

No. 69735-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

IN THE MATTER OF:
MARYSVILLE TAPING CO
Appellant

v.

DEPARTMENT OF LABOR &
INDUSTRIES
Respondent

BRIEF OF APPELLANT

David C. Mott, WSBA# 20548
Attorney for MARYSVILLE TAPING CO
Appellant

The MOTT LawFirm
16821 Smokey Point Blvd. #811
Arlington, WA 98223
(360)435-5656

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAY 17 PM 1:31

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAY 17 PM 3:53

TABLE OF CONTENTS

A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
Issues Pertaining to the Assignments of Error	3
C. STATEMENT OF THE CASE	4
Relevant Facts For Review	4
D. PROCEDURE BELOW	6
E. SUMMARY OF THE ARGUMENT	7
F. STANDARDS FOR JUDICIAL REVIEW OF ADMINSTRATIVE ACTION	8
G. STANDARD OF REVIEW	9
H. DEFERENCE TO THE HIGHEST FACT-FINDING FORUM	9
I. ARGUMENT	10
No. 1. The trial Court erred when it adopted the Electric Board's Conclusion of Law No. 5 on the Issue of Relevancy and Refused to Affirm the Administrative Law Judge's Conclusion No. 5	10
No. 2. The trial Court erred when it adopted the Electric Board & Department's Conclusions of Law No. 8 & 9 and Refused to Affirm the Administrative Law Judge's Conclusions No. 8 & 9	27
No. 3 The Trial Court Erred When It Adopted the Electric Board & Department's Request to Affirm the Penalties Cited	30
No. 4. The Trial Court Erred When It Adopted The Electric Board's Final Order In Violation Of Article I, § 7 of The Washington Constitution	31
J. CONCLUSION	35.

- APPENDIX A: Final Order Affirming Agency Action by Snohomish
County Superior Court
- APPENDIX B Final Order by Electrical Board:
- APPENDIX C Administrative Law Judge's Proposed Decision and Order
- APPENDIX D The Exemption Statute RCW 19.28 .261
- APPENDIX E Statute for Judicial Review of Administrative Actions
RCW 34.0 5.570
- APPENDIX F Art. 1, § 7 of the Washington Constitution

TABLE OF AUTHORITIES

Cases

1. City of Redmond v. Kezner, 10 Wash.App. 332, 343, 517 P.2d 625, 632 (Wash.App. 1973).27
2. Epperly v. City of Seattle, 65 Wash.2d 777, 781, 399 P.2d 591, 594 (WASH 1965).....27
3. Freebury v. Chicago, Milwaukee & Puget Sound Railway Co., 77 Wash. 464, 137 H.W. Van Slyke Warehouse Co. v. Vilter Mfg. Co., 158 Wash. 659, 664, 291 P. 1103, 1105 (Wash. 1930) P. 1044.....16
4. Isla Verde Intern. Holdings, Inc. v. City of Camas, 99 Wash.App 127, 134, 900 P.2d 429, 433 (Wash App.Div.2, 1999).....9
5. Kendall v. Johnson, 51 Wash. 477, 99 P. 310..... 15
6. Magula v. Department of Labor and Industries of State of Washington, 116 Wash.App. 966, 969, 69 P.3d 354, 355 (Wash.App. Div. 3,2003).....9
7. State v. Jackson, 102 Wash.2d 432, 439, 688 P.2d 136, 141 (Wash.,1984).....32
8. Tapper v. State Employment Sec. Dept., 122 Wash.2d 397, 402, 858 P.2d 494, 497-98 (Wash.,1993)8

Statutes

- RCW 19.28.271.....6
- RCW 19.28.010.....6
- RCW 34.0 5.010 (12) (a). 7
- RCW 34.05.570(3).....8
- RCW 19.28.261.....10
- RCW 19.28.271 10

RCW 19.28.26191.....	13
RCW 19.28.26191(6).....	13
RCW 19.28.161.....	17
RCW 19.28.261.....	24
RCW 19.28.261 (1)(6).....	31
RCW 33.05.570(3).....	32
Washington Constitution, Art. 1, § 7.....	31

Other Authorities

Wash. Prac., Evidence Law and Practice § 103.8 (5th ed.).....	20
31 Seattle U. L. Rev. 431, 466.....	32

A. INTRODUCTION

This appeal concerns the Legislature's policy which permits a property owner to perform electrical work on his property, without hiring an electrician. It also covers the person assisting him who may rely on the "householder exemption" as a matter of right.

Ron Moen, the owner of Marysville Taping Co¹, installed sheetrock at a newly constructed, residential property, at the request of its owner. The owner was required to furnish heat at the conclusion of the sheetrock installation. The owner furnished wiring and gave Mr. Moen specific instructions as how to connect the wiring to the heater. Mr. Moen is not a licensed electrician or an electrical contractor. He never held himself out or engaged in the trade or business of electrical installation. He reluctantly connected the wiring to the heater.

When an electrical inspector discovered the connection, which he deemed to be in violation of electrical law, he contacted the owner. The owner blamed Mr. Moen for the installation. The inspector never investigated the owner's involvement in the installation. Mr.

¹ Ron Moen is the owner a family-owned business- Marysville Taping Co, the appellant. His position with respect to the issues herein are identical to Marysville Taping Co.'s position on all issues.

Moen's company was cited for violating electrical law. The home owner was never cited.

The citations were appealed and Mr. Moen appeared pro se at a hearing before an administrative law judge. The administrative law judge determined that the householder exemption applied for such electrical work, completely exonerated him, and proposed that all citations be dismissed and that no penalties be assessed.

The Department of Labor and Industries ("Department")² appealed to the Electrical Board ("Board"). In part, the Board determined that the household exemption was irrelevant and held that all of the original citations (with penalties) against Marysville Taping Co. should be affirmed.

Marysville Taping Co. appealed to the Snohomish County Superior Court. The Court affirmed the decision of the Board.

B. ASSIGNMENTS OF ERROR

Assignment of Errors:

No. 1. The trial Court erred when it adopted the Electric Board 's Conclusion of Law No. 5 on the Issue of Relevancy and Refused to Affirm the Administrative Law Judge's Conclusion No. 5.

² Since the Board adopted the Department's recommendation with respect to each citation, their respective positions are construed to be identical.

No. 2. The trial Court erred when it adopted the Electric Board's Conclusions of Law No. 8 & 9 and Refused to Affirm the Administrative Law Judge's Conclusions No. 8 & 9.

No. 3 The trial Court erred when it adopted the Electric Board & Department's Request to Affirm the Penalties Cited.

No. 4. The trial Court erred when it adopted The Electric Board's Final Order in Violation of Article I, § 7 of The Washington Constitution

Issues Pertaining to the Assignments of Error

1. Was the Department's investigation so incomplete, negligent and prejudicial that it did not identify the exemption favoring Mr. Moen?

(Assignments of Error #1)

2. Did the home owner have direct, non-delegable, responsibility for the electrical hook-up to the heatsource?

(Assignments of Error #1)

3. Since the Department opened the door on the householder exemption, is it estopped from declaring its irrelevancy?

(Assignments of Error #1)

4. Didn't the Electrical Board Identify The Relevancy Of Householder Exemption? **(Assignments of Error #1)**

5. Was it the Electrical Board's position that "the judge got it wrong", therefore the Department's position must prevail?

(Assignments of Error #1)

6. Does identifying it as an electrical installation matter if a homeowner is permitted to do electrical work on his land?

(Assignments of Error #2)

7. In her fact-finding role, didn't the ALJ determine that Mr. Moen had met his burden of proof? **(Assignments of Error #2)**

8. Was the Department's enforcement action an arbitrary and capricious abuse of governmental power? **Assignments of Error #4)**

C. STATEMENT OF THE CASE

Relevant Facts For Review.

Mr. Gilbertson was both a homeowner and the owner of a general contracting business. He was building his own home. The Department ignored his homeowner status.

The appellant, Marysville Taping Company ("MTC") was employed to provide sheetrock services. Their contract relationship required Mr. Gilbertson to provide heat following the sheetrock installation. Mr. Gilbertson refused to accept his responsibility to provide heat; instead, he personally directed Mr. Moen to hook up his wiring to the heat source. He gave Mr. Moen very specific instructions regarding the hook-up. With respect to the wiring connection, Mr. Moen was at all times, under the direct supervision of Mr. Gilbertson. The hookup wiring provided by Mr. Moen was gratuitous and exceeded the scope of his contract services. Mr. Moen reluctantly hooked the heater up to the temporary power source.

The Department chose not to cite the general contractor. The general contractor had hired an electrician to furnish its electrical installation services. Mr. Mutch, the inspector never asked Mr. Gilbertson why he had not had his electrician hook up the heat source.

The Department never investigated Mr. Gilbertson's connection and direct involvement with Mr. Moen's connecting the wiring to the heat source. Instead, it focused entirely on Mr. Moen's actions and cited him for violating the electrical code.

D. PROCEDURE BELOW

The Department issued citation EMUTR00555 to MTC for violating RCW 19.2 8.2041 by “offering to perform, submitting a bid for, advertising, installing or maintaining cables, conductors or equipment that convey or utilize electric current without having a valid electrical contractor license. The citation was issued because MTC had installed the cable from the temporary electrical servers pole in front of the driveway of the residence under construction to the heater inside the house under construction without having an electrical contracting license.

The Department issued citation EMUTR00556 to MTC for violating RCW 19.28.271 by employing an individual for the purposes of chapter 19.28 RCW who does not possess a valid certificate of competency or training certificate to do electrical work. The citation was issued because MTC employed Mr. Moen on the residential project and Mr. Mullen did not hold a training certificate to do electrical work

The Department issued citation EMUTR00587 to MTC for violating RCW 19.28.010 by “failure of the electrical installer to ensure installation, maintenance or repair of wires or equipment that convey electrical current art in strict conformity with the

statutes, rules and approved methods of construction for safety to life and property," which the Department considered to be a non-conforming installation – and a serious violation.

Mr. Moen appealed and a hearing was held by Administrative Law Judge Rosary Otto on June 22, 2010. She issued a proposed decision and order which ordered the three citations be dismissed with no penalties.

The Department petitioned for review of three conclusions of law to the Electrical Board. It adopted the Department's position to reverse the three conclusions of law. The Electrical Board's final order reversed the three conclusions of law and reinstated the three citations.

MTC petitioned for review to the Snohomish County Superior Court.³ On December 5, 2012 the Superior Court affirmed the Electrical Board's order.

E. SUMMARY OF THE ARGUMENT

Mr. Moen did connect wiring between the temporary power source and the heating source.

The Department argues that Mr. Moen's wiring connection

³ Mr. Moen argued that the Electrical Board exceeded its authority to decide issues of law and that Administrative Procedure Act reserved appeals to it by persons to whom agency action was specifically directed (RCW 34.0 5.010 (12) (a)).

constituted the performance of electrical work; that it was defective and not in strict compliance with the electrical law; and that this electrical work was unlawfully performed by an unlicensed, non-electrician.

Mr. Moen argues that a well-established policy in Washington allows property owners to perform electrical work on their own property. Furthermore, there is a “householder” exemption that applies to certain persons who assist the homeowner with an electrical installation.

The highest forum for fact-finding was completed by the Administrative Law Judge.

She determined that Mr. Moen and his company (MTC) met their burden of proof by establishing that Mr. Moen’s electrical installation fell within the “householder” exemption; therefore she dismissed the Department’s citations that were issued against MTC.

F. STANDARDS FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

The Tapper case and RCW 34.05.570(3) set forth the parameters

for judicial review of administrative action:

Judicial review of a final administrative decision of the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA). *Macey*, 110 Wash.2d at 312, 752 P.2d 372; *Safeco Ins. Cos. v. Meyering*, 102 Wash.2d

385, 389, 687 P.2d 195 (1984); *Becker v. Employment Sec. Dep't*, 63 Wash.App. 673, 675, 821 P.2d 81 (1991). The WAPA allows a *498 reviewing court to reverse an administrative decision when, *inter alia*: (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious. RCW 34.05.570(3). In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency. See *Macey*, 110 Wash.2d at 312, 752 P.2d 372 (citing *Farm Supply Distribs., Inc. v. State Utils. & Transp. Comm'n*, 83 Wash.2d 446, 448, 518 P.2d 1237 (1974)); *Shaw v. Department of Empl. Sec.*, 46 Wash.App. 610, 613, 731 P.2d 1121 (1987). *Tappe r v. State Employment Sec. Dept.*, 122 Wash.2d 397, 402, 858 P.2d 494, 497-98 (Wash., 1993)

G. STANDARD OF REVIEW

The facts are undisputed.

In this case, the Court adopted the agency's decision

An agency's conclusions are reviewed de novo. *Magula v. Department of Labor and Industries of State of Washington*, 116 Wash.App. 966, 969, 69 P.3d 354, 355 (Wash.App. Div. 3, 2003)

H. DEFERENCE TO THE HIGHEST FACT-FINDING FORUM

In this case, the hearing before the ALJ was the highest forum where factual determinations were made.

Since MTC prevailed, all evidence and any reasonable inferences will be reviewed in the light most favorable to it. *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wash.App 127, 134, 900 P.2d 429, 433 (Wash App.Div.2, 1999).

I. **ARGUMENT**

This is an appeal from the Court's Final Order Affirming Agency Action *CP21*, p1-4.

No. 1. The trial Court erred when it adopted the Electric Board's Conclusion of Law No. 5 on the Issue of Relevancy and Refused to Affirm the Administrative Law Judge's Conclusion No. 5.

A. **The Contrary Positions Relating to Conclusion #5**

The Administrative Law Judge's ("ALJ") Conclusion of Law #5 (CL 5) is as follows:

5. RCW 19.28.261 governs electrical work by property owners on their own property. It states, in pertinent part:

...(6) Nothing in RCW 19.28.161 through 19.28.271 shall be construed to restrict the right of any **householder to assist or receive assistance from a friend, neighbor, relative** or other person (emphasis added) when none of the individuals doing the electrical installation hold themselves out as engaged in the trade or business of electrical installations.

The Electrical Board rejected her CL5 (*CP3*, p51) and the Court adopted the

Department's CL5 (*CP 21*, p2) as follows:

Conclusion of Law No. 5 from the Proposed Decision and Order dated August 23, 2010, was found by the Electrical Board in its Final Order dated January 27, 2011, **to be irrelevant and inapplicable to this case (emphasis added)** and was not adopted by the Electrical Board in its Final Order; this court agrees with the Electrical Board that Conclusion of Law No.

5 is irrelevant and inapplicable to this case, and, therefore, is not adopted.

B. The Legislature's Broad Policy Favors Property Owners.

It is generally unlawful for a non-electrician to maintain electrical conductors and perform electrical work (RCW 19.28.161)

However, the Legislature has mandated a policy which permits a non- electrician to do electrical work at his or her residence or farm or place of business or on other property owned by him without an electrical license and without hiring an electrician:

(1) Nothing in RCW 19.28.161 through 19.28.271 shall be construed to require that a person obtain a license or a certified electrician in order to do electrical work at his or her residence or farm or place of business or on other property owned by him RCW 19.28.261(1)

1. Was The Department's Investigation So Incomplete, Negligent and Prejudicial That It Did Not Identify the Exemption Favoring Mr. Moen?

The Department suggested that the ALJ's CL5 was not relevant because the general contractor was not a "householder" under the common meaning of the term and therefore the RCW 19.28.261(6) householder exemption should not apply. (CP 3 p 101).

Before it cited MTC, it contacted Mr. Gilbertson and asked him who had hooked the heater up. Mr. Gilbertson blamed it all on MTC. Of course, Mr. Gilbertson did not volunteer that:

- he personally was required (by contract) to furnish a heat source following MTC's installation of the sheetrock;
- he personally had furnished the wiring;
- he personally had directed Mr. Moen to install the wiring;
- he personally gave Mr. Moen specific instructions as to how to connect the wiring to the heat source;and
- he personally had failed to have his own electrician make the installation.

After the Department determined from its initial, incomplete and negligent investigation that Mr. Gilbertson had blamed MTC for the faulty investigation, it recklessly afforded him credibility which he did not deserve. It took no further action against him or his company.

It focused all of its enormous enforcement resources on Mr. Moen. It refused to determine the essential facts regarding Mr. Gilbertson's involvement in the installation

The Department refused to pursue any investigation against Mr. Gilbertson because it knew that he could raise the home owner exemption.

It knew that as a homeowner he could perform his own electrical work on his own property (RCW 19.28.26191). It also knew that a householder could receive assistance from persons who did not hold themselves out as engaged in the trade or business of electrical installations. (RCW 19.28.26191(6)).

Within minutes of his investigation, the inspector knew these essential facts, that is, (1) that Mr. Gilbertson owned the property and (2) that Mr. Moen did not hold himself out as engaged in the trade or business of electrical installations. Nevertheless, it targeted him and his company and cited him for numerous violations of the electrical code.

If it had not been biased in its investigation and had investigated further, it could have determined that Mr. Moen was entitled to the householder exemption, as well, because(1) Mr. Gilbertson had directed him to make the connection and (2) he was allowed to provide assistance to the householder

If the Department had made a complete, unbiased, and competent investigation, it would have determined that their contract relationship required the contractor, Mr. Gilbertson, to furnish a heat source and that he had failed to do so.

The Department had failed in its shoddy investigation to determine the essential facts at issue which facts the ALJ restlessly pursued until she was able to identify a glaring hole in its investigation. The ALJ asked Mr. Mutch about his conversations with Mr. Gilbertson:

Q did you issue any citations to Mr. Gilbertson for the electrical work?

A. no, I did not

Mr. Gilbertson didn't perform any of the electrical work. (CP 3-148

The relevancy of the householder exemption was established as a result of the facts developed by the ALJ. Clearly the home owner could do electrical work on his own home. In addition, he could receive the assistance of Mr. Moen, without violating the electrical code. The Department's incomplete, biased and negligent investigation was irrelevant. The homeholder exemption was relevant. It was ALJ' s that established it's relevancy,

2. Did the Home Owner Have Direct, Non-Delegable, Responsibility for the Electrical Hook-up to the Heatsource?

The ALJ inquired about Mr. Gilbertson's involvement:

Q so did Mr. Gilbertson instruct you specifically how to--- how to hook up the heater or what? (CP 3,p149)

Q And so -- so in what context did he tell you to hook up the-- so he provided the cable, or wire?

A. yes, yes(CP 3, p149)

The general contractor was contractually required to provide the electrical hook up for the heat source. Mr. Gilbertson personally refused to accept this responsibility. He attempted to delegate it to Mr. Moen, however in this case it was non-delegable. While he personally directed Mr. Moen to make the electrical connection (and did so by furnishing the wiring, retaining control and directing the manner for the hook-up installation), this did not relieve him of his legal responsibility., Since he undertook to provide the electrical connection for the heat source, he was, at all times, legally responsible for the wiring connection. 33 Wash. Prac., Wash. Construction Law Manual § 15:3 (2012-2013 ed.) Since work of an inherently dangerous character was involved, neither the contractor or Mr. Gilbertson could escape an absolute, non-delegable responsibility for the work performed. Epperly v. City of Seattle, 65 Wash.2d 777, 781, 399 P.2d 591, 594 (WASH 1965)

In another case, the Supreme Court held in Kendall v. Johnson, 51 Wash. 477, 99 P. 310, that, where the work is inherently or

inherently dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work. To the same effect in *Freebury v. Chicago, Milwaukee & Puget Sound Railway Co.*, 77 Wash. 464, 137 P. 1044. The same general rule is announced in 39 C. J. 1331, 1339. *H.W. Van Slyke Warehouse Co. v. Vilter Mfg. Co.*, 158 Wash. 659, 664, 291 P. 1103, 1105 (Wash. 1930)

Since Mr. Gilbertson was solely responsible for the non-delegable installation and was authorized to seek the assistance of Mr. Moen, under the householder' exemption, the householder exemption was not only relevant, it completely shielded MTC and Mr. Moen from any punitive enforcement activities by the Department

3. Since the Department Opened the Door on the Householder Exemption, Is It Estopped From Declaring Its Irrelevancy.

The Department's witness, Mr. Mutch, (who issued the citations) testified that this was a new house being built and that when he initiated his investigation, he learned from the general contractor,

Brook Gilbertson, for the first time that MTC and Mr. Moen had made the connection. (*CP3 p 123, 129*).

Although Mr. Mutch claimed that this was a dangerous installation, he did not request the contractor's electrician, GH Electric *CP3, p133* to disconnect the wiring. The wiring had been connected to a temporary power source which had been installed by the electrical contractor, pursuant to the permit obtained. An electrical contractor "does the work of installing or maintaining wires or equipment that convey electrical current." RCW 19.28.006. Since the electrical contractor was maintaining the temporary service during the construction phase and was familiar with its installation, he should have been called to disconnect the service. It is unlawful for a non-electrician to maintain electrical conductors (RCW 19.28.161), however a non-electrician can do electrical work at his or her residence or farm or place of business or on other property owned by him without an electrical license and without hiring an electrician RCW 19.28.261.

So when the inspector instructed Mr. Gilbertson to disconnect the wiring (*CP3 p 130*), rather than the general contractor's electrician, he was, in fact, enforcing the applicable statute which allowed a homeowner to do electrical work on his own property,

including the disconnecting of the wiring which extended from a temporary service which had been installed by an electrician. In other words, he recognized the application of the householder's exemption for such work.

The Department cannot have it both ways. It cannot, in the course of its enforcement activities, engage in conduct which confirms Mr. Gilbertson's exempt status, but deny MTC's right to claim the householder exemption status when Mr. Moen is rightfully one of the protected persons under the householder exemption statute.

The Department, by its own conduct, while engaged in its enforcement activities, cannot, in effect, allocate householder status to the home owner, while denying that identical status to the person who assisted him, It granted a de facto household exemption to the owner, but denied it to the assistant who was qualified to receive the exemption,

On appeal, without any rational analysis to support its discriminatory arbitrary, it simply declared the ALJ' conclusion# 5 to be irrelevant

In fact, it was the Department who introduced the homeowner exemption into evidence, then in its appeal, it designated the homeowner exemption to be irrelevant

The ALJ asked Mr. Mutch:

....maybe you could tell me a little bit more about what-- when does it rise to the level of an electrical installation?

A An electrical installation is any time you connect and energize a piece of equipment with electrical wiring. (CP3, p140)

Although the ALJ was satisfied with his answer and responded "Okay." CP3, p141), apparently Mr. Mutch was not satisfied with his own prior answer.

He chose, on behalf of the 'Department to introduce (for the first time in the hearing), the issue of the homeowner's exemption. He said:

but there's an exemption for homeowners. They can do their own work..... CP3, p141).

In making this admission against interest, Mr. Mutch corroborated why he had had Mr. Gilbertson make the disconnection. By legal extension (where the homeowner exemption is applied to the owner), the qualified non-electrician, assistant, MTC and Mr. Moen are also entitled to this exemption.

He, not the ALJ, had introduced the householder exemption into the record.

There was no objection by the department's counsel to this testimony. There was no motion to strike Mr. Mutch's homeowner exemption testimony. An attorney who is questioning his own witness is also entitled to object and move to strike. Broun, McCormick on Evidence § 52 (two-volume 6th ed.). 5 Wash. Prac., Evidence Law and Practice § 103.8 (5th ed.) There was no redirect on this issue.

The ALJ then gave then department's counsel several opportunities to respond, but he never attempted to strike this testimony. (CP 3, p 141, 147, 150)

Instead the Department elected to rely on its appeal even though the ALJ clearly identified its relevancy in the proceedings.

4. Didn't the Electrical Board Identify The Relevancy Of Householder Exemption?

The Electric Board ("Board") recognized that Mr. Gilbertson was wearing two hats as an owner and a general contractor owner. It clearly identified the homeholder exemption as a significant issue. It rightfully concluded that the ALJ had used the householder

exemption to cover Mr. Moen' installation, but it noted that the Department disagreed *CP3, p 56 (13-14)*.

The ALJ recognized that the householder exception was relevant to her analysis of the issues before her:

The relevance requirement is not a high hurdle. Relevance is defined as evidence that has "any tendency" to make the existence of a consequential fact more or less likely than it would be if the evidence did not **586 exist. ER 401. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 670, 230 P.3d 583, 585-86 (Wash.,2010)

The Board even recognized that Mr. Moen had probably acted under the direction of Mr. Gilbertson, but rather than complete its analysis and apply the law to favor Mr. Moen, as the ALJ had done, it applied its own bias in favor of the Department by suggesting that Mr. Moen's ignorance of the law is no excuse *CP3, p58 (17)*.

The Board acknowledged that Mr. Gilbertson owned the property *CP3 p. 58 (17)*, but wrongfully concluded the exemption did not apply to MTC because it was a subcontractor and an electrical contractor had been hired to do the work. ⁴ *CP3 p. 58 (18)*. *The exemption did apply to MTC as set forth above.*

⁴ The legislature previously used the term "householder." "Householder" shall be taken to mean and include every person, married, in a state

Chairwoman Ashford correctly stated the issue, that is, referring to Mr. Gilbertson, "but in the case of the homeowner, even though he was a general contractor he was doing it as his own electrical installation." CP3 p. 58 (23).

The Board noted that Mr. Gilbertson likely perceived his potential liability and pushed it all on Mr. Moen: referring to Mr. Gilbertson[he] "put him in a horrible situation by basically saying, "you do it. And I'm leaving. Here's a coil of wire. You do it. I'm leaving."

And I would think that the general contractor actually knew what liability he was placing on the sheet rocker, and the reason why he made the sheet rocker do it is because he didn't want to have to do it himself. Clearly not very much a friend lending assistance situation in my opinion CP3 p. 59-60 (24-25)

5. **Was It the Electrical Board's Position That "the judge got it wrong", Therefore the Department's Position Must Prevail?**

registered domestic partnership, or single, who resides within the state of Washington being the owner or holder of an estate or having a house or place of abode, either as owner or lessee. RCW 84.04.050

The Electrical Board adopted the Department's position that the ALJ simply misapplied the law and reached the wrong conclusion. It did not explain nor provide an analysis as to how the judge misapplied the law, but it simply explained (referring to the ALJ) "the judge got it all wrong." *CP3 p 60 (25)*.

The Board agreed that there was substantial evidence in the record to support the findings of fact in the proposed order and therefore it adopted the ALJ's findings of fact in its final order *CP3 p 50*.

Because the Board adopted the ALJ's findings of fact, it was compelled to use those facts when it analyzed the application of the householder exemption (RCW 19.28.261).

The exemption can be claimed by any householder. The householder, in this case, was Mr. Gilbertson who owned the residential property (Finding of Fact "FF" #4, 13) *CP3, p104-105*.

The exemption further permitted the householder to receive assistance from a person who did not hold themselves out as engaged in the trade or business of electrical installations.

Mr. Moen & MTC were never involved in electrical work and Mr. Moen did not offer to connect the heater nor did he want to, FF#18 CP3, p106; he reluctantly connected the heater; FF#19 CP3, p106; and Mr. Moen was directed by Mr. Gilbertson (who provided the cable) when he connected the wiring to the heat source FF#17 CP3, p105.

Clearly Mr. Moen qualifies under the exemption statute as a person who was permitted to provide assistance to the householder.

The ALJ simply made a common sense application of the essential facts which qualified Mr. Gilbertson for the household exemption and which permitted him to accept the assistance of Mr. Moen when he hooked up the wire to the heat source.

The ALJ interpreted the householder exemption consistent with the underlying policy of the statute. *Safeco Ins. Companies v. Meyering*, 102 Wash.2d 385, 392, 687 P.2d 195, 200 (Wash., 1984). Moreover, it was consistent with state policy that an owner can do electrical work at his or her residence or farm or place of business or on other property owned by him without an electrical license nor is he required to hire an electrician. RCW 19.28.261

When the ALJ applied the law to the facts, she accorded substantial weight to the Department's view before reaching CL #5., but denied its applicability to the facts at hand

It is undisputed that Mr. Mutch, the inspector, knew about the householder exemption. It is clear from the colloquy of the Board members that they were aware of the householder exemption. However, the agency's expertise in the field was not relevant to CL #5. This was not an issue in which she was compelled to defer to the Department's interpretation of the statute. But even if the Department's interpretation was relevant (which we don't concede), its interpretation was not conclusive⁵.

In this case, neither the Department or the Board provided any interpretation of the statute, they simply concluded that the judge misapplied the law and reached the wrong conclusion CP 18, p22-23.

The exemption statute was not ambiguous. Its plain meaning was clear on its face. Her fundamental objective was to first ascertain

⁵ The Electrical Board claimed that the judge reached the wrong conclusion that the fact that MTC did not hold itself out as an electrical contractor prevented application of the electrical law to its actions CP 18, p22. However, the stipulated findings of fact show clearly that MTC did not hold itself out as an electrical contractor and the ALJ's finding of this fact necessarily qualified him for the householder exemption.

and carry out the Legislature's intent, then give effect to the plain meaning of the statute's expression of Legislative intent. *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9-10, 43 P.3d 4, 9-10 (Wash.,2002). She did just that.

The ALJ reached her conclusions from the evidence, identified her findings of fact, then applied the law to the facts when she determined that MTC & Mr. Moen's conduct was shielded by the householder exemption.⁶

⁶both history and uncontradicted authority make clear that it is *392 emphatically the province and duty of the judicial branch to say what the law is. *Safeco Ins. Companies v. Meyering*, 102 Wash.2d 385, 391-392, 687 P.2d 195, 199 (Wash.,1984)

No. 2. The trial Court erred when it adopted the Electric Board & Department's Conclusions of Law No. 8 & 9 and Refused to Affirm the Administrative Law Judge's Conclusions No. 8 & 9.

The ALJ's Conclusions of Law 8 & 9 are as follows:

8. Here, the Appellant did not offer to undertake the installation or maintenance of wires or equipment that convey electrical current. The appellant did connect a wire that conveys electrical current, but this act does not constitute an "installation" which infers working on an electrical system, as defined in WAC 296-46B-100 and as contemplated by statute. Nor does the appellant meet the definition of an electrical contractor, because the appellant did not hold itself out or offer its services in electrical contracting as required by RCW 19.28.006(8). The appellant's acts, though hazardous, were not in violation of the pertinent statutes and regulations. Even if connecting the cable to the heater does rise to the level of an "installation," the Appellant did so at the direction of the hiring contractor who incidentally happened to be the owner of the property where the Appellant worked. The Appellant in no way promoted itself to do electrical work and only connected an electrical wire at the request of the general contractor.

9. Here, the Department has not demonstrated that the Appellant's actions subject him to RCW 19.28 and, therefore, the Department has not carried its burden of demonstrating by the preponderance of the evidence that the Appellant violated citations EMUTR00555, EMUTR00556, and EMUTR00587. *CP 3, p107*

The ALJ reached back to her relevant findings of fact from the record when she made the above-stated conclusions of law. They may be treated as such when included in a conclusion of law. *City of Redmond v. Kezner*, 10 Wash.App. 332, 343, 517 P.2d 625, 632 (Wash.App. 1973). The facts included, however, did not differ from her designated findings of fact.

6. Does Identifying It As An Electrical Installation Matter if A Homeowner Is Permitted to Do Electrical Work On His Land?

She concluded that Mr. Moen's activity did not constitute an installation which infers working on an electrical system. This conclusion is consistent with the evidence because Mr. Moen did not install the temporary power source and he was not working on this electrical system, as contemplated by WAC 296-46B-925. However, even if his activity does constitute an installation, his connecting to the heat source was an authorized and legal activity because of the Legislature's policy (RCW 19.28.261) and the householder exemption that permits home owners to receive assistance from qualified persons to do electrical work on their property. Mr. Moen satisfied the statutory requirements for the householder exception (discussed above). Her additional factual assertions further corroborated his qualifications for the householder exemption.

7. In Her Fact-Finding Role, Didn't the ALJ Determine That Mr. Moen Had Met His Burden of Proof?

With respect to the ALJ's Conclusion # 9, Mr. Moen proved by a preponderance of the evidence that (1) he could connect the wiring to the heat source because the householder exception applied to

him and (2) by statute, as indicative of the Legislature's policy on this matter --a home owner can do his own electrical work on his property. The Department did not even attempt to rebut this evidence; in fact, it introduced the householder exemption into evidence. The Department necessarily failed to meet its burden of proof.

No. 3 The Trial Court Erred When It Adopted the Electric Board & Department's Request to Affirm the Penalties Cited

The Court approved the Department's request to affirm the original citations issued together with the penalties assessed. (Paragraphs 9-12 of the Order) *CP21, p 3*.

For the reasons set forth above, the citations should be dismissed and no penalties should be assessed against MTC.

No. 4. The Trial Court Erred When It Adopted The Electric Board's Final Order In Violation Of Article I, § 7 of The Washington Constitution.

RCW 19.28.261 (1)(6) embodies the State Legislature's respect for the mandate of the Washington Constitution that protects citizens from being disturbed in their private affairs and having their homes invaded by a state agency.

Art. 1, § 7 of the Washington Constitution provides that:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Mr. Gilbertson exercised his constitutional right to perform electrical work on his own property. Mr. Moen aided him, as his agent, in the exercise of this constitutional right and his activity is also constitutionally protected.

Our state constitution's protections are broader than the 4th

Amendment to the U.S. Constitution:

For example, recently we held that the substantial difference in wording between the Fourth Amendment and Const. art. 1, § 7 mandates that the freedom from unreasonable searches and seizures to be interpreted more expansively under the state constitution than under the federal constitution. *State v. Chrisman*, 100 Wash.2d 814, 818, 676 P.2d 419 (1984); *State v. Ringer*, 100 Wash.2d 686, 674 P.2d 1240 (1983); *State v. White*, 97 Wash.2d 92, 640 P.2d 1061 (1982); *State v. Simpson*, 95 Wash.2d 170, 622 P.2d 1199 (1980); *State v. Hehman*, 90 Wash.2d 45, 578 P.2d 527

(1978). *State v. Jackson*, 102 Wash.2d 432, 439, 688 P.2d 136, 141 (Wash., 1984)

This right to be free from government intrusion in one's private affairs applies to government agencies:

By mandating that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," the framers ensured the provision would apply to **all governmental interferences (emphasis added)** with residents' private affairs, not merely searches and seizures. The framers' choice of "private affairs" was probably due to the advent of new technologies such as the camera and telephone and the need to protect far more than simply tangible items including houses, persons, papers, and effects. Any article I, section 7 analysis, therefore, must focus on a person's personal affairs themselves, as opposed to engaging in a "protected areas" analysis, as the U.S. Supreme Court once used for the Fourth Amendment. 31 *Seattle U. L. Rev.* 431, 466

8. Was the Department's enforcement action an arbitrary and capricious abuse of governmental power?

RCW 33.05.570(3) grants the Court the authority to provide relief to Mr. Moen and MTC if the agency action is (1) in violation of a constitutional provision; (2) the order is outside the statutory or jurisdiction of the agency; (3) and the agency has engaged in an unlawful decision-making process.

Here, the Department implemented its own rules and procedures in a manner that is an arbitrary and capricious abuse of government power.

Mr. Mutch, the inspector, based on his training and experience, had to be aware of the statute which protects a citizen from such governmental action. While from our view, he had no authority to order Mr. Gilbertson to disconnect the wire installation, the fact that he selected Mr. Gilbertson to make the disconnect, rather than the electrician, is indicative of his training and education with respect to the householder exception. Moreover, he alone introduced the householder exception into evidence which is also indicative of his knowledge of this exception.

The Electrical Board members were also aware of the householder exception. Nevertheless they refused to uphold the exception and they voted to approve the Department's recommendations, without exception.

The Board said:

"And I think we need to be clear and send a message to people."
CP3, p61.

There is no doubt that Mr. Mutch and the Board members were well-intentioned and concerned with the safety issues they were charged with enforcing. However, when it comes to enforcement, an agency can't cherry-pick the laws it likes and disregard the ones

it doesn't like, especially when the unlimited power of governmental resources are used against its citizens.

In this case, the Board sent the wrong message. It did not respect the legislative policy which it was aware of and refused to enforce the exemption (which it didn't like). It relied on its enormous enforcement power.

The Electrical Board said "the judge got it wrong." In fact, she got it right.

More than likely, she not only relied on her analysis of the exemption statute, but based on her training, education and experience; she had a deep respect for Washington's constitutional protection against governmental intrusion into the private affairs of its citizens.

In summary, when the Electrical Board ordered reinstatement of the citations against Mr. Moen and the Court affirmed its action, Mr. Moen and MTC were denied their right to be free from government intrusion into their private affairs and the Department's action is an excessive abuse of power which abuse was arbitrary and capricious.

CONCLUSION

The Superior Court's order affirming the Electrical Board's final order should be reversed and the citations issued should be held for naught.

Respectfully submitted
this 15th day of May, 2013

The MOTT LawFirm

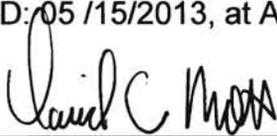


David C. Mott, WSBA# 20548
16821 Smokey Point Blvd. #811
Arlington, WA 98223
(360)435-5656
Attorney for Appellant

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I mailed a true copy of this BRIEF OF APPELLANT IN SUPPORT OF ITS PETITION to Respondent's counsel at the regular office or residence thereof.

DATED: 05 /15/2013, at Arlington, Washington



DAVID C. MOTT, WSBA #20548

FILED

DEC 05 2012

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

FILED

2012 DEC -5 AM 11:05

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

ATTORNEY GENERAL'S OFFICE
151 DIVISION OLYMPIA

2012 DEC -5 PM 4:58

RECEIVED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

MARYSVILLE TAPING CO.,

Petitioner,

vs.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

No. 11-2-03620-9

FINAL ORDER AFFIRMING
AGENCY ACTION

(Clerk's Action Required)

THIS MATTER came on duly and regularly before the Court on December 5, 2012. The petitioner, Marysville Taping Co., appeared by and through its attorney, DAVID C. MOTT; the respondent, Department of Labor and Industries, was represented by ROBERT M. MCKENNA, Attorney General, per LINDA S. KING, Assistant Attorney General.

The Court, having considered the evidence presented in the form of the Certified Record of Electrical Board, the Petitioner's Petition for Review, the Amended Petitioner-Appellant's Brief in Support of its Petition for Review of Agency Decision, the Respondent's Brief, and the Petitioner-Appellant's Reply Brief, having listened to the argument of the parties or their counsel of record, considers itself fully advised, and for the reasons stated in its oral opinion of December 5, 2012, hereby makes the following Findings of Fact and Conclusions of Law.

//

//

FINAL ORDER AFFIRMING
AGENCY ACTION

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
PO Box 40121
Olympia, WA 98504-0121
3601 586-7707

A

I. FINDINGS OF FACT

1. There is no dispute as to the facts.

2. Findings of Fact Nos. 1.1-1.5, which incorporates the Findings of Facts 1-24 of the Proposed Decision and Order dated August 23, 2010, and 1.6, included by the Electrical Board in its Final Order dated January 27, 2011, are hereby adopted.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this appeal. RCW 34.05; RCW 19.28.131, RCW 19.28.271, WAC 296-46B-995(18).

2. A party may appeal a proposed decision issued by the office of administrative hearings to the Electrical Board. WAC 296-46B-995(13).

3. The Department is a party to an appeal of a citation which is directed to the Electrical Board, and assigned to the Office of Administrative Hearings. RCW 19.28.311, RCW 34.05.010(12)(b),(13)(a),(b),(14), WAC 296-46B-100(36).

4. Conclusions of Law Nos. 1-4, and 6 and 7, from the Proposed Decision and Order dated August 23, 2010, incorporated by the Electrical Board in its Final Order dated January 27, 2011, were not outside the law or arbitrary and capricious within the meaning of RCW 34.05.570(3)(b) and (d).

5. Conclusions of Law Nos. 1-4 from the Proposed Decision and Order dated August 23, 2010, incorporated by the Electrical Board in its Final Order dated January 27, 2011, are correct, and are hereby adopted.

6. Conclusion of Law No. 5 from the Proposed Decision and Order dated August 23, 2010, was found by the Electrical Board in its Final Order dated January 27, 2011, to be irrelevant and inapplicable to this case and was not adopted by the Electrical Board in its Final Order; this court agrees with the Electrical Board that Conclusion of Law No. 5 is irrelevant and inapplicable to this case, and, therefore, is not adopted.

7. Conclusions of Law Nos. 6 and 7 from the Proposed Decision and Order dated August 23, 2010, incorporated by the Electrical Board in its Final Order dated January 27, 2011, are correct, and are hereby adopted.

//
//

2

- 1 8. Conclusions of Law Nos. 8 and 9 from the Proposed Decision and Order dated
2 August 23, 2010, are not supported by the law or the facts and were not adopted by
3 the Electrical Board in its Final Order dated January 27, 2011; this court agrees
4 with the Electrical Board, and holds that Conclusions of Law Nos. 8 and 9 from the
5 Proposed Decision and Order dated August 23, 2010, are not supported by the law
6 or the facts and, therefore, are not adopted.
- 7 9. When Marysville Taping Co. hooked up a heater (one that was not a plug-in
8 appliance or plug-in equipment) to a power source using the cable, it violated
9 RCW 19.28.041, which requires a company to have a valid electrical contractor
10 license to "engage in, conduct, or carry on the business of installing or maintaining
11 wires or equipment to convey electric current." Therefore, citation EMUTR00555
12 should be affirmed, together with the \$500 penalty that was assessed along with it.
- 13 10. Since one of its employees who was not a certified electrician hooked up the
14 heater, Marysville Taping Co. violated RCW 19.28.271, which makes it unlawful
15 for a company to "employ an individual for" such work when that person is not
16 certified. Therefore, citation EMUTR00556 should be affirmed, together with the
17 \$250 penalty that was assessed along with it.
- 18 11. The way in which Marysville Taping Co. installed the heater and wiring was
19 hazardous. Therefore, Marysville Taping Co. violated RCW 19.28.010, which
20 requires that such wires, equipment, and installations thereof "be in strict
21 conformity with this chapter, the statutes of the state of Washington, and the rules
22 issued by the department, and shall be in conformity with approved methods of
23 construction for safety to life and property." Therefore, citation EMUTR00587
24 should be affirmed.
- 25 12. The hazardous installation of the heater constituted a gross violation under
26 WAC 296-46B-915, so the \$500 penalty accompanying citation EMUTR00587
27 should be affirmed.

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

This court has jurisdiction to hear this appeal.

This court holds, pursuant to the Administrative Procedures Act and the Electrical Law of
the state of Washington, that the Department is a party who may appeal from a Proposed
Decision and Order issued by an Administrative Law Judge with the Office of Administrative
Hearings to the Electrical Board. RCW 34.05, RCW 19.28. 131, 271; WAC 296-46B-
995(13)(a).

//

1 The Final Order of the Electrical Board dated January 27, 2011, affirming Citation Nos.
2 EMUTR00555, EMUTR00556, and EMUTR00587, together with their associated penalties,
3 are affirmed.

4
5 IT IS SO ORDERED this 5th day of December, 2012.



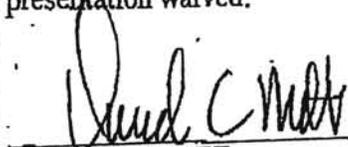
JUDGE

8 Submitted by:

9 ROBERT M. MCKENNA
10 Attorney General

11 
12 LINDA S. KING
13 Assistant Attorney General
14 WSBA No. 44211

15 Copy received and notice of
16 presentation waived:

17 
18 DAVID C. MOTT
19 Attorney for Petitioner
20 WSBA No. 20548

FINAL ORDER AFFIRMING
AGENCY ACTION

4

1
2
3
4
5
6
7 **BEFORE THE ELECTRICAL BOARD**
8 **FOR THE STATE OF WASHINGTON**

9 In re: MARYSVILLE TAPING CO.

FINAL ORDER

10 Citation Nos. EMUTR00555, EMUTR00556,
11 EMUTR00587

12 OAH Docket No. 2009-LI-0352

13 This matter came before the Electrical Board (Board) for the State of Washington for
14 hearing on January 27, 2011. Marysville Taping Co. did not appear and was not represented.
15 The Department of Labor and Industries (Department) was represented by ROBERT M.
16 MCKENNA, Attorney General, through COURTLAN P. ERICKSON, Assistant Attorney
17 General.

18 The Board, having reviewed the record and heard oral argument, and therefore, being
19 fully informed, makes the following:

20 **I. FINDINGS OF FACT**

21 1.1 On or about July 21, 2009, the Department of Labor and Industries issued Citation No.
22 EMUTR00555 to Marysville Taping Co., alleging violation of RCW 19.28.041. On or
23 about July 21, 2009, the Department of Labor and Industries issued Citation No.
24 EMUTR00556 to Marysville Taping Co., alleging violation of RCW 19.28.271. On or
25 about August 20, 2009, the Department of Labor and Industries issued Citation No.
26 EMUTR00587 to Marysville Taping Co., alleging violation of RCW 19.28.010.

FINAL ORDER

1

ATTORNEY GENERAL OF WASHINGTON

Labor & Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7707
FAX: (360) 586-7717

CA

B

49

1 Marysville Taping Co. filed appeals of citations EMUTR00555 and EMUTR00556 on
2 August 13, 2009. It filed an appeal of citation EMUTR00587 on September 28, 2009.

3
4 The Office of Administrative Hearings (OAH) conducted a hearing in this matter on
5 June 22, 2010. On August 23, 2010, OAH issued a Proposed Decision and Order with
6 Findings of Fact and Conclusions of Law. The Proposed Decision and Order dismissed
7 and set aside citations EMUTR00555, EMUTR00556, and EMUTR00587.

8 1.2 The Department of Labor and Industries filed a timely petition for review to the
9 Electrical Board on September 10, 2010. Timely notice of the Electrical Board hearing
10 was properly served on Marysville Taping Co.

11 1.3 In deciding this appeal, the Electrical Board considered the transcript of the June 22,
12 2010, hearing; the Proposed Decision and Order from OAH; the Department's petition
13 for review; and the oral argument presented before the Board on January 27, 2011.

14 1.4 The exhibits presented to OAH and considered by OAH in making its decision were not
15 included in the appeal packet. However, during oral argument before the Board, the
16 Department moved to correct the record to include a copy of the exhibits. The Board
17 granted the motion and considered the exhibits in reaching its decision.

18
19 1.5 Substantial evidence in the record supports Findings of Fact Nos. 1-24 from the
20 Proposed Decision and Order; therefore, the Board adopts and incorporates Findings of
21 Fact Nos. 1-24 as though fully set out herein.

22 1.6 In addition, the Board makes the following findings:

23 The heater that Marysville Taping Co. installed was not "plug-in equipment" or a
24 "plug-in appliance" as contemplated by chapter 19.28 RCW and chapter 296-46B
25 WAC.
26

leB

25

1 Based upon the foregoing Findings of Fact, the Board now makes the following:
2

3 **II. CONCLUSIONS OF LAW**

- 4 2.1 The Electrical Board has jurisdiction to hear the above-entitled matter pursuant to
5 RCW 19.28.131 and RCW 19.28.271.
- 6 2.2 Conclusions of Law Nos. 1-4 from the Proposed Decision and Order are correct, and
7 the Board adopts them and incorporates them herein as though fully set forth.
- 8 2.3 Conclusions of Law Nos. 6 and 7 from the Proposed Decision and Order are correct,
9 and the Board adopts them and incorporates them herein as though fully set forth.
- 10 2.4 Conclusion of Law No. 5 from the Proposed Decision and Order is irrelevant and
11 inapplicable to this case and, therefore, is not adopted.
- 12 2.5 Conclusions of Law Nos. 8 and 9 from the Proposed Decision and Order are not
13 supported by the law or the facts and, therefore, are not adopted.
- 14 2.6 When Marysville Taping Co. hooked up a heater (one that was not a plug-in appliance
15 or plug-in equipment) to a power source using the cable, it violated RCW 19.28.041,
16 which requires a company to have a valid electrical contractor license to “engage in,
17 conduct, or carry on the business of installing or maintaining wires or equipment to
18 convey electric current.” Therefore, citation EMUTR00555 should be affirmed,
19 together with the \$500.00 penalty that was assessed along with it.
- 20 2.7 Since one of its employees who was not a certified electrician hooked up the heater,
21 Marysville Taping Co. violated RCW 19.28.271, which makes it unlawful for a
22 company to “employ an individual for” such work when that person is not certified.
23 Therefore, citation EMUTR00556 should be affirmed, together with the \$250.00
24 penalty that was assessed along with it.
- 25 2.8 The way in which Marysville Taping Co. installed the heater and wiring was
26 hazardous. Therefore, Marysville Taping Co. violated RCW 19.28.010, which requires

lec

151

1 that such wires, equipment, and installations thereof "be in strict conformity with this
2 chapter, the statutes of the state of Washington, and the rules issued by the department,
3 and shall be in conformity with approved methods of construction for safety to life and
4 property." Therefore, citation EMUTR00587 should be affirmed.

5 2.9 The hazardous installation of the heater constituted a gross violation under
6 WAC 296-46B-915, so the \$500.00 penalty accompanying citation EMUTR00587
7 should be affirmed.

8 Based on the foregoing Findings of Fact and Conclusions of Law, the Board makes the
9 following:

10
11 **III. ORDER**

12 IT IS ORDERED that:

13 3.1 Citation Nos. EMUTR00555, EMUTR00556, and EMUTR00587, together with their
14 associated penalties, are affirmed.

15 DATED this 07 day of January, 2011.

16
17
18 
19 GLORIA ASHFORD
Electrical Board Chair

20 Presented by:
21 ROBERT M. MCKENNA
22 Attorney General

23 
24 COURTLAN P. ERICKSON, WSBA No. 38246
25 Assistant Attorney General
26 Attorney for the Department of
Labor and Industries
State of Washington

FINAL ORDER

led

5

1
2 Copy received and notice of
3 presentation waived:
4

5 Did not appear
6 RONALD MOEN, Owner
Marysville Taping Co.
7
8

9 NOTICE TO PARTIES

10 PETITION FOR RECONSIDERATION/PETITION FOR JUDICIAL REVIEW

11 This is a final agency decision subject to a petition for reconsideration filed within ten days of
12 service pursuant to RCW 34.05.470. Such a petition must be filed with the Electrical Board.
13 Twenty-one (21) copies shall be delivered to the Secretary to the Electrical Board, who will
14 then distribute them to the Board and Board's counsel. The parties shall serve opposing
15 counsel with a copy of the petition for reconsideration at the same time or earlier than
16 submission to the Board. The filing of a petition for reconsideration is not a prerequisite for
17 seeking judicial review.

18 Pursuant to RCW 34.05.514 and RCW 34.05.542(2), a petition for judicial review of this
19 decision must be filed with the court and served on the Department of Labor and Industries and
20 the Board within thirty days after service of the final order. If a petition for reconsideration is
21 filed, this thirty-day period will begin to run upon the disposition of the petition for
22 reconsideration pursuant to RCW 34.05.470(3).
23
24
25
26

6E

53

MAILED

AUG 23 2010

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRIES

Office of Administrative Hearings
Spokane

IN THE MATTER OF

Marysville Taping Co.

Appellant

Department of Labor and Industries
Electrical Appeals

Citation No's EMUTR00555,
EMUTR00556, EMUTR00587

OAH Case No. 2009-LI-0352

Administrative Law Judge, Rosemary L. Otto, conducted the hearing by telephone on June 22, 2010 in Spokane, Washington, at the Office of Administrative Hearings. Marysville Taping Co., the Appellant, appeared and were represented by Ron Moen, Owner. Courtlan Erickson, Assistant Attorney General, appeared and represented the Department of Labor and Industries ("Department"). Rod Mutch, Electrical Department Inspector, testified for the Department. The Department's Exhibits 1 through 11 were admitted. The hearing record closed at the conclusion of the hearing.

ISSUE

Whether the Appellant, Marysville Taping Co., violated the electrical licensing laws as alleged by citations EMUTR00555, EMUTR00556, and EMUTR00587?

RESULT

Marysville Taping Co. did not violate electrical licensing laws under citations EMUTR00555, EMUTR00556, and EMUTR00587 and appellant does not owe fines for these citations.

FINDINGS OF FACT

1. The Appellant is Marysville Taping Co. ("MTC"), Ronald Moen, Owner.
2. Ronald Moen is not a certified electrician and MTC is not an electrical contractor. MTC is a sheet rock installation contractor.
3. MTC is based in Marysville, Washington.
4. All the citations at issue emanated from work done at a residential property located at 21805 Colt Road in Leavenworth, Washington, owned by Gilbertson Construction.

56 12(A)

C104

5. Leavenworth, Washington is located in Labor and Industries Region Five.
6. Ron Mutch is an Electrical Field Inspector for the Department.
7. On July 14, 2009, Mr. Mutch went to 21805 Colt Road in Leavenworth, Washington to perform a requested inspection on an established permit at the new home construction on the property for the electrical contractor, GH Electric, Inc..
8. As Mr. Mutch approached the new house, he noticed that the temporary electrical service pole in front of the driveway had its cover removed with a piece of non-metallic sheathed cable coming out of it, laying on the ground. The cable ran across the driveway, into the house, to an electric heater laying on the floor of the house.
9. The circuit was energized and the heater was on. The cable was connected to two different circuit breakers in the temporary panel. One breaker was rated 20 amps and the other 50 amps. The cable had a maximum ampacity of 25 amps, which means the maximum breaker size this cable could safely handle was 20 amps.
10. The heater was rated at 5760 watts, which requires a cable with an ampacity of at least 31 amps.
11. Further, the equipment grounding conductor was not connected to the electrical panel, creating a potential shock hazard.
12. The manner in which the heater had been energized, through this particular cable from the circuit breakers in the temporary panel created a very hazardous situation, which could have resulted in injury through electrical shock or sparks leading to fire.
13. Mr. Mutch called the general contractor and owner for the property, Brooks Gilbertson, and asked who connected the heater. Mr. Gilbertson stated that MTC had connected the heater.
14. At Mr. Mutch's request, Mr. Gilbertson came to the property within a short period of time and disconnected the heater.
15. MTC's work installing sheet rock requires heat.
16. Mr. Moen arrived with his MTC crew from out of town to perform sheet rock work associated with the new home on Monday, July 13, 2009, as a subcontractor for Mr. Gilbertson. MTC's assignment would be completed by Wednesday, July 15, 2009.
17. Mr. Gilbertson directed Mr. Moen to install the heater. Mr. Gilbertson instructed Mr. Moen to connect the heater to the power source, the "two hot leads" and Mr. Gilbertson provided the cable for Mr. Moen to complete the task.

HCB 57

105

18. Mr. Moen never involves himself, and MTC never involves itself, in electrical work when performing sheet rock contracting. Mr. Moen did not offer to connect the heater to the power source and did not want to do so, as he has no expertise in electrical contracting.

19. Mr. Moen reluctantly connected the heater to the heat source at the instruction and request of Mr. Gilbertson.

20. On July 21, 2009, Mr. Mutch issued two Non-Compliance Citations to MTC, numbers EMUTR00555 and EMUTR00556. (Exhibits 7 and 8). On August 20, 2009, Mr. Mutch issued a third citation to MTC, number EMUTR00587. (Exhibit 9).

21. Mr. Mutch issued Citation EMUTR00555 to MTC for violation of RCW 19.28.041 for: "Offering to perform, submitting a bid for, advertising, installing or maintaining cables, conductors or equipment that convey or utilize electrical current without having a valid electrical contractor license.." He issued this citation because MTC had installed the cable from the electrical panel to the heater without an electrical contracting license.

22. Mr. Mutch issued Citation EMUTR00556 to MTC for violation of RCW 19.28.271 for: "Employing an individual for the purposes of chapter 19.28 RCW who does not possess a valid certificate of competency or training certificate to do electrical work." He issued this citation because MTC employed Ron Moen on the project, who did not hold a training certificate for the electrical work.

23. Mr. Mutch issued Citation EMUTR00587 to MTC for violation of RCW 19.28.010 for: "Failure of the electrical installer to ensure installation, maintenance, or repair of wires and equipment that convey electrical current are in strict conformity with the statute, rules, and approved methods of construction for safety to life and property" This is considered a non-conforming installation and is a "serious violation."

24. Appellant argued that it did not offer to perform any electrical work and only did so at the request and direction of general contractor.

CONCLUSIONS OF LAW

1. Chapter 19.28 of the RCW governs electrical installations in the State of Washington. The Department has promulgated its own regulations pursuant to RCW 19.28. They are within chapter 296-46B of WAC.

2. RCW 19.28.010(1) provides in pertinent part:

All wires and equipment, and installations thereof, that convey electric current and installations of equipment to be operated by electric current, in, on, or about buildings or structures...shall be in strict conformity with this chapter, the statutes of the state of Washington, and the rules issued by the department,

58 13 (A)

106

and shall be in conformity with approved methods of construction for safety to life and property.

3. According to RCW 19.28.006(8): "Electrical contractor" means a person, firm, partnership, corporation, or other entity that offers to undertake, undertakes, submits a bid for, or does the work of installing or maintaining wires or equipment that convey electrical current.

4. WAC 296-46B-100 defines various terms and provides in pertinent part:
(37) An "installation" includes the act of installing, connecting, repairing, modifying, or otherwise performing work on an electrical system, component, equipment, or wire except as exempted by WAC 296-46B-925.

5. RCW 19.28.261 governs electrical work by property owners on their own property. It states, in pertinent part:

...(6) Nothing in RCW 19.28.161 through 19.28.271 shall be construed to restrict the right of any householder to assist or receive assistance from a friend, neighbor, relative or other person when none of the individuals doing the electrical installation hold themselves out as engaged in the trade or business of electrical installations.

6. The burden is on the Department to show violations of RCW 19.28 by the preponderance of the evidence. WAC 296-46B-995(19)(c).

7. Rules regarding civil penalties are enumerated in WAC 296-46B-915.

8. Here, the Appellant did not offer to undertake the installation or maintenance of wires or equipment that convey electrical current. The appellant did connect a wire that conveys electrical current, but this act does not constitute an "installation" which infers working on an electrical system, as defined in WAC 296-46B-100 and as contemplated by statute. Nor does the appellant meet the definition of an electrical contractor, because the appellant did not hold itself out or offer its services in electrical contracting as required by RCW 19.28.006(8). The appellant's acts, though hazardous, were not in violation of the pertinent statutes and regulations. Even if connecting the cable to the heater does rise to the level of an "installation," the Appellant did so at the direction of the hiring contractor who incidentally happened to be the owner of the property where the Appellant worked. The Appellant in no way promoted itself to do electrical work and only connected an electrical wire at the request of the general contractor.

9. Here, the Department has not demonstrated that the Appellant's actions subject him to RCW 19.28 and, therefore, the Department has not carried its burden of demonstrating by the preponderance of the evidence that the Appellant violated citations EMUTR00555, EMUTR0056, and EMUTR00587.

59 136B5

107

PROPOSED DECISION AND ORDER

IT IS HEREBY ORDERED:

Citations EMUTR00555, EMUTR0056, and EMUTR00587, issued to Ronald Moen and Marysville Taping Company are dismissed and set aside, and no penalties are assessed.

DATED at Spokane, Washington this 23rd day of August, 2010.

Rosemary L. Otto

Rosemary L. Otto
Administrative Law Judge
Office of Administrative Hearings

A copy was sent to:

Marysville Taping Co.
Ronald Moen, Owner
5817 92nd Place NE
Marysville WA 98270

Courtlan Erickson
Assistant Attorney General
Office of the Attorney General
PO Boc40121
Olympia WA 98504-0121

Rod Mutch
Department Inspector
Dept of Labor and Industries
15 W Yakima Ave Suite 100
Yakima WA 98902

Electrical Appeal Desk
PO Box 44460
Olympia WA 98504-4460

Ronald E Fuller
Chief Electrical Inspector
Department of Labor and Industries
PO Box 44460
Olympia WA 98504-4460

AUG 25 2010
Department of Licensing

14 (A)

Leo

801

West's Revised Code of Washington Annotated

Title 19. Business Regulations--Miscellaneous (Refs & Annos)

Chapter 19.28. Electricians and Electrical Installations (Refs & Annos)

Provisions Applicable to Electrical Installations

West's RCWA 19.28.261

19.28.261. Exemptions from RCW 19.28.161 through 19.28.271

Effective: July 22, 2007

Currentness

(1) Nothing in RCW 19.28.161 through 19.28.271 shall be construed to require that a person obtain a license or a certified electrician in order to do electrical work at his or her residence or farm or place of business or on other property owned by him or her unless the electrical work is on the construction of a new building intended for rent, sale, or lease. However, if the construction is of a new residential building with up to four units intended for rent, sale, or lease, the owner may receive an exemption from the requirement to obtain a license or use a certified electrician if he or she provides a signed affidavit to the department stating that he or she will be performing the work and will occupy one of the units as his or her principal residence. The owner shall apply to the department for this exemption and may only receive an exemption once every twenty-four months. It is intended that the owner receiving this exemption shall occupy the unit as his or her principal residence for twenty-four months after completion of the units.

(2) Nothing in RCW 19.28.161 through 19.28.271 shall be intended to derogate from or dispense with the requirements of any valid electrical code enacted by a city or town pursuant to RCW 19.28.010(3), except that no code shall require the holder of a certificate of competency to demonstrate any additional proof of competency or obtain any other license or pay any fee in order to engage in the electrical construction trade.

(3) RCW 19.28.161 through 19.28.271 shall not apply to common carriers subject to Part I of the Interstate Commerce Act, nor to their officers and employees.

(4) Nothing in RCW 19.28.161 through 19.28.271 shall be deemed to apply to the installation or maintenance of telephone, telegraph, radio, or television wires and equipment; nor to any electrical utility or its employees in the installation, repair, and maintenance of electrical wiring, circuits, and equipment by or for the utility, or comprising a part of its plants, lines or systems.

(5) The licensing provisions of RCW 19.28.161 through 19.28.271 shall not apply to:

(a) Persons making electrical installations on their own property or to regularly employed employees working on the premises of their employer, unless the electrical work is on the construction of a new building intended for rent, sale, or lease;

(b) Employees of an employer while the employer is performing utility type work of the nature described in RCW 19.28.091 so long as such employees have registered in the state of Washington with or graduated from a state-approved outside lineworker apprenticeship course that is recognized by the department and that qualifies a person to perform such work;

D

(c) Any work exempted under RCW 19.28.091(6); and

(d) Certified plumbers, certified residential plumbers, or plumber trainees meeting the requirements of chapter 18.106 RCW and performing exempt work under RCW 19.28.091(8).

(6) Nothing in RCW 19.28.161 through 19.28.271 shall be construed to restrict the right of any householder to assist or receive assistance from a friend, neighbor, relative or other person when none of the individuals doing the electrical installation hold themselves out as engaged in the trade or business of electrical installations.

(7) Nothing precludes any person who is exempt from the licensing requirements of this chapter under this section from obtaining a journeyman or specialty certificate of competency if they otherwise meet the requirements of this chapter.

Credits

[2007 c 218 § 83, eff. July 22, 2007; 2003 c 399 § 302, eff. July 27, 2003; 2001 c 211 § 19; 1998 c 98 § 2; 1994 c 157 § 1; 1992 c 240 § 3; 1986 c 156 § 16; 1983 c 206 § 21; 1980 c 30 § 12. Formerly RCW 19.28.610.]

Notes of Decisions (5)

West's RCWA 19.28.261, WA ST 19.28.261

Current with 2013 Legislation effective through April 25, 2013

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

West's RCWA 34.05.570

34.05.570. Judicial review

Currentness

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

- (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
- (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
- (c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
- (d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;

E

- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
 - (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
 - (i) The order is arbitrary or capricious.
- (4) Review of other agency action.
- (a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.
 - (b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.
 - (c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:
 - (i) Unconstitutional;
 - (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
 - (iii) Arbitrary or capricious; or
 - (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

Credits

[2004 c 30 § 1, eff. June 10, 2004; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

34.05.570. Judicial review, WA ST 34.05.570

Art. 1, § 7 of the Washington Constitution provides that:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

F