cooperation and 10% for history. The resulting proposed adjusted penalty for Citation One, Item 1 is \$700.00.

**Citation One, Item 2**

12. Citation One, Item 2 charges a serious violation of 29 CFR 1926.416(a)(3) alleging that Respondent did not ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, was so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with an energized electric power circuit.

13. Mr. Rouse and his helpers routinely worked around energized electrical power circuits. Mr. Rouse also routinely used electrical testing devices provided by the Respondent to test the wiring where he was working in order to determine whether such wiring was energized. On the day of the accident, Mr. Rouse stated to his helpers that they would be working in proximity to energized electric power circuits. He instructed one of the Helpers, Mr. Milton Lewis Harvey, Jr., to turn off a wall switch to de-energize a portion of the electric power circuit. Mr. Rouse further requested Mr. Chris Payton, the other helper, to test whether the electrical power circuits in his work area had been de-energized.

14. Mr. Rouse ascertained by direct observation and instruments that he was working on part of an energized electric power circuit and he was aware of the location of such circuit, the hazards involved and the protective measures to be taken.

15. Respondent was not in violation of 29 CFR 1926.416(a)(3).

**Citation One, Item 3**

16. Citation One, Item 3 charges a serious violation of 29 CFR 1926.1053(b)(3) alleging that a ladder used at the worksite was loaded beyond the manufacturer's rated capacity.

17. At the time of the accident Mr. Rouse weighed approximately 335 pounds and was working from an eight-foot fiberglass sided ladder with a manufacturer's rated capacity of 300 pounds. The subject ladder was in good condition when inspected by Officer Horres and Officer Horres determined that the ladder's capacity did not contribute to the worksite accident or Mr. Rouse's injuries.

18. Mr. Rouse's use of the subject ladder created the possibility of an accident and exposed him to a hazardous condition; however, he was not exposed to a risk of death or serious injury as the result of his use of the ladder.

19. The manufacturer's rated capacity is clearly stated on the side of the ladder. Mr. Rouse was Respondent's foreman and was aware of his own weight. He also knew or with reasonable diligence could have determined that his use of the subject ladder placed a load on the ladder beyond the manufacturer's rated capacity.

20. As a result, Respondent committed a non-serious violation of 29 CFR 1926.1053(b)(3).

21. In accordance with the North Carolina Operations Manual, a non-serious violation rated with a medium probability carries no penalty.

Based upon the foregoing Findings of Fact, the undersigned Hearing Examiner concludes as a matter of law the following:

**CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated by reference hereunder as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. This Court has jurisdiction of this cause and the parties are properly before the Court.

3. Respondent is subject to the provisions of the Act (N.C.G.S. §95-128) and is an employer within the meaning of N.C.G.S. §95-127(9).

4. Respondent violated 29 CFR 1926.416(a)(1) by allowing an employee to work in proximity to electric power circuits and while not protected against electrical shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means.

5. Respondent did not violate 29 CFR 1926.416(a)(3).

6. Respondent violated 29 CFR 1926.1053(b)(3); however, the violation was non-serious.

7. The proposed penalty for Citation One, Item 1 was calculated in accordance with the North Carolina Operations Manual and is appropriate. There is no penalty for Citation One, Item 2 because there was no violation of the cited standard. Reclassifying Citation One, Item 3 as a nonserious violation results in no penalty assessment for this item.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

1. Citation One, Item 1, alleging a serious violation of 29 CFR 1926.416(a)(1) is affirmed together with the proposed penalty of \$700.00.

2. Citation One, Item 2, alleging a serious violation of 29 CFR 1926.416(a)(3), is hereby dismissed.

3. Citation One, Item 3, alleging a serious violation of 29 CFR 1926.1053(b)(3), is hereby affirmed as a nonserious violation with no penalty.

4. All penalties shall be paid within ten (10) days of service of this Order.

This the 6<sup>th</sup> day of November, 2003.

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Carroll D. Tuttle  
Administrative Law Judge Presiding