

IN THE MATTER OF
CHUCK’S ELECTRIC, INC.

* BEFORE THE
*
* COMMISSIONER OF LABOR
*
* AND INDUSTRY
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* MOSH CASE NO. M3373-031
* 98
* OAH CASE NO. 98-DLR-
* MOSH-41-0084050087

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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”), issued a citation to Chuck’s Electric Service, Inc. (“Chuck’s Electric” or “Employer”), alleging a violation. Following an evidentiary hearing, Stephen J. Nichols, Hearing Examiner, issued a Proposed Decision recommending dismissal of the citation.

Thereafter, by Order dated February 12, 1999, pursuant to Labor and Employment Article, § 5-214(e), *Annotated Code of Maryland*, the Commissioner of Labor and Industry (“Commissioner”) ordered review. On April 20, 1999, the Commissioner held the review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of relevant law and the positions of the parties, the Commissioner has decided to reverse the Hearing Examiner’s proposed decision and affirm the citation.¹

¹ The Commissioner affirms the Hearing Examiner’s Findings of Fact. As to Findings of Fact 25, 26, 27, 28, and 29 concerning employee training, the Commissioner notes the Hearing Examiner’s statement that this training constitutes a “part” of safety related

BACKGROUND

In this case, a Chuck's Electric employee was sent on a service call to determine the source of an electrical problem at the Maryland Marine Police Academy. FF 3.² Tracing the problem from the building, the employee attempted to open the step-down transformer. FF 6. The step-down transformer takes voltage and "steps it down" to the lower voltage used inside a building. T1 at 148. The employee was unable to open the step-down transformer due to the fact that the lock on the transformer required a special socket. FF 6 & 12. Neither the Employer nor the owner of the property provided the employee with the necessary socket. FF 12. The employee then turned to the sectionalizing unit (otherwise known as the switchgear box), a pad-mounted unit that is located upstream from the step-down transformer. T1 at 148; FF 13. The employee testified that the sectionalizing unit feeds electrical current into the step-down transformer and that he understood that the sectionalizing unit had a primary side and a secondary side. T2 at 39-42. The employee stated that he thought the side with the power "would possibly be under 600 volts," but because there was no labeling, he conceded that he was unable to determine the voltage. T2 at 40-41. The employee proceeded to cut the padlock off the south side door of the sectionalizing unit. FF 14. The south side door of the sectionalizing unit contained high voltage. FF 15. The

training required under 29 CFR 1910.333-335. Given the Commissioner's determination, it is not necessary to evaluate whether this training would satisfy the entire training requirements of these sections as required by Section 332(b)(1).

² Herein, the Hearing Examiner's Proposed Decision is referred to as "HE Dec."; the Hearing Examiner's Findings of Fact as "FF"; the transcript of the record before the Hearing Examiner on September 9, 1998 as T1; the transcript of the record before the Hearing Examiner on October 29, 1998 as T2 ; MOSH Exhibits as MOSH Ex.; and the transcript of the exceptions hearing on April 20, 1999 as "Rev. T."

employee was knocked back from the sectionalizing unit due to the electrical current and sustained first and second degree burns. FF 17 & 18.

MOSH cited the Employer for a serious violation of 29 CFR 1910.332(b)(1), which provides:

Employees shall be trained in and familiar with the safety-related work practices required by § § 1910.331 through 1910.335 that pertain to their respective job assignments.

The Hearing Examiner found that because the employee was trained in, and familiar with, the safety related work practices required of the employee's normal job and the particular job at issue, i.e., to work on low voltage electrical equipment, MOSH did not meet its burden of establishing that the Employer violated 29 CFR 1910.332(b)(1). HE Dec. at 14-15. According to the Hearing Examiner, if MOSH believed the Employer knew or should have known that its employees were troubleshooting on high voltage equipment, and that training on such equipment was therefore required, MOSH should have alleged a violation of the related standard, 29 CFR 1910.269. *Id.* at 15. The Hearing Examiner held that MOSH did not meet its burden of establishing the alleged violation because the employee had been trained to work on low voltage equipment consistent with 29 CFR 1910.332(b)(1). *Id.*

DISCUSSION

To prove its prima facie case, MOSH has the burden of establishing that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees were exposed to or had access to the violative condition; (4) the employer knew or should have known of the condition with the exercise of reasonable diligence. *Dun-Par Engineered Form Co.*, 12 O.S.H. Case (BNA) 1962, 1965 (1986). The Hearing

Examiner suggested that MOSH should have cited the Employer under Section 269 if MOSH believed that the Employer knew or should have known that the employee would be working on high voltage equipment. HE Dec. at 15. The Hearing Examiner's suggested reliance on Section 269 is misplaced.

Section 269 applies to qualified employees working on power generation and transmission equipment. *See* 1910.269(a)(1). The Appendix to Section 269 demonstrates that 1910.269 applies only to employees who meet the definition of "qualified" under 1910.269(x). See Appendix A-2 "Application of 1910.269 and Subpart S of this Part to Electrical Safety-Related Work Practices." Further clarifying the scope of Section 269, OSHA Instruction STD 1-16.7, Electrical Safety Related Work Practices, states "Section 332 does not cover qualified workers (but does cover unqualified workers) performing work on ... [e]lectric power generation, transmission and distribution installations." MOSH Ex. 10 (emphasis added). Neither MOSH nor the Employer has ever contended that the employee was a "qualified" employee to work on high voltage equipment. Appendix A-2 to Section 269 is clear that employees who are "unqualified" and working on power generation and transmission equipment must adhere to the work practices of 1910.331-335. As such, the Commissioner finds that the standard cited by MOSH, Section 332, applies.

Chuck's Electric had an unwritten policy that it did not perform electrical work on equipment over 600 volts. Based upon this fact, the Hearing Examiner found that the employee's job assignment was to work on low voltage equipment only, that the employee was qualified to work on low voltage equipment, and that the employee was trained and familiar with work practices for low voltage. HE Dec. at 14-15.

Accordingly, the Hearing Examiner dismissed the citation. The Commissioner finds the Hearing Examiner's focus on the employee's qualification to work on low voltage equipment is misplaced. Whether an employee is deemed qualified or unqualified for purposes of applying Section 269 or Section 332 depends upon the factual circumstances of the workplace. *See* 29 CFR 1910.399 (definition of "qualified person"); MOSH Ex. 10 (OSHA Instruction STD 1.16-7, Electrical Safety Related Work Practices).

The record reflects the proper focus in this case is not whether the employee was properly trained as a qualified employee working on low voltage equipment but whether the employee was properly trained as an unqualified employee working on high voltage equipment. The Employer sent its employee to find the source of an electrical problem. FF 3. There were no special instructions to the employee regarding this assignment. *Id.* The employee testified that he assumed before he opened the unit that it was the sectionalizing unit, and that he did not know whether the voltage was over 600 volts. T2 at 39 & 42. The employee opened the south side door of the sectionalizing unit that contained high voltage. FF 17. The employee, therefore, was working on high voltage equipment.

In training its employees in the safety-related work practices of Sections 331-335, a reasonably prudent employer must address those hazards that the employer should be aware of, and direct its employees in how to avoid those hazards. Training by an employer who limits the scope of its work to low voltage equipment only should be specific in advising its employees of the hazards associated with low voltage equipment, and on how to avoid high voltage work altogether. Adequate training would necessarily included the common sense admonition that if an employee does not know the voltage

of electrical equipment, then an employee is prohibited from working on that equipment. Chuck's Electric did not provide its employees with any such training.

Training an employee who only works on low voltage equipment not to commence work without first determining the voltage is consistent with the requirement of 1910.333(a) that appropriate safety-related work practices be employed to prevent electrical shock and other associated electrical hazards. 1910.333(a) requires that the "specific safety-related work practices shall be consistent with the nature and extent of the electrical hazards." 1910.333(c) mandates that only qualified persons are allowed to work on energized parts or equipment and that verification that equipment is deenergized must be performed by a qualified person." *See also* MOSH Ex. 10. Knowledge of the voltage of equipment is fundamental to limiting the hazards associated with electrical shock as well as to determining the necessary safety-related work practices. Warning employees to ascertain the voltage of equipment prior to commencing work is also consistent with Section 334(c) which requires that test instruments, equipment and accessories be rated for the circuits and equipment to which they are connected. Training employees who only work on low voltage equipment to first determine the voltage complies with the requirements of Section 335 that employees use appropriate personal protective equipment, tools and alerting techniques for the work to be performed. Knowledge of the voltage of the electrical equipment is necessary to determine, and to comply with, the prescriptions of this section.

In this case, the employee conceded not knowing the voltage of the equipment, and he worked on the equipment anyway. There is no evidence that he was trained otherwise. The employee was therefore exposed to the hazard of high voltage equipment

without the necessary equipment and precautions. The facts of this case readily demonstrate that an employer cannot rely on employee common sense to avoid this hazard. The issue of determining the voltage of equipment cannot be so unanticipated that an Employer could not incorporate this requirement into its training program as an obligatory step prior to commencing work on any electrical unit. The Commissioner finds that the Employer's failure to train its employee where not to tread, namely only work on electrical equipment once the voltage is determined, constitutes a failure to train its employee in the necessary safety related work practices in compliance with 29 CFR 1910.331-335.

MOSH must also establish the Employer's knowledge of the hazard. The hazards associated with electrical work, especially on high voltage equipment, are well known. The possibility of an employee, even an employee working for a company that only works on low voltage equipment, encountering high voltage equipment is not an unexpected event. "Reasonable diligence" has been defined as "such watchfulness, caution, and foresight as, under the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise." *Ames Crane & Rental Service, Inc.*, 3 O.S.H. Case (BNA) 1279 (1975), (separate opinion of Cleary, Commissioner), *aff'd* 532 F.2d 123 (8th Cir. 1976), quoting *Wabash Railway Co. v. McDaniels*, 107 U.S. 454, 460 (1883). The Employer had no work rule requiring an employee to first check the voltage of equipment. Chuck's Electric ignored the potential electrical hazard that reasonably and logically existed when an employee does not know the voltage of equipment. It is reasonable to expect that a prudent employer, one who works on low voltage equipment only, would instruct its employees to first determine

equipment voltage. The Commissioner finds that the Employer had constructive knowledge of the hazard because the Employer failed to provide adequate safety instruction. *See Candler-Rusche, Inc.*, 4 O.S.H. Case (BNA) 1232 (1976), *aff'd* 559 F2d 187 (D.C. Cir. 1977)(constructive knowledge found where employer failed to provide necessary safety instructions). For all of the reasons set fort above, the Commissioner finds merit to the citation.

MOSH characterized this citation as “serious.” A violation is characterized as “serious” where there is a “substantial probability that death or serious physical harm could result from a condition” unless the employer “did not and could not with the exercise of reasonable diligence” know of the violation. § 5-804, Labor and Employment Article, *Annotated Code of Maryland*.³ MOSH must demonstrate that an accident is possible due to the lack of training and that death or serious injury could result from that accident.

The nature of the hazard – electricity – is such that there is a strong probability of death or serious harm. Chuck’s Electric had an unwritten policy that employees were not to perform work on high voltage equipment, yet it failed to train its employees to refrain from working on equipment without first determining the voltage. This failure to train resulted in an employee opening a sectionalizing unit without first determining the voltage. The employee suffered first and second degree burns. FF 18. The lack of training by Chuck Electric’s created the possibility serious injury to an employee. *See Sec of Labor v. Miniature Nut and Screw Corp.* 17 O.S.H. Cas (BNA) 1557, 1558-59

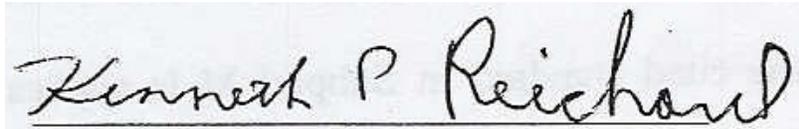
³ The Employer was clear at the exceptions hearing that it does not assert employee misconduct. Rev. T. at 57.

(1996). The Commissioner concludes that the citation was properly classified as serious.

ORDER

For the foregoing reasons, the Commissioner of Labor and Industry, on the 20th day of June, 2002, hereby ORDERS:

1. Citation 1, Item 1, alleging a serious violation of 29 CFR 1910.332(b)(1) with a proposed penalty of \$1750.00 is AFFIRMED.
2. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, Annotated Code of Maryland, and the Maryland Rules, Title 7, Chapter 200.

A handwritten signature in black ink that reads "Kenneth P Reichard". The signature is written in a cursive style and is positioned above a horizontal line.

Kenneth P. Reichard
Commissioner of Labor and Industry