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Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

LYMAN-RICHEY SAND AND GRAVEL
CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. CENT 80-166-M

A/O NO. 25-00556-05001

MINE: Plant #10 Waterloo

DECISION

Appearances:

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Before: Judge Virgil E. Vail

This proceeding was brought by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter the Act), for assessment of a civil penalty for an alleged violation of a mandatory safety standard. The case was heard October 7, 1980 at Omaha, Nebraska. Both parties were represented by counsel, who have submitted their proposed findings, conclusions and briefs following receipt of the transcripts.

Citation no. 184644 was issued by Inspector Marino M. Solano, Jr., on September 12, 1979, pursuant to section 104(a) of the Act. He cited 30 C.F.R. 55.12-13 and described the condition or practice as follows:

"Several splices were observed north of the reel racks leading to the dredge with exposed energized wires, carrying 440 volts. The outer jacket was barely replaced with rubber inner tubes with tape. Several other joints were observed where a possible bad splice was installed, signs of excess heat and boiling points were evident. Again inner tube was used as outer jacket insulation."

STIPULATION

The parties stipulated as follows:

1. The operator, Lyman-Richey Sand and Gravel Corporation, is owner and operator of the subject mine, Plant Number 10 Waterloo.
2. The operator and the mine are subject to the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge, Virgil E. Vail, of the Federal Mine Safety and Health Review Commission has jurisdiction of this case.
4. The inspector, Marino M. Solano, Jr., who issued the subject citation, was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. A copy of the subject citation is authentic and may be admitted into evidence for the purpose of establishing its issuance but not for its truthfulness or relevancy.
7. The Lyman-Richey Sand and Gravel Company is a member of the National Sand and Gravel Association. During 1979 Plant Site 10 at Valley, Nebraska was classified by that Association as a class C plant site, which is a plant site which extracts between 225,000 and 549,999 metric tons of sand and gravel during a year's operation and is considered to be moderate in size.
8. The record shows the respondent had no violations prior to the inspection on September 12, 1979.

ISSUES

Although respondent apparently advances three arguments, there are actually only two issues to be decided in this case.

1. Whether a violation of mandatory safety standard 30 C.F.R. 56.12-13 occurred at the time of the inspection on September 12, 1979 at the Waterloo Plant, and
2. Whether the standard cited in this instance applies to temporary splices in a power cable.

DISCUSSION

The evidence shows that on September 12, 1979 Inspector Kenneth McCleary conducted two inspections, one during the daylight and a second "illumination" inspection at night, at the respondent's Waterloo Plant No. 10 near Valley, Nebraska.

The plant involved herein is a sand and gravel extraction process involving a dredge. The dredge is powered by electricity supplied by three power cables which run through a reel rack to a transformer located on shore. In this particular dredging operation, the dredge starts removing or dredging materials from the property near the shore and as the material is mined from the property it is replaced by water creating a lake. As the dredge moves further away from the transformer on shore, power cable is spliced in at a point in front of the reel rack located between the transformer and the dredge.

During the daytime inspection, Inspector McCleary performed his duties alone issuing citations involving areas not involved in this citation. He testified that he did point out to Pete Reeves, the plant superintendent, several places on the power cable south of the reel rack near the transformer where the cable was "starting to get a little bit ratty" and stated that he would like to have that fixed. This was not the part of the power line involved in Citation no. 184644.

During the "illumination" inspection on the night of September 12, 1979, Inspector McCleary was accompanied by Inspector Solano who issued Citation no. 184644 for the violations involved in this case. Inspector McCleary testified that the citation was issued covering several splices in the power cable between the reel rack and the dredge (Tr. 33). The section of cable where the splices were observed was approximately 60 feet in length from the reel rack to the water's edge (Tr. 25). There was a path or walkway 3 to 4 feet from where the cable lay on the ground. The path was used by employees going to and from the dredge. A handrail constructed of a wire cable separated the path or walkway from where the power cable was located.

The petitioner argues that the inspectors observed and photographed several splices in the power cable to the dredge which were in violation of 56.12-13 which states as follows:

Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Solano was not available to testify at the hearing, but Inspector McCleary testified that he observed the splices with inner tube wrapped around them and the splicing wrapped with electrical tape (Tr. 21). Regarding one splice, he observed one bare wire showing which was photographed and appeared in exhibits 7 and 9 (Tr. 28). He stated that he observed one splice smoking which was located approximately 25 feet from the shore line over the water (Tr. 32). The evidence in the record shows that the "Y" splice shown in exhibits 7 and 9 and described by the inspectors as showing a bare wire is a "temporary splice" next to the reel rack which is made in the power line as the cable is extended to allow the dredge to proceed out onto the lake. As the power cable is extended, new sections of cable are added and the temporary splice is made into a permanent splice (Tr. 54). The petitioner further argues in his brief that the cable lay in an area which exposed workers to a potential shock hazard.

The respondent argues in his brief that the citation does not involve a permanent splice or repair made to a power cable and therefore 30 C.F.R. 56.12-13 does not apply, that no employee would be exposed to risk of injury and that the evidence does not show a violation occurred due to the method by which the splices in the power cable were made.

I find that the petitioner has failed to prove that a violation of 30 C.F.R. 56.12-13 occurred in this case. The testimony of Inspector McCleary was that the splices he observed and that appear in the photographs admitted in evidence had inner tubes around the splices with electrical tape around the inner tubes, which he believed to be improper (Tr. 20). However, no evidence was presented to show that the splice under the inner tube was defective. The inspectors did not remove the covering on any of the splices to examine their exact condition. The respondent's general superintendent testified that the common practice in the company in splicing cables was to clear the insulation from the end of the cable, apply a clamp to the two cable ends, and wrap the splice with two layers of scotch tape number 22.10 and then at least two wraps of scotch tape number 88 for a permanent splice (Tr. 51-52). The procedure for wrapping the temporary splice was to remove part of the insulation from the wire, place it in a "Kearny clamp" and wrap it with either paper, inner tube or friction tape, and then generally put on two layers of scotch tape number 2210. After this is done, inner tube is wrapped around the tape and friction tape applied to the inner tube to hold it in place (Tr. 52-53).

I find that 56.12-13 does not cover the requirements for making "temporary splices" in power cables. It speaks only of permanent splices and repairs. The particular splice described as near the reel rack and shown in exhibits 7 and 9 is of a temporary nature. No interpretation is possible that this can be described otherwise. Webster's New Collegiate Dictionary, 1973 edition, gives the following primary definition for the word "permanent": "Continuing or enduring without fundamental or marked change." The standard provides for the repair of power cable. However, the splice or joint involved here is not a

repair of a power cable according to the definition of "repair"
in the same dictionary which

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states as follows: "repair-to restore by replacing a part or putting together what is torn or broken: fix; to restore to a sound or healthy state". Although this definition more nearly describes the action taken in the "temporary splice" involved herein, it cannot be construed to have given the respondent sufficient notice that said standard would apply. Judge Fauver in his decision Secretary of Labor, (MSHA), v. Evansville Materials, Inc. Docket No. Lake 80-82-M (March 1981) stated as follows: "A mandatory safety standard must be clearly worded and fairly administered so that a reasonable prudent operator can understand and follow it. The operator should not be subjected to varying and inconsistent interpretations based on the subjective understanding of different inspectors. Clear wording and consistent application of the standard are required to avoid unfairness to the mine operator." I concur with his reasoning here.

In Connally v. General Construction Company, 269 U.S. 385, (1925), the Supreme Court said, "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

I conclude that the wording of the cited standard does not give the respondent sufficient notice that the "temporary splice" involved here was to be treated the same as "permanent" splices and "repairs" in power cables.

The evidence shows also that the inspectors failed to examine the permanent splices sufficiently to prove that said splices were not "(a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket." I find that the testimony shows that the concern of Inspector McCleary was over the splice that was smoking not being adequately wrapped and that this might be the inner tube burning (Tr. 24). This type of statement lacks proof and appears to be pure conjecture. Other splices were also found by the inspectors to be in violation of the cited standard based upon being wrapped in inner tube (Tr. 38). Here, again, no examination of the splice was performed to determine what it consisted of. I find no basis upon which to conclude that wrapping inner tube around a splice will make a proper splice become a safety hazard. The record does not support such a finding in this case.

The final argument of the respondent, that the location of the power cable does not expose employees to a risk of injury, is moot by reason of my findings that no violations of the cited standard was proven. However, I cannot agree with the respondent's argument as to this situation.

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The location of those power cables within 3 to 4 feet of a walkway used by the respondents' employees presents a potential hazard of an injury which would be most likely fatal. Such an exposure requires a high degree of care, which is not satisfied by the construction of a single cable along the walkway.

CONCLUSIONS OF LAW

1. The Commission and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter of these proceedings.

2. The petitioner did not meet his burden of proving a violation of 30 C.F.R. 56.12-13 as alleged in Citation no. 184644.

ORDER

Citation no. 184644 and the penalty therefor is hereby VACATED.

Virgil E. Vail
Administrative Law Judge