

IN THE MATTER OF

CHUCK'S ELECTRICAL

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BEFORE THE
COMMISSIONER OF LABOR
AND INDUSTRY

MOSH CASE NO. J7595-004-07;
OAH CASE NO. DLR-MOSH-41-
06-52962

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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 a planned job site inspection on September 7, 2006, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH") issued two citations to Chuck's Electrical Service, Inc. ("Employer"), alleging various violations. A hearing was held on February 21, 2007, at which the parties introduced evidence, presented witnesses, and made arguments. Thereafter, D. Harrison Pratt, Administrative Law Judge sitting as the Hearing Examiner ("HE"), issued a Proposed Decision recommending that one of the two citations be affirmed.

The Employer filed a timely request for review and the Commissioner, exercising his authority pursuant to Labor and Employment Article, § 5-214(e), *Annotated Code of Maryland*, ordered review. On September 6, 2007, the Commissioner of Labor and Industry 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 recommendations are AFFIRMED.

FINDINGS OF FACT

On September 7, 2006, the Employer was doing electrical work on a job at 25390 Richardson Road in Federalsburg, Maryland. FF 1. On the morning of September 7, 2006, a MOSH assigned Compliance Officer, Stephen Ridgell ("MOSH Inspector" or "Inspector"), to conduct a routine safety inspection of the site. During his inspection, the MOSH Inspector observed one of the Employer's employees, Mr. Joshua, drilling holes in a metal column using three electrical cords (extension cords) that were connected to each other and plugged into an outlet in the side of the building. Using two different tests, the MOSH Inspector examined the electrical outlet in which the cords were plugged and determined that the outlet was not properly grounded. The Employee's foreman, Mr. Roeder, also tested the outlet and confirmed that it was not properly grounded.

When inspecting the kitchen area of the school, a room used by the Employer as a staging area, the MOSH Inspector observed an electrical panel being used by the Employer's employees loosely covered by a piece of cardboard. On the outside of the cardboard was the word "HOT" in large red letters. The metal doors that would normally cover the panel were missing, and there was a gap of about four inches above the top of the cardboard and the top of the panel. Tr. 29-30; MOSH Exhibit 5. Some of the electrical wires to and from the panel board were energized. Immediately in front of the panel board was a stream of water that ran for several feet through a nearby door and into another room. A few inches to the left of the panel board was an electrical outlet into which two electric cords were plugged. The cords were in contact with the water on the floor.

Pursuant to that inspection, on October 4, 2006, MOSH issued two citations against the Employer, each of which was appealed. MOSH Ex. 1 and 2. The HE affirmed Citation 1,

Items 1 and 2 and the accompanying penalties and dismissed Citation 2, Item 1. On review, the Employer objects to Citation 1. As neither party has requested review of Citation 2, the HE's decision regarding that Citation will stand, and the Commissioner is reviewing only Citation 1, Items 1 and 2.

DISCUSSION

Citation 1, Item 1

MOSH charged the Employer with a serious violation of 29 CFR § 1926.404(f)(6), which requires that "[t]he path to ground from circuits, equipment, and enclosures shall be permanent and continuous." MOSH Exhibits 1 and 7. The MOSH Inspector testified that both he and Mr. Roeder tested the extension cords being used by Mr. Joshua to drill holes into the metal columns and determined that they had an open ground, i.e. that the path to ground was not permanent and continuous. Tr. 25-28.¹ This testimony is supported by photographic evidence. See MOSH Exhibit 5.

The Employer has not disputed that the electrical cords and outlet used by Mr. Joshua were not grounded. Rev. Tr. 10; Tr. 26-29. Instead, the Employer argues before the Commissioner that, because they were using the existing wiring in the building as temporary wiring and there was no grounded conductor present, their decision to install ground fault circuit interrupters was in compliance with the National Electrical Code, NEC 406.3-3(b)(c), and thus should not have been the basis of a citation. Rev. Tr. 10-11. However, the fact remains that, regardless of compliance with the NEC, the Employer was not in compliance with 29 CFR § 1926.404(f)(6), which has been adopted into Maryland Law and is a

¹ Herein, the transcript of the February 21, 2007 hearing as "Tr." and the transcript of the September 6, 2007 review hearing before the Commissioner as "Rev. Tr.".

mandatory standard. COMAR 09.12.31.00. As the mandatory standard requires a “permanent and continuous path to ground”, the Commissioner upholds Citation 1, Item 1.

Citation 1, Item 2

MOSH cited the Employer with a serious violation of 29 CFR § 1926.405(d), which requires that “[p]anelboards shall be mounted in cabinets, cutout boxes, or enclosures designed for the purpose and shall be dead front.” MOSH Exhibits 1 and 10. On review, the Employer does not dispute the factual findings regarding the panel board in use at the time of the inspection, but questions MOSH’s definition of “dead front”, arguing that the panel board cover underneath the cardboard marked “HOT” and shown in picture number 9 of MOSH Exhibit 4 constituted a “dead front” cover. Tr. 7-8.

“Dead front” is defined in CFR § 1926.449 as “[w]ithout live parts exposed to a person on the operating side of the equipment.” MOSH Exhibit 12. The MOSH Inspector testified that Mr. Roeder told him during the inspection that the box was “live” or “hot”. Tr. 30. The MOSH Inspector further testified that the cardboard box cover did not constitute an acceptable way to prevent a hazard because the cardboard, unlike metal, could be pushed through anything located inside the box, allowing contact with a live or energized part underneath. Tr. 39. He explained that he was not willing to go within three feet of the panel box once Mr. Roeder told him that the panels were hot or energized, because, especially due to the water on the floor, he did not want to expose himself to a potential serious hazard. Tr. 40. While Mr. Roeder testified at one point that the cardboard was merely an “extra precaution” installed over an existing “dead panel”, and that there were no energized parts of the panel under the cardboard because they were not “live to the touch”, this testimony conflicts with his acknowledgement that at the time of the inspection, the main power in the

panel was on and some of the lines were on, and some were off. Tr. 92, 96. It also conflicts with his admission that the panel board was probably “hot” and that, if you put your fingers behind the cardboard you could probably get shocked. Tr. 107-109.

In assessing the credibility of a witness, the reviewing agency should give “appropriate deference to the opportunity of the examiner to observe the demeanor of the witnesses.” *Anderson v. Dep’t of Public Works*, 330 Md. 187, 216 (1993). “The presiding officer’s findings as to credibility have almost conclusive force...[and] the review authority has the power to reject credibility assessments only if it gives strong reasons for doing so.” *Id.* The HE made a credibility determination regarding Roeder’s testimony that the panel met the definition of “dead front” and was not a hazard, noting that, upon further questioning, Mr. Roeder admitted that “if you put your hands behind the panel you could be shocked.” HE Decision at 11. Finding no reason to contest the HE’s determination that Roeder’s testimony was not credible, the Commissioner finds that, especially given the fact the live wires were plugged into a nearby socket and the cords were running through a stream of water immediately in front of the unguarded panel, the panel box presented a serious hazard, and was not “dead front” as required by 29 CFR § 1926.449. The Commissioner also finds that Mr. Roeder’s testimony demonstrated that the Employer was aware of the danger of the violation. Tr. 108-12. Therefore the Commissioner affirms Citation 1, Item 2.

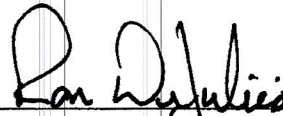
Penalty Calculations

The Employer has not contested the penalty calculations. Therefore, finding that MOSH appropriately used approved formulas derived from COMAR 09.12.20.12 to compute the penalties, the Commissioner upholds the penalty calculations for Citation 1, Items 1 and 2.

For the foregoing reasons, the Commissioner of Labor and Industry on the 7TH day of APRIL, 2008, hereby **ORDERS**:

1. Citation 1, Item 1 for a serious violation of 29 CFR § 1926.404(f)(6) and its accompanying penalty of \$750.00, is **AFFIRMED**.
2. Citation 1, Item 2 for a serious violation of 29 CFR § 1926.405(d) and its accompanying penalty of \$1,000, is **AFFIRMED**.

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.



J. Ronald DeJullis, Commissioner
Division of Labor and Industry