

IN THE MATTER OF	*	BEFORE THE
GILBANE BUILDING COMPANY	*	COMMISSIONER OF LABOR
AND	*	AND INDUSTRY
THE HEFFRON COMPANY, INC.	*	MOSH CASE NOS.
		N6297-028-04
	*	AND N6297-027-04
	*	OAH CASE NOS.
		DLR-MOSH-41-04-00615
	*	AND DLR-MOSH-41-04-02801
* * * * *	*	* * * * *

FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, *Labor and Employment Article*, Title 5, Annotated Code of Maryland. Following an accident inspection at the Employers' work site at the Human Genome Sciences ("HGS") facility (hereinafter "HGS facility") in Rockville, Maryland, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued one serious citation against Gilbane Building Company and one serious citation against the Heffron Company, Inc. ("Employers" or "Gilbane" and "Heffron", respectively). The citations are both based upon a violation of 29 C.F.R. § 1926.416(a)(3) for failure to ascertain whether any part of an energized electric power circuit was so located that the performance of the work could bring any person into contact with it. Penalties of \$4,975.00 and \$3,750.00 were assessed against Gilbane and Heffron respectively.

A hearing was held on June 15, 2004, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Stephen J. Nichols, Administrative Law Judge designated by MOSH to sit as a Hearing Examiner ("HE")

issued a proposed decision ("HE Decision") recommending that the citation and penalties be affirmed. The Employers filed timely requests for review and the Commissioner of Labor and Industry held a review hearing and heard argument from the parties on February 15, 2005. Based upon a review of the entire record and consideration of the relevant law and the positions of the parties, for the reasons set forth below, the Commissioner hereby AFFIRMS the citation against each Employer.

FINDINGS OF FACT

The facts in this case are not in dispute. Gilbane primarily operates as a general contractor or as a construction manager for the construction of various types of buildings. At all times relevant it was acting as the construction manager for the construction of the HGS facility in Rockville, Maryland. FF 1. Heffron primarily operates as a contractor for the installation of heating and air conditioning systems, and was doing so at all times relevant during the construction of the HGS facility. FF 2. On September 16, 2003, Lia Stevenson, a Heffron employee, was working in the basement mechanical room of Wing B of the HGS facility. FF 3-4. While on a ladder attempting to disconnect a drainage hose from a glycol hose bib, she experienced an electric shock. FF 5-6. An investigative team made up of employees from both Gilbane and Heffron immediately investigated the incident. Finding no energized electrical surfaces in the area, the team concluded that Ms. Stevenson may have simply struck her funny bone and allowed other employees to resume work in that area. FF 10-24. On October 2, 2003, Mark Hancock, also a Heffron employee, was fatally electrocuted while working in the same area in which Ms. Stevenson had been working on September 16, 2003. FF 26-27. An investigation after

that incident ultimately revealed 277 volts of electricity on the rod of the metal pipe hanger in that area. FF 29-32.

DISCUSSION

The standard at issue in this case, 29 CFR § 1926.416(a)(3), requires an employer to:

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.

This standard cannot be interpreted to impose strict liability on employers for all electrical hazards, but rather compliance with this standard requires simply that an employer use reasonable diligence in seeking to locate and eliminate the hazard. *See Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982). Reasonable diligence is defined as such "watchfulness, caution, and foresight as, under all circumstances of the particular service, a corporation controlled by a careful, prudent officer ought to exercise." *Ames Crane & Rental Service, Inc.*, 3 O.S.H. Cas. (BNA) 1279, 1282 (1975), *aff'd* 532 F.2d 123 (8th Cir. 1976), *quoting Wabash Railway Co. v. McDaniels*, 107 U.S. 454, 460 (1883). Factors relevant to the reasonable diligence inquiry include the duty to anticipate hazards and the duty to adequately inspect the workplace. *See N&N Contractors Inc.*, 19 O.S.H. Cas. (BNA) 1401, 1403 (2001). Whether an employer exercised reasonable diligence in attempting to discover a potential hazard is a finding of fact. *Martin v. OSHRC (Milicen & Co.)*, 947 F.2d 1483 (11th Cir. 1991)

In determining whether the Employers exercised reasonable diligence in anticipating hazards and inspecting the workplace, the Commissioner must first

determine whether the Employers had, or should have had, notice of such a hazard.

“Notice, either actual or constructive, is the gravamen of employer responsibility under the Act; notice of risk, regardless of source, creates a concomitant responsibility to abate the risk.” *Commissioner of Labor and Industry v. Bethlehem Steel Corp.*, 344 Md. 17, 25 (1996). The September 16, 2003 incident should have put the Employers on notice of the existence of a potential risk. The record demonstrates that Ms. Stevenson’s report of the electrical shock was specific and reliable. Ms. Stevenson stated during her interviews that she was dazed for several minutes after the shock and that her lower right hand was numb. Tr. 139; 196; MOSH Ex. 12. Also, the onsite nurse stated that Ms. Stevenson suffered electrical burns to her forearm and the Field Report notes that she could not use her right hand to write shortly after the incident. MOSH Ex. 10; Resp. Ex. 5. Richard Fries, a service technician for the electrical subcontractor Mona Electrical Group, testified that Ms. Stevenson had a bruise on her arm one week after the incident. Tr. 51 - 52. The Employers had no reason to question the validity of Ms. Stevenson’s allegations.

With this clear notice of an electrical hazard, the Employers had a responsibility to perform a thorough investigation of the area at issue prior to allowing other employees to enter that area. Failure to inspect the workplace to discover readily apparent hazards has been specifically found to constitute a lack of reasonable diligence. *Austin Building Co. v. OSHRC*, 647 F.2d 1063 (10th Cir. 1981). After her accident, Ms. Stevenson spoke briefly with Mr. Barnek, a co-worker, about the accident. Resp. Ex. 11. The Employers then assembled a team of experienced employees to investigate the hazard. The team used a voltmeter for two rounds of testing of an approximately six foot by six foot area around Ms. Stevenson’s ladder, as it had been placed by Mr. Barnek. FF 15-21; Resp.

Ex. 11. After the second round of voltmeter testing, three members of the team touched the back of their hands to valves and some other metal surfaces in and around the tested area, but experienced no electrical shocks. FF 22. This testing took only about 30-45 minutes, after which the team terminated their investigation, concluded that Ms.

Stevenson must have hit her funny bone, and opened the area up to other employees.

Tr. 174. While the Commissioner recognizes that an investigation does not have to be conclusive in order to represent reasonable diligence, it must be thorough enough to reasonably protect employees who subsequently work in that area.

The Commissioner finds that, in light of the reliable report of a shock by Ms. Stevenson, the investigation performed by the Employers does not represent reasonable diligence. There are a number of things the Employers could have done to reasonably protect their employees prior to allowing other employees to work in that area. At the very least, the Employers could have directed the investigative team to speak directly with Ms. Stevenson about the incident. The evidence in the record demonstrates that, because the investigative team relied only on information provided by Mr. Severson to Mr. Barnek immediately after her accident, they did not know Ms. Stevenson's exact position with respect to the hangers. Tr.196. Ms. Stevenson stated that she did not tell Mr. Barnek that she was inside the hole between the hose bibs from her waist up, but that she only told him where the ladder had been. Tr. 196-7. Accordingly, the record shows that when Mr. Fries, an investigative team member, was testing for electric charge, he only had his arm in the hole, and did not test behind himself, whereas Ms. Stevenson could have easily hit the hose bibs behind her due to her positioning on the ladder. Tr. 223-224, 229. The MOSH Investigator testified that the Employer's failure to have the

investigative team talk to Ms. Stevenson directly impeded the investigation because the team simply did not have all the information they needed. Tr. 230. Because Ms. Stevenson was back at work the next day, it is not unreasonable to suggest that the Employers should have interviewed her further before concluding their investigation. Tr. 140. In addition, when Ms. Stevenson returned, the Employers could have de-energized the circuits and had her climb a ladder to demonstrate exactly what she had been doing at the time of the shock. Rev. Tr. 41. This would have helped to ensure that the investigators were able to test all possible metal surfaces that could have been the source of her shock. Rev. Tr. 42; Tr. 52, 57. The record also demonstrates that the Employers could have systematically shut down all systems in order to isolate the area of the charge.¹

Any one of these actions would have been reasonable given the fact that the Employers had direct, reliable knowledge of a previous injury and suspected electrical shock. Failure to do a more thorough investigation prior to requiring other employees to return to work in the area of Ms. Stevenson's injury constitutes a lack of reasonable diligence and a violation of 29 CFR § 1926.416(a)(3). Therefore, the Commissioner upholds the HE's conclusion that the Employers violated 29 CFR § 1926.416(a)(3) when they failed to adequately inspect the electrical system and the area in the basement mechanical room in which Ms. Stevenson reported receiving an electrical shock on September 16, 2003.

¹ This is not an unreasonable suggestion since it probably would have been done if the investigation had been of an equipment failure. Had this been done, the Employers may have discovered the source of the charge since the source became apparent only when all systems had been shut down after the incident on October 2, 2003. Tr. 64.

The parties stipulated that MOSH used approved formulas, derived from COMAR 09.12.20.12, which take into account the gravity of the violation, good faith of the employer, history, size of the employer, actual harm to employees, and other factors. The Employers raised no arguments as to the propriety of the penalty calculations. Therefore, the Commissioner finds that MOSH's penalty assessments for Citation 1, Item 1 as issued to Gilbane and for Citation 1, Item 1 as issued to Heffron were appropriate.

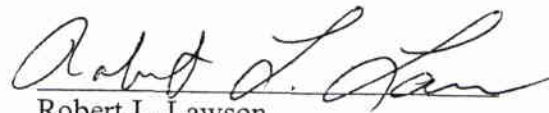
ORDER

For the foregoing reasons, the Commissioner of Labor and Industry on the 18th day of OCTOBER, 2005, hereby **ORDERS**:

Citation 1, Item 1 against Gilbane in MOSH No. N6297-028-04 for a "serious" violation of 29 CFR § 1926.416(a)(3) and its accompanying proposed penalty of \$4975.00 is **AFFIRMED**.

Citation 1, Item 1 against Heffron in MOSH No. N6297-027-04 for a "serious" violation of 29 CFR § 1926.416(a)(3) and its accompanying proposed penalty of \$3750.00 is **AFFIRMED**.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult *Labor and Employment Article, § 5-215, Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.


Robert L. Lawson
Commissioner of Labor and Industry