

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
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Complainant,	:	OSHRC
	:	Docket No. 96-0214
	:	
v.	:	
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<b>MASS. ELECTRIC CONSTRUCTION CO.</b>	:	
	:	
Respondent.	:	

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Appearances:

Karin Froom, Esq. Office of the Solicitor U.S. Department of Labor For Complainant	Kieran B. Meagher, Esq. City, Hayes, Meagher & Disette, P.C. Boston, Massachusetts For Respondent
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Before Administrative Law Judge Richard DeBenedetto

**DECISION AND ORDER**

Mass. Electric Construction Co. (Mass. Electric) was cited on January 18, 1996, for serious violation of the electrical safety standard at 29 C.F.R. § 1926.416(a)(1) which reads as follows:

(a) *Protection of employees*—(1) 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.

Mass. Electric, a multistate electrical contractor, was engaged to install a neon sign on a parking garage and related electrical work, including the installation of a new circuit

breaker in a panelboard which is the focal point of this case. It is undisputed that two of Mass. Electric's employees, one a master electrician and job foreman, the other a journeyman electrician, worked on the electric power circuit while it was energized and neither employee was protected from electric shock by proper insulation or other means.

The OSHA inspection was triggered by an incident which occurred on November 22, 1995, which caused the job foreman to suffer burns from an electric flash while working on the energized circuit. Mass. Electric challenges the citation on the grounds of unpreventable employee misconduct, claiming that "McCormick [the job foreman], by his own admission, acted against established company safety policies known by him and the express instructions of a supervisor." Mass. Electric brief at 2.

The panelboard in question was a 480 volt main distribution panel which served the entire parking garage. Mass. Electric's foreman, Michael McCormick, testified that approximately one week before the November 22 accident, he removed the cover to look at the configuration of the panelboard and determine exactly where the new circuit was to be placed. He saw that the "fingers" of the busbars were wrapped with electrical tape, a condition not previously encountered by Mass. Electric's employees.

Because the new circuit could not be added to the panelboard unless the tape was removed from the busbars, foreman McCormick discussed the matter with his supervisor, Steven Smith, who happened to visit the job site when the taped busbars were discovered. Both McCormick and Smith assumed the panelboard was equipped with a main switch which would shut off the electric power serving the entire garage. They agreed that Smith would contact the garage manager to schedule a "shutdown." On November 21, the day before the accident, Steven Smith telephoned McCormick to inform him that a power shutdown was arranged for the following morning. Before leaving the garage at the end of the day, McCormick took another look at the panelboard to review what needed to be done the following morning when the electric power was to be shut down. It was then that he discovered that there was no main switch to deenergize the electric power. He immediately telephoned Steven Smith to inform him of the problem (Tr. 239-50).

The foregoing narrative essentially reflects the way both parties view the events that took place up to the time of the telephone conversation between McCormick and Smith on the eve of the accident. Conflicting accounts of that conversation were presented by the witnesses.

The compliance officer testified that when McCormick related his phone conversation with Steven Smith during an interview on December 1, 1995, he stated that the absence of a main switch in the garage's electrical system was a surprise to both men. They discussed their options, including the need to have the electrical utility company deenergize the power (Tr. 48-52):

Q: Did you ask Mr. McCormick if he was told anything by Mr. Smith?

A: Yes. He told me that the way it was left was that Steven Smith told him to go in the next morning, open up the panel, take a look at it and if he felt comfortable installing the breakers hot, then to go ahead and install them. If not, then to call back to the office.

Q: And Mr. McCormick told you — did he specifically say he felt comfortable?

A: Oh, I'm sorry. No, that was somebody else said that.

Mr. McCormick told me that to open — that Steven Smith told him to open up the panel and take a look and see what they could do about installing this breaker hot, without an extended shutdown.

Q: Did Mr. McCormick indicate to you whether he felt that he had any discretion in what to do the next day?

A: Yeah. He said, after the conversation, it was basically left — it was left to his discretion on whether to go ahead and install the breaker hot. If not, he was to call Steven Smith back and Mr. Smith would contact the power company and shut the power down.

Q: Did Mr. McCormick and Mr. Steven Smith — I'm sorry if you already said this, because I may have missed it, did they have any discussion about personal protective equipment?

A: I don't believe they did.

Q: Do you remember if Mr. McCormick said anything to you at that time about it?

A: I believe he said that Steven Smith told him if he needed anything, to give him a call.

The compliance officer went on to testify what McCormick said concerning his use of materials at hand to reduce exposure to the electrical hazard. As Mass. Electric acknowledges: “He attempted to insulate his tools with tape, and wrapped cardboard around the fingers of the bus for insulation. TR, 261. He did not use insulated gloves, properly insulated tools, a face shield, or a rubber mat. TR, 261.” Mass. Electric's brief at 5.

The compliance officer's interview with McCormick on December 1, 1995, regarding the accident was tape recorded (Exh. C-5). The compliance officer also obtained a signed written statement from McCormick during that same interview (Exh. C-8).

Appearing as a witness for Mass. Electric, Michael McCormick gave a different version of his conversation with Steven Smith. Citing the hearing transcript, Mass. Electric provides us with a capsule of McCormick's testimony — testimony which forms the basis of the employee misconduct defense:

Smith instructed McCormick to inspect the circuit panel the following morning. TR, 253. Smith told McCormick that, after McCormick looked at the panel, if he determined he would be comfortable working on the panel while it was energized, he was to call Smith and tell him what protective equipment he would need. TR, 255. If he was not comfortable working on the energized panel, he was to call Smith and they would make arrangements to shut off the power for the building at the source. TR, 255. Either way, McCormick was instructed to call Smith before taking any action. Either way, McCormick was not to work on an energized panel without protective equipment. TR, 255. McCormick understood this instruction. TR, 254-55.

Mass. Electric's brief at 4-5.<sup>1</sup>

Steven Smith, called by Mass. Electric to testify, corroborated McCormick's testimony (Tr. 307-08):

A: Mike started off the conversation with, you know our planned shutdown for tomorrow morning?

And I said, yes.

He says, are you aware there is no main breaker?

And I say, no, I'm not. I says, what are you talking about?

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<sup>1</sup> It is noteworthy that Mass. Electric's counsel stated during the hearing that he represented Mass. Electric's employees as well as the company itself (Tr. 278).

He says, there is no main breaker. He asked me, what do you want to do?

I said, Mike, I says, I wasn't aware there wasn't a main breaker. I don't know how we both missed that. I said, you're going to have to look at that tomorrow morning and let me know what you want to do. If you can get in there and work on that safely, call me back and [tell me] what you want for safety equipment to get in there.

Q: What did he say?

A: He says, okay. I'll get back to you tomorrow morning.

Q: In any form of words, Mr. Smith, did you tell Mr. McCormick or authorize Mr. McCormick to proceed to work on the panel the next day without getting back to you?

A: Absolutely not.

Mass. Electric's employee misconduct defense is seriously undermined by several factors. To establish the defense of unpreventable employee misconduct, the employer must show that it had: "established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated." *Pride Oil Well Svc.*, 15 BNA OSHC at 1815, 1991-93 CCD OSHD at p. 40,585.

First, McCormick's testimony is starkly at odds with the prior statements made at the time he was interviewed by the compliance officer. The tape-recorded interview contains the following relevant exchange (Exh. C-5):

Q: ...so you told Steven Smith about the problem that there was no main switch and then what happened after that?

A: That's correct. Well, we discussed, you know, what our options would be...

\* \* \* \*

Q: Ok...So you talked...you didn't know what kind of notice the utility company would need and how long the power would be down...

A: So basically what we agreed upon was that the next morning that I would take a look at the panel, to see what could be done, as far as inside the panel. Typically, mounting a breaker in a hot panel is a very common thing that we do. I've done it many times, so that you don't interrupt the power on a building.

\* \* \* \*

Q: So when you had made this agreement the afternoon before, you said you would look at...you know, take the covers off and look and see, and then...was the agreement that you would call Steve and tell him what you saw? Or was it just that you would look and if you thought...?

A: Yeah, I mean, basically, you know, I would look at it and see what my opinion was, at that point, what he...you know, what I thought I could do with it.

Q: Ok. Did he say that, to call me and let me know before you do anything, or was it basically left up to your judgement?

A: I think it was left up to my judgement.

Q: Ok. So after you popped the covers off, what did you do then?

A: Well, I surveyed the situation, and basically, I knew that the tape was the only thing that was stopping us from installing the breaker. At this point I decided that I would see if I could get the tape off, and see what kind of job that would be.

Q: Ok. So you decided to see if you could get the tape off?

A: That's correct.

McCormick gave a matching account in his signed written statement (Exh. C-8):

When we agreed that I would look at the panel that morning, it was left up to my judgement, I believe, on what I would do. I knew that the tape was the only thing that was stopping us from installing the breaker. I decided to see if I could get the tape off...

Second, in contrast to his testimony, Steven Smith's statements to the compliance officer during the tape-recorded interview were somewhat less assertive and clear as to preconditions that McCormick had to fulfill before proceeding with his work on the energized circuit (Exh. C-6):

Q: So...tell me about the conversation you had with Mike the night before.

A: Conversation went...Do you realize there's no main breaker; I said, no I didn't realize that; he said "What do you wanna..." he asked me what you wanna do? I says, "Well Mike, I can either call Larry..." I says take a look at it; I said if you're comfortable with installing that hot, I says you do...use your own discretion, and let me know what you're gonna do. I says if you're not comfortable, I said we have to shut down and call Narragansett. ...I said you call me and tell me what you need, you know, what

ever you want for equipment, safety gear, whatever, let me know and I'll get it there. ...And that was it.

Q: And he never called back?

A: Never called back.

\* \* \* \*

Q: Ok...so you told him basically that if he felt comfortable to use your [sic] own judgement?

\* \* \* \*

A: I says if you're comfortable enough...you know, I said, we install stuff hot before.

Q: Ok. So the understanding...

A: ...it's not out of the ordinary. You tell me if you're comfortable with it, I said you do it. I said if you're not comfortable with it get back to me and let me know. Let me know what you need to do it, if you're comfortable, you wanna do it like that...

Q: So if he felt comfortable doing it like that and he wasn't...didn't need to get back to you he could just go...

A: Use your own judgment.

The third factor undermining Mass. Electric's defense is Steven Smith's laissez-faire attitude concerning the equipment McCormick would need in order to install the circuit while it was energized. The standard calls for "effective" guarding by insulation or other means. It is undisputed that McCormick's efforts to insulate his tools and guard the busbars were not appropriate as effective protection against the electrical hazard that existed.

William Coffin, OSHA's assistant area director and licensed journeyman electrician, testified that having chosen to work on an energized circuit, McCormick and his co-worker (Dennis Smith) were required to use protective equipment consisting of insulation blanket [or rubber matting], face shield, insulated gloves, and insulated tools (Tr. 132). Coffin's testimony was not disputed. In fact, Mass. Electric's safety officer, John Schlittler, testified that Mass. Electric's safety policy for working on a live circuit requires employees to use the "proper personal protective equipment" specified by William Coffin (Tr. 319-20, 327).

Steven Smith acknowledged that he had observed the condition of the taped busbars shortly before the accident (Tr. 304). He knew or should have known precisely what protective

equipment McCormick and his co-worker were required to use if they were to remove the tape from the busbars and install the new circuit while the electric power was energized.

An employer does not have recourse to the defense of unpreventable employee misconduct where, as in the instant case, it has a safety program but does not enforce it by insisting upon safe methods and practices at all times. This is particularly true in the business of electrical construction where the stakes are high when events go wrong. As McCormick's first-line supervisor, Steven Smith had the responsibility to make a reasonable effort in assuring that McCormick did not work on the energized circuit before all the required protective equipment was delivered to the site and that such equipment was in fact used. When he addressed the safety issue during his telephone conversation with McCormick on the eve of the accident, Smith clearly did not measure up to that responsibility by merely stating: "Let me know what [safety equipment] you need to do it."<sup>2</sup>

Mass Electric's contention that it had no actual or constructive knowledge of McCormick's violation because it was contrary to both the established work rules and the express instructions of Steven Smith, has no merit. Constructive knowledge has been established because supervisor Steven Smith could have prevented the violation with the exercise of reasonable diligence. Reasonable diligence includes an employer's obligation to anticipate hazards to which employees may be exposed and to take measures to prevent the occurrence. *Pride Oil, supra*, 15 BNA OSHC at 1814.<sup>3</sup>

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<sup>2</sup> With respect to the issue of effective enforcement of the safety rules it should further be observed that while we may agree with Mass. Electric for not taking disciplinary action against McCormick because of the injuries that he sustained, Mass. Electric failed to present any evidence to indicate whether McCormick's co-worker, Dennis Smith, was disciplined for not following the safety rules (Tr. 372).

<sup>3</sup> Mass Electric also alleges that McCormick's violation was an isolated act; however, McCormick's statements made to the compliance officer concerning the use of protective equipment suggest otherwise (Tr. 51).

It is difficult to discern the relevancy of Mass. Electric's argument regarding the "unique" situation of having to remove tape from the panelboard's busbars. The argument is best summarized by Mass. Electric's responses to certain interrogations which Secretary's counsel cited during the hearing in an effort to clarify the issue of Mass. Electric's safety policy when working on live circuits (Tr. 321-22):

MS. FROMM: We have to go back an interrogatory to get the frame for it, so I'm going to read interrogatory No.6. Please describe with particularity each and every fact upon which you base the third affirmative defense that the accident and condition arose out of employee error tantamount to misconduct.

Response. When Mr. McCormick discovered that the fingers of the bus were taped, a condition unique in the experience of Mass. Electric and all its personnel, he should have contacted John Badessa for instructions on how to proceed. Those instructions would have been to deenergize the circuit. Mr. McCormick should not have attempted to scrape the tape with his knife. And a statement to OSHA admits that he erred in working on the energized circuit under the conditions he observed.

Interrogatory No. 7. With respect to Interrogatory No. 6, describe with particularity, any company policy or rule which the employee allegedly violated.

And the response. Because the circumstance encountered by Mr. McCormick is to Mass. Electric's knowledge unprecedented, there is no company policy or rule covering the precise situation. However, it is a fundamental tenant of Mass. Electric's safety policy communicated to employees that when in doubt, stop. Employees are constantly informed not to proceed where they do not know the necessary details of an unusual circumstance or uncertain as to the proper way to proceed.

This line of defense--with the omission of Jan Badessa as the person to be contacted and with only slight variations here and there-- was vigorously pursued by Mass. Electric during the hearing, and in its posthearing brief at 3-4. One cannot help but remark upon the obvious disconnectedness in the logice of Mass. Electric's defensive position. The response to the Secretary's interrogatory No. 6 identifies John Badessa as the authoritative person McCormick should have consulted before any work was done on the circuit. The circumstances of Badessa having such a key role in this case does not fit the context of the hearing record. trouble with this argument is that we would have to ignore the obvious and fundamental facts of the case: that Mass. Electric's employees were assigned to work on an electric power circuit; and that both the OSHA

standard and Mass. Electric's own safety policy prohibited such work unless the circuit was deenergized or effectively guarded. Whether that work involved removing tape from busbars or some other specific type of work does not alter the fundamental equation. The notion that McCormick or any other electrician directly involved in the project was in a state of uncertainty after that final phone conversation and required further instructions in what needed to be done in order to safely install the new circuit while the electrical power remained energized, has no evidentiary foundation and is sharply at odds with Mass. Electric's own arguments regarding the quality of its training program and the reliability of McCormick's skills as an experienced master electrician.

Mass. Electric has renewed its motion to strike the compliance officer's rebuttal testimony concerning statements alleged to have been made by Dennis Smith, McCormick's co-worker. Mass. Electric's brief at 19-20. Inasmuch as the rebuttal testimony was not material to the disposition of this case, Mass. Electric's motion is denied for being moot. Other matters which Mass. Electric has argued in its brief have not been overlooked, but are without substance or merit and require no further comment.

The hazardous conditions for which Mass. Electric was cited posed a substantial threat of death or serious physical harm to its employees and therefore, the characterization of the violation as serious was justified. Applying the penalty criteria of 29 U.S.C. § 666(j), a penalty of \$1,300, as proposed by the Secretary, is appropriate.

Based upon the foregoing findings and conclusions, it is

ORDERED that the citation is affirmed and a penalty of \$1,300 is assessed.

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Richard DeBenedetto, OSHRC Judge

Date: \_\_\_\_\_  
Boston, Massachusetts