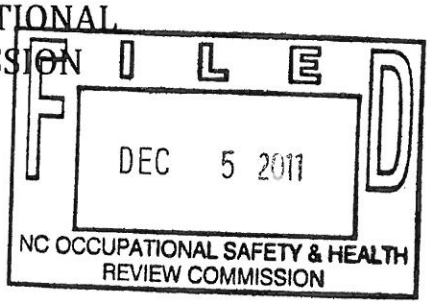
BEFORE THE NORTH CAROLINA OCCUPATIONAL
SAFETY AND HEALTH REVIEW COMMISSION



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

Complainant,

DOCKET NO. OSHANC-2010-5063
OSHA INSPECTION NO. 313899452
CSHO ID: Q8086

vs.

LIN R. ROGERS ELECTRICAL
CONTRACTORS, INC.
and it successors

ORDER

Respondent.

APPEARANCES:

Complainant:
Newton G. Pritchett, Jr., Assistant Attorney General
North Carolina Department of Justice

Respondent:
Edwin J. Foulke, Jr., Fisher & Phillips LLP
Counsel for Respondent

BEFORE:

Hearing Examiner: Monique M. Peebles

THIS CAUSE came on for hearing and was heard before the undersigned Monique M. Peebles, Administrative Law Judge for the North Carolina Occupational Safety and Health Review Commission, on

DATABASE
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February 24, 2011 and March 29, 2011, at the North Carolina Medical Society Auditorium, 222 North Person Street in Raleigh, North Carolina.

The complainant was represented by Mr. Newton Pritchett, Jr. Assistant Attorney General and the respondent was represented by attorney Edwin Foulke, Jr., Fisher & Phillips, LLP. Present for the hearing for the Department of Labor, OSHA Division, was Ms. Kay Knezevich, Safety Compliance Officer. Present at the hearing for the respondent was Mr. Ken Webb, President, CEO and CFO of Rogers Electrical (Respondent), Lindsey Rogers, Vice President of Human Resources and Risk Management for Respondent, Gerald Todd Cannon, Superintendent Foreman for Respondent, Robert Joseph Miller, Foremen for Respondent and Theodore Migchelbrink, Safety Consultant for Respondent.

The parties stipulated that an employee was exposed to a hazard that could have caused injury and which created the possibility of an accident. The two issues before the Court is whether the Complainant satisfied its burden of proving that a serious hazard existed, and for which the employer had actual or constructive knowledge thereof. The second issue is whether the Respondent satisfied its burden of proving the necessary elements of the employee misconduct defense.

After reviewing the record file and the evidence presented at the hearing, with due consideration of the post-hearing briefs of both parties, and reviewing relevant legal authority, the undersigned makes the following Findings of Fact and Conclusions of Law and enters an Order accordingly.

FINDINGS OF FACT

1. 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, and enforcement of the provisions of N.C. Gen. Stat. § 95-126 et. seq., the Occupational Safety and Health Act of North Carolina (the "Act").

2. This case was initiated by Notice of Contest received by the Complainant, Commissioner of Labor of the State of North Carolina, on or about December 8, 2008, contesting a citation issued on July, 6, 2010 to Respondent, Lin R. Rogers Electrical Contractors. ("Respondent" or "Rogers Electric")

3. Respondent, a corporation which does electrical contracting business in the State of North Carolina and is subject to the provision of the Act (N.C. Gen Stat § 95-128 and 129) and is an employer within the meaning of N.C. Gen. Stat. § 95-127 (10). Respondent employs 615 workers overall and 10 people were employed at the worksite at the time of the accident.

4. The undersigned has jurisdiction over the case (N.C. Gen. Stat. § 95-135).

5. On January 27, 2010, Safety Compliance Officer, Kay Knezevich ("SCO Kay") inspected Respondent's worksite at 8121 Concord Mills Boulevard in Concord, North Carolina ("site") on the basis of a referral from the Concord Fire Department as a result of an injury that occurred on January 26, 2010.

6. SCO Kay conducted an opening conference with Mr. Robert Joseph "Jody" Miller, foreman for Respondent ("Mr. Miller"). She presented her credentials to Mr. Miller and Mr. Miller presented SCO Kay with a business card stating his title as "Foreman" for Respondent. SCO Kay was given permission to do the inspection.

7. SCO Kay took photographs, interviewed Mr. Cannon, Mr. Miller and Lindsey Rogers ("Ms. Rogers") and took written statements.

8. SCO Kay conducted a closing conference with Ms. Rogers in May 2010 and as a result of the inspection, she recommended that citations be issued.

9. As a result of the recommendations of the compliance officer, on May 24, 2010 the Complainant issued one Citation to Respondent as follows:

Citation 1 Item 1: Serious

Citation 1, Item 1 alleges a serious violation of 29 CFR 1926.416(a)(1): "Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means:

(a) construction site, electrical main distribution panel area, on January 26, 2010, an employee suffered first and second degree burns when an arc flash occurred while installing circular breaker boxes in an energized 3-phase 480V main distribution panel. No steps had been taken to de-energize or guard the circuits.

The proposed penalty for this violation was $6300.00.

10. On January 26, 2010, Respondent Rogers Electric was working as a subcontractor, providing electrical services on a Best Buy conversion in Concord, North Carolina and Groom Construction was the general contractor.

11. Respondent was installing circuit breakers into a main distribution panel (also called "racking breakers on and off the bus").

12. The week prior to the accident, Respondent installed the mounting hardware, which was the majority of the work on the panel. This work was done while the panel was de-energized.

13. A breaker needed to be bolted in the panel to complete the project.

14. This installation would take about 15 to 20 minutes to complete, however, the wrong breaker came with the other hardware and had to be reordered.

15. It would have taken an approximate one to two day advance notice to the power company to schedule the shutdown to complete the installation.

16. When the correct breakers were received, Best Buy employees were installing computers, an activity which would have to cease if the Respondent had the power shut off for the three to four hours which was necessary to install the remaining breakers.

17. Mr. Miller and Mr. Cannon were both foreman on the site. Mr. Cannon was the day shift crew foreman and Mr. Miller was the night shift crew foreman. By the day of the accident, the two crews consolidated and Mr. Cannon was the lead foreman.

18. Mr. Cannon is a master electrician and has been a foreman for about 13 to 14 years. Mr. Miller is also an electrician and has worked for Respondent for about ten years, and as a foreman for about four to six years.

19. Mr. Cannon and Mr. Miller discussed the work to be done prior to the accident and no mention was made of their employer's "no live work" rule or guarding the circuit.

20. Mr. Cannon and Mr. Miller felt that the installation could be done in a safe manner since Mr. Cannon was wearing the proper PPE (arc flash suit, gloves, jacket and hard had with face shield).

21. Neither foreman took any steps to guard the circuits, nor did either request that the power be shut down before the work was performed.

22. The panel was not de-energized or guarded at the time of the accident.

23. There was no evidence that guarding the circuit was infeasible.

24. While bolting the breaker in, Mr. Cannon suffered first and second degree burns over several parts of his body including his back, arm and thighs while he was wearing an arc flash jacket with a hood, a head stocking, safety glasses, a hard hat with a full face shield, and rubber gloves with leather gloves on top of it.

25. Respondent provides the following employee training: orientation, weekly safety meetings, mandatory safety trainings, skills classes, leadership training and individualized training depending on the job.

26. Respondent also provides its employees written material such as a copy of Respondent's safety manual, a copy of Respondent's worksite safety requirements in orientation and Respondents 10 Top Safety Programs Pocket Card.

27. Respondent includes a safety policy called "no live work" or "no engergized work" in the written material and it is discussed in safety meetings and classes.

28. Mr. Cannon and Mr. Miller were aware of the "no energized work" policy and testified as electricians for Respondent, the exception to the policy for troubleshooting and testing allowed them to work on energized lines.

29. The exception for troubleshooting and testing was not stated in any of the written safety material provided to employees, including Respondent's safety manual, handouts for employees and power point slides shown to employees for training.

30. Other types of "live" electrical work, in addition to various types of trouble shooting and testing tasks, were included in written material provided to employees with the precaution that proper PPE must be worn.

Constructive Knowledge-Foreseeability Discussion

The first issue is whether the Complainant satisfied its burden of proving that a serious hazard existed, and for which the employer had actual or constructive knowledge thereof. There was ample evidence that the stipulated hazard that existed was serious. Next, did Respondent have actual or constructive knowledge? While Respondent did not have actual knowledge, he did have constructive knowledge imputed by the supervisor's knowledge of his own misconduct. In W.G. Yates & Sons Inc. v. OSH Review Commission, 459 F.3d 604,(5th Cir. 2006) the court found that a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. This court agrees with the Respondent that the test for foreseeability in this case is tied to the adequacy of the employer's safety policies. The court disagrees however, that Respondent's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable here. When looking at the Respondent's electrical safety policies in totality, it is not clear when, how and what type of live work can be performed to protect against electric shock in compliance with §§1926.416(a)(1).

Inconsistencies

There was an overwhelming amount of testimony about the emphasis placed on Respondent's "no energized work" safety policy with the exception of troubleshooting or testing. However, upon review of the written safety material, the exception of troubleshooting or testing, so heavily relied upon during the presentation of evidence in testimony was *never* documented in *any* of the training materials ***provided to the employees***. Moreover, there were several examples where the written material provided or shown to Respondent employees and the "no

energized work" policy with the exception of troubleshooting or testing explained in the testimony of several witnesses was inconsistent. (See Complainant's exhibits 16, 17, 18 and Respondent's exhibit 2 pg. 9) For example, on page 9 of Rogers Electric Site Safety Requirements, it states "workers shall make every attempt to de-energize electrical systems before the work task begins. If 'live' work is the only option, proper PPE shall be worn". If Respondent employees were only permitted to work "live" on energized lines when testing and troubleshooting, as it was testified to, there would be no need to include the precaution, "make every attempt to de-energize", because it's impossible to test or troubleshoot on de-energized lines. Again, there was no mention of the exception for testing or trouble shooting in Respondent's exhibit 2. The inadequacies of the Respondent's electrical safety policy are sufficient to make the supervisor's conduct in violation of the policy foreseeable. The "no energized work" safety policy should not only be clearly explained to employees, but clearly stated in the written material given to Respondent employees.

Non-compliance with §§1926.416(a)(1)

More importantly however, Respondent's electrical safety policy designed to protect against electric shock was not in compliance with §§1926.416(a)(1). §§1926.416(a)(1) states "no employer shall permit an employee to work in such a proximity to any part of an electric power circuit in the course of work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means." There is no dispute that ***the circuit itself*** in this case was not de-engergized or guarded.

Based on the written safety documents provided to the Respondent employees and the testimony of Respondent witnesses, it is clear to the court that Respondent employees are permitted to work live if proper PPE is worn. Mr. Migchelbrink's testimony regarding his interpretation of §§1926.416(a)(1)is key here and clarifies Respondent's electrical safety policy. He testified that there is an ambiguity regarding the insulation issue and there is a gray area in the standard's requirement to "guard it (the circuit) effectively by insulation". Respondent's position regarding ***"guarding"***, which is paramount in this case, is that

the word "insulation" in §§1926.416(a)(1), ***can mean wearing proper PPE.*** In other words, if you as the electrician, (not the circuit itself) while working live, are wearing proper PPE, then the standard's requirement to guard "it effectively by insulation or other means" is satisfied. This would obviously extend beyond maintenance with testing and troubleshooting. It is also consistent with Respondent's written electrical safety policy which does not distinguish between electrical maintenance safety in troubleshooting and testing and construction electrical safety while working "live". Moreover, Mr. Cannon's actions on the day of the accident were consistent with Respondent's position on safety or protection against electric shock. He was working on an energized, "live" panel, wearing proper PPE. Mr. Cannon testified that "since we had the proper PPE, we felt we could do it ("live" or "hot" installation of breaker) in a safe manner." He further testified that he had on an arc flash jacket with a hood, a head stocking, safety glasses and a hard hat with a full face shield and rubber gloves with leather gloves on top of it and that that was the appropriate PPE. However, ***in spite of the "appropriate" PPE worn on the day of the accident, Mr. Cannon was still severely burned.***

If the employee is not protected against electric shock by de-energizing the circuit and grounding it, he must be protected by guarding it ***effectively*** by insulation or other means when performing "live" work. Respondent's safety policy when working "live", by either wearing proper PPE alone, or inappropriate PPE based on the hazard risk category for the work being done, is ineffective to protect employees against electric shock and is not in compliance with §§1926.416(a)(1).

31. The parties stipulated that an employee was exposed to a hazard that could have caused injury and which created the possibility of an accident.

32. Installing a circuit breaker on the 800 amps, 480 volts three-phase main electrical distribution panel while it was energized and not guarded effectively by insulation or other means, created the possibility that an employee would be seriously injured as a result of the electric shock, arc flash or arc blast.

33. The substantial probable result of such an accident is death by electrocution, severe electrical shock, severe burns, third-degree burns or death from internal injuries.

34. Respondent had imputed knowledge of the hazardous condition as the hazard to Cannon, the site foreman, and at least one (Miller), possibly two other employees (Miller and the unknown employee who walked by) was foreseeable and was created by Cannon.

35. SCO Kay found the severity to be high, the probability to be high and accessed a Gravity based penalty of $7,000.

36. SCO Kay applied a 10% reduction for respondent's cooperation and proposed an adjusted penalty in the amount of $6,300. The proposed penalties were computed in accordance with the provisions of the Field Operations Manual.

37. The hazard could have been abated or reduced by de-energizing the panel and having policies and procedures in place that address the hazard.

Defense: Isolated Employee Misconduct

The second issue was whether Respondent has proved the affirmative defense of isolated employee misconduct? Respondent had the burden of showing (1) Respondent had work rules designed to prevent the violation; (2) the rules were adequately communicated to the employees; (3) steps were taken by the employer to discover violations; and (4) the employer enforced the rules when violations were discovered.

38. The Respondent's electrical safety policy orally communicated to its employees permitted employees to work on energized lines for troubleshooting or testing with proper PPE.

39. The Respondent's written electrical safety policy given to its employees also permitted employees to work on energized lines for other electrical tasks beyond trouble shooting and testing.

40. The Respondent had ineffective work rules attempting to protect their employees against electric shock.

41. The Respondent's "no live work" or "no energized work" policy exception (testing or troubleshooting) did not appear in any written material provided to its employees.

42. The rules that were in place were not adequately communicated to the employee due to the inconsistency.

43. Steps such as foremen walking the site throughout their shift and Mr. Migchelbrink's unannounced inspections on a regular basis were taken by the employer to discover violations.

44. According to the Discipline Policy of Respondent, an act that poses an immediate danger to the life and health of themselves, or any other individual, will warrant immediate termination.

45. Mr. Miller and Mr. Cannon received a written disciplinary warning or notice for violating the no-live work policy for this accident.

46. Prior to the accident, several of Respondent employees received a written disciplinary warning or notice for violating the no-live work policy.

47. The employer inconsistently enforced the rules when violations were discovered.

CONCLUSIONS OF LAW

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

2. Respondent is subject to the provisions and jurisdiction of the Act.

3. Cannon's knowledge of his own foreseeable misconduct is imputed to Respondent.

4. Respondent had constructive knowledge of the violation of 29 CFR §1926.416(a)(1).

5. Complainant proved by a preponderance of the evidence that the Citation 1, Item 1 was a serious violation of 29 CFR §1926.416(a)(1) and that Respondent violated 29 CFR §1926.416(a)(1) .

6. Respondent failed to meet its burden of proving the affirmative defense that the employee action was a result of isolated employee misconduct.

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, **IT IS ORDERED ADJUDGED AND DECREED** that Citation 1, Item 1 alleging a serious violation of 29 CFR 1926. 416(a)(1) is hereby affirmed with a penalty of $6300.00.

This the 30 day of November, 2011.

Monique M. Peebles
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

EDWIN G FOULKE JR
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945 E PACES FERRY ROAD
ATLANTA GA 30326-1125

NEWTON PRITCHETT
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by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 5th DAY OF December 2011.

OSCAR A. KELLER, JR.
CHAIRMAN

Nancy D. Swaney

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