SECRETARY OF LABOR, Complainant, v. MILLER ELECTRIC COMPANY, INC., Respondent.	OSHRC Docket No. 99-1702

DECISION

Before: ROGERS, Chairman; and EISENBREY, Commissioner.

BY THE COMMISSION:

Miller Electric was installing electric power circuits and light fixtures at a construction project in Lake City, Florida, when Sean Stucker, a journeyman electrician, was electrocuted. Following an inspection by the Occupational Safety and Health Administration, Miller was issued a citation alleging three serious violations of standards addressing electrical power circuits and light fixtures. A Review Commission Administrative Law Judge ("ALJ") subsequently issued a decision affirming two of the violations. In response to Miller's petition for review, the ALJ's decision was directed for review and the case is now before us.

In its petition, Miller argued, in part, that the ALJ misinterpreted certain testimony concerning enforcement of one of its safety rules that the ALJ relied on in rejecting its affirmative defense of unpreventable employee misconduct. The testimony in question came from Matthew Meadows, an apprentice electrician employed by Miller at the time of the fatality. He testified as follows: "I can't remember one instance that [Stucker] might have hooked up something hot, but about any of the 50 or 60 journeymen electricians I've ever worked with . . . sometimes . . . might hook up something hot." The ALJ apparently misconstrued this testimony to find that Meadows saw Stucker working on energized circuits 50 to 60 times. However, Meadows did not say that Stucker worked on energized circuits 50-60 times or that the 50-60 journeymen he had seen working on energized circuits were

Miller employees. Further, Meadows did not testify that Miller had been his only employer during his career. By the time of the hearing Meadows was working for another employer.

In view of the mistaken understanding of the testimony upon which the ALJ relied, we conclude that it would be appropriate at this early stage in the proceedings to remand this case to have the ALJ reconsider the decision. We therefore remand the case to the ALJ for reconsideration.[1]

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: June 8, 2001

[1]At this time we are not addressing any other issues raised in the petition for review.

Secretary of Labor,
Complainant,

v. OSHRC Docket No. **99-1702**

Miller Electric Company,
Respondent.

Appearances:

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U. S. Department of Labor
Office of the Solicitor
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For Complainant

Mr. John Steele
Miller Electric Company
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Miller Electric Co. (Miller) contests the Secretary's citation issued on August 31, 1999. The citation followed the April 15, 1999, inspection by Occupational Safety and Health Administration (OSHA) compliance officer Joseph Roesler of a work-related fatality on April 14, 1999. The Secretary alleges that Miller was in serious violation of § 1926.416(a)(1) when it permitted its employee to work in too close a proximity to an electric power circuit without taking required precautions, of § 1926.416(a)(3) when it failed to ascertain and warn employees of the proximity of an energized electrical power circuit, and of § 1926.417(a) when it failed to properly lock and tag out an electrical circuit. In general, Miller asserts that if it violated the terms of the standards, the violations occurred because of the misconduct of the trained electricians who failed to follow its safety procedures.

A hearing was held in Gainesville, Florida. The parties briefed the issues, and the case is ready for decision. For the reasons set out below, the undersigned finds that the Secretary established violations of the first and second items and has failed to prove the third. Miller did not meet its defense of employee misconduct for item 1.

Background

Miller, an electrical contractor located in Jacksonville, Florida, installed electrical service at a large medical center complex under construction in Lake City, Florida (Tr. 156). By the time of the accident, the physical structure of the building had been completed. On April 13 and 14, 1999, Larry Saye, Miller's foreman, assigned journeyman electricians Sean Stucker and Randy McClendon, and apprentice Matthew Meadows to install incandescent and flourescent light fixtures and switches in the Endo and Cysto Rooms of the hospital (Tr. 45-46, 62-63). When completed, the rooms would have lights running on three circuits: incandescents on a 110-volt circuit, fluorescents on a 277-volt circuit, and an emergency system running on a separate 277-volt circuit (Tr. 92, 154).

On April 14, Stucker was finishing the installation of a flourescent fixture in the Endo Room. The fixture's circuit was energized. Working off a ladder with his head above the ceiling, Stucker tied in the ground and the neutral wires (Tr. 42, 47). As he began to connect the "hot" wire to the light fixture, he physically made contact with the energized circuit and was electrocuted (Tr. 83-84).

Discussion

> 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) employees access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation.

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1741, 1994).

Items 1 and 2: §§ 1926.416(a)(1) and 1926.416(a)(3)

The Secretary asserts that Miller violated § 1926.416(a)(1)[2] (item 1) when Sean Stucker wired a flourescent ceiling fixture while the electrical circuit was energized. The Secretary also asserts that Miller violated § 1926.416(a)(3)[3] (item 2) when it failed to ascertain and warn Stucker

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[2] Section 1926.416(a)(1) 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 de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

[3] Section 1926.416(a)(3) provides:

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by

(continued...)

of possible contact with the energized electrical circuit. It is stipulated that the terms of both standards apply to the conditions cited (Tr. 5-6). Although the standards have different requirements, in this case the main issues in the two allegations, *i.e.*, knowledge and employee misconduct, are closely related. These issues will be discussed together.

Item 1:

Miller stipulates that Stucker was exposed to conditions which violated § 1926.416(a)(1) while he worked in direct proximity to the energized circuit without using personal protective equipment or without guarding or grounding the circuit (Tr. 5).

Item 2:

The standard required Saye to learn of and to warn Stucker that he would be working near a live circuit. Saye gave the crew their work assignments each morning. During the investigation, Larry Saye admitted to Roesler that he had not checked the circuit to determine if it was energized before he directed the employees to work on it that day. Saye explained to Roesler that it was the responsibility of the individual electrician to check the circuit (Tr. 115). However, at the hearing Saye testified that he, in fact, told Stucker to de-energize the circuit on the morning of the accident. Saye's testimony on this point is not credited.

Saye did not tell Roesler that he had given the alleged instruction to Stucker. The point would have been particularly germane, and it is anticipated that a reasonable person would have stated it to OSHA's investigator. Apprentice Meadows, also in the crew, does not describe hearing the admonition. Meadow's understanding of how the journeymen worked was at odds with their being given an instruction of this nature (Tr. 55-56). At the hearing, Saye's initial recitation that he told Stucker to de-energize was hesitant and unsure. Saye's testimony appeared to lack sincerity on several issues, as he modified his answers to reflect the interests of his employer (Tr. 76-78, 81, 84, 86, 90). It is concluded that foreman Saye did not tell Stucker to de-energize the circuits on April 14

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[3](...continued)

> 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.

and that he failed to warn Stucker that he would be working near energized circuits. The terms of § 1926.416(a)(3) were violated.

Knowledge

Remaining for decision is whether Miller knew or should reasonably have known of the violative conditions for items 1 and 2. The Secretary contends that Miller had at least constructive knowledge of both violations.

The Secretary emphasizes that Saye should have drawn inferences from the fact that the lights were on in the Cysto Room. On April 13, 1999, foreman Larry Saye directed the crew (Stucker, McClendon, and apprentice Meadows) to wire the lighting in the Endo and Cysto Rooms to the permanent power. The flourescent lights in both the Endo and Cysto rooms were on the same 277-volt electrical circuit, marked HC-12-9 on the circuit breaker panel. The circuit breaker panel box was located in a locked electrical room about 100 feet away. On April 13 the crew unlocked the electrical room and de-energized and taped down the HC-12-9 circuit. By the end of the workday on April 13, the crew had installed all the receptacles and light fixtures for the Cysto Room and all of the outlets for the Endo Room. Wanting to test the lights in the Cysto Room, Miller's electricians again unlocked the electrical room, removed the tape from the specific circuit, flipped the circuit breaker, and turned on the lights. Because other employees planned to work in the Cysto Room during the night, the flourescent lights were left on (Tr. 63-65).

At 7:00 a.m. on April 14, the crew returned to finish installing the remaining fixtures in the Endo Room, particularly the flourescent fixtures. The lights were still on in the Cysto room (Tr. 68, 111).

Saye was in and out of the Cysto and Endo Rooms the morning of the accident. Saye knew that the Cysto room was lighted, although he testified that he did not pay attention to whether the incandescent or flourescent lights were on. Discerning which lights were on would indicate which circuits were energized. A failure to pay attention is not the same thing as being without knowledge. Saye was familiar with the plans for the electrical lighting and was well aware that the flourescent lights in the two rooms were on the same circuit. He was familiar with the work sequences needed to complete the wiring. Saye also knew that only the foremen, superintendent Higginbotham, and the general contractor had keys to the electrical room. None of the non-management electricians

had a key. It would be normal procedure for Stucker to go though his foreman to get the key to the locked electrical room (Tr. 52, 169-170).[4]

It is more likely that Saye was unconcerned about lights being on because Miller's electricians often worked on energized circuits while using the wall switch to control the electricity. There was a wall switch in the Endo Room for the particular fixture. During the investigation, Saye's focus with Roesler was that Stucker "would have been safe" if he had turned the wall switch off (Tr. 75, 78, 112). Saye was not alone in this belief. As discussed more fully *infra*, many of Miller's electricians followed the practice of controlling electricity with a wall switch.

By the time of the hearing, Saye had changed his mind and stated that turning off the wall switch would have had no effect on the circuit and that Stucker should have de-energized the circuit "like I told him to" (Tr. 78, 84, 112). Miller and the Secretary agree that using the wall switch to control electricity totally fails to comply with § 1926.416(a)(1). Knowing that the lights were on in the Cysto Room and knowing that Miller's electricians often used their discretion when deciding whether to work on energize circuits sufficiently establishes Saye's constructive knowledge of item 1. He had actual knowledge of item 2. Because Miller's employees so often worked with energized circuits, Saye's constructive knowledge is properly imputed to Miller.

This conclusion is not changed because Miller's general superintendent testified that there may have been "a separate feeder" for the emergency flourescent lights. Miller suggests that even if Saye saw that flourescent lights were on in the Cysto Room, he could have believed that they were the emergency flourescent lights (Tr. 153-154). It does not appear that the other electricians, including Saye, even considered the possibility that the emergency lights could have been on. A simple glance upward would have verified for Saye which circuits were energized.

Finally, Miller argues that it could not have known what Stucker was doing because he was partially hidden by the ceiling as he worked. This argument is rejected. For the reasons stated, it was not necessary for Saye to be able to view the work to know that Stucker was working on a live circuit.

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[4] Miller points out that Saye was not the only person Stucker could have asked for a key to the electrical room. Saye was the most accessible person to provide the key to Stucker, however. The fact that Stucker did not request the key from Saye was another indication that Stucker may not have de-energized the circuit.

Working near an energized 277-volt circuit likely would result in serious injury or death, as occurred in this case. Unless Miller establishes a defense, the Secretary proved that Miller violated the standards and that the violations were serious.

Employee Misconduct Defense for Item 1

> In order to negate a violation on the grounds of employee misconduct, the employer must show that: (l) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to its employees; and (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).

Although Miller's journeyman electricians were recruited from the IBEW Local No. 1205, they had longstanding employment relationships with Miller (Tr. 40, 63, 141). Miller contends that it had an oral workrule that required employees to de-energize circuits before working on them or, alternatively, that required the employees to secure a formal "hot work" permit (Tr. 146, 168-169).[5] It contends that the workrule was communicated to employees at various times, including at safety meetings. In order to be considered effective, an employer's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard, *Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349 (No. 89-287, 1993) or "designed to prevent the cited violation" *See Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1056 (No. 86-1087, 1991).[6]

The fact that a workrule remains unwritten may legitimately lead to questions about its specificity in limiting exposure to the hazard. The testifying employees generally knew that Miller had an official "policy" to de-energize circuits before working on them. They were also aware that Miller's "practice" was otherwise. After explaining that industry practice allows electricians to work on electrical equipment with the electricity turned off at the wall switch, rather than de-

[5] It is accepted that some of the electrical work had to be completed while the circuits were energized. This decision refers to the larger percentage of hot work where employees "cut corners" and worked on circuits which could have been de-energized at the circuit panel box (Tr. 143).

[6] Miller made no showing that it had a workrule which required foremen to ascertain whether electricians would work near energized circuits. Both its foremen and superintendent acknowledge that it was the electrician's responsibility to do this. Thus, the employee misconduct defense can apply only to item 1.

energizing it at the breaker panel, journeyman electrician Bernard explained Miller's practice (Tr. 19):

> Well, the Company policy is, you know, ever since I've been there is to whenever you can, you de-energize the circuit. And in this particular case, if the wall switch had been off, it would probably be different circumstances. As far as the breaker, you know, their policy is, you know, that it be de-energized. Now, whether it was executed, that's a different story.

According to Bernard, whatever Miller's policy, its practice was "to work on a circuit with the wall switch off" (Tr. 20). Journeymen electricians viewed the practice as one of the "tricks of the trade" and Bernard and other electricians would work on energized circuits when they "felt comfortable" with doing it that way (Tr. 25).

Miller tolerated the extensive practice of controlling energized circuits at the light switch and otherwise allowing the employees discretion as to whether they would work "hot" circuits. Two incidents around the time of the accident support this conclusion. At separate times within 24 hours of the accident, foreman Charles Worley advised two electricians who were working on live 120-volt circuits not to do the work that way (Tr. 158-160). The workrule was widely violated. Even the apprentice electrician noted that although the journeymen did not allow him to do it, they could work on energized circuits at their option. Apprentice Meadows saw Stucker working "hot" 50 to 60 times but he had never seen him disciplined (Tr. 54, 56). Bernard, who was in Worley's crew, worked on energized circuits which should have been de-energized. He had never known anyone at Miller to be disciplined for a safety infraction (Tr. 16-18, 24). When a workrule is widely disregarded, it cannot be considered sufficiently specific or properly enforced. *Propellex*, 18 BNA OSHC 1677, 1683, No. 96-0265, 1999 ("fact that all of the demilling employees lit or at least utilized the burn barrel in violation of the rule also suggests that the rule was ineffectively enforced"); *Falcon Steel*, 16 BNA OSHC 1179, 1193-94, No. 89-2883, 1993 (7 employees out of about 30 found not wearing safety belts tends to reveal an enforcement problem, not just isolated deviations from an effective safety program).

Penalty

The Commission is the final arbiter of penalties. In arriving at an appropriate penalty, the gravity of the violation is weighed. The gravity of the violations is high. Sean Stucker worked in a tight space while standing on a ladder within inches of a 277-volt circuit. Miller's size, good faith,

and previous history of violation are considered as potentially mitigating factors. Miller had over 500 employees and is not a small employer (Tr. 114). The penalty is reduced because OSHA had not cited Miller for a serious violation within the previous 3 years (Tr. 134-135). A good faith reduction is not warranted because Miller had the widespread practice of permitting employees to independently decide whether to de-energize circuits and because its safety program was so informal. Some reduction is afforded, however, since the two violations are related. A penalty of $5,000 is assessed for item 1, and a penalty of $4,500 is assessed for item 2.

Item 3: § 1926.417(a)

The Secretary asserts that Miller violated § 1926.417(a)[7] when it failed to lock and tag out the energized electrical circuits on April 13, 1999.[8] The allegation is not that the circuit was insufficiently locked and tagged out on the morning of the accident. The violation is based on Roeslar's supposition that the circuit was not properly tagged out before the employees energized the line to test the lights in the Cysto Room on the evening of April 13, 1999. Roeslar reached his conclusion based upon Saye's admission that they used tape on the circuit breaker, which he saw was still by the HC-12-9 circuit on April 15, 1999 (Tr. 121).

On April 13, Miller's crew taped down the circuit in the panel box corresponding to the 277-volt circuit in the Cysto/Endo Rooms. When locking out a circuit on such a "residential type" panel box, Miller's journeyman electrician Vernon Bernard explained Miller's procedure (Tr. 17):

> If there were no break-away locks to break it out . . ., usually we would just tape them off; put a tag on it, you know explaining why it was taped off or tagged out. . . . [T]hey would put your name on it and say ...work being done on circuit, you know, and stated what company you worked for and who placed it.

Although Miller's electricians had keys to the panel box cover, only its management had a key to the locked electrical room where the panel box was located. The Secretary has failed to show why use of the electrical tape was insufficient to secure the circuit when access to the panel box was effectively controlled under lock and key. Miller must still "tag" the taped circuit. On April 15,

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[7] Section § 1926.417(a) provides:

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

[8] At the hearing, the Secretary's motion to amend the citation to reflect that the violation allegedly occurred on April 13, 1999 was granted.

Roesler did not notice a tag with the information the employees stated was put on the front of the panel box on April 13. The photograph shows only the opened panel box (Exh. C-9). However, both the police and the general contractor had investigated the area after the accident and may have dislodged the sign. While the employees forthrightly agreed that they used their discretion in deciding how and whether to de-energize circuits, they were as convincing that they wrote a tag giving the required information for the circuits actually deenergized. If Miller's method of tagging out circuits was insufficient, the Secretary failed to show it.

For the above reasons, item 3 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), Fed. R. Civ.P.

ORDER

Based on the foregoing decision, it is ORDERED:

Item	Standard	Disposition	Penalty
1	§ 1926.416(a)(1)	Affirmed	$5,000.00
2	§ 1926.416(a)(3)	Affirmed	$4,500.00
3	§ 1926.417(a)	Vacated	---

/s/
NANCY J. SPIES
Judge

Date: December 21, 2000