

February 4, 2014

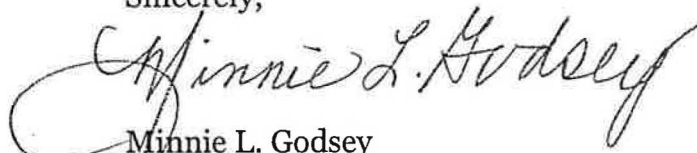
Adele L. Abrams  
Attorney-at-Law  
4740 Corridor Place, Suite D  
Beltsville, MD 20750

Subject: Riggs Distler & Company, Inc.  
MOSH Case No. M1380-001-09  
OAH No.: DLR-MOSH-41-08-47163

Dear Ms. Abrams:

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	*	BEFORE THE
	*	COMMISSIONER OF LABOR
RIGGS DISTLER & COMPANY, INC.	*	AND INDUSTRY
	*	MOSH CASE NO. M1380-001-09
	*	OAH CASE NO. 41-08-47163
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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*. On October 27, 2008, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued a citation to Riggs Distler & Company, Inc. (“Riggs” or “Employer”) for a violation of 29 C.F.R. § 1926.416(a)(1), a construction safety standard pertaining to the prevention of electrical shocks. The citation stemmed from an inspection that MOSH performed after the Employer informed MOSH that one of its workers had suffered a fatal workplace accident.

The Employer contested the citation and a hearing was held on April 21 and May 27, 2009 at the Office of Administrative Hearings in Hunt Valley, Maryland. Thomas G. Welshko, Administrative Law Judge presided as the Hearing Examiner (“HE”). The HE then issued a proposed decision recommending that the citation and proposed penalty of \$ 4,800.00 be vacated.

MOSH appealed the proposed decision and the Commissioner of Labor and Industry held a review hearing on December 15, 2009. Based upon a thorough review of the factual record, the relevant law, and the arguments made by both parties, the

Commissioner affirms the proposed decision of the Hearing Examiner and vacates Citation 1.

### **FINDINGS OF FACT**

1. The employer is an electrical contractor and a sub-contractor for Baltimore Gas and Electric Company. FF1.<sup>1</sup>

2. On July 19, 2008, the Employer sent workers to address an electrical problem at 229 Berrywood Drive, a residential neighborhood in Severna Park, Maryland. MOSH Ex. 5.

3. The issue was a secondary residential service fault, or interruption in power distribution. FF 2 and 3; TR1<sup>2</sup> at 197-98.

4. The employer sent one crew out that was having trouble locating the problem. TR2 at 198. The employer then sent a second crew, Steven Gilbert and Thomas Kikas, to relieve the first crew and locate the fault in the underground power cable. MOSH Ex. 5; TR2 at 196.

5. One safety limitation on Mr. Gilbert and Mr. Kikas was that the fault in the cable had not entirely disrupted electrical services to the homes on Berrywood Drive. TR1 at 198-99. One elderly woman in the neighborhood still had functioning air conditioning – which she needed to remain working for health reasons on a hot summer evening. *Id.* This meant that Mr. Gilbert and Mr. Kikas had to service the cable while it was live. *Id.* As Mr. Gilbert described in his written statement to MOSH, both houses had half power and one of the legs was still “hot.” MOSH Ex. 9 at 2 & 3.

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<sup>1</sup> “FF” refers to the findings of fact set forth in the Hearing Examiner’s decision.

<sup>2</sup> There were two days of administrative hearings in this case. The April 21, 2009 hearing will be referred to as TR1 and the May 27, 2009 hearing will be referred to as TR2.

6. Mr. Kikas and Mr. Gilbert dug a hole to service the cable. The hole was located between the roadway and a street light. TR2 at 218. They dug the hole to locate and fix the fault. *Id.* While Mr. Gilbert was getting tools ready, Mr. Kikas fell into the hole. FF 13. Mr. Gilbert pulled Mr. Kikas out of the hole but he was not breathing. *Id.* Mr. Kikas died later that day. *Id.*

7. MOSH issued a citation to Riggs alleging a violation of 29 C.F.R. 1926.416(a)(1). MOSH Ex. 1. The basis for the alleged violation is that employees “were permitted to work in proximity to electric power circuits and were not protected against electric shock by de-energizing and grounding the circuits or effectively guarding the circuits by insulation or other means.” *Id.*

### **DISCUSSION**

The issue on review is whether the standard cited by MOSH, 29 C.F.R. § 1926.416(a)(1), applies to the work that was being performed. MOSH argues that the HE erred in concluding that the work performed by Riggs was not construction work, and therefore, subject to Section 416(a)(1). The Employer contends that the HE properly found that the cited standard does not apply and a more specific standard, 29 C.F.R. § 1910.269 would apply to the circumstances of this case.

Section 1926, subpart 400, addresses electrical safety requirements “that are necessary to safeguard employees involved in construction work.” MOSH Ex. 2. Construction work is defined as “work for construction, alteration, and/or repair, including painting and decorating.” 29 C.F.R. 1910.12. This safety standard further provides that construction work “includes the erection of new electric transmission and distribution lines and equipment and the alteration, conversion, and improvement of the

existing transmission and distribution lines and equipment.” 29 C.F.R. 1910.12(d). The section cited, 1926.416(a)(1) requires the following:

(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 de-energizing the circuit and grounding it or by guarding it effectively by insulation or other means.

On the day of the accident, two Riggs employees were in the process of locating a fault to several residential homes. As one of the Riggs’ employees described in his written statement, one of the “legs” was out and the homes had half power. MOSH Ex. 9. The employees had located the fault and were planning on splicing a section and replacing it. *Id.* At issue is whether this work constitutes construction work under Section 416 or whether this work is operations or maintenance under 29 C.F.R. 1910.269.<sup>3</sup>

MOSH urges the Commissioner to rely on the term “repair” in the definition of construction work under 29 C.F.R. 1910.12 as the basis to apply the cited standard. However, the term repair is used in both the cited standard as well as 1910.269. *See* 1910.269(l). MOSH also asserts that *Central Kansas Power Co.* 6 O.S.H.C. (BNA) 2118 (1978)<sup>4</sup> is applicable and supports the application of Section 416(a)(1). Yet, this case was decided 15 years before Section 269 was adopted. As the HE found and the

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<sup>3</sup> On review, MOSH challenges the HE’s conclusion that 29 C.F.R. 1910.269 “preempts” 29 C.F.R. 1926.416(a) (1). HE Decision at 14. The Commissioner agrees that the HE’s conclusion that Section 269 preempts Section 416 is incorrectly phrased. As discussed herein a more appropriate way to frame the conclusion would be to find that the specific section prevails over a more general standard.

<sup>4</sup> In *Central Kansas Power Co.*, the employer was cited with a violation of the general duty clause and a construction standard while employees were repairing a power line that had broken during a storm. The Review Commission held that replacement of parts to restore electrical service was a repair under 29 C.F.R. 1910.12(b). The citation was vacated by the Review Commission on other grounds.

Commissioner affirms, the holding of the case is of limited value given the subsequent adoption of Section 269.

Section 1910.269, known as the Electric Power, Generation, Transmission and Distribution Standard, addresses work practices to be followed during the operation and maintenance of electrical power generation, transmission, and distribution facilities. The Employer asserts that Section 269 applies to fault location work with replacement of in kind equipment just the type of work being performed in this case. While Section 269 does not define “operation” or “maintenance”, the regulatory history sheds some light on the intended scope of the standard. In the Preamble adopting Section 269, OSHA acknowledges that maintenance and operations are not defined but notes that activity “associated with electric power generation, transmission, and distribution installations is covered including “testing and fault locating”, “maintenance of lines and equipment”, and “other operations and maintenance activities”. 59 FR 4332-4333. In addition, an OSHA Instruction Directive provides further guidance. The “Enforcement of the Electric Power Generation Transmission, and Distribution Standard” provides examples of situations where the work performed is construction vs. maintenance. Of relevance to this case, OSHA provides as follows:

The repair of specific limited portions of electrical systems with “replacement in kind” parts to keep them in operation is maintenance and covered by the general industry standards.

OSHA Compliance Directive 2-1.38; Employer Ex. 1/23.

The Riggs’ employees were locating a fault and repairing a portion of the electrical system with replacement parts to keep in it operation. The Commissioner finds that fault location work with the splicing of a distribution cable is a repair of a “specific limited portion” of an electrical system which constitutes maintenance and therefore falls

under 29 C.F.R. 1910.269 rather than 1926.416(a). This conclusion is supported by the general occupational safety and health standards principle that where there is a particular standard which specifically addresses a condition or practice, it prevails over a more general standard. *See* 29 C.F.R. 1910.5(c). Section 269 lays out in detail protections to follow for employees performing work “on or near exposed energized parts” including which employees can perform work, types of personal protective equipment to be used and grounding protection. *See* 29 C.F.R. 1910. 269(g), (l), and (n). In contrast, 1926.416(a)(1) provides in general terms that employees shall be protected against electric shock by de-energizing the circuit. As noted by Riggs, the Review Commission has recognized that the construction standards apply to actual “construction work or to related activities that are an integral and necessary part of construction work. Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a non-construction operation.” *B.J. Hughes, Inc.* 10 O.S.H.C. (BNA) 1545, 1547 (1982). Here, the Employer was locating a fault and replacing it with in kind parts. There was no addition to the existing system such as upgrading voltage or laying additional lines. Moreover, the MOSH inspector acknowledged that there were no nearby houses under construction, roads torn up or other evidence of a construction operation. TR1 at 161-62.

The HE correctly found that a repair can, depending upon the circumstances, constitute maintenance and therefore fall under a general industry standard of Section 269 rather than the construction standard of Section 416(a).<sup>5</sup> Based upon the foregoing, the

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<sup>5</sup> It is for this reason that MOSH has the authority to issue a citation in the alternative so that should there be a set of facts for which more than one standard may apply, MOSH may cite to one standard and in the alternative to another.

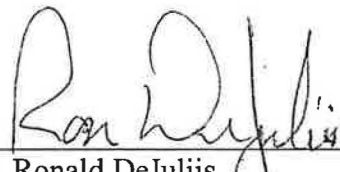


Commissioner finds that MOSH failed to establish that the cited standard applies and the citation is hereby vacated.

Therefore, on this 4<sup>th</sup> day of February, 2014, the Commissioner hereby ORDERS:

1. Citation 1, Item 1 for a serious violation 29 C.F.R. §416(a)(1) with a proposed penalty of \$4,800.00 is VACATED.

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.

  
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J. Ronald DeJuliis  
Commissioner of Labor and Industry

**RECEIVED**

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ATTORNEY GENERAL