

Secretary of Labor,
Complainant,

v.

OSHRC Docket No. **99-1702**

Miller Electric Company,
Respondent.

Appearances:

Leslie John Rodriquez, Esq.
U. S. Department of Labor
Office of the Solicitor
Atlanta, Georgia
For Complainant

Mr. John Steele
Miller Electric Company
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION ON REMAND

On June 8, 2001, the Review Commission remanded the captioned case for further proceedings. The Commission directed reconsideration of a portion of the underlying December 21, 2000, decision. Specifically, the Commission sought clarification of the extent to which the Judge relied on an error in the decision in determining that Miller Electric Co. (Miller) failed to establish its defense of employee misconduct.

This Judge's initial decision had affirmed a serious violation of item 1 (§ 1926.416(a)(1)) for permitting an employee to work in too close a proximity to an electric power circuit without safety precautions and item 2 (§ 1926.416(a)(3)) for failing to ascertain and warn employees of the proximity of an energized electrical power circuit. Item 3 was vacated. Miller's employee misconduct defense was rejected for items 1 and 2.

As the Order of Remand states, the initial decision erroneously included the words "50 or 60 times" in the following sentence:

Apprentice Meadows saw Stucker working "hot" 50 to 60 times but he had never seen him disciplined (Tr. 54, 56).

The transcript at page 54 actually states:

Q.: How about Mr. Sean Stucker [hooking up the ground, neutral, and energized wires]?

A.: As far as I know, yes, I'm sure he had.

Q.: How do you know that?

A.: We worked together for a while. I can't remember one instance that he might have hooked up something hot, but about any of the 50 or 60 journeyman electrician[s] I've ever worked with, it's all kind of -- sometimes they might hook up something hot.

In the transcript "50 or 60" modified "journeymen" and not "times," and the journeymen Meadows referred to are not attributable to Miller. This Judge does not recall specifically when she mistakenly added "50 or 60 times" to the sentence of the decision but knows that it was not in her original drafts. The sentence is accurate if "50 to 60 times" is deleted from it. The numbers were added after the determination was made that Miller failed to meet the employee misconduct defense, and the incorrect information was not relied upon to reach that determination. Indeed, had the Judge concluded that the apprentice observed Stucker "50 or 60 times" violating a work rule, it would have merited more discussion. Despite the fact that the judge did not rely on these numbers, the decision contained an error which necessarily casts doubt on the conclusions reached in the December 21, 2000, decision.

As directed, the record and arguments on the employee misconduct defense were again considered. This further review did not change the conclusion that Miller failed to meet the elements of the employee misconduct defense for items 1 and 2 of Citation No. 1. With the exception of the error, the Judge adopts and incorporates her previous discussion on the issue of employee misconduct and includes this further explanation.

The Conduct at Issue

It is undisputed that disconnecting the circuit at the breaker panel box (which in this case was in a locked electrical room) is the only way to "de-energize" the circuit, as that term is defined by the standard. It was insufficient to turn off a wall switch, even if this practice may have prevented the electrical current from reaching one of the switch legs of the circuit (Tr. 23, 31, 84, 123).

As discussed in the underlying decision, Miller's electrician failed to de-energize an electrical circuit before working on it. During the incident which resulted in the fatality, the electrician was wiring in a 277-volt fluorescent light fixture. He had not disconnected the circuit

at the breaker panel box. Nor did he “cut a corner,” as at least some Miller electricians did, and simply turn off the wall light switch to ostensibly disconnect the power to the circuit (Tr.19, 22, 42, 143).

Miller argued that it met the employee misconduct defense, noting that its journeymen electricians were skilled employees. The Secretary countered that Miller’s journeymen used wide discretion to determine whether to work on energized circuits and that they believed that they were allowed to disconnect the circuit at the wall switch. This being the case, the Secretary contended that a work rule to prohibit employees from working on energized circuits was not enforced.

Employee Misconduct Defense

The four elements of the employee misconduct defense are: (1) the employer established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to its employees; (3) it took steps to discover violations of those rules; and (4) it effectively enforced the rules when violations were discovered. *E.g., Gary Concrete*, 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991).

The oral work rule in question stated that employees should not work on energized circuits or, alternatively, that employees should secure a formal permit to work on an energized circuit.¹ Miller contends that this work rule was “designed to prevent” the cited violations and was clear enough to eliminate employee exposure to the hazards covered by the standards. This is correct for item 1. The rule is aimed at the conduct prohibited by § 1926.416(a)(1), which provides:

No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

However, this work rule is not specifically aimed at the conduct prohibited by §1926.416(a)(3) (item 2), which provides:

¹ Although the work rule was oral, it is understood that Miller had a written “permit” procedure in the safety manual. The permit was to be filled out by a company official with the concurrence of the project’s owner before employees worked on an energized circuit. They were to use protective equipment in that event (Tr. 168).

Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

Miller's work rule placed the onus of determining whether a circuit was energized on the individual electrician and not on the supervisors, as Miller's witnesses acknowledged. The standard, on the other hand, requires *an employer* to make the assessment. Therefore, the employee misconduct defense is rejected for item 2 for failure to establish the first element of the defense. The remaining elements of the defense are discussed below for item 1.

As stated in the underlying decision, the fact that a work rule is oral may lead to confusion in how it is communicated, implemented, or enforced. Such confusion existed here. At the hearing Miller stated that its work rule required employees to disconnect a circuit at the breaker panel box. This was not always clear to employees and supervisors. While Miller's electricians understood that Miller had a general "policy" about deenergizing circuits, they were unsure about what qualified as an acceptable method for doing so.

During the investigation compliance officer Joseph Roesler interviewed journeyman electrician Vernon Bernard. (Bernard, who had been a journeyman electrician for 27 years and a Miller employee for 5 (Tr. 29, 40), was found to be a knowledgeable and fair-minded witness.) Roesler's interview notes reflected that (Tr. 20):

"Employee states that it is industry practice to work on a circuit with the wall switch off. He also stated that it would be Miller's practice."

Bernard verified the statement at the hearing but at the same time appeared to make some distinction between turning off a wall switch and turning off the breaker (Tr. 18-19). On cross-examination, Bernard again explained his understanding of Miller's policy (Tr. 30):

Q.: You stated that it is Miller Electric's policy to deenergize circuits by the wall switch?

A.: Okay, de-energize circuits by the wall switch. I mean, that's their policy is to turn it off. I mean, what I was saying was if the wall switch is off, you've got somebody to de-energize the wall switch and watch it. I mean, I think -- I mean, I would assume that would be de-energized. You know.

If you're working on a light that's on a switch leg or whatever. That's what I meant. I mean, what I was saying is whether that's, per se, exactly in the manual, that's a different story. But, as far as Miller policy, off. You know, have it off. The whole circuit, I'm not sure.

Roesler also spoke with foreman Larry Saye, who explained that it would have been safe to wire the fixture with the light switch off, and with safety director John Steele, who acknowledged that it was industry practice to work with only the switch off (Tr. 75, 78, 112, 124-125). Employees did not understand that Miller's work rule required them to deenergize the circuit at the panel box.

To the extent that journeymen electricians understood how Miller wanted them to deenergize the circuit, they used their discretion in deciding whether to comply with Miller's "policy" (Tr. 23-26, 54-56). As Bernard testified (Tr. 25-26):

Q.: Sir, can you explain or would you look at Page 3 of your interview statement. I'm trying to understand something that maybe we can clarify for the Court here. It says: "Employee states that if they work 120 volts, you can only do this if you feel comfortable."

What does that mean?

A.: Well, that means -- what we're saying here is this is, you know, journeyman discretion, in other words. I mean, in the electrical trade there are, you know, journeymen that work on things hot. I mean, maybe they shouldn't, but they do.

You know, but the thing is nobody is not going to work on it unless they feel satisfied or comfortable with it. That's what the statement is saying. And, you know, also, I'll say this, if it's Company practice, and you're told to turn it off, well, that's what you need to do. But, there again, we don't always do that.

But, the thing is if you feel comfortable about doing something, but there are flags that go up. But, in this 120-volt case, that's what it's saying.

Q.: How about in the 277 volts?

A.: In that case, well, like and I say, the Company policy is turn it off; but, there again, I've been guilty of doing it, you know, working on it with it on and probably every other journeyman, but that's one of the tricks of the trade. I'll put it that way.

The conclusion remains that Miller tolerated an extensive practice either of working on energized circuits or of merely controlling energized circuits at the light switch. For these and for the reasons stated in the underlying decision, Miller's work rule was not sufficiently communicated or enforced. After reconsideration, Miller's employee misconduct defense is rejected for items 1 and 2.

/s/

NANCY J. SPIES

Judge

Date: July 27, 2001