COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040253-90**

Angelo Resendes	Employee
John Healy and Co.	Employer
Liberty Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy and Wilson)

APPEARANCES
Kathy Jo Cook, Esq., (for the employee at hearing
George N. Keches, Esq., with her)
Karen S. Hambleton, Esq., for the employee on brief
Thomas G. Brophy, Esq., for the insurer at hearing
Andrew P. Saltis, Esq., for the insurer on brief
John J. Maloney, Esq., for the employer

MCCARTHY, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for § 28 benefits based on the employer's alleged serious and wilful misconduct, as well as his claim for further partial incapacity benefits. Because "the decision is firmly grounded in the evidence and . . . the law was correctly applied to the facts found in determining that a § 28 violation had [not] occurred," Luis v. Merrimack Valley Roofing Co., 9 Mass. Workers' Comp. Rep. 784, 786 (1995), we affirm.[1] The story of Mr. Resendes' brush with death by electrocution, when his air-driven chipping gun came into contact with a 13.8 kilovolt Boston Edison line in the course of digging a trench for a water pipe, is carefully detailed by Justice Ireland in Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344 (1995). For the purposes of this appeal, we recount only such portions of the administrative judge's decision as are pertinent to the issues that we address.

[1] We summarily affirm the judge's denial of the employee's claim for further § 35 benefits.

Resendes worked for John Healy, doing landscaping and excavation work. He had started out as a laborer, but became a working foreman after a few years, supervising crews of from two to six people installing water and sewer lines, usually in residential settings. He developed a certain amount of expertise as a result of this on-the-job experience. Resendes worked directly with Healy, with whom he would discuss the details of how any particular job was to be accomplished. Healy would delegate to Resendes the on-site supervision of and responsibility for completing various jobs. Resendes was in charge of the crew repairing and installing water pipes at 470 Atlantic Avenue in Boston during June –July 1990 when he was electrocuted. (Dec. 5-6.) At the time of the accident, Resendes was drilling through an abandoned brick sewer located directly under a concrete Boston Edison duct carrying a 13.8 kilovolt power line. (Dec. 9.) It is undisputed that Healy had not made the required "dig safe" notification prior to the digging of the trench in which the employee was injured. (Dec. 8.) Healy had made such notification as to the earlier part of the 470 Atlantic Avenue job, in which Resendes and his crew repaired a water pipe in the parking lot of the building. (Dec. 6-7.) Resendes relied on Healy to take care of pulling permits and making the "dig safe" notifications. (Dec. 6.)

The employee's appeal of the § 28 denial presses two major themes. First, the employee argues that the judge erred as a matter of law in not finding Healy's "superintendence," as the term is used in § 28, with regard to the employee's injury and the events leading up to it. "If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amount of compensation hereinafter provided shall be doubled." G.L. c. 152, § 28. Second, the employee contends that the employer's failure to make "dig safe" notification under G.L. c. 82, § 40, an omission that undisputedly was within the employer's responsibility and powers of superintendence, was serious and wilful misconduct that caused his injury. We are not persuaded by either argument.

The law on superintendence is well established, dating back to the pre-chapter 152 days of the Employers' Liability Act. It is well set out by the Supreme Judicial Court in Thayer's Case, 345 Mass. 36, 40-41 (1962).

> "The phrase, 'exercising the powers of superintendence,' in G.L. c. 152, § 28, is substantially identical with that used in § 1 of the Employer's Liability Act with reference to the negligence of a superintendent. In interpreting the quoted phrase this court has said, 'The employer is not answerable for the negligence of a person intrusted with superintendence, who at time, and in doing the act complained of, is not exercising superintendence, but is engaged in mere manual labor, the duty of a common workman. . . . Unless the act itself is one of direction or of oversight, tending to control others and to vary their situation or action because of his direction, it cannot fairly be said to be . . . in the exercise of superintendence.' Cashman v. Chase, 156 Mass. 342, 344, 31 N.E. 4, 5. Or, as stated by Holmes, C.J., in Joseph v. George C. Whitney, Co., 177 Mass. 176, 178, 58 N.E. 639, 640, 'we are of the opinion that by a true construction of the statute the superintendence must contribute as such, and that when it had nothing to do with the injury qua superintendence, the case is not within [§ 28].' "

The employee first argues that his working in the trench in such a manner as resulted in his injury was due to Healy's superintendence – that Healy ordered him to do it. The administrative judge's findings on the events leading up to the accident, after the first water pipe repair job in the parking lot had already been performed, do not support that interpretation:

> [I]n late June, the Healy crew was directed to return to the 470 Atlantic Avenue address to install a second water main from the street into the building. It appears that there was a requirement that the building have two waterlines leading to it, one for the domestic water supply to the building and the other for the water supply to fire lines, including the sprinkler systems. Here, again, Resendes and his crew arrived at the job site and Mr. Healy was not present. The appropriate permit had been obtained (employee's exhibit #4) however, it was later discovered that no "Dig Safe" notice had been afforded to that agency. The job was started on the evening of June 29th due to the fact that traffic requirements were such that no work was allowed during the day, and the employee worked on that job until July 9, 1990 on which date the incident from which these claims arise occurred. During the course of the required excavation, Resendes, who was in charge of the operation, came across a brick structure. Prior to that time, he had encountered various Edison ducts, steam lines, MBTA lines and telephone lines. Except for the steam lines and gas lines, all the other utility lines are encased in concrete ducts. It was on July 7, 1990 when the brick structure was unearthed. It was a red brick

> structure over which an Edison line had been built. There was insufficient space between the Edison duct and the red brick structure to enable the construction crew to lay the appropriate five inch pipe. Resendes reported the brick structure to Healy and was advised that Healy would check on the structure and notify him as to what to it was. The following day, after having called the Boston Sewer Department, Healy was advised that the structure in question was a vacant sewer line. At that time, Healy and Resendes discussed the appropriate procedures necessary to effect an appropriate opening to install the waterlines and it was decided that since the sewer line was apparently abandoned and not in use, it would be appropriate to chip away "a couple layers of brick" to enable the passage of the waterline.

(Dec. 8-9.) Resendes was electrocuted the next day while chipping away at the bricks as discussed. (Dec. 9.)

The findings do not make out "superintendence" and the judge, in the face of conflicting testimony by Healy and Resendes, did not err in so concluding:

> I find that there was a special relationship between John Healy and Angelo Resendes. I find that Healy placed a great deal of faith and confidence in Resendes and the conduct of Resendes during the course of his employment warranted such faith and confidence. At the time of the incident, Resendes was using a "chipping hammer" and during the course of his testimony allowed that Healy was not aware of what type of tool was being used to complete the job. It is clear from the evidence that Resendes was the supervisor and that Resendes was exercising the authority of the supervisor, as well as that of a common employee, when he entered the hole and commenced working on the evening of July 9, 1990. I find that the conduct of the employer does not meet the legal standards . . . that would warrant a finding that the employee was entitled to benefits in accordance with M.G.L. c. 152, Section 28.

(Dec. 16.) The employee argues that the judge erred when he did <u>not</u> find as fact, based on the employee's testimony, that Healy <u>ordered</u> him to perform the excavation work on the abandoned brick sewer, in a dangerous manner that caused his injury. (Tr. 56-59, dated Aug 19, 1997; Tr. 36-37, 57, dated Nov 25, 1997; Employee Brief, 8, 13.) Contrary to the employee's assertion, the judge concluded that there was no proof of superintendence based on Healy's version of their <u>discussion</u> concerning how to proceed digging after the discovery of the brick sewer. (Tr. 31-33, 150-151, dated Feb 25, 1998.)

We do note that the findings on the discussion between Healy and Resendes, in isolation, are ambiguous as to whether Healy ordered Resendes. The judge says: "[I]t was decided." However, the judge amplifies upon and clarifies his finding in two places later in his decision. First, the judge analyzes and distinguishes Memmolo's Case, 17 Mass. App. Ct. 407 (1984), from the present case. The judge states:

> [T]he Appeals Court [in Memmolo] found that the employee was entitled to Section 28 benefits due to the fact that he was instructed by his supervisor to re-enter a five foot trench and continue excavating even though a concrete pipe was visible. While the facts of that case are very similar to the case at bar, I find that it is distinguishable due to the fact that the employee in this case was, in fact, the supervisor of the work being performed and was not, at the time of the incident, directed by another party to proceed.

(Dec. 15.) Finally, the judge concludes with the general finding:

> I find that the employee has failed to prove by a preponderance of the evidence, and considering the totality of the situation, that he is entitled to benefits in accordance with M.G.L. Chapter 152, Section 28. I based this finding partly on the fact that I find that the cases cited by the employee are distinguishable when considered in the light of the facts in the instant case, and I find that there existed between the employer and the employee a special relationship created by the fact that *Healy and Resendes worked very closely in arriving at a decision relative to the handling of any particular problem.*

(Dec. 18-19; emphasis added.) These findings make out a scenario in which Resendes was a decision-maker along with Healy respecting the plan of attacking the brick structure, which then caused his injury. The hearing judge makes it clear that Resendes was not "ordered" by his "superintendent," Healy, to do anything in particular. Although not necessary to the finding of superintendence, we do note that there is no evidence in this case of Resendes' objecting to the course of action taken. Cf. Thayer's Case, 345 Mass. at 40 (court noted repeated warnings by employee against supervisor's order to go faster in fully loaded heavy construction vehicle which then jackknifed). Thus, without Healy's exercise of superintendence as to digging through the brick sewer, the judge correctly concluded that § 28 liability did not attach.

The employee's other argument meriting discussion concerns the judge's failure to find Healy's "dig safe" violation as a basis for § 28 liability. The judge admittedly did not specifically address this theory of § 28 liability. The findings, however, are sufficient for us to conclude that the failure to notify "dig safe" had nothing to do with the employee's injury as a matter of law. The "dig safe" statute, G.L. c. 82, § 40, "imposes on the contractor a duty to see that excavations in a public way are performed 'in such a manner, and such reasonable precautions taken, as to avoid damage to the pipes or conduits in use under the surface of said way.' " Yukna v. Boston Gas Co., 1 Mass. App. Ct. 62, 66 (1973). As the Appeals Court pointed out in Resendes, supra, Healy failed to comply with the statutory requirement that seventy-two hour notice be given to the agency set up to handle "dig safe" notice (see Resendes at 346), prior to the commencement of excavation, and the Department of Public Utilities cited him as failing to exercise reasonable precaution as a result. Id. at 353; G.L. c. 82, § 40. It is undisputed that Healy was solely responsible for making the "dig safe" notification. Certainly, in relation to the question of § 28 liability, Healy's omission to obtain the "dig safe" notification to the utilities could be seen to be in the exercise of his superintendence. However, that one fact does not a § 28 award make.

The judge's findings on the earlier excavation work at 470 Atlantic Avenue refer to the proper "dig safe" procedure followed by Healy at that time:

> [In June 1990,] the John Healy Company was called upon to repair a broken water main at or near the parking lot of a building located at 470 Atlantic Avenue, Boston, Ma. The work was of an emergency nature and the appropriate permits were obtained from the City of Boston and the "Dig Safe" Agency was properly notified. Resendes was in charge of the repair crew that went to the appropriate address having been directed to do go there by Healy. Upon arrival at 470 Atlantic Avenue, the employee observed that there was spray painting on the street marking off the appropriate telephone and electrical installations. He was aware of the fact that the orange markings represented telephone lines and that the red markings represented Boston Edison lines. The employee and his crew used a jack hammer to break up the pavement adjacent to the leak and then used a backhoe to dig out the trench. They came across a concrete block believed to be a Boston Edison line. The Edison duct was sitting right on top of the broken water

> main. The duct had collapsed on top of the water main. An Edison representative called F.L. Kelly Company to effect the appropriate repairs on the Edison duct.[2]

(Dec. 6-7.)

However, Healy did not effectuate the "dig safe" notification when Resendes and the crew went back to 470 Atlantic Avenue to install the new water line, as we have seen from the findings at Dec. 8-9, set out above. It is also instructive to review some of the employee's testimony regarding the commencement of that second job at 470 Atlantic Avenue:

> Q: While you were digging did you run into anything unusual?
>
> A: Edison Ducts, steam lines, MBTA lines, fiberoptics.

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[2] The employee's testimony on this point is worth noting, in that the actual contact to Edison when something went wrong was simply a matter of common sense, not "dig safe":

> Q: Once you reached the Edison duct and found out it was collapsed on the water main what happened?
>
> A: I was going to call Mr. Healy but there was a superintendent from the building that was there and an owner, some lady that ran the building. And before I got a hold of Mr. Healy some one had called Edison.

(Tr. 33, dated Aug 19, 1997.) We also note (without relying on) the Appeals Court's handling of Boston Edison's argument in the Superior Court action, that Healy's failure to notify the "dig safe" agency relieved it of any duty to take safety precautions around the excavation. The Court reasoned:

> The short answer to this argument us that "dig safe" notification does not provide the exclusive means of putting a utility company on notice of possible excavation activity occurring near its lines. The plaintiff testified about conversations, during the Atlantic Avenue work, that he had with an unnamed Edison employee, who was apparently familiar with the inherent dangers of 115 kilovolt lines (and presumably with 13.8 kilovolt lines as well). From this evidence, the jury could infer Boston Edison's knowledge of the work being done on Atlantic Avenue near its lines. . . . Moreover, a utility company's duty to monitor or warn is not limited to those obligations enumerated in the "dig safe" statute, cf. Yukna v. Boston Gas Co., 1 Mass. App. Ct. at 66 294 N.E.2d 551 (imposing common law duty on defendant gas company, beyond the requirements of c. 82, § 40, to exercise high degree of care due to explosive nature of its gas lines when ruptured).

Resendes, supra at 356.

Q: How did you know when you got to the various things?

A: You meet this block of concrete and assuming something is in there.

. . .

Q: And what did you do when you saw each of these concrete objects?

A: We dug around it by hand.

Q: [W]hy didn't you stop digging as you [had] done earlier when you made those water repairs when you ran into these lines?

A: Because we had enough clearance to go under them.

Q: [W]hat was your understanding [as] to when you could work and when you couldn't work in relation to the various concrete objects?

A: If we had room to go under, we would go under.

(Tr. 50-51, dated Aug 19, 1997.)

What is apparent on review is that the judge's omission to discuss Healy's "dig safe" violation in detail evinces no error on appeal. The violation played no part in the industrial accident. The findings, and the evidence on which they are based, lead conclusively to the lack of proximate cause between Healy's omission to make "dig safe" notification and Resendes' injury. The point is that the danger here was open and obvious: there were various utility lines and ducts exposed in the trench, in particular, the Boston Edison duct that abutted the brick sewer. The employee had just repaired the primary water line at the same address, also working in the proximity of all these types of utility lines and ducts. He knew that he had to work around them and to avoid them, as he testified in the excerpt above. "Dig safe" notification, in order to ascertain the location of the various lines and ducts, would have added nothing to the safety of the employee at the advanced stage of the excavation process, when he came in contact with the Edison line with the chipping gun. See G.L. c. 82, § 40 ("[The utility] company shall respond to the original written [dig safe] notice or to subsequent oral or written notice by designating at the locus, the location of pipes, mains, wires or conduits, in that portion of the public way . . . in which the excavation is to be made . . ."). The injury was unconnected to the omission of Healy to notify the "dig safe" agency; it was right not to consider it a

consequence of that omission. See Joseph v. George C. Whitney Co., supra. Cf. Memmolo's Case, 17 Mass. App. Ct. at 411-412 (lack of "dig safe" notification relevant to § 28 claim where employee ordered to keep drilling, even after he had encountered concrete five feet beneath street level, and then hit Boston Edison duct). In the present case, we do not think that Healy's omission "could justifiably have been found to have contributed proximately to [the employee's] injury." Thayer, supra at 41.

As to the other arguments of the employee on appeal, we summarily affirm the decision.

Accordingly, the decision is affirmed.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **December 26, 2000**

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Sara Holmes Wilson
Administrative Law Judge