

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 28, 2015 Session

**DAVIS H. ELLIOT CONSTRUCTION COMPANY, INC. V.
COMMISSIONER OF LABOR AND WORKFORCE DEVELOPMENT, ET
AL.**

**Appeal from the Chancery Court for Davidson County
No. 120951I Claudia Bonnyman, Chancellor**

No. M2014-00807-COA-R3-CV

This appeal involves review of an administrative decision. Chattanooga's local utility company hired the Appellant construction company to perform preliminary work on the utility company's fiber-optic internet infrastructure. One of the Appellant's employees was injured while performing this work. The Tennessee Department of Labor and Workforce Development's Division of Occupational Safety and Health ("TOSHA") conducted an investigation of the incident. Thereafter, on recommendation of the inspector, TOSHA cited the Appellant for violations of the telecommunications safety regulations. Appellant contested the citations before the Division of Occupational Safety and Health Review Commission ("the Commission"), which upheld the citations. Appellant then appealed the Commission's decision to the Davidson County Chancery Court, which also affirmed the citations. Appellant now appeals the Chancery Court's decision to this Court. We conclude that TOSHA erred in applying the telecommunications regulation instead of the construction regulations. Accordingly, we reverse the trial court and vacate the citations issued to Appellant construction company.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Reversed

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Paul Kent Bramlett, Nashville, Tennessee, Robert Preston Bramlett, Nashville, Tennessee, and Carl B. Carruth, Columbia, South Carolina, for the appellant, Davis H. Elliot Construction Company, Inc.

Ryan L. McGehee, Nashville, Tennessee, for the appellees, the Commissioner of Labor and Workforce Development and the Division of Occupational Safety and Health Review Commission.

OPINION

I. Background

Electric Power Board (“EPB”), Chattanooga’s local utility company, contracted with Davis H. Elliot Construction Company (“DHE” or “Appellant”) to complete “Phase 1” of EPB’s plan to offer fiber-optic internet in Chattanooga. Phase 1 required DHE employees to push fiberglass rods through existing electrical conduits and then use these rods to pull “mule tape” through the conduits.¹ Once in place, the mule tape would be used in a later phase to pull the fiber-optic cables through the conduits. Phase 1 did not require DHE to install the fiber-optic cable, only to place the mule tape in the conduits.

The underlying facts in this case are not in dispute. On November 3, 2009, DHE employed a six-person “crew” to insert the mule tape into the electric conduits. The Appellant’s crew accessed the conduits through the interiors of EPB’s outdoor transformers. When one of the fiberglass rods became stuck in a conduit, Mr. Jesse Stills, the “crew chief,” attempted to facilitate the rod’s movement by removing his safety equipment and placing himself close to the inner workings of the transformer. While inside the transformer, Mr. Stills accidentally came into contact with an energized part of the transformer, which carried a 7200-volt current. He was injured but survived. As a result of this incident, TOSHA conducted an inspection of the worksite on November 5, 2009. After the inspection, TOSHA’s inspector concluded that DHE had violated sections of both the general industry and telecommunications safety standards and issued two citations to DHE. The first citation consisted of five “serious violations” of Title 29 of the Code of Federal Regulations. Specifically, these were violations of Title 29, Code of Federal Regulations Sections 1910.135(a)(1), 1910.135(a)(2), 1910.268(f)(1), 1910.268(b)(7), and 1910.268(f)(2). The second citation was for a “nonserious” violation of Title 29 of the Code of Federal Regulations Section 1910.268(c)(3).

On February 23, 2010, DHE appealed the citations to the Commission. The Commission conducted a hearing on August 17, 2011 and affirmed the citations in a final order dated May 2, 2012. On July 5, 2012, DHE appealed the Commission’s decision to the Davidson County Chancery Court pursuant to Tennessee Code Annotated Section 4-5-322. On March 28, 2014, the Davidson County Chancery Court (“the trial court”)

¹ At oral argument, Appellant’s counsel described mule tape as similar to a drawstring. EPB planned to use the mule tape that DHE placed in the electric conduits to pull the fiber-optic cable through the conduits once it was ready to install the cables.

affirmed the Commission's determination. DHE appeals.

II. Issue

The dispositive issue in this appeal is whether TOSHA applied the correct safety standards when it cited DHE for safety violations.

III. Standard of Review

Tennessee Code Annotated Section 4-5-322 codifies the standard of review for decisions of administrative agencies. In pertinent part, the statute provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are...[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 4-5-322(h)(4). Reviewing an administrative agency's decision under Tennessee Code Annotated Section 4-5-322 is a three-step process. *See McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 820 (Tenn. Ct. App. 2005). First, the court must "determine whether the agency has identified the appropriate legal principles applicable to the case." *Id.* Second, "the court must examine the agency's factual findings to determine whether they are supported by substantial and material evidence." *Id.* Third, "the reviewing court must examine how the agency applied the law to the facts." *Id.*

IV. Analysis

Appellant argues that TOSHA's citations were issued under an incorrect legal standard, thus rendering these citations arbitrary, capricious, and an abuse of discretion. Specifically, the Appellant contends that its work for EPB constituted construction work, and, therefore, is not subject to the telecommunications safety standards or the general industry safety standards that TOSHA applied in issuing the citations in this case. Given the nature of DHE's work for EPB, Appellee argues that DHE was correctly cited under the telecommunications standards and general industry standards.

In affirming the Commission's decision, the trial court reasoned that "the standard which specifically describes the activity of the [Appellant's] workers...is found at 29 CFR section 1910.268(a)(1)...." The trial court also noted that "[i]f a particular standard is...specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applied to the same condition or practice." Based upon this principle, the trial court concluded that

[b]ecause the standard for telecommunications is specific and is the more accurate description of the work being done by the petitioner and because ‘construction’ is general, the definition is general and does not describe the work that was done by the Petitioner, the Court finds the Petitioner workers were not constructing but were installing telecommunications. 29 C.F.R. 1910.268 applies and is the correct standard.

The Tennessee Department of Labor & Workforce Development has adopted the federal regulations on occupational safety and health codified in Title 29 of the Code of Federal Regulations, Part 1910. *See* Tenn. Comp. R. & Regs. § 0800-01-01-.06(2). Part 1910 prescribes general industry standards for occupational health and safety. Section 1910.268 gives specific safety standards for telecommunications work. The federal regulations specifically state that “[t]he standards prescribed in part 1926 of [Title 29 of the Code of Federal Regulations] are adopted as occupational safety and health standards...and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in *construction work*.” *Id.* § 1910.12(a) (emphasis added). Tennessee has adopted the federal regulations for construction work in Part 1926 of Title 29, Code of Federal Regulations. *See* Tenn. Comp. R. & Regs. 0800-01-06-.02(2). Therefore, construction work in Tennessee is not subject to the standards set out in Part 1910. *See Ownby v. Tennessee Farmers Coop. Corp.*, No. M2008-00878-COA-R3-CV, 2009 WL 1392574 (Tenn. Ct. App. May 18, 2009).

As noted above, when reviewing the administrative agency’s decision in this case, we must first determine “whether [TOSHA] has identified the appropriate legal principles applicable to the case.” *McEwen*, 173 S.W.3d at 820. We must determine whether the regulations for general industry, telecommunications, or construction apply to the facts in this case. This determination presents a mixed question of law and fact. As noted above, however, the facts in this case are not in dispute; thus, the question before us is one of law, which we review *de novo*. *See Brunswick Acceptance Co., LLC v. MEJ, LLC*, 292 S.W.3d 638, 642 (Tenn. 2008).

The Code of Federal Regulations defines construction work as “work for construction, alteration, and/or repair, including painting and decorating.” 29 C.F.R. § 1910.12(b). Construction work also includes “the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of the existing transmission and distribution lines and equipment.” *Id.* § 1910.12(d). Telecommunications work, in pertinent part, “includes the installation, operation, maintenance, rearrangement and removal of conductors and other equipment used for signal or communication service, and of their supporting or containing structures, overhead or underground, on public or private rights of way, including buildings or other structures.” *Id.* § 1910.268(a)(1). The telecommunications regulation does not apply to “construction work, as defined in § 1910.12.” *Id.* § 1910.268(a)(2)(i).

To support its argument that DHE was engaged in telecommunications work, the Appellee's brief characterizes DHE's work as the installation of fiber-optic cable. Upon review of the record, however, it appears that DHE only used fiberglass rods to put nylon mule tape inside electrical conduits. The insertion of nylon tape into an existing electrical conduit does not constitute the "installation...of conductors and other equipment used for signal communication." Further, TOSHA has offered no evidence in this case to suggest that DHE was installing the fiber-optic cables themselves. Neither fiberglass rods nor nylon tape qualify as equipment used to transmit signals or to communicate. Moreover, the mere placement of such items into existing conduits created for the purpose of distributing electric energy does not constitute work on telecommunications support structures. Because the conduit at issue here was part of EPB's electric grid, we cannot conclude that the conduits were support structures for a telecommunications network at the time of Mr. Stills's injury. Rather, it appears that DHE was altering existing equipment used in the transmission and distribution of electric energy. Such alteration of existing equipment for electricity distribution and transmission is clearly within the definition of construction work, *supra*. Consequently, we conclude that DHE was performing construction work when Mr. Stills was injured.² Therefore, neither the telecommunications standards nor the general industry standards are applicable to DHE's work.

We also note that, even if DHE's work were subject to the general industry regulations and the telecommunications regulation, the telecommunications regulation specifically exempts the work that DHE was performing. The telecommunications standards do not apply to "*installations under the exclusive control of electric utilities used for...generation, control, transformation, transmission, and distribution of electric energy, which are located...outdoors on property owned or leased by the electric utilities or on public highways, streets, roads, etc., or outdoors by established rights on private property.*" 29 C.F.R. § 1910.268(a)(ii) (emphasis added). The record reveals that the transformer involved here was located outdoors, and the trial court's order specifically states that the transformer was a "right of way" for EPB. Transformers, of course, are for the transmission of electric energy, and the record contains no evidence to suggest that the transformer that Mr. Stills was working inside was not under the exclusive control of EPB. Therefore, under the plain language of the statute, the work that DHE performed would not be subject to the telecommunications safety standards. Accordingly, even if DHE's work was not construction work, the four violations of the telecommunications safety standards under Section 1910.268 would not be applicable because the regulation specifically exempts the type of work DHE was performing in this case.

² We are not holding that the existence of electrical conduits used for power distribution renders such work outside the sphere of telecommunications work. We simply hold, in this case, that DHE's work was not on a telecommunications network because no telecommunications equipment was present at the time of the accident.

Construction work is governed by its own set of safety standards and is not subject to the general industry standards. *See* 29 C.F.R. § 1910.12. Accordingly, none of the standards TOSHA relied upon to cite DHE were applicable to the work that DHE performed. Even if DHE's work did not constitute construction work, four of the six violations cited by TOSHA were specifically exempted under the plain terms of Section 1910.268. Because TOSHA issued citations to DHE under standards that did not apply to the work DHE was conducting, we hold that TOSHA applied the wrong legal standard when issuing citations in this case. Thus, its decision to cite DHE under the telecommunications standards was arbitrary and capricious and characterized by an abuse of discretion. We, therefore, reverse the decision of the trial court affirming the Commission's decision and vacate the citations issued to DHE due to the improper application of the governing safety standards.

V. Conclusion

For the foregoing reasons, we reverse the order of the trial court and vacate the citations issued to DHE. Costs of the appeal are assessed against the Appellee, the Commissioner of Labor and Workforce Development and the Tennessee Occupational Safety and Health Review Commission, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE