

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 99-3811
OSHA INSPECTION NO. 302649462
CSHO ID NO. B7902

v.

ASHEVILLE METAL FINISHING, INC.,

ORDER

RESPONDENT.

THIS CAUSE was heard before the undersigned on July 26, 2001 in Asheville, North Carolina. Complainant was represented by Daniel S. Johnson, Assistant Attorney General. Respondent was represented by Jay M. Wilkerson of the Durham County Bar.

STIPULATIONS

The parties stipulated that if any standard was violated in this case, such standard would be a construction standard rather than a general industry standard. Upon that stipulation, Citation 1, Item 1c was dismissed by Complainant.

Complainant announced that of the two alternative grounds for Citation 1, Item 1a, the Complainant was proceeding as to the specific citation under 29 CFR 1926.416(a)(1) rather than proceeding under the General Duty Clause ground. The parties stipulated that in the event the Administrative Law Judge did not find a violation of the specifically cited standards, the alternative General Duty Clause violation would still be available to Complainant, if proved.

The parties stipulated that the penalty calculation and grouping engaged in by the Complainant as to Citation 1, Item 1a and Citation 1, Item 1b are proper and in accordance with the Field Operations Manual and North Carolina law. The parties stipulated that Complainant need not introduce evidence regarding the method of calculating the penalty.

The parties stipulated that on the day at issue, Respondent had control of the work site, which was at the storage building across the street from the Asheville Metal Finishing plant.

The parties stipulated that the electric power lines above the roof of Respondent's storage building, as will be discussed herein, were, at their closest approach to the roof, no higher than 5 ½ feet above the roof.

After reviewing the admissible evidence presented at the hearing and after hearing arguments of the parties, the undersigned makes the following:

FINDINGS OF FACT

1. Complainant is charged by law with the responsibility of enforcing the provisions of the Occupational Safety and Health Act of North Carolina, N.C. Gen. Stat. § 95-126, at et seq.
2. Respondent is a corporation doing business in North Carolina. Respondent has one or more places of business in the Asheville, North Carolina area, including a plant on Clingman Avenue in Asheville.
3. Respondent is an employer and is subject to the Occupational Safety and Health Act of North Carolina.
4. The Department of Labor's compliance officer, Mr. Bill Best, properly conducted the inspection pursuant to a notice received by OSHA of an on-the-job fatality.
5. This case was initiated by a notice of contest filed by the Respondent within apt time after the issuance of citations.
6. On March 18, 1999 Respondent had the use of and controlled the building at which the injuries and death discussed hereafter took place. The storage building is located across the street and up the street from the Asheville Metal Finishing Plant on Clingman Avenue.
7. As of the date of the injury and death on March 18, 1999, Respondent used the storage building to store company property and as a lot for its employees to park their automobiles.
8. As of the date of the injury and death on March 18, 1999, Respondent had used the storage building for approximately two years.
9. The storage building had electrical service and that electrical service was fed by the power lines and transformers on the pole behind the storage building.

10. The power lines connected to the pole behind the storage building passed over the roof of the storage building. These power lines carried high voltage electric current and were not insulated.

11. The fact that the power lines passed over the roof of the storage building was open and apparent and obvious to Respondent's personnel, including Respondent's Plant Manager, Mr. Israel. Mr. Israel testified that he was aware of the existence of those power lines passing over the roof of the storage building.

12. In 1998, more than one year prior to the incidents which are the subject matter of this proceeding, Respondent contracted for a re-routing of the electrical service line to the storage building. The re-routing of the service line did not alter the configuration of the power lines which passed over the roof of the storage building. Asheville Metal Finishing paid for the 1998 electrical work.

13. The electric service line which was installed in 1998 was insulated and was different in appearance from the uninsulated high voltage power lines passing over the roof of the storage building.

14. The roof of the storage building is pitched and is not a flat roof.

15. The roof of the storage building is metal with fiberglass panels.

16. Dale Hussung, Kenny Stone, Tom Israel and Joe Gilliam each testified. They were all employees of Respondent as of March 18, 1999.

17. Prior to March 18, 1999, none of Respondent's employees had measured the height of the power lines over the roof of the storage building.

18. Prior to March 18, 1999, none of Respondent's employees had been on the roof of the storage building.

19. Prior to March 18, 1999, Respondent had never sent an employee to the roof of the storage building for the purpose of making measurements or assessing the height of the power lines over the roof of the storage building.

20. Prior to March 18, 1999, Respondent had never lifted an employee up for the purpose of examining the roof of the storage building to make sure it was safe to work on.

21. Mr. Israel, Respondent's Plant Manager, was aware that Respondent had never measured the height of the power lines above the roof of the storage building.

22. While Mr. Israel and Mr. Gilliam had been at the street side of the roof edge of the storage building while repairing gutters, they did not climb onto the roof at that time, and they were working at eye-level to the gutters. They did not have a view which allowed them to look at the entire roof.

23. Respondent did not know the exact height of the high voltage power lines above the roof of the storage building, but photographs introduced into evidence, particularly photograph Exhibit 1 shows that the crossbar of the power pole behind the storage building was barely visible above the storage building roof when observed from the front. The transformers are not visible. From this picture alone, an inference or assumption should have been made that the power lines were within only a few feet of the roof on the storage building.

24. It is not possible to look down upon the roof of the storage building from the Asheville Metal Finishing property.

25. Respondent had control of the work site on the roof of the storage building and could have prohibited any entry upon the roof by its employees.

26. The prior visit by Department of Labor did not result in an inspection of the storage building, and Mr. Israel did not recall even telling the OSH inspectors that Asheville Metal Finishing used the storage building.

27. Mr. Gilliam was employed as Respondent's maintenance person. Mr. Gilliam is not a licensed electrician.

28. During February of 1999, snow entered into the storage building through the roof. Mr. Gilliam had told Mr. Israel that he would repair the holes in the roof of the storage building "on the first pretty day." Mr. Israel was Mr. Gilliam's supervisor.

29. On March 18, 1999, Mr. Gilliam told Mr. Israel that he planned to work on the roof, and Mr. Israel gave his approval. Mr. Gilliam gained access to the roof on company business and with the express approval of Mr. Israel.

30. On March 18, 1999, Mr. Gilliam, assisted by Norman Clayton, mounted the roof of the storage building to make repairs. Mr. Gilliam took his hammer to drive nails to stop the roof leaks. Mr. Clayton was a foreman, but was not Mr. Gilliam's foreman.

31. Mr. Gilliam ascended the building at the right rear of the structure by being lifted up in a platform or cage mounted to a fork lift. Mr. Clayton operated the fork lift to bring Mr. Gilliam to the roof.

32. After a period of time had passed without any sign of Mr. Gilliam, Mr. Clayton asked Dale Hussung to assist him in seeing if something was wrong with Mr. Gilliam.

33. Mr. Clayton climbed on top of the driver's protective cage on a forklift at the Asheville Metal Finishing Plant to see if he could observe Mr. Gilliam. He could not.

34. Mr. Hussung and Mr. Clayton crossed the street to the storage building to check on Mr. Gilliam. Mr. Hussung lifted Mr. Clayton to the roof using the same fork lift and platform that had allowed Mr. Gilliam to access the roof.

35. Mr. Tom Israel, having seen Mr. Clayton and Mr. Hussung crossing the street, now appeared at the storage building. Mr. Israel lifted Mr. Hussung up to the roof using the fork lift. Mr. Hussung was reaching the roof and had a view of Mr. Clayton at the time Mr. Clayton stood up. Mr. Hussung saw a bright flash at the side of Mr. Clayton's head. Mr. Hussung described Mr. Clayton as convulsing forward. When Mr. Hussung reached Mr. Clayton on the roof, he observed Mr. Clayton "blowing blood bubbles" from his mouth. Mr. Gilliam was unconscious and incoherent.

36. Mr. Kenny Stone observed Mr. Clayton on the roof from across the street at the Asheville Metal Finishing Plant. Mr. Stone was looking at Mr. Clayton when Mr. Clayton "stood into" the power line. Mr. Stone observed a ball of fire around Mr. Clayton's head and saw Mr. Clayton fall.

37. Mr. Clayton was about five feet ten inches tall and was less than six feet tall.

38. Mr. Gilliam suffered an entrance wound at the top of his head from electrical current while he was on the roof. The wound is utterly hairless and is a noticeable bald spot on Mr. Gilliam's head. Mr. Gilliam suffered an exit injury to left foot from the exit of the electricity.

39. Respondent was charged in Citation 1, Item 1a with a violation of 29 CFR §1926.416(a)(1). This regulations provides: " 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 de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means."

40. In Citation 1, Item 1b, Respondent was cited for violating 29 CFR § 1926.416(a)(3) which provides: "Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with

the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken."

41. The work that Mr. Gilliam was performing on the roof on the date in question was construction work as that term is defined under the Occupational Safety and Health Act and the regulations thereunder.

42. The above standards applied and Respondent was bound to comply with those standards.

43. Respondent did not comply with the first standard referred to above in that Respondent permitted an employee to work in such proximity to an electric power circuit that the employee could contact the electric power circuit in the course of his work.

44. Respondent failed to protect its exposed employee against electric shock by de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means in violation of 29 CFR § 1926.416 (a) (1).

45. The standard cited in Citation 1, Item 1b refers to "direct observation." The undersigned finds that direct observation means, in the case of a roof, either standing on the roof and looking at the roof or placing oneself at a vantage point from which the entire roof can be observed. It was not possible to place the roof of the storage building "under direct observation" from the ground at the Asheville Metal Finishing Plant across the street. It was also not possible to place the roof of the storage building "under direct observation" from the ground at the storage building.

46. The court finds that no one at Asheville Metal Finishing had assessed the proximity of the electric power circuits at the work area on the roof of the storage building prior to March 18, 1999 or on that date.

47. At no time did Respondent advise its employees of the location of the electricity lines, the hazards involved, and the protective measures to be taken in violation of 29 CFR § 1926.416 (a) (3).

48. Respondent violated the construction standards cited in Citations 1, 1a and Citation 1, 1b.

49. The high voltage power lines within 5 ½ feet of the roof of the storage building constituted a hazardous condition which could lead to an accident.

50. Respondent's employee Joe Gilliam was exposed to the hazard.

51. The fact that Mr. Clayton was killed while rescuing, or attempting to rescue, Mr. Gilliam does not lessen the culpability of Respondent for exposing Mr. Gilliam to the hazards.

52. The possibility of an accident in this case is obvious. However the fact that an accident did take place is also evidence from which the possibility of accident can be inferred.

53. In the event an accident took place by reason of the proximity of the power lines to the roof, the injury which could be expected to take place by reason of such accident would have been a serious injury, which could have led to electrical burns, electrocution, or death.

54. The undersigned finds as a fact that respondent knew, or in the exercise of reasonable diligence, should have known of the close proximity of the high voltage power lines to the roof of the storage building.

55. On the date of March 18, 1999 Respondent was chargeable with knowledge that there may be a hazard to any of its employees who ascended the roof in the area near the high voltage power lines.

56. An employer may not choose to remain ignorant or "close his eyes" to the existence to a problem and then claim that the employer was without notice of the dangerous condition.

57. The hazard could have been avoided by de-energizing the power lines with the assistance of the power company or by calling upon a qualified person to isolate the high voltage lines by use of temporary insulation blankets.

58. The court does not find a violation of the general duty clause since specific regulations have been found to be applicable and the court has found that Respondent violated such specific standards or regulations.

59. The undersigned finds that the conduct of Respondent is in no way excused or superseded by any failure of Carolina Power and Light Company to warn Asheville Metal Finishing of the close proximity of the power lines to the roof of the building during the electrical work done in 1998. The responsibility of CP&L for the tragic events on which this case is based is not before me.

60. Respondent's contention that they were "lulled into a false sense of security" by the failure of CP&L to draw the power lines specifically to their attention in 1998 is not convincing. Mr. Israel testified that he was well aware of the power lines and that a visual observation of the power lines, as demonstrated by the photographic exhibits, would place a person of ordinary prudence on notice that the power lines were in close proximity, perhaps only a few feet, above the roof of the storage building.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. 29 CFR 1926.416(a)(1), as alleged in Citation 1, Item 1a, is applicable.
2. 29 CFR 1926.416(a)(3), as alleged in Citation 1, Item 1b, is applicable.
3. On March 18, 1999, Respondent did not comply with the requirements of 29 CFR 1926.416(a)(1) as alleged in Citation 1, Item 1a.
4. On March 18, 1999, Respondent did not comply with the requirements of 29 CFR 1926.416(a)(3) as alleged in Citation 1, item 1b.
5. Respondent's employee Joe Gilliam was exposed to the hazard of electrocution or death created by Respondent's non-compliance.
6. Respondent knew or in the exercise of reasonable diligence could have known of the hazardous condition.
7. The penalty assessed by Complainant in the amount of \$2,100.00 is, by the stipulation of the parties, properly calculated.
8. The penalty for Citation 1, Item 1b was properly grouped with Citation 1, Item 1a.
9. Since the undersigned has decided that Citation 1, Item 1a should be affirmed as to the specifically cited standard, 29 CFR 1926.416(a)(1), the alternative allegation of a violation of the general duty clause in the citation should not be affirmed.

IT IS, THEREFORE, ORDERED as follows:

1. Citation 1, Item 1c is hereby dismissed upon motion of Complainant.
2. Citation 1, Item 1a is affirmed as to the specifically cited standard, 29 CFR 1926.416(a)(1), but the alternative allegation of violation of the General Duty Clause is not affirmed.

3. Citation 1, Item 1b is hereby affirmed.

4. The penalty of \$2,100 is affirmed and the penalty is hereby imposed in said amount. The penalty of \$2,100 shall be paid within 10 days of the filing of this Order.

This 30th day of September, 2001.

Charles R. Brewer
Administrative Law Judge