Secretary of Labor,
Complainant,
v.

Orion Electric, Inc.,
Respondent.

OSHRC Docket No. **99-212**

EZ

APPEARANCES

Channah S. Broyde, Esq.
Office of the Solicitor
U. S. Department of
Atlanta, Georgia
For Complainant

Ms. Tamara N. Thomas
Secretary/Treasurer
Orion Electric, Inc.
Margate, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Orion Electric, Inc., (Orion) contests a serious citation issued December 30, 1998, by the Occupational Safety and Health Administration (OSHA). The citation alleges that two employees on July 2, 1998, were exposed to electric shock from unprotected energized electric circuits while installing dimmer switches at a bar and restaurant, in violation of § 1926.416(a)(1). The citation proposes a penalty of $1,500.

The E-Z Trial hearing was held on April 15, 1999 in Fort Lauderdale, Florida. The parties stipulate jurisdiction and coverage (Tr. 7). Orion is represented *pro se* by Robert Thomas, Orion's president, and Tamara Thomas, secretary/treasurer. After the hearing, the parties filed written statements of position.

Orion argues the lack of a hazard and unpreventable employee misconduct.[1] Orion's arguments are rejected. The standard cited makes no exception for exposure to low voltage circuits and assumes a hazard. Also, the record fails to establish that a safety rule prohibiting the activity was implemented and enforced. The violation is affirmed and a penalty of $1,000 is assessed.

The Accident

Orion, a small employer in Margate, Florida, with less than 25 employees, is engaged in the installation of electrical equipment primarily in new residential construction in South Florida (Tr. 12, 13, 42). Orion was formed in 1989 by Robert Thomas, a master electrician. It maintains approximately 13 crews in the field, which Thomas schedules and generally acts as a "traffic cop" (Tr. 15). Orion employs approximately five journeyman electricians (Tr. 14, 48).

In 1996 Orion hired William Beckinger, a journeyman electrician (Tr. 28, 39, 41). Thomas had worked with Beckinger for several years at another electric company. He considered Beckinger an experienced electrician with good judgment and safe work habits. Beckinger was also a personal friend (Tr. 25, 26-27, 29, 37).

With Beckinger's persistence, Orion expanded its business to include service work which involves installing electric equipment in pre-existing commercial and residential structures (Tr. 13, 41). According to Thomas, service work is more hazardous and requires more judgment than work in new construction because the electrician deals with existing power (Tr. 41, 43). Beckinger was allowed to develop and manage the service business. He was called "the service manager." Beckinger and Marlon Singh, another journeyman electrician, performed all of the service work for Orion (Tr. 13-14, 30-31, 45, 46).

In the evening of July 2, 1998, Beckinger and Marlon Singh were completing renovation work on Mulligan's Bar & Grill in Lauderdale-by-the-Sea (Tr. 96-97). The restaurant and bar was scheduled to open the next day for the fourth of July weekend (Tr. 97). They arrived at 4:00 p.m. to finish some "loose ends," such as running cable TV lines and cables from the cash register to the kitchen (Tr. 97). At approximately 8:00 p.m., there only remained four dimmer switches to install (Tr. 49, 98). Installing a dimmer switch takes approximately 15 minutes and was described as a "no-

[1] In its written statement, it appears that Orion may no longer argue employee misconduct (Orion's Statement of Position, p. 7). Since it is unclear, the employee misconduct defense is discussed in this decision.

brainer." For a qualified person, the job was not considered hazardous even on an energized circuit (Tr. 32, 35, 103, 108).

Beckinger began installing the dimmer switch behind the bar. The 110-volt[2] circuit was not de-energized (Tr. 98, 104). It was a hot, muggy night and Singh speculates that Beckinger was perspiring (Tr. 110, 146). While installing the dimmer switch, Beckinger was electrocuted. The assistant medical examiner identified the cause of death "as a result of low voltage electrocution" (Exh. R-8).

Compliance Safety and Health Officer Joe DeMartino initiated an OSHA investigation on July 6, 1998 (Tr. 115, 164). He inspected the bar and visited Orion's offices (Tr. 117, 119). He testified that according to Thomas, journeyman electricians were allowed to work without de-energizing the circuit (Tr. 120, 153). Thomas denied making the statement and testified that he recommends employees to de-energize the circuit (Tr. 21).

Discussion

The Secretary has the burden of proving a violation.

> 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., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Violation of § 1926.416(a)(1)

Section 1926.416(a)(1) provides that:

> 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

[2] The record identifies the circuit as 110-volt or 120-volt (Tr. 31, 35, 73, 108). The citation refers to 115/120 VAC. For the purpose of the decision, it is referred to as 110-volt circuit. There is no dispute that it is low voltage (Exh. R-8; Tr. 97).

grounding it or by guarding it effectively by insulation or other means.

There is no dispute that the standard applies to the electric work performed by Beckinger and Singh. The installation of dimmer switches was part of the renovation work on the bar (Tr. 22, 39, 49). Orion does not dispute that Beckinger and Singh were working on a "live" circuit which was not de-energized (Exh. C-1A; Tr. 98, 104). Also, the employees were not protected from shock by insulation or other means. The two employees were exposed to 110-volts and Beckinger was electrocuted. Installing the dimmer switch enabled Beckinger to contact the energized circuit. Thus, the application and terms of § 1926.416(a)(1) were violated and employees were exposed to the energized circuit.

In order to establish an employer's knowledge of a violation, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, could have known of a hazardous condition. Orion argues that it had no knowledge of Beckinger's work on an energized circuit. Although he knew the work involved installing dimmer switches, Thomas was not consulted about the work (Tr. 35, 39).

Orion concedes that Beckinger was a supervisory employee (Orion's Statement of Position, p. 2). He was in charge and responsible for Orion's service work. He obtained the jobs and supervised the other journeyman electricians. He was paid a salary (Tr. 30-31, 37, 41, 46). When Beckinger and Singh decided to install the dimmer switches without de-energizing the circuits, Beckinger acted on behalf of Orion. His knowledge and activity is imputed to Orion.

When a supervisory employee has actual or constructive knowledge of the violative conditions, his knowledge is imputed to the employer. *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*,11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

Orion's Argument

Orion argues that there is no hazard when working on energized low voltage circuits such as 110-volts because its journeymen electricians are licensed, trained and experienced. Beckinger was a journeyman electrician for 15 years, which he maintained with 16 hours of continuing education every two years (Tr. 30). Beckinger was considered an excellent electrician with good judgment and safe work habits (Tr. 25, 27, 37, 108).

Orion asserts that an energized 110-volt circuit is not hazardous in most circumstances. "[C]hanging out a switch or any other device 'live' is a rather common trade practice on a 120-volt system, which, in 20 years in the trade, I've seen countless times. I've done it, and I have talked to quite a few Electricians and Electrical Inspectors after Bill's death, who wouldn't think twice about doing it." Other than receiving a possible shock, Orion argues that for 110 volts to be fatal, the person would have to be "unable to break contact with the 'live part' or 'ground' by virtue of a physical condition, or by becoming part of a completed circuit" (Orion's Statement of Position, p. 3; Tr. 31).

Section 1926.416(a)(1), however, does not provide an exception for electrical work on low voltage circuits. The safety standard assumes a hazard. In deciding the seriousness of the hazard, "the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur." *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, (No. 87-1238, 1989). An employer's failure to perceive the violative conditions as hazardous is not a defense to the citation. When a standard prescribes specific means of enhancing employee safety, such as de-energizing the circuit, the Review Commission has long presumed that a hazard exists if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc*., 6 BNA OSHC 1335, 1337 (No. 15983, 1978).

As the accident here demonstrates, the practice of working on energized circuits, including low voltage circuits, can cause injury and even death. As noted by the Associate Medical Examiner for Broward County, Florida:

> Because many people have sustained shocks with no apparent ill effects, they reason that it is not harmful. The term low voltage is misleading because the voltage is largely unimportant in electrocutions. Most "low voltage" circuits in a house have a current between 15 and 30 amps. The heart may be stopped or sent into a lethal irregular rhythm by less than 1 amp. Non-fatal shocks, for

> whatever reason (grounding, resistance, attenuation, direction, etc.) either do not carry sufficient amperage or do not pass through the heart or brain which are most susceptible to electric shock. But under the correct set of conditions, ordinary house current can be quite deadly, usually without leaving any burns or other injuries. This is apparently what happened to Mr. Beckinger. In this county, there are about a half dozen electrocutions a year. On average, half are low voltage and half are classified as occupational.

"Experience in working under hazardous conditions cannot be considered a substitute for physical protection measures set out in a standard." *Cornell & Company, Inc*., 5 BNA OSHC 1018, 1020 (No. 9353, 1977). The purpose of a safety standard is to prevent the first accident, such as in this case. An employer must assure that employees, even experienced employees, work in a safe manner. The Secretary has met her burden in establishing a serious violation of § 1926.416(a)(1).

Orion's Employee Misconduct Defense

During the hearing, Orion asserted that if there was a violation, it was due to unpreventable employee misconduct. Orion points to its safety rule, which states:

> All machines and equipment must be operated in a safe, sensible manner. Shut off machine or equipment before making adjustment, cleaning or repairing. Only authorized persons are allowed to operate machines and equipment" (Exhs. R-1, R-5).

Orion maintains that this safety rule instructs employees to turn off the power before working on an electrical circuit (Exh. R-5; Tr. 74-75). Since the term "equipment"[3] is specifically defined in the National Electric Code and Orion's business involves electrical installations in accordance with the Code, Orion argues that this rule directs its electricians to de-energized the circuit before making any adjustments or repairs. OSHA considers the rule vague, ambiguous and not job specific (Tr. 121, 172).

As written, Orion's work rule is general and open to interpretation. An employer's safety rule that employees "shut off machines and equipment" during adjustment, cleaning and repair is not as clear as instructing employees to de-energize a circuit during installation of electrical

[3] The term "equipment" is defined in the National Electric Code as "[A] general term including material, fittings, devices, appliances, fixtures, apparatus, and the like used as a part of, or in connection with, an electrical installation" (Exh. R-6).

equipment. As conceded by Thomas, under the electric code "electrical circuit" and "equipment" are different in that the former term refers to the wires connected to the equipment (Tr. 83). However, even if the court accepts Orion's interpretation of its safety rule as reasonable within the electrical industry, Orion's employee misconduct defense is still not met.

In order to show unpreventable employee misconduct, an employer is required to prove that (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations are discovered. *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). It is Orion's burden to show that the employee's misconduct was unpreventable.

Thomas testified that he recommends employees to de-energize the circuit before working on it (Tr. 21, 74). Singh testified that Thomas instructed employees to de-energize the circuit (Tr. 89, 107). Thomas, however, concedes that he has worked on energized circuits and is aware that employees, depending on the circumstances, also work on "live" circuits (Tr. 20-21, 39). Singh also acknowledges that he had worked on energized circuits in the past (Tr. 99, 108). In fact, Thomas states that "[I]f I felt like I needed to leave that circuit on for whatever reason, I would change it out 'live' without a second thought or trepidation" (Orion's Statement of Position, p. 7).

Singh testified that he and Beckinger decided to install the dimmer switch without de-energizing the circuit because "they are single volt dimmers. If we shut the power, it would shut the lights off the entire place. We didn't have flash lights on our person with us at the time. We do have them in the truck" (Tr. 98). "It's faster and quicker" (Tr. 99).

Singh's reasons for not de-energizing the circuit do not excuse the noncompliance. Singh concedes that a flashlight was in the truck. Also, the circuit breakers prevented the shut down of all power to the bar (Tr. 102, 106). A more expedient or faster method to perform a task does not excuse compliance with the safety requirements.

Also, the record fails to show that any rule to de-energize the circuit was enforced by Orion. ``[W]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee" *Archer-Western Contractors, Ltd*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). The Commission also stated that "where a supervisory employee is involved, the proof of

unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Id*. at 1017. The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax" *United Geophysical Corp.*, 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981).

The failure of Beckinger and Singh to de-energize the circuits indicates a misunderstanding of any company rule, or that the rule was ineffectively enforced by Orion. Because there were no circumstances shown which prevented the employees from de-energizing the circuit, Beckinger and Singh's failure to de-energize or use other protection indicates a lack of concern for the consequences of their action. Adequate enforcement is a critical element of the employee misconduct defense. Although Beckinger and Singh were experienced electricians, Orion is not excused from assuring that employees comply with safety requirements. There is no evidence that Orion enforced a rule to de-energize the circuit. No employees were shown to have been warned or disciplined for violating the rule, although Thomas was aware that his instruction was not followed. An effective safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty, d/b/a Betty Brothers*, 9 BNA OSHC 1379, 1383 (No. 76-4271, 1981).

Orion is a small company and appears conscientious. However, it must take responsibility to ensure that its employees, including experienced journeymen electricians, work in a safe manner. Unless Orion changes its attitude about the hazards associated with working with low voltage, there remains the potential for another accident. This case demonstrates that even an experienced employee can make a serious mistake if safety is not considered. It concerns the court that even after his accident, neither Thomas nor Singh[4] indicate that they will change their attitude towards working on an unprotected energized circuit (Orion's Statement of Position, p. 7; Tr. 109). Orion needs to take responsibility and enforce a safety instruction to electricians. If circumstances do prevent de-energizing the circuit, the standard permits protection by insulation or other means.

[4] Since January, 1999, Singh no longer works for Orion. He left for another opportunity (Tr. 114).

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Orion is a small employer with less than 25 employees (Tr. 14). There were two employees involved in working on an unprotected, energized circuit. There was no reason shown which prevented the circuit from being de-energized. Orion is entitled to credit for history in that there is no record of prior OSHA inspections or past violations (Tr 123). Orion does maintain a written safety program (Exh. R-7). Also, there is no evidence that Orion was uncooperative during the inspection.

A penalty of $1,000 is reasonable for violation of § 1926.416(a)(1). The employees were working on a low voltage, energized circuit to install dimmer switches. There was a hazard of shock or, as in this case, death. Two employees worked on the energized circuit for approximately 15 minutes.

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 serious Citation No. 1:

1. Item 1, alleging violation of § 1926.416(a)(1), is affirmed and a penalty of $1,000 is assessed.

KEN S. WELSCH
Judge

Date: May 7, 1999