

Secretary of Labor,

Complainant,

v.

C. F. McDonald Electric, Inc.,

Respondent,

and

I.B.E.W., Local Union 716,

Authorized Employee Representative.

OSHRC Docket No. 02-2234

Appearances:

Jennine R. Lunceford, Esq., Mary L. Cobb, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas
For Complainant

Neil Martin, Esq., Faye L. Rodman, Esq., Gardere, Wynne and Sewell, Houston, Texas
For Respondent

Mr. Bob Allison, IBEW Local Union 716, Houston, Texas,
For the Authorized Employee Representative

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

C. F. McDonald Electric, Inc. (McDonald), contests a citation issued by the Secretary on November 27, 2002, alleging McDonald committed serious violations of seven standards of the Occupational Safety Act of 1970 (Act). The citation resulted from an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Ronnie Benavides following a fatality at one of McDonald's worksites on August 29, 2002.

Item 1a of the citation alleges that McDonald violated § 1926.20(b)(2) by failing to provide frequent and regular inspections of the worksite by a competent person.

Item 1b alleges a violation of § 1926.21(b)(2) by failing to instruct each employee in the recognition and avoidance of unsafe hazards.

Item 2a alleges a violation of § 1926.28(a) for failing to require the wearing of appropriate personal protective equipment (PPE).

Item 2b alleges a violation of § 1926.95(a) for failing to ensure the provision, use, and

maintenance of appropriate PPE.

Item 2c alleges a violation of § 1926.102(a)(1) for failing to provide eye and face protections equipment when operations presented potential eye and face injury.

Item 3 alleges a violation of § 1926.416(a)(1) for allowing unprotected employees to work in such proximity to any part of an electric power circuit that the employees could contact the electric power circuit in the course of work.

Item 4 alleges a violation of § 1926.417(a) for failing to tag controls that are to be activated during the course of work on energized or deenergized equipments or circuits.

A hearing was held in this matter on June 10 and 11, 2003, in Houston, Texas. The Secretary and McDonald have filed post-hearing briefs. McDonald argues that the Secretary has failed to prove that McDonald violated the cited standards. Furthermore, McDonald asserts the affirmative defense that any violations the Secretary did establish resulted from unpreventable employee misconduct.

For the reasons set out below, items 1a and 1b; items 2a, 2b, and 2c; item 3, and item 4 are vacated and no penalties are assessed.

Background

McDonald has been in business as an electrical contractor since 1956. The company has been on NASA's approved list of electrical contractors for over 25 years. At the time of the OSHA inspection, McDonald had 11 employees working projects at NASA. NASA awarded McDonald the contract to renovate the electrical work for Building 37 at NASA's Johnson Space Center in Houston, Texas. McDonald began work on this project in May 2002 (Tr. 404, 552, 608).

Harry Keller is the vice-president and chief estimator for McDonald. As new projects would arise at the NASA facility, Keller would evaluate the requirements of the particular job by reviewing drawings, attending pre-bid meetings, doing preliminary walkthroughs of the sites, and developing a safety and health plan to be submitted as part of a bid proposal (Tr. 113-115).

After NASA awarded McDonald the Building 37 project, Keller appointed journeyman electrician Steve Lovelace as project foreman (Tr. 28, 112-113). Keller and Lovelace conducted a preliminary walkthrough of the project site in May 2002 to assess potential hazards (Tr. 29). Lovelace conducted a second assessment when the company began work in July 2002 (Tr. 30).

One phase of the project required the relocation of two generators at Building 37 to a new location across the parking lot. McDonald hired a subcontractor, C. L. Vick, to excavate a trench through the lot, in which McDonald employees laid new conduit and electrical lines to the new locations of the generators.

McDonald hired a crane company, McCray Crane, to transport the generators from their current locations to the new locations (Tr. 32-35).

From July to August, much of the excavation work had been done, and on August 29, 2002, McDonald began to physically relocate the generators. To move the generators, McDonald employees had to disconnect the generators from the line that connected them to two separate junction boxes (J-boxes), move them by crane 25 to 30 feet, and reconnect them to the J-boxes with the newly-laid wires (Tr. 53-54, 453). The J-boxes contained power lines that connected several different circuits. These circuits were connected to several different power sources, including to Houston Utility Power inside the building, to the generators themselves, to battery chargers, to battery charger heaters, and to crank case heaters (Tr. 43-44, 49, 64, 84).

The morning of August 29, Lovelace held his daily meeting with his 5-man crew (journeyman electricians Horace Blackmon and David Ferri, and apprentices Ryan Henderson, Matthew Wood, and Alfredo Layton). Lovelace discussed the work to be completed and assigned specific tasks (Tr. 38-39, 52, 73).

Lovelace instructed Blackmon and his apprentice Henderson to go to another NASA worksite (Building 220) to finish the completion of a fire alarm installation. They were to return to Building 37 after they finished to help with the generator relocation. The other members of the crew were told to begin work on the relocation (Tr. 73-74).

At approximately 7:30 a.m. Lovelace tested the circuits at both J-boxes with a voltage meter known as a "Wiggie" (Tr. 53). The Wiggie measured zero voltage. Lovelace told the crew to begin disconnecting the generators (Tr. 49-50). After Ferri, Wood, and Lathan finished disconnecting the generators from their junction boxes, the crane operator moved the generators to the new location with the crane. Ferri and Wood then reconnected the smaller generator to its J-box and began assisting with the work in the trench (Tr. 35, 70, 332).

Blackmon and Henderson returned from their work at Building 220 shortly before noon (Tr. 165). At this time Ferri and Wood were reconnecting the smaller generator to the J-box (Tr. 32, 166, 378-379). Lovelace informed Blackmon and Henderson that he had already tested the circuits and found no voltage (Tr. 105, 170). Lovelace instructed Blackmon and Henderson to reconnect the larger generator to the J-box (Tr. 73, 166). Blackmon terminated the wires at the J-box and Henderson began terminating wires at the generator (Tr. 168). At approximately 1:10 p.m., Lovelace motioned with hand signals to Blackmon that it was time for him and Henderson to take their lunch break. Blackmon signaled back that he wanted to

continue working (Tr. 407).

While working at the generator, Henderson had to reach over the plate and place his hand into the generator so that he could see the wires. When he was placing the wires on the terminal strip inside the generator, Henderson received an electrical shock which caused him to slam his nose into the plate (Tr. 169). Blackmon was standing next to Henderson when this happened (Tr. 172). Blackmon and Henderson walked to the J-box and Blackmon tested the circuits at the J-box (Tr. 174). Blackmon detected voltage and disconnected two wires at the J-box (Tr. 183, 379). Blackmon instructed Henderson to go to the bathroom to tend to his bleeding nose (Tr. 174, 379).

After leaving the bathroom, Henderson went to sit in the company van to compose himself. Blackmon called to him to ask if he was okay. Blackmon continued walking to the J-box. A minute later Henderson heard Blackmon yell. Henderson rushed to the J-box, where Blackmon was leaning with his left arm on top of the J-box cover, obviously in distress (Tr. 175-176). Henderson tried to push Blackmon by his waist away from the J-box, but received an electrical shock. Henderson then grabbed Blackmon by the ankle and pulled him away from the J-box (Tr. 185-186). Paramedics arrived and took Blackmon to the hospital, where he died 2 days later (Tr. 555).

McDonald's electrical expert, Dr. Edsil Hamilton, PhD., subsequently traced the energized circuit. He speculated that the circuit to the battery charger heater was energized (Tr. 519). How it became energized is unknown (Tr. 520).

The Citation

The Secretary has the burden of proving the alleged violations by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Compliance officer Benavides did not appear as a witness at the hearing due to a serious illness in his family. While the Secretary filed portions of Benavides's pre-hearing deposition after the hearing was held in this case, the compliance officer's absence at the hearing prevented the Secretary from presenting her strongest case. Area Director Raymond Skinner testified regarding his approval of the issuance of the citation, but without Benavides's eyewitness testimony regarding the alleged violations, elements of the Secretary's case for each item were not established by a preponderance of the evidence.

Furthermore, the descriptions of the violative conditions contained within the citation are not well-drafted. Under items 1a and 3, the descriptions of the alleged violative conditions include conditions not prohibited by the cited standards. Item 4 cites a substandard that does not apply to the cited condition; it is the following substandard that applies. The Secretary's inexactitude was fully exploited by McDonald at the hearing and in its post-hearing brief. McDonald's actions on August 29, 2002, may have been in noncompliance with one or more of OSHA's standards, but the Secretary has not been able to establish the specific violations cited in this case.

Item 1a: Alleged Serious Violation of § 1926.20(b)(2)

The Secretary alleges that McDonald committed a serious violation of § 1926.20(b)(2), which provides:

Such [safety] programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Section 1926.32(f) defines "competent person" as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

The citation alleges that McDonald's employees "were working on energized equipment while terminating conductors at a junction box without a competent person present." It is noted that, despite the language used by the Secretary in item 1a of the citation, the cited standard does not require that a competent person be present while employees are working, only that the competent person make frequent and regular inspections of the worksite and equipment.

Lovelace was McDonald's designated competent person at the Building 37 site (Tr. 277). Lovelace is a licensed electrician who was trained in the recognition of hazards during his apprenticeship (Tr. 330). McDonald trained its foreman in recognition of hazards at the NASA worksites. Lovelace instructed his crew on assessing hazards. He had the authority to shut down procedures if hazardous or dangerous conditions arose (Tr. 411-413). The Secretary does not dispute Lovelace's qualifications as a competent person.

Section 1926.20(b)(2) requires that the competent person conduct frequent and regular inspections of the site, but it does not set a specific schedule for the inspections. Inspections do not have to be documented and the competent person is not required to maintain a continuous presence on the site. Lovelace conducted a full hazard assessment on a weekly basis, and walked the jobsite daily looking for potential hazards and unsafe conditions (Tr. 272, 276-277, 412).

The Secretary contends that Lovelace did not conduct an adequate inspection on the day of Blackmon's fatality and that Lovelace was not present when Blackmon and Henderson were reconnecting the generator. Section 1926.20(b)(2) does not impose either of these requirements. In his deposition, Benavides states that he recommended the citation for violating § 1926.20(b)(2) because he believed McDonald "didn't inspect the job site because they didn't use lockout/tagout and they didn't have the proper PPE" (Benavides Deposition, p. 8). The Secretary is deducing from McDonald's other alleged safety violations that McDonald did not make frequent and regular inspections, rather than presenting evidence that no such inspections took place.

The Secretary has failed to establish a violation of § 1926.20(b)(2). Item 1a is vacated.

Item 1b: Alleged Serious Violation of § 1926.21(b)(2)

Section 1926.21(b)(2) provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Again, the Secretary relies on the existence of other alleged safety violations to support its conclusion that these violations would not have occurred had McDonald's employees been adequately trained.

"An employer complies with § 1926.21(b)(2) when it instructs its employees about the hazards they may encounter on the job and the regulations applicable to those hazards. *Concrete Construction Co.*, 15 BNA OSHC 1614, 1619 (No. 89-2019, 1992). McDonald's electricians are members of International Brotherhood of Electrical Workers (IBEW) Local 716, whose apprenticeship program is conducted by the National Joint Apprenticeship Training Committee (Tr. 25). McDonald develops a specific Hazard Communication Plan for each project site at NASA (Tr. 574, 597). McDonald has a written safety program, which requires regular safety meetings. Lovelace conducted weekly safety meetings on the NASA jobsite. During these meetings, Lovelace instructed the employees in the recognition of hazards on the jobsite (Tr. 325, 382, 416-420, 577-578). On June 10, 2002, Lovelace held a safety meeting (which Blackmon and Henderson attended) where he addressed the use of PPE and what to do in the event of an unsafe situation (Exh. R-3; Tr. 418-419).

McDonald has demonstrated that it instructed its employees specifically in the recognition and avoidance of hazards they were likely to face on the project. The Secretary has failed to establish a violation of § 1926.21(b)(2). Item 1b is vacated.

**Items 2a, 2b, and 2c:
Alleged Serious Violations of §§1926.28(a), 95(a), and 102(a)(1)**

Items 2a, 2b, and 2c all cite standards requiring the use of PPE. The cited standards provide:

§ 1926.28(a): The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to employees.

§ 1926.95(a): Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

§ 1926.102(a)(1): Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

It is undisputed that neither Blackmon nor Henderson, nor any of the other members of Lovelace's crew were wearing any form of PPE, including lineman's sleeves (item 2a), low voltage gloves (item 2b), or eye and face shields (item 2c).

McDonald furnishes PPE for its employees working on circuits that could be reenergized, including lineman's sleeves, low voltage gloves, and face and eye equipment (Tr. 136-137). The PPE was available in McDonald's gang box on the site and in McDonald's truck parked at the site (Tr. 326-327, 385).

McDonald argues that Blackmon and Henderson were working on a deenergized circuit, and thus were not required to wear PPE. The Secretary presented no evidence to show that PPE was "necessary by reasons of hazards of processes or environment," or "where there was exposure to hazardous conditions," or that "machines or operations present potential eye or face injury."

McDonald's witness, Dr. Hamilton, is a professional electrical engineer who owns an engineering company (Exh. R-20; Tr. 464-465). Dr. Hamilton testified as an expert on electrical circuitry and the causes of electrical shock (Tr. 496).

Dr. Hamilton testified without contradiction that Lovelace's assumption that the circuits were deenergized because of the "no voltage" reading on the Wiggie was in line with the custom of the electrical industry (Tr. 509). McDonald required its employees to wear PPE when working on energized circuits. Apprentices such as Henderson were not allowed to work on any energized circuits, in any event.

At the time of Blackmon's fatality, McDonald had a Hot Work Permit policy in place. When a McDonald employee on a NASA project planned to work on a circuit or job "hot," the foreman was required to complete a Hot Work Permit form from NASA at least 7 days prior to the work and submit it to Gilbane, NASA's safety contractor, for approval. Gilbane would submit the form to NASA. If approved, NASA would issue a Hot Work Permit Number to McDonald, who would then proceed with the work (Tr. 35-36, 124-125, 272-273).

Up until the time of Henderson's initial shock, McDonald had no actual or constructive knowledge that PPE was required for its employees. The Hot Work Permit policy notifies McDonald prior to the work being done that its employees intend to work on a hot circuit. If electrical work on energized circuits is needed, McDonald requires its employees to use PPE (Tr. 136-137).

Items 2a, 2b, and 2c are vacated.

Item 3: Alleged Serious Violation of § 1926.416(a)(1)

The Secretary alleges a serious violation of § 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 the electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

The citation alleges that McDonald violated this standard "where employees were working on energized equipment while terminating conductors at a junction box without the use of Lockout/Tagout." As with item 1a, the Secretary is importing a requirement into the standard that its plain language does not mandate. Section 1926.416 is found in Subpart K (Electrical) of the construction standards. It is captioned "General Requirements." The following standard, § 1926.417, is captioned "Lockout and tagout of circuits." The cited standard says nothing about locking or tagging out the circuits, as claimed by the Secretary in the citation. At the hearing, the Secretary argued that McDonald must have violated this standard because Henderson and Blackmon received electrical shocks, indicating that at least one energized circuit was connected to the generator and J-box.

NASA failed to deliver the schematic drawings for Building 37 to McDonald at the time of the project (Tr. 609-610). As late as the hearing date, NASA had still not provided schematics for Building 37 to McDonald's expert (Tr. 488-489).¹ Lovelace was working with limited information regarding the

¹ Dr. Hamilton testified that he spent several hours tracing the systems to find the energized circuit (Tr. 535): "I traced out these systems. NASA was not cooperative in terms of providing what we've asked for, at least not to date."

wiring of Building 37. However, there was no evidence that the NASA jobsite in general, or Building 37 in particular, had known problems with unusual or unexpected wiring connections. McDonald thought it had fully disconnected the equipment. Because Lovelace had tested the generators and J-box and had found no voltage, McDonald contends it was reasonable to assume that the circuits were already deenergized and that the actions required by § 1926.416(a)(1) were already complied with. McDonald argues that once the Wiggie measured zero voltage, there was nothing to deenergize or insulate.

Support for McDonald's position is found in Subpart V of the construction standards, regulating "Power Transmission and Distribution." Section 1926.950(a) states that subpart V applies to the construction of electric transmission and distribution lines and equipment, with "construction" including "the alteration, conversion, and improvement of existing electric transmission and distribution lines and equipment."

Section 1926.950(b)(2) states (emphasis added):

Electric equipment and lines shall be considered energized *until determined to be deenergized by tests* or other appropriate methods or means.

Having disconnected the known circuits and tested the generators and J-box, it was reasonable for Lovelace to conclude that a zero voltage reading meant the circuits were deenergized. Following Henderson's initial shock, it became evident that one or more circuits were, in fact, energized. However, McDonald had no actual knowledge that this energization had occurred. Henderson acknowledged at the hearing that he should have notified Lovelace as soon as he received the first electrical shock, but he testified that he was not thinking clearly (Tr. 399): "I was trying to get my senses back." Blackmon failed to notify Lovelace of the energization, despite McDonald's prohibition on working hot without a Hot Work Permit and despite McDonald's work rule requiring employees to notify their foreman in the event an unsafe condition arises. Henderson and Blackmon were not supervisory personnel and their knowledge is not imputed to McDonald.

The Secretary has failed to prove that McDonald's failure to lockout or tagout the circuits that Blackmon and Henderson were working on violated § 1926.416(a)(1), or that McDonald knowingly permitted its employees to work in proximity to an energized circuit.

Item 3 is vacated.

Item 4: Alleged Serious Violation of § 1926.417(a)

The Secretary alleges that McDonald committed a serious violation of § 1926.417(a), which provides:

Controls that are to be deactivated during the course of work on energized or deenergized equipment or circuits shall be tagged.

The citation alleges that McDonald violated the standard “where employees were working on energized equipment while terminating conductors at a junction box without the use of Lockout/Tagout.” McDonald argues that the cited standard does not apply to the cited conditions.

Dr. Hamilton testified that “a control circuit carries a signal that causes some other device to—some other device that actually controls a third device to do something to make that third device perform a function” (Tr. 506). Dr. Hamilton testified that “there were no control circuits that would have been involved in that particular operation at all” that Blackmon and Henderson were performing (Tr. 507). In his deposition, Benavides conceded that a circuit breaker, such as the ones on which Blackmon and Henderson were working, is not the same as a control circuit (Benavides Deposition, p. 30).

Section 1926.417(b) would seem to be the standard applicable to the cited conditions:

Equipment or circuits that are deenergized shall be rendered inoperative and shall have tags attached at all points where such equipment or circuits can be energized.

The Secretary did not cite this standard. As the record stands, the cited standard is inapplicable to the cited conditions.

The Secretary has failed to establish a violation of § 1926.417(a). Item 4 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of the citation, alleging a violation of § 1926.20(b)(2), is vacated and no penalty is assessed;
2. Item 1b of the citation, alleging a violation of § 1926.21(b)(2), is vacated and no penalty is assessed;
3. Item 2a of the citation, alleging a violation of § 1926.28(a), is vacated and no penalty is assessed;
4. Item 2b of the citation, alleging a violation of § 1926.95(a), is vacated and no penalty is assessed;
5. Item 2c of the citation, alleging a violation of § 1926.102(a)(1), is vacated and no penalty

is assessed;

6. Item 3 of the citation, alleging a violation of § 1926.416(a)(1), is vacated and no penalty is assessed; and
7. Item 4 of the citation, alleging a violation of § 1926.417(a), is vacated and no penalty is assessed.

/s/ Nancy J. Spies

NANCY J. SPIES

Judge

Date: November 17, 2003