

October 29, 2014

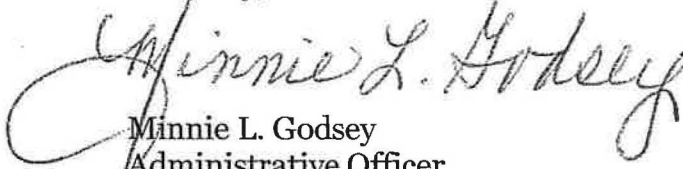
John Wood, Esquire
100 Constellation Way
Suite 1700P
Baltimore, MD 21202-6302

Subject: Constellation Power Source Generation, Inc.
MOSH Case No. M1380-031-08
OAH No.: DLR-MOSH-41-08-38581

Dear Sir:

Enclosed is the Final Decision and Order issued today in the case noted above.

Sincerely,


Minnie L. Godsey
Administrative Officer
Division of Labor and Industry

cc: ✓ Jenny Baker/Sarah Harlan, Assistant Attorneys General
✓ Catherine Bellinger, Assistant Attorney General
Judge Jana Burch, Office of Administrative Hearings
Librarian, Office of Administrative Hearings
MOSH Office of Review

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

IN THE MATTER OF
CONSTELLATION POWER
SOURCE GENERATION, INC.

* BEFORE THE
* COMMISSIONER OF LABOR
* AND INDUSTRY
* MOSH CASE NO. M1380-031-08
* OAH CASE NO. DLR-MOSH-41-08-
* 38581

* * * * *

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*. On April 28, 2008, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) conducted an accident investigation at a Constellation Power Source Generation, Inc. (“Constellation”) facility at Wagner’s Point. At the conclusion of the investigation, MOSH issued citations for violations of 29 C.F.R. § 1910.269(d)(2)(iv) and 29 C.F.R. §1910.269(d)(2)(vi)(C). Constellation contested the citations and a hearing was held on January 20, 2009 and February 3, 2009, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, Louis Hurwitz, Administrative Law Judge sitting as the Hearing Examiner (“HE”), issued a Proposed Summary Decision in which he recommended that both citations be affirmed.

Constellation filed a request for review under the Labor and Employment Article, §5-214(e), *Annotated Code of Maryland*, on the issue of whether the citations were properly characterized as serious. On October 20, 2009, the Commissioner held a review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of

the relevant law and the positions of the parties, for the reasons set forth below, the HE's recommendation as to the citations being characterized as serious is REVERSED.

FINDINGS OF FACT

Constellation operates the Wagner Plant which is a power source generation facility with four steam turbine generators that produce electricity. FF 1. On April 28, 2008, Unit Four ("Unit") of the generators was undergoing maintenance which involved the use of a Meggar Tester. FF 3. The Meggar Tester operates at a maximum of 10,000 volts and a maximum of five milliamps. FF 9. The Unit was locked out/tagged out to prevent the equipment from starting. FF 10.

Two Constellation employees were at the facility to perform the test. FF 8. While the Constellation employees prepared to perform the test, there were several NEC employees working on a separate floor. FF 14. While one Constellation employee went to confirm that there were no other people working around the Unit, the other waited by the Meggar Tester. FF 13. He inadvertently activated the Meggar Tester which sent a 10,000 volt current to Unit Four at five milliamps. FF 17. As soon as the Constellation employee realized what had happened, he shut off the Meggar Tester. *Id.* At the time, one of NEC employees was standing on a scaffold. MOSH Ex. 5. All NEC employees were wearing personal protective equipment which included a hard hat. Tr1 at 147. ¹

All of the NEC employees experienced electric shock. FF 19. NEC employee Santiago Sanchez felt a shock in his right arm and collapsed after exiting the Unit. FF 20. NEC employee Todd Gerhard felt a shock in his arm while he was standing on a scaffold. FF 21. NEC employee Clifford McCracken was knocked back by the electrical shock and felt the effect of the

¹ The administrative hearing was conducted on January 20, 2009 and February 3, 2009. The January 20, 2009 hearing will be referred to as Tr1 and the February 3, 2009 hearing as Tr2.

shock hours after the accident. FF 22. The three employees were sent to the hospital for medical evaluation and returned to work that afternoon. MOSH Ex. 14.

MOSH issued two serious citations under 29 C.F.R. 1910.269(d)(2)(iv) and 29 C.F.R. 1910.269(d)(2)(vi)(C). The Employer contested the citations and proposed penalties. An administrative hearing was held at the Office of Administrative Hearings on January 20, 2009 and February 3, 2009. The Hearing Examiner heard the evidence and issued a proposed decision upholding both citations. The Employer requested review on the Hearing Examiner's determination on the limited issue of the classification of the violations as serious.

DISCUSSION

The issue on review is whether MOSH has met its burden of proving that the citations in this case are properly characterized as serious. A violation is serious if "there is a substantial probability that death or serious physical harm could result from a condition that exists ... unless the employer did not and with the exercise of reasonable diligence could not know of the violation." §5-809(a), *Labor and Employment Article, Annotated Code of Maryland*. MOSH has the burden of establishing that there is a "substantial likelihood of serious injury in the event of an accident." *Pack River Lumber*, 2 O.S.H. (BNA) 1614, 1615 (1975). It is important to note that it is not necessary for MOSH to prove that an accident will occur, only that an accident is possible and that death or serious physical harm could result.

In support of its serious characterization, MOSH asserts that the electric shock from the Meggar Tester or the threat of a fall from scaffolding in reaction to the electric shock constitutes a serious violation because of the substantial possibility that serious physical harm could result. The Employer contends that the shock was insufficient to create substantial likelihood of a serious injury.

With regard to the electric shock creating a substantial probability of serious bodily harm, there is more than ample evidence to support the Hearing Examiner's conclusion that the effects of the electricity on the affected employees was perceptible but did not pose a substantial probability of serious physical harm. At the administrative hearing, the MOSH Inspector mistakenly concentrated on the voltage of 10,000 as the hazard. He did not seem to understand that the hazard is not from the voltage but from the amperage. Tr1 at 110-112. The amperage in this case was low -- 5 milliamps. Tr2 at 97. The MOSH Worksheets identify the harm as "minor electrical shock." MOSH Ex. 16 & 17. In the severity portion of the worksheets which describe reasonably predictable injuries, MOSH left this portion blank. *Id.* The MOSH Inspector's confusion regarding voltage coupled with MOSH's Worksheets do not support a substantial probability of illness or death from electric shock. This conclusion is further supported by the fact that all three employees returned to work on the day of the accident as well as the testimony of the employer's expert witness.

Turning to the issue of whether the threat of a fall from scaffolding in reaction to the electric shock poses a substantial probability of death or serious physical harm, the Hearing Examiner found that MOSH met its burden of proving that there is a substantial probability of a serious injury as a result of a fall from a scaffold from an electric shock from 5 milliamps. The Commissioner disagrees.

One of the NEC employees was standing on a scaffold at the time he experienced the electric shock. MOSH Ex. 5. It is unclear how high the scaffold was as MOSH did not measure the exact height but the MOSH Inspector estimated the scaffold to be three feet. Tr1 at 73. As there are no fall protection requirements at three feet, the scaffold is relevant if the electricity has some kind of effect on the human body that would create a danger from being on the scaffold.

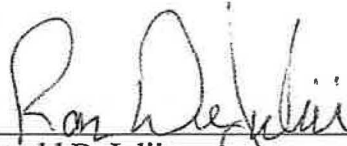
The Employer's expert witness, Charles Kovarik, who was accepted as an expert in electrical engineering and had experience with numerous personal injury accidents involving contact with electrical current, testified that five milliamps was perceptible but did not rise to the level of hazardous under these facts. Tr2 at 92-93. Mr. Kovarik testified that falling from a scaffold would not be an obvious problem for someone who gets a sudden and unexpected electric shock. Tr2 at 95. As noted by Mr. Kovarik, it is possible to fall from the scaffold after receiving an unexpected shock but that an individual can fall from a scaffold without getting shocked. Tr2 at 93. Additionally, the NEC employees were wearing hard hats. Given the scaffold was only approximately three feet high and the amperage only 5 milliamps, even if an employee experienced an electric shock resulting in him falling off the scaffold, it is unlikely that death or a serious injury would result. The Commissioner finds that under these facts that MOSH has not demonstrated that there is a substantial likelihood of a serious injury.

As found by the Hearing Examiner, the citations are affirmed. The Commissioner, however, modifies the characterization of the violations to other than serious.

For the foregoing reasons, the Commissioner of Labor and Industry on this 29th day of October, 2014, hereby ORDERS:

1. Citation 1, item 1(a) alleging an other than serious violation of 29 CFR §1910.269(d)(2)(iv), with no penalty is AFFIRMED;
2. Citation 1, item 1(a) alleging an other than serious violation of 29 CFR §1910.269(d)(2)(vi)(C) with no penalty is AFFIRMED;
3. 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, 5-212, *Annotated Code of Maryland*, and the
Maryland Rules, Title 7, Chapter 200.



J. Ronald DeJuliis
Commissioner of Labor and Industry