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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. KENT 80-187 A.O. No. 15-02069-03013 V
v.		Sinclair Strip
PEABODY COAL COMPANY,	RESPONDENT	

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner
Thomas Gallagher, Esq., St. Louis, Missouri, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of a civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. 77.807. Respondent filed a timely answer contesting the citation and requested a hearing. A hearing was held pursuant to notice on June 26, 1980, in Evansville, Indiana, and the parties appeared and participated therein. The parties filed posthearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of a civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations (Tr. 4-5)

1. Respondent is subject to the jurisdiction of the Act.

2. Respondent is a large mine operator and the subject mine employs 280 miners.

3. Respondent's history of prior violations at the mine in question is not excessive and any penalty assessed in this matter will not adversely affect respondent's ability to remain in business.

4. MSHA inspector Curtis W. Haile conducted an inspection at the mine in question on October 12, 1979, and issued Citation No. 799652.

5. The depositions taken in three prior proceedings which were settled by the parties (KENT 80-155, 80-156, and 80-157), where relevant and material in the instant proceeding, may be incorporated by reference in this case (Tr. 108-109).

Discussion

Citation No. 799652, issued by MSHA inspector Curtis W. Haile on October 12, 1979, charges a violation of 30 C.F.R. 77.807, and states as follows:

> The high voltage cable supplying 4160 volts AC to the 5561 pit (I.D. 002) was inadequately protected against damage by mobile equipment in at least three separate locations between the main substation and the 5561 shovel. The cable locations at which mobile pit equipment were crossing was inadequate which was resulting in cable damage and or deterioration which was clearly visible especially near the 5561 shovel. Responsibility of Eddie Curtis (Supt).

Petitioner's Testimony and Evidence

Inspector Haile testified that he has been employed as an MSHA electrical inspector for approximately 5-1/2 years, and prior to this was employed in electrical maintenance with Peabody Coal and Island Creek Coal Companies. He confirmed that he conducted an electrical inspection at the mine on October 12, 1979, starting at the power substation and proceeding to the 5561 pit. He believed that there were damaged areas in the power cable and his visual observations confirmed this fact. The damaged cable constituted a violation of section 77.807 which requires that high-voltage transmission cables be installed or placed so as to afford protection against damage by mobile equipment. He walked along the cable inspecting it, and his inspection covered the area between the power substation and the 5561 pit shovel, and the area covered is depicted in a sketch which he drew (Exh. P-3, Tr. 11-15).

Inspector Haile described the damaged cable areas as those which are detailed in the citation, and in his opinion the damage was caused by mobile equipment crossing the cable even though a varied amount of dirt had been pushed over the cable in order to protect it. The cable supplied 4,160 volts of power to the 5561 shovel, and it was a 40 GGC-shielded cable approximately 5,000 to 6,000 feet long, beginning at the power substation, connecting to a series of connection boxes commonly known as "knife houses," and ending at the 5561 shovel. The cable was stretched out along travelways and reclaimed spoil areas, and it was lying on the ground. At the locations used for equipment crossings, mounds of dirt were pushed over the cable to protect it when equipment crossed over it. The type of equipment working in the pit varied, and Mr. Haile could not specify the types of equipment utilized other than bulldozers performing reclamation work. He observed no equipment crossing over any of the cable during his inspection (Tr. 15-20).

Inspector Haile testified that the cable damage he observed was limited to a torn outer jacket. The cable shielding was still intact at all three damaged locations, and the only damage visible was the torn outer jacket. The cable was not energized during the inspection because he asked that it be deenergized so that it could be inspected. He estimated the dirt crossover ramps to be approximately 10 feet wide and the depth of the dirt ranged from 8 to 20 inches, but he made no measurements. He could not recall the three specific locations along the cable length where the damage had occurred (Tr. 20-29).

Inspector Haile indicated that the damage to the outer cable jacket would eventually result in deterioration to the cable due to its exposure to the soil. However, he conceded that respondent tried to keep rocks out of the dirt used for the ramps so as to prevent cable damage. The three damaged areas were not visible, and they were detected only after the cable was pulled out of the dirt. Abatement was achieved by repairing the damaged cable areas and repairs were also made to several questionable cable sections which were not cited. The cable was also placed

in a different location (Tr. 30-33). A portion of the cable had been already been removed prior to his inspection

and a company electrician told him the cable was removed because it was damaged by a dozer (Tr. 37).

In addition to repairing the cable cover to achieve abatement, Inspector Haile indicated that he requested that the cable be placed in a trench at least the depth of the cable and then covered with dirt at the locations designated as equipment crossovers. The depth of the trench would depend on the size of the cable, and the three locations cited were trenched and covered. The other alternative abatement methods discussed with management were suspending the cable or placing it in a metal trough (Tr. 38-41).

Inspector Haile testified that the three alternative methods of cable protection through trenching, suspending, or placing it in a trough, was a policy arrived at collectively in his MSHA district at a conference of electrical personnel, an electrical supervisor, and the district manager, and the three methods were deemed acceptable as future compliance. Inspector Haile identified Exhibit P-4 as a district memorandum detailing the policy in writing, and although it pertains to section 77.604, it also applied to section 77.807, because a trailing cable covered by section 77.604 is of the same basic design as a high-voltage transmission line covered by section 77.807 (Tr. 42).

Mr. Haile confirmed that one would have to walk miles of cable and examine it closely in order to detect any damage, but he considered the practice of covering the cable with dirt to be more of a hazard than the actual cable damage condition because the cable could deteriorate over a period of time and it could contribute to cable blowouts (Tr. 45). Abatement was achieved immediately and repairs were made as each damaged cable condition was detected (Tr. 47).

On cross-examination, Inspector Haile recalled that the cable outer jacket insulation was damaged in three locations, but he could not recall whether he made notes of the specific extent of the damage, and indicated that if the damage had been more than just the outer jacket he would have cited other standards covering other damage. The three damaged areas were observed after the cable was pulled out of the dirt at the places where it had been covered. The practice of burying cable above ground is not a violation, and he confirmed that such a practice is contrary to the "Craft Memorandum." If a cable buried above ground is found to be damaged, he would cite the regulation and not the memorandum, but he would not issue a citation simply because a mine operator buried its cable above ground (Tr. 63-70).

Inspector Haile testified that the cable was on the pit spoil, and reclamation dozers would be in the area, although he observed none on the day of the inspection. The distances between the cable crossovers varied and some looked inadequate in that a small amount of dirt was pushed up over the cable (Tr. 80). He described the interior make up of the cable (Tr. 80-82), and he indicated that the three damaged cable locations he cited

consisted of torn outer jackets ranging from 8 to 10 inches wide exposing the inner cable

shielding and the outer jacket was gapped open for approximately 2 inches (Tr. 84). He could pinpoint only one cable location which was directly under the dirt, and while he could not state whether the other two damaged cable locations were buried, he indicated that they were "near" (Tr. 88). He observed no evidence of the cable being run over at the areas away from the cable buries, and except for an electrician or pit foreman, no one would have any reason to be on the spoil (Tr. 91, 101).

Inspector Haile identified the notes he made when he issued his citation (Tr. 107, Exh. R-8, deposition of May 28, 1980). He confirmed tht his notes do not specifically describe the damaged cable locations (Tr. 112), and he could only confirm that one location was directly under the cable crossing bury and he could not confirm that the cable was not damaged before it was buried (Tr. 131).

Respondent's Testimony and Evidence

Richard D. Stokes, director of respondent's Eastern Service Electrical Engineering Operations (including the Sinclair Mine), who holds a B.S. degree in electrical engineering from the University of Kentucky, testified he was familiar with the alleged violation in question by reviewing the citation and speaking to several mine personnel, but he was not present when the citation was issued. Mr. Stokes examined a demonstration piece of a cable (Exh. R-1) and described its various parts (Tr. 146-157). The cable which was cited by Mr. Haile was an above-ground buried cable located on the spoil bank and it was apparently installed by being reeled off a cable reel mounted on a truck cable transporter, and he identified a series of aerial photographs showing the cable location area (Tr. 152-153, Exhs. R-4, R-5, R-6). When necessary, the cable is handled by electricians, and the cable locations depicted on the exhibits indicates to him that it is not handled often (Tr. 155-156). Based on his experience in surface mining since 1953, he believed that a high transmission cable such as the one in question only requires handling when there is a cable failure requiring repairs or when it is buried underground. Surface burying does not require the handling of the cable. In his view, the cable in question is a feeder cable (Tr. 158).

Mr. Stokes was of the opinion that assuming the cable outer jacket was damaged as described by Inspector Haile, no one would be in any danger or exposed to a hazard because the shielding affords protection against any faults and the cable is not handled without proper gloves while it is energized (Tr. 159-160). The function of the cable outer jacket is to afford mechanical protection to the internal cable conductors and it is not constructed as an insulation (Tr. 161).

On cross-examination, Mr. Stokes could not state with any certainty what caused the cable damage described by Inspector Haile, and he indicated that it could be damaged by rocks or equipment. Cables are surfaced buried to a sufficient depth to protect them at places where mobile equipment may cross over them

(Tr. 162). Cables are inspected as required by the law, monthly or daily, but damaged cables are not reported to him since that it is the

responsibility of the mine chief electrician (Tr. 163-164). He could not state whether the cable cited was in fact handled at the time in question (Tr. 165). Cable hooks and rubber gloves are used to handle such cables (Tr. 166). Outer cable jackets do provide protection from cable electrical problems, and he did not believe that outer jackets are required for the cable construction in question and has never seen cable deterioration simply from a damaged outer jacket (Tr. 168). He confirmed that the cited cable was a high-voltage transmission cable and its construction is no different from the one depicted in Exhibit R-1 (Tr. 171). He was advised that abatement was achieved by trenching the cable below the surface and covering it (Tr. 172), and he believed that water would not present a hazard to the particular torn cable jacket in question because the conductors are composed of tin and are insulated from each other (Tr. 172-173).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of mandatory safety standard 30 C.F.R. 77.807, which provides as follows: "High-voltage transmission cables shall be installed or placed so as to afford protection against damage. They shall be placed to prevent contact with low-voltage or communication circuits."

The cited standard requires that cables be installed and placed in such a manner so as to provide protection against damage. Since the inspector found three areas of cable damage at or near locations where he believed mobile equipment was operating and passing over the cables, he concluded that respondent had failed to provide adequate protection for the cable and this caused him to issue the citation.

One of the defenses advanced by the respondent in its posthearing brief is the assertion that Inspector Haile did not specifically pinpoint the exact three locations between the area described as "the main substation and the 5561 shovel" where he discovered cable damage. This defense is rejected. While I am in agreement with the respondent's observation in this regard, and find that the inspector's citation is lacking somewhat in specificity, the fact is that his description adequately enabled respondent to achieve abatement, and the record reflects that company representatives, including electrical personnel, accompanied the inspector during his inspection and they were clearly aware of the cited three damaged cable areas.

It seems clear to me that Inspector Haile could not specifically pinpoint the three cable locations which he believed constituted areas which were apparently damaged by mobile equipment passing over the cable, and petitioner's counsel candidly conceded this fact at the hearing (Tr. 187). However, it is also clear from the inspector's testimony that in at least one cable location the outer jacket of the cable was torn and

ripped apart to a degree which exposed the inner shielding, which in itself was not damaged. In addition, the inspector alluded to two other unspecified cable

locations which also contained some degree of damage to the outer cable, and he also indicated that one section of cable near the shovel had been removed and repaired by the respondent prior to his inspection due to apparent damage caused by equipment running over it. Respondent's testimony does not rebut these findings by the inspector, and the thrust of its defense centers on its assertion that MSHA is attempting to force it to bury its cables below the surface as a means of protection and to matters which go to the question of negligence and to the gravity of the conditions cited rather than a denial of the fact that the cable was in fact damaged as described by the inspector on the face of the citation, and respondent's counsel conceded this fact during the hearing (Tr. 188).

Respondent's suggestion that since the inspector did not personally observe any equipment actually running over the cable the petitioner has failed to establish a violation is likewise rejected as a defense in this case. Respondent has not rebutted the inspector's findings that in at least three locations along the approximately 6,000 feet of cable, there was some damage to the cable. While it is true that the inspector could not pinpoint the precise locations, he did in fact specifically recall one location where the outer jacket of the cable was torn and ripped open at a location where the cable was "surface buried." That is, dirt was piled over the cable so as to form a ramp to facilitate equipment crossing over it. Therefore, as to that location, absent any rebuttal or explanation from the respondent as to what may have caused the damage, there is a strong inference and presumption that the cable was in fact damaged by equipment passing over it at the point where it was covered with dirt.

In view of the foregoing findings and conclusions, and on the basis of the preponderance of the credible evidence and testimony adduced by the petitioner in support of the citation, I conclude and find that petitioner has established a violation of section 77.807, and the citation issued by Inspector Haile is AFFIRMED.

While I have affirmed the citation in this case, I believe that some comment is in order regarding the real concern by respondent regarding MSHA's enforcement policy concerning cable protection. The thrust of respondent's concern centers on its assertion that MSHA is attempting to impose a requirement that it trench or bury its cables underground as a means of complying with section 77.807, and that it has attempted to do this by adopting an enforcement policy issued by MSHA District 10 Manager William M. Craft, in a Memorandum dated October 16, 1978, directed to all "District 10 Surface Personnel and All Surface Mine Superintendents" (Exh. P-4). That memorandum states as follows:

> SUBJECT: 77.604 - Trailing Cable Protection
>
> Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged

by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway

2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or

3. An equivalent form of protection, i.e., by cutting a trench and burying the cable covered with dirt. Covering cable with dirt only will no longer be acceptable.

The subject matter of the Craft Memorandum deals with cable protection for trailing cables, while the cited standard in this case deals with cable protection for high-voltage transmission cables. The practical effect of the memorandum is to treat both mandatory requirements as interchangeable, and it seems clear to me that MSHA's district office believes that on the facts of this case the proper method to protect the cable which was cited by the inspector is to bury it beneath the surface of the ground, even though petitioner's counsel conceded that the standard itself does not provide for any specific method for protecting such cables (Tr. 51).

Although Inspector Haile denied that he would not issue a citation simply because the respondent did not trench or bury its cable beneath the surface of the ground, I believe that his assertion in this regard is tempered by the fact that there is no specific mandatory standard requiring that cables be protected by burying or trenching, and he was cognizant of this fact. In short, were it not for the fact that he discovered some cable damage which he attributed to equipment running over it, he clearly would not have issued a citation simply because the cable was not buried. Further, I am convinced that Inspector Haile was not oblivious to the Craft Memorandum and that he was influenced to some degree by the memorandum and by his own personal opinion concerning what he and his MSHA district believed to be proper cable protection. My conclusion in this regard is supported by the fact that abatement was achieved in part by retrenching the cable in question in the manner suggested by the memorandum after the damage was repaired (Tr. 130-131). It is further supported by Inspector Haile's assertion that in the event cable damage is detected, he would, as a matter of course, attempt to reach some agreement with an operator as to the best method to protect the cable from further damage or deterioration, presumably by burying it underground, before he would abate any citation. If this were not done, he would issue a withdrawal order (Tr. 127-128). This strikes me as being a rather arbitrary method of achieving compliance by the threatened use of closure orders.

In addition to MSHA's apparent use of the Craft Memorandum as a means of achieving compliance with section 77.807, respondent is also concerned with the real possibility that MSHA inspectors will require it to take up all of its surface-buried cables for inspection purposes, and if any damage is detected, will require respondent to trench or rebury it underground or suffer the consequences of a withdrawal order. In short,

respondent believes that MSHA has rejected its surface-burying method of cable protection out of hand

and is attempting to impose the trenching or subsurface-burying method as a mandatory requirement for continued compliance with section 77.807.

After careful consideration of the facts and circumstances surrounding the issuance of the citation in this case, I believe that respondent's assertions concerning the somewhat arbitrary enforcement scheme concerning the application of section 77.807 has merit. I believe that the record adduced in this case supports a strong inference that at the time he conducted his inspection, Mr. Haile was influenced to some degree by the policy in his district concerning the MSHA method of protecting cables as opposed to the method used by respondent. In these circumstances, were it not for the fact that the inspector discovered unrebutted evidence of cable damage, I would vacate the citation forthwith on the ground that the cited standard does not require any particular method for protecting cables, that the District 10 Craft Memorandum, which is not a validly promulgated safety standard, may not serve to impose MSHA's cable-trenching policy on the respondent, and that respondent's failure to trench or bury its cable in accordance with the memorandum is not per se a violation of section 77.807. While I express no opinion on the merits of MSHA's suggestions concerning the methods of providing cable protection, suffice it to say that this is not the first time MSHA has attempted to impose its invalid unpromulgated will on a mine operator by means of a memorandum seemingly limited to one of its districts. It seems to me that a better way to achieve industry-wide compliance in these instances is to promulgate such requirements as mandatory standards, rather than attempting to force them on a selected operator through administrative fiat.

As far as I am concerned, I see nothing on the face of section 77.807, which prohibits the respondent from continuing to provide cable protection by means of constructing dirt ramps at mobile equipment crossover points. If that method results in adequate protection for the cable, then respondent has achieved compliance. If it does not, then respondent runs the risk of being cited again for failure to provide adequate damage protection for its cables. Further, if the respondent believes that MSHA's continued enforcement policy in connection with section 77.807, is arbitrary, then I suggest it avail itself of any additional legal remedies afforded pursuant to the Act.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business.

The parties stipulated that the respondent is a large mine operator and that any civil penalty assessed in this matter will not adversely affect its ability to remain in business. I adopt this as my findings on these issues.

History of Prior Violations

Respondent's prior history of violations at its Sinclair Strip Mine is reflected in petitioner's Exhibit P-1, a list

complied by the inspector. Although this history reflects two prior citations of section 77.807, both issued in October, 1979, there is no indication that these were paid assessments, and petitioner concedes that respondent's history does not appear to be

excessive for the mine in question (p. 4, posthearing brief). Under the circumstances, I cannot conclude that respondent's prior history is such to warrant any increase in the civil penalty assessment normally attributed to the citation in question.

Good Faith Compliance

The record supports a finding that respondent achieved rapid good faith compliance in correcting the conditions cited and abating the citation. As pointed out by the petitioner, the inspector testified that as soon as a damaged section of the cable was found it was corrected immediately and the respondent removed another damaged section of cable from use before being told by the inspector to do so (Tr. 37, 47-48). Respondent's abatement efforts in this regard are reflected in the civil penlaty assessed by me in this case.

Gravity

The entire length of the cable in question was some 6,000 feet, and its location at a rather isolated section of the mine along a spoil bank where miners normally do not travel as shown in the aerial photographs (Exhs. R-4 (a) (b); R-5 (a) (b); and R-6 (a) (b)), coupled with the fact that only one section of the cable exhibited any real surface damage, leads me to conclude and find that in the circumstances presented, the condition cited was nonserious. As noted by the petitioner at page 3 of its posthearing brief, the inspector's opinion that the condition was serious was based upon the possibility of greater damage existing inside the cable. However, since the inner parts of the cable which conducted the high-voltage current were not exposed, the potential for danger to any miners was not great.

Negligence

I agree with the petitioner's proposed finding that the conditions cited resulted from the respondent's failure to exercise reasonable care to prevent the occurrence of the violation. Accordingly, I find that the violation resulted from respondent's ordinary negligence. It seems to me that if respondent chooses to construct dirt ramps for cable protection, thereby concealing any damage, it has a positive duty to monitor and inspect those crossover locations to insure that the ramps are adequately maintained for continued cable protection against damage.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of $950 is assessed for Citation No. 0799652, issued on October 12, 1979, for a violation of 30 C.F.R. 77.807.

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in the amount of $950 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge