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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. LAKE 81-37 A.C. No. 11-01526-03014-I
v.	Leahy Mine
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., RESPONDENT	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Stephen Hansell, Esq., Amax Coal Company, Indianapolis, Indiana, for Respondent.

Before: Administrative Law Judge Joseph B. Kennedy

Statement and Findings

This case is before me on cross-motions for summary decision and a joint stipulation of facts. The parties have waived the right to an evidentiary hearing. Respondent has also filed a motion to dismiss raising the same issues as the motion for summary decision. Respondent's motions will be considered together.

The parties have agreed to the following relevant facts:

On October 12, 1979, inspectors Joseph Wolfe and Ronald Zara of the Mine Safety and Health Administration conducted an investigation at respondent's

Leahy Mine. The inspection was due to the occurrence of an electrical burn-type accident which occurred on October 11, 1979, at approximately 3 p.m.

Prior to October 11, 1979, respondent experienced a continuing problem with the elevator motor circuit in the preparation plant, in that the elevator motor circuit would "trip" or "overheat" the breaker and as a result respondent would have to reset the circuit and the load in order to continue normal operations.

On October 11, 1979, at approximately 3 p.m., Greg Morris, a qualified electrician and employee of respondent since 1968, was assigned to locate and repair the problem with the elevator motor circuit in the preparation plant. He had been aware of the problem and opened the circuit breaker panel cover. He then deenergized only the elevator motor circuit within the panel by switching the breaker to the "off" position. Other circuits within the panel were not deenergized. Mr. Morris proceeded to check each connection with his screwdriver to see if there were any loose connections that were causing the problem.

In the course of checking the circuit, Mr. Morris used a screwdriver on an energized circuit above the open breaker, which caused an electrical arc. As a result, Greg Morris was severely burned on the face, neck, and arms. He was hospitalized for approximately one (1) week and lost three (3) weeks of work.

On October 12, 1979, respondent received Citation No. 0774168. It charged that a violation of 30 C.F.R. 77.500 occurred in that the circuit

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supplying three-phase, 480-volt AC power to the No. 2 elevator was not deenergized prior to work being performed on the circuit. Respondent abated the citation by instructing all electrical foremen and electricians not to work on energized electrical equipment and by posting the regulation in the bathhouse and preparation plant.

The special assessment in Citation No. 0774168 was not received until September 25, 1980, approximately 11-1/2 months after the accident occurred.

In 1980, respondent employed approximately 329 employees at the Leahy Mine. The daily production at the mine is approximately 7,434 tons of coal; annual production is 2,713,357 tons. Respondent operates nine surface mines and one deep mine employing 3,620 miners and 801 non-mine employees. Annual production of all of respondent's mines was 40,547,065 tons in 1980. Respondent had 35 violations assessed in the 24 months prior to the instant violation. Respondent does not contend that payment of the maximum penalty would impair its ability to continue in business.

Conclusions
A.

1. The operator contends that it is contrary to law for MSHA to wait almost 1 year for the proposed assessment of a civil penalty. Section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), requires that the Secretary notify the operator by certified mail of the civil penalty proposed to be assessed "within a reasonable time." Respondent argues that as a matter of law, 361 days is not a reasonable time.

Petitioner has argued that the necessity of assessing the penalty under 30 C.F.R. Part 100 procedures caused the delay and that respondent has shown no prejudice resulting from this delay.

Respondent has been unable to point to a single item of evidence or a single witness unavailable to it today that would have been available if the assessment had been proposed at an earlier date. Absent a showing of prejudice, I conclude that MSHA, as a matter of law, has not violated section 105(a) of the Act. In this I agree with Secretary of Labor v. Heldenfels Brothers, Inc., 1 MSHC 2414, (April 8, 1980), rev. den., 2 FMSHRC ___ (May 1980), aff'd. mem. 636 F.2d 312 (5th Cir. 1981), in which the judge found 220 days was not an excessive amount of time for the assessment of a civil penalty, absent a showing of actual prejudice.(FOOTNOTE.1) I find the assessment of the penalty in this case was not, per se, prejudicial to the operator's right to a fair hearing nor ultra vires as claimed by the operator.

Respondent also asserts that taking a period of almost 1 year for a proposed assessment violates 30 C.F.R. 100.5 and is not in accord with the purposes and policies of the Act. Section 100.5(b) states: "The Office of Assessments shall make an initial review of the citation or order and shall

immediately serve by regular mail a copy of the Results of the Initial Review." This section requires that the results of the initial review, when completed, must be served "immediately." There is no evidence that the Office of Assessments failed to serve Respondent immediately once it had made its initial review. Therefore, Respondent's argument is without merit. Furthermore, although it is clear that prompt assessment of penalties promotes the safety of the miners and the policies of the Act, where there has been some delay but no showing of prejudice to the operator, the purposes of the Act would be completely defeated by a dismissal of the case. The Supreme Court has said in reference to the 1969 Act:

> [i]f a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

National Independent Coal Operators' Association v. Kleppe, 423 U.S. 388 (1976)

2. Under 30 C.F.R. 100.4, the Mine Safety and Health Administration may issue a special assessment in cases of "fatalities and serious injuries * * *." Where the victim spent 1 week in the hospital, lost 3 weeks of work, and could have been killed, it is futile to argue that the injury was not "serious." I note that respondent's own Supervisor's Report (RX-4) characterized the injury as "serious." It also was not improper for the Office of Assessments to make use of a Special Assessment without a finding of negligence. The Supreme Court has held that where a proposed assessment is subject to de novo review, there is no requirement that the proposed assessment include findings of fact. Kleppe v. Delta Mining, Inc., 423 U.S. 403 (1976).

Under section 110(i) of the Act, the administrative law judge assesses penalties de novo. Secretary of Labor v. Shamrock Coal Company, 1 MSHC 2069 (June 7, 1979). He is in no way bound by the proposal of the Assessment Office nor by the procedures of Part 100. Secretary of Labor v. Co-op Mining Company, 1 MSHC 2356 (April 21, 1980). The respondent can present evidence as to each of the statutory criteria to the administrative law judge and such evidence will be given full consideration. Therefore, respondent has in no way been prejudiced by any deficiency in the proposed assessment.

B.

Respondent contends that no violation of 30 C.F.R. 77.500 occurred because:

> [t]he portion of the panel on which work was to be done was, in fact, de-energized before work was done on the equipment. (Proposed Stipulation of Fact No. 16). The problem arose when the qualified electrician attempted to adjust a connection on a separate part of the panel which was a separate circuit, * * *. [Emphasis in original.] Respondent's Memorandum in Support of Motion for Summary Decision. (R. Memo).

The question before the court is whether the victim was performing work on an energized circuit at the time of the accident. It makes no difference if the victim had deenergized another circuit, if he also worked on a live circuit. Both the company's argument and the record as a whole support the conclusion that the victim deliberately performed some action on an energized circuit.

MSHA Accident Report From 7000-1, completed by Richard G. Stanfield (RX-3) states: "[a]s he [Mr. Morris] was tightening connections on the top side of

the circuit breaker with the power on, the screwdriver came in contact with the side of the motor control center causing voltage to go phase to phase on top of the breaker." The work activity listed on the form is "repairing electrical circuit breaker."

The Amax Coal Company Supervisor's Report (RX-4) similarly described the events:

> He [Mr. Morris] turned the breaker off and checked the connections on the motor starter and heaters. Then he started to tighten the connections on the top side of the circuit breaker with the power on (480 volts). He tightened the first one when he started on the second one the crewdriver [sic] contected [sic] with the side of the motor control * * *.

As a contributing cause, the report lists "employee failed to de-energize circuit breaker before performing electrical maintenance."

The program coordinator, William Melcher, reported that Greg Morris "said he knew better; that he knew there was no way he could lose control of that screwdriver - he had both hands on it" (RX-7) (Emphasis in original).

The statement signed by Mr. Earl Butler, foreman, (RX-8) reports that Mr. Morris checked each connection behind the [open] breaker to see if there was a loose connection. "When he didn't find any problem, he did go to the line side of the breaker * * *. Greg told Homer Pits and Gary Degenhardt that he screwed up, he knew better than that, he just wasn't thinking at the time."

Pete Rhodes investigated the accident for the company and prepared an interoffice memorandum (RX-9). He concluded:

> [n]o electrical work should have taken place on any part of the circuit while it was energized. The electrician reportedly stated that he was trying to tighten the lug screws on the bottom part of the refuge elevator breaker and has mistakenly worked on the top. This I would consider as an unsafe act or error by a qualified electrician.

From the statements made by company officials and reportedly by Mr. Morris, I conclude that Mr. Morris intentionally attempted to repair part of a live electrical circuit rather than pull the main breaker.

The company contends that Mr. Morris was testing or troubleshooting at the time of the accident, citing Secretary of Labor v. United States Steel Corporation, 2 FMSHRC 3220 (November 3, 1980). This contention is in direct contradiction to the evidence cited above. Mr. Morris was attempting to tighten the lug screws at the time he received the electrical shock. No evidence has been put forward to show that any procedure he may have contemplated required that the electrical circuit be live so that he could test for an electrical problem. In United States Steel, supra, the judge found that the mechanic was merely attempting to loosen a bolt so that he could remove a guard and observe the oil hose on the continuous miner. If the mechanic had not been able to see the oil leak, the oil pump would have had to be restarted so that the oil leak could be located. In this case, Mr. Morris assumed that the problem with the elevator originated in the circuit box and was attempting to repair the circuit by tightening all the screws without deenergizing all the circuits.

Even if Mr. Morris did not intend to work on the upper energized circuits, he was in violation of section 77.500. The MSHA Inspector's Manual states:

"[w]hen work is performed in close physical proximity to exposed electrical circuits or parts, they shall be deenergized * * *. All circuits within an electrical enclosure shall be deenergized before work is performed within the enclosure unless such energized circuits are guarded by suitable physical guards or adequate physical separation." The photographs and sketches provided by respondent (RX-9; RX-10) show that both the energized and deenergized circuits were located within the same circuit box. The very hazard presented by working on circuits located in close proximity to energized circuits, is the danger of contacting such circuits. I find that a violation of section 77.500 did, in fact, occur.

C.

Respondent asserts that it should be relieved of liability under the Isolated Misconduct Defense. Although there is such a defense under the general duty clause of the Occupational Safety and Health Act, the Mine Act is a strict liability statute and the operator is liable for violations of its agents and employees under the doctrines of respondeat superior and vicarious liability. Secretary of Labor v. Ace Drilling Coal Co., Inc., 1 FMSHRC 2357 (April 24, 1980) aff'd mem. 642 F.2d 440 (3rd Cir. 1981); Secretary of Labor v. Warner, 1 MSHC 2446 (April 28, 1980); U.S. Steel Corporation v. Secretary of Labor, 1 MSHC 2151 (September 17, 1979); Secretary of Labor v. Nacco Mining Company, 3 FMSHRC 848 (April 29, 1981); cf. Houston Systems Manufacturing Company, Inc., 1981 OSHD, CCH, 23,024.

The claim of employee misconduct, which the operator has failed to support, can be considered a mitigating circumstance under the negligence

criteria of section 110(i) of the Act. "Only conduct that is willfully reckless, obviously inexplicable, demented or suicidal can reduce imputable conduct amounting to gross negligence to that of slight negligence." Warner, supra; accord, Marshfield Sand and Gravel, Inc., 1 MSHC 2475 (June 10, 1980). The company admits that Mr. Morris's conduct was not willfully reckless, demented or suicidal (R. Memo at 17). I must agree. This is not a case in which a supervisor or foreman took it upon himself to perform an inexplicable action which caused danger only to himself. Here an ordinary employee subject to the oversight and direction of others performed a task in a manner which assisted the company in maintaining production. I cannot conclude that the miner was unaffected by the knowledge that had he completely deenergized the circuit box by pulling the main breaker 4 feet away, he would have shut down some 26 other systems, including centrifuges, oil pumps, conveyors, breakers, feeders, vibrators, screens, crushers, blowers, etc.(FOOTNOTE.2)

Where there is independent negligence on the part of the company, the unexpected action of its employee will not relieve the company of liability. Consolidation Coal Company v. Secretary of Labor, 1 MSHC 1742 (January 10, 1979). The company has pointed out that Mr. Morris violated a company rule when he worked on an energized circuit, that he had received the required electrical refresher training, and that he was a qualified electrician who could work without supervision. I do not find this convincing evidence of no negligence on the part of the company in the face of other evidence in the

record. Miners respond to the general attitude of the company toward safety. Apparently, the company did not discipline Mr. Morris for his disobedience. There is no evidence that anyone has ever been disciplined for disobeying this or any other company safety rule. The company, on the contrary, argues that discipline severe enough to enforce compliance is not available (R. Memo at 12). Moreover, the company, after pointing out the number of systems involved, has argued that the regulation at issue cannot require deenergizing all power leading to the circuit or power equipment in all cases (R. Memo at 15). Where it is necessary to shut down part of a plant in order to work on a circuit safely, this is exactly what the regulation and common sense require. I find that the miner could not have been unaware of this attitude on the part of the company. It is entirely understandable and foreseeable that an employee would attempt to avoid causing trouble by a dangerous short cut of the this kind where violation of the law and company rules never result in discipline. I find, therefore, that Mr. Morris' actions were not so aberrational as to relieve the company of responsibility for his gross negligence or of its own failure to enforce compliance with the safety standard.

Accordingly, the Secretary's motion for summary decision is GRANTED and the Respondent's motion to dismiss and motion for summary decision is DENIED. It is ORDERED that Respondent pay a penalty of $1,500 on or before Tuesday, September 1, 1981, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

MSHA has at last clarified what it considers a reasonable time for the serving of an initial proposed assessment in a civil penalty case. See, MSHA Policy Memorandum No. 81-3A. My determination that 1 year for the assessment of a proposed penalty is not in violation of the Act is also in accord with the Commission's recent decision, Secretary of Labor v. Salt Lake County Road Department, 3 FMSHRC ___ (July 28, 1981), in which the Commission found that a late filing of a proposal for a penalty under Commission Rule 27 is excused by the Secretary's claim that a lack of clerical personnel and a high volume of cases caused the delay. The Secretary in this case has pointed out that the need to comply with the requirements of Part 100 was the reason for the length of time taken by the Office of Assessments.

~FOOTNOTE_TWO

A finding of negligence on the part of the operator is not meant to imply that miners should be immune from liability under section 110(c) of the Act for their own negligence.