FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE. SUITE 400
DENVER. COLORADO 80204

JUN 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNITED NUCLEAR - HOMESTAKE PARTNERS, now HOMESTAKE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NOS. CENT 79-251-M CENT 79-252-M CENT 79-262-M MINES: Section 23 Section 25 Section 13 (Consolidated)

APPEARANCES:

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For the Petitioner

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For the Respondent

Before: Virgil E. Vail
Administrative Law Judge

DECISION

I. Statement of the Case

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (hereinafter referred to as "the Act"). The violations were charged in 25 citations issued to the respondent following inspections at three of its mines between the dates of February 28, 1979 and April 25, 1979.

Pursuant to notice, a hearing on the merits was held in Albuquerque, New Mexico on June 3, 1980. The parties filed post-hearing briefs.

II. Stipulations

At the outset of the hearing, the parties entered into the following stipulations:

1. The Section 23 and, 25 mines are operated by United Nuclear-Homestake Partners and are subject to the Act.

2. The Administrative Law Judge has jurisdiction to hear these matters.

3. The Section 23 mine is a large uranium mine with approximately 486,000 hours worked in 1979.

4. The Section 25 mine is a medium size uranium mine with approximately 287,000 hours worked in 1979.

5. The mine inspectors who issued the citations were employees of the Mine Safety and Health Administration and authorized representatives of the Secretary of Labor.

6. Any penalties assessed in these proceedings would not affect the operator's ability to remain in business.

7. The respondent demonstrated good faith in abating all the alleged violations.

8. The Section 23 and 25 mines have a small history of previous violations.

III. Settlement Proposals

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On May 22, 1980, petitioner filed a written motion for approval of a partial settlement agreement which had been entered into with the respondent. At the hearing, the parties moved that the agreement be approved. The agreement provides for withdrawal of Citation no. 151097 and for payment of the penalties proposed in connection with Citations numbered 151093, 151094, 151098, 151440 and 151441. At the hearing the parties stated that they had agreed to settle three more citations. Respondent, agreed to pay the proposed penalty assessments in Citations numbered 151889, 151090 and 151096. Both the written and oral motions included a documented discussion of the six criteria as' set forth in Section 110(i) of the Act.

Upon due-consideration, I conclude that the proposed settlements should be approved. Approval of the settlement proposals are reflected below in the final order.

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The parties entered into an agreement to settle Citation no. 151439. Respondent agreed to pay the full amount of the proposed penalty assessment. Petitioner's written motion contained a complete discussion of the elements set out in Section 110(i) of the Act and said-motion is incorporated herein by reference.

The proposed settlement is hereby approved, as reflected in the final order.

At the hearing, petitioner moved that Citation no. 151606 be vacated. In support of his' motion, petitioner stated that the wrong standard was set forth in the citation. Petitioner's motion is approved and Citation no. 151606 is hereby vacated.

Respondent agreed to pay the full amount of the assessed penalties in Citation nos. 150800, 151603, 151609, 151610, 151611 and 151612. The reasons, as set forth by the parties, were accepted by the undersigned and the settlements were approved at the hearing.

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The Secretary's written motion to approve settlement is granted. Respondent agreed to pay the proposed assessment in full for Citation no. 151446.

IV. Discussion

CENT 79-251-M

Citation No. 151092

Citation no. 151092 alleges a violation of 30 C.F.R. 57.9-2, which provides that : "Equipment defects affecting safety shall be corrected before the equipment is used."

Inspector Jose Aragon issued the citation charging that,. "the operating control for the service air tugger . . . was defective. The tugger had to be operated with the open/close air valve on the air hose eight feet behind the tugger."

The issue is whether or not the absence of an operating control device on the tugger constituted a defect and, if so, did the defect affect the safety of the miners?

Inspector Aragon testified that the tugger was being used as a winch to hoist supplies onto supply cars. He stated that the manufacturer is supposed to install a control on the tugger, but in this instance the air pressure was being regulated by a valve eight feet behind the tugger. (Tr. 17). It was the inspector's opinion that the tugger was defective because

the handle and part of the control on the tugger were missing, causing the operator to regulate the air pressure by using an open/close air valve from a position behind the machine. (Tr. 16 and 56). This, he stated, was a safety hazard since the operator would not have complete control of the materials that were being lifted and the materials could fall or the cable could break if the load was dropped too suddenly. (Tr.18).

Roy Souther, safety director at the mine, testified that the tugger had not been manufactured with a control device. For this reason the respondent could not have known that the condition constituted a violation. He stated that the tugger was a converted slusher and at one time there had been another control, but that was when it was being used to pull slusher buckets and not as a winch. (Tr. 146).

Mr. Souther disagreed with the inspector's view that the operator would have better control if he was operating the tugger with control on the tugger itself. He was of the opinion that air pressure is like water pressure and when the air is turned off the pressure stops immediately. This would be true from either control position. (Tr. 129). Also, he stated that the cable had a test strength greater than what the 90 pounds of *air* pressure could break. The cable had 17,000 pounds weight strength. (Tr. 128). The operator was operating the tugger with a back lash guard in front of the tugger so in case the cable would break the guard would prevent it from hitting the operator. (Tr. 132).

I find the testimony of the respondent's witness to be more credible than that of the petitioner's, The operator would not have any greater control if he was operating the machine from a valve on the tugger than by using the open/close air valve. The citation is therefore vacated.

Citation No. 151095

Citation no. 151095 charges a violation of standard 57.19-101 which provides that: "Positive stopblocks or a derail switch shall be installed on all tracks leading to the shaft collar or landing."

As Mr. Aragon described the condition at the shaft on the day the citation was issued, there was a supply car parked on the track approximately 30 feet from the shaft. There was no derail switch or positive stopblocks, which would prevent the car from going into the shaft. (Tr. 21-22).

Respondent claims that there was a derail' switch. Roy Souther testified that there was a switch tongue, which if turned would direct a car off the main line. (Tr. 134).

I am not persuaded by the testimony presented by the respondent, that the tongue acted as a derail switch. The testimony is uncontroverted that there was a raif car sitting on the main track and if pushed the car would not have derailed; rather it would have proceeded in the direction of the shaft. (Tr. 149). Although the tongue could be used to derail a car, it was not being used as a derail switch. Therefore, I find that there was a violation and the citation is affirmed.

Penalty Assessment

The bulk .of the testimony in this matter went to the issues of respondent's negligence and the gravity of the violation.

The. shaft gates are kept closed except when the conveyance is at the collar and there are signs posted saying to keep the door shut. (Tr. 135). The rails are on leveled ground and it would be highly improbable that a rail car would roll into the shaft on its own. It would take two or more people or a heavy piece of equipment to push a car into the shaft. Even then, respondent offered testimony to the effect that. a car could not roll through the shaft gates which are made. from quarter inch steel and completely cover the shaft. (Tr. 136 and 153).

For the reasons stated above, I conclude that the possibility of an accident steeming from this violation would be remote. If an accident were to occur, however, it could be serious in nature and affect up to- thirteen miners. (Tr.24). .If find that the appropriate penalty. for this violation is $100.00

Citation No. 151099

Citation no. 151099 alleges a violation of a mandatory safety standard 30 C.F.R. 57.12-68, which provides that: "Transformer enclosures shall be kept locked against unauthorized entry."

The sole issue is whether the transformer enclosure was "locked" as defined by the standard.

The facts are undisputed. The transformer enclosure consisted of a chain link fence 5 to 7 feet high which was stretched .and tied to the corner posts. (Tr. 27 and 141). The chain link fence was attached to the four corner posts with wire. (Tr.34).

Mr. Aragon issued the citation based on his belief that 57.12-68 requires that there be a gate that is locked and that hooking a piece of wire to hold the chain link to the post did not meet the requirements of the standard.

I concur with the Petitibner's position, that merely wiring the chain link fence to the posts does not satisfy the requirement that the enclosure be locked.

Penalty Assessment

Respondent's negligence -was slight due to the fact that respondent was in the process of completing the enclosure. A permanent gate was going to be installed and respondent had posted danger signs on the fence. (Tr. 141 and 142).

If an injury were to occur it could have been of a serious nature. However, it would be only slightly easier to gain admittance to the transformer the way the fence was constructed the day the citation was issued than if the gate had been completed and was padlocked.

For the reasons stated above, I find that a penalty of $20.00 is appropriate.

Citation No. 151601

Mine inspector Charles Sisk, issued Citation no. 151601, alleging a violation of 57.3-22[1]/ in that "proper ground control practices were not being followed by a miner ..." Mr. Sisk testified that the miner was installing roof support starting at the face and working back toward the existing ground support. It is an improper practice to go under unsupported ground to start installing roof bolts. (Tr.72). The inspector stated that the problem with installing roof support, the way it was being done by the miner in the instant case, is that he was 25 feet from any existing support. (Tr.73). Although Mr. Sisk tested the ground and it appeared to be all right, he testified that the practice or how the miner was -proceeding was what concerned him, rather than the condition of the ground. (Tr. 102).

Respondent argues that MSHA should not determine when ground support is required. (Respondent's brief at p. 10). This, however, is not the issue in the present. case. The only determination to be made is whether proper ground control practices were-being followed. Respondent contends that the ground was in good condition and did not require bolting and therefore the petitioner did not prove that proper practices were not being followed. Furthermore, respondent claims that the miner was acting on his own and the respondent cannot be held responsible for his actions.

1/ 57.3-22' Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground 'shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled, or supported as necessary.

I find respondent's arguments to be unpersuasive. The miner was not acting on his own when he was installing the roof bolts. George Ruff, underground shift boss at Section 25, testified that the determination that ground support should be installed was made by Mr. Lloyd. (Tr. 175). Mr. Ruff also stated that the miner was not following good mining practices by starting from the face and bolting out. (Tr. 177). The fact that the method being used by the miner was. not sanctioned by the company and was not the general practice in the mine, does not relieve the respondent of liability. Secretary of Labor v. Nacco Mining, Company Docket No. VINC 76X99-P, (April 29, 1981).

I find that the citation should be affirmed. Once it was determined that ground support was going to be put in, it was the responsibility of the respondent to see that it was done in a proper and safe manner.

Penaltv Assessment

Although the ground appeared to be solid, if a roof fall were to occur a fatality could result. I find that the violation was of a serious nature and that a penalty of $200.00 is appropriate.

Citation No. 151607

While inspecting the car shop, Mr. Sisk issued Citation no. 151607 based on the fact that a portable drill did not have a proper prong in the electrical plug, thereby removing the continuity of the grounding circuit. (Tr. 84). 2/

Respondent does not refute the fact that the grounding prong in the plug was missing. Rather, respondent contends that petitioner failed in his burden of proof in not proving that the drill was not otherwise grounded or was not provided with equivalent protection.

Petitioner claims that the drill was portable and- therefore the only proper grounding device would be the three prong plug. (Tr.91). To support respondent's pas it ion, that the drill had become a fixed piece of equipment, George Ruff testified that the drill press was bolted to a bench, which was then welded to a rock bolt plate. (Tr.170).

I agree with petitioner that it was a portable drill. There is nothing in the record that convinces me that the drill could not have been

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2/ Citation no. 151607 alleges a violation of mandatory safety standard 57.12-25 which provides that:

> "All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.. This requirement does not apply to battery-operated equipment."

easily removed from the bench. Respondent's expert witness testimony was all based upon the assumption that the drill was a stationary or fixed piece of equipment. Therefore, his testimony is of no value in determining whether a violation occurred.

I find that a violation did occur. The record is void of any evidence that would prove that there was another method of grounding being used when the citation was issued. Petitioner established a prima facie case through the testimony of Mr. Sisk. Respondent then had the burden of proving that the drill had been grounded in a way other than by the missing prong or there was equivalent protection. This respondent failed to do.

Penalty Assessment

I find the respondent negligent in that it knew or should have known of the condition. Mr. Sisk testified that if the drill were to become energized the 120 volts could injure or even prove to be fatal. (Tr. 92). Based on his testimony, I find the violation to be of a serious nature. A penalty of $130.00 is assessed for the violation.

Citation Nos. 151604 and 151614

Citation nos. 151604[2]/ and 151614[3]/, both of which allege a violation of mandatory safety standard 57.12-10, will be discussed together. The standard allegedly violated provides that:

> 57.12-10 Mandatory Telephone and low potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source.

Respondent does not contend that the phone lines were isolated from the power cables. The sole issue, therefore, is whether there was "suitable insulation."

2/ Citation 151604 reads as follows: The mine telephone line is in physical contact with 480 power cables at the 31E-8 substation (3 different cables - 480 volts) and with the 18N feeder cable at 18N-31E intersection. All of these (4) power cables were energized (480 volts).

3/ Citation 151614 reads as follows: On the 640 level from the station out to the 640 transformer station the telephone circuit is in direct physical contact with the 2300 volt primary feeder in 3 places and in contact with2 440 volt cables in 5 or 6 places and also in' contact with the water line cable in 2 places. (heat tape electrical cable).

Charles Sisk, the mine inspector, who issued the citations testified that even if the phone lines and cables were insulated the respondent would-not have been in compliance (Tr. 116-119). It is the Secretary's position that the word "from," as contained in 57.12-10,[4/] means that there must be insulation in addition to what insulation would already be in a power cable. In support of his position, petitioner cites a policy memorandum, dated February 21, 1975,. issued by the Assistant Administrator-Metal and Non-Metal Mine Health and Safety of the Mining Enforcement and Safety Administration, the predecessor to MSHA. The memorandum interprets 30 C.F.R. § 57.12-82, which is similar to 30 C.P.R. § 57.12-10. The memorandum states that, "Jacketing as provided on a powerline by the manufacturer is not adequate for the insulating purposes of Federal mandatory standard 55, 56, 57.12-82. Additional insulation or separation must be provided ..."

Respondent contends that the company was in compliance. It is Respondents position that all the wires were adequately insulated and that the standard does not require insulation in addition to that which is already contained in the cables and wires.

Respondent's expert witness was Robert Witter, an electrical engineer. He testified that Respondent's Exhibit 18, which is a piece of cable similar to that used in the 31 East 8, is a shielded multi-conductor cable. The cable consists of three inner conductors which are surrounded by a layer of insulation. The conductors are surrounded by a filler and then covered. by a concentric shield. Outside the shield there is another layer of filler and then the jacket. (Tr. 161, 188-189); Respondent's Exhibit 19, the 2300 volt cable was constructed in a similar manner (Tr. 193). The phone line, Mr. Witter stated, was a "shielded" cable. Shielded means that there is a thread of wires that encircle the insulated conductors and the wires are then covered by an outer jacket. (Tr., 187).

In his opinion there would no possibility of the phone line becoming energized if it came into contact with either of the cables because there was adequate insulation. (Tr. 191 and 193).

I find that both the phone lines and power conductors were adequately insulated within the meaning of the standard. Petitioner's argument that additional insulation is needed for compliance is unconvincing. If in fact additional insulation is required, the standard is unclear and does not give adequate notice to mine operators.

This position is further supported by Judge Edwin S. Bernstein in his interpretation of facts and standard 30 C.F.R. § 57.12-82, both of which are similar to the present case. He held that ," the "insulation" installed by the manufacturer "insulated" the cables within the meaning of the standard ... if the Secretary of Labor required some special kind of insulation or some additional insulation, he should have specified that in the standard ." Secretary of Labor v. Homestake Mining Company CENT 79-27, August 20, 1980, review granted.

Accordingly, both citations *are* vacated.

4/ 57-12-82 Mandatory. Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines.

ORDER

CENT 79-251

The proposed settlement agreement is hereby approved for the citations listed below and respondent is ordered to pay the designated amounts.

Citation	151089	$160.00
Citation	151090	$122.00
Citation	15 1093	**$180.00**
Citation	151094	$ 72.00
Cit at ion	151096	$140.00
Citation	15 1098	**$** 70.00
Citation	151440	$210.00
Citation	151441	$160.00

Citations 151092 and 151097 are vacated.

Citation 151095 is affirmed and Respondent is ordered to pay a $100.00 penalty.

Citation 151099 is affirmed and Respondent is ordered to a $20.00 penalty.

CENT 79-252-M

The proposed. settlement agreement is hereby approved as listed below.

Citation	151439	$210.00
Citation	150800	$195.00
Citation	151603	$ 84.00
Citation	151609	$195.00
Citation	151610	$210.00
Citation	151611	$1.95 **.00**
Citation	151612	$195 .oo

Citations 151606, **151604** and 151614 are vacated.

Citation 151601 is affirmed and respondent is ordered to pay a $200.00 penalty.

Citation **151607** is affirmed the proposed penalty of $130.00.

CENT 79-262

The proposed settlement agreement, whereby respondent agreed to pay the proposed penalty of $106.00 for Citation 151446 is approved.

Respondent is ordered to pay the sum of **$2,982.00** within forty days of this decision.

Virgil E. Vail

Virgi **L E.** Vail
Administrative Law Judge

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