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

KAISER STEEL CORPORATION,
CONTESTANT

v.

CONTEST PROCEEDING

Docket No. CENT 81-264-R
Citation/Order No. 326835 8/4/81

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

York Canyon No. 1 Mine

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

v.

CIVIL PENALTY PROCEEDING

Docket No. CENT 82-50
A.C. No. 29-00095-03059 V

York Canyon No. 1 Mine

KAISER STEEL CORPORATION,
RESPONDENT

DECISION

Appearances: David B. Reeves, Esq., Industrial Relations, Kaiser Steel Corporation, Fontana, California, for Contestant/Respondent Leo J. McGinn, Esq., Office of the Solicitor, United States Department of Labor, Arlington, Virginia, for Respondent/Petitioner

Before: Judge Vail

STATEMENT OF THE CASE

Pursuant to provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act"), Kaiser Steel Corporation (hereinafter "Kaiser"), filed a Notice of Contest alleging that a type 104(d)(1) citation No. 326835, was improperly issued on August 4, 1981. The notice challenged the findings accompanying the citation that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard and was caused by an unwarrantable failure to comply with the standard. Pursuant to notice, a hearing was held in Raton, New Mexico. Subsequent to the hearing, the Secretary of Labor, (hereinafter "Secretary"), filed a petition proposing the assessment of a penalty against Kaiser based upon citation No. 326835 alleging a violation of mandatory safety standard 30 C.F.R. 75.601-1.

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The parties stipulated that the above two cases be consolidated and that a decision in the civil penalty case be made upon the record developed in the notice of contest case. Both parties submitted post-hearing briefs.

STATUTORY PROVISION

Section 104(d)(1) of the Act, provides in pertinent part as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act

REGULATORY PROVISION

30 C.F.R. 75.601-1 provides in pertinent part:

Circuit breakers providing short circuit protection for trailing cables shall be set so as not to exceed the maximum allowable instantaneous settings specified in this section; however, higher settings may be permitted by an authorized representative of the Secretary when he has determined that special applications are justified:

Conductor Size	Maximum allowable circuit breaker
AWG or MGM	instantaneous setting (amperes)
4/0.....	2,500(FOOTNOTE 1)

FINDINGS OF FACT

1. Kaiser is the owner and operator of an underground coal mine near Raton, New Mexico known as the York Canyon Mine No. 1.

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2. The subject mine has a daily production of 4,301 tons of coal and employees 270 miners underground. Kaiser is considered a large operator.

3. The assessment of a civil penalty in this case will not affect Kaiser's ability to continue in business.

4. The York Canyon mine contains six working sections consisting of two longwall and four continuous miner sections. The mine is classified as "gassy" and is subject to the specific methane inspection requirements found in section 103(a)(i) of the Act (Transcript at 13).

5. On August 4, 1981, during an inspection of the 7 left longwall section of the subject mine, Federal Mine Inspector Daniel Martinez observed the number 2 circuit breaker in the power center feeding electrical current to the longwall conveyor system was set at its maximum setting of 4000 amperes (Tr. 22).

6. Electrical power to operate the machinery and equipment in various sections of the mine is transmitted through power centers which act like transformers and reduces the current to an amount permissible for the operation of the equipment.

7. The power center cited in this case is a box approximately eight feet wide by fifteen feet long containing circuit breakers which are designed as short circuit protection for the equipment in the mine. The individual pieces of equipment in the mine are attached by a cable to a distribution box which in turn is attached by another cable to the power center. Both the distribution box and power center are movable and move along in conjunction with the mining process. The distribution boxes are moved more frequently, possibly two times a week, whereas the power center may move only once every two months (Tr. 31).

8. The circuit breaker in the power center cited in this case was used to protect the supply of electrical power to the distribution box for the longwall conveyor system. The cable between the power center and distribution box was approximately 500 feet long Essex 4/0 3 conductor cable with an outer rubber jacket encasing three phase wires plus a ground and a ground pilot conductor (Tr. 32).

9. Kaiser was cited on two prior occasions, July 13 and 23, 1981, for similar violations of standard 75.601-1 as that contained in citation No. 326835 (Ex-G-3 and G-4).

ISSUES

The issues in this case are:

1. Whether a violation of 30 C.F.R. 75.601-1 occurred as alleged in citation No. 326835.
2. Whether such violation was of such a nature as could significant and substantially contribute to the cause and effect of a mine safety hazard.
3. Whether such violation was caused by an unwarrantable failure of the operator to comply with the mandatory safety standard.
4. If a violation is found, what is the appropriate penalty to be assessed.

DISCUSSION

TRAILING CABLES:

There is no dispute between the parties that the circuit breaker in the power center serving the longwall conveyor was set at a maximum setting of 4000 amperes. Also, it is agreed that section 75.601-1 requires that circuit breakers for trailing cables of the size involved here should be set at 2500 amperes. However, Kaiser argues that the cable between the power center and the distribution box cited in this case is not a trailing cable as specifically referred to in 75.601-1 and therefore not subject to the maximum allowable circuit breaker settings for certain cable sizes. Kaiser argues that trailing cables are used primarily to connect the distribution boxes to various pieces of machinery used in the mining process and that they are exposed to hazards such as mobile equipment running over them. Kaiser contends that these same hazards to the cable are not present in the area between the power center and the distribution boxes.

An examination of the regulations causes me to reject Kaiser's definition of what is a trailing cable. Admittedly, there is not a definition of trailing cable in part 75 of the regulations or in parts 55, 56 and 57 covering electricity in open pit, sand and gravel and nonmetal mines. However, the term is expressly defined in part 18 of the regulations which deals with electrical equipment in general.

It must be noted that the definitions in part 18 are prefaced by the phrase "as used in this part." However, I believe, lacking specific definitions in part 75, these definitions should be applicable as the term should not mean one thing in part 75 and

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another in 18. Particularly since the term trailing cable is used in at least five different parts of the regulations but is defined only once, that being in part 18 which applies to electric motor-driven mine equipment and accessories. Under subpart A, general provisions, are several definitions that are particularly relevant to this case and are as follows: 18.2 definitions.

"Accessory" means associated electrical equipment, such as a distribution or splice box, that is not an integral part of an approved (permissible) machine.

"Distribution box" means an enclosure through which one or more portable cables may be connected to a source of electrical energy, and which contains a short circuit protected device for each outgoing cable.

"Portable cable" or "trailing cable" means a flame-resistant, flexible cable or cord through which electrical energy is transmitted to a permissible machine or accessory. (A portable cable is that portion of a power supply system between the last short circuit protective device, acceptable to MSHA, in the system and that machine or accessory to which it transmits electrical energy.)

The term "portable gate end boxes", "distribution box", and "distribution center" were used throughout the hearing to describe the piece of equipment into which the cables from the power center entered, and from which the cables then extended to various equipment operating on the longwall system. These boxes, whether distribution centers or portable tail gate boxes, were described as small sized, covered, square boxes, which in addition to switches, contained circuit breakers. They are mounted on skids and are moved at least several times a week as the mining process continued. It is obvious that these boxes by their description by witnesses' testimony at the hearing are an "accessory" as defined in part 18.2. It follows that the 4/0 cable in this case that connected the distribution box as "accessory" to the power center was a trailing cable as above defined for it is a "flame resistant, flexible cable or cord through which electrical energy is transmitted to a permissible machine or accessory." (emphasis added).

In light of the foregoing, I find that the cable involved in this case is a trailing cable as described in 75.601-1. Although I have seriously considered Kaiser's arguments to the contrary, I must believe that the purpose of the regulation is to provide protection in the form of a circuit breaker for the cable that is feeding power to the machine directly or by way of an accessory in the form of a distribution box. This protection provides a proper maximum setting of the circuit breaker for the particular type and size of cable used, should an electrical problem occur such as a ground fault or short circuit.

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WARRANTABLE FAILURE

In that the parties agreed as to the type of cable being used in this instance, and it is admitted that the No. 2 circuit breaker in the power center was set at 4000 amperes; whereas the maximum allowed under 75.601-1 is 2500 amperes, I find that a violation of the regulation occurred.

Kaiser further argues that if it is found that a violation occurred, there was not an unwarrantable failure on their part in this instance. It is contended that even though Kaiser had been cited for similar violations on two prior occasions, the specific issue is whether they knew or should have known about the particular circuit breaker cited here.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals in Ziegler Coal Company, 7 IBMA 280 (1977) as follows: "[A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices which the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care." This definition was approved in the legislative history of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

The evidence of record in this case shows Kaiser was issued two prior citations for violations of 75.600-1 on July 13 and 23, 1981 and that Kaiser was aware of the existence of the problem with the circuit breakers. However, Kaiser argued, and it was indicated by memorandums they had issued, that the problem arose from disgruntled employees tampering with the settings. Even assuming that it were true that employees were responsible for the wrong settings involved in these citations, the operator's prior knowledge requires it to take whatever steps are necessary to prevent the reoccurrence of these acts and stay in compliance with the regulations of the Act. If it is not accomplished by memorandum, then other protective measures must be adopted. I therefore find that Kaiser demonstrated unwarrantable failure in their actions in this case.

SIGNIFICANT AND SUBSTANTIAL

Kaiser further argues that if a violation is found in this case, it was not such as to be of a significant and substantial nature. Extensive and divergent testimony was presented by both

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parties on the safety hazards associated with the circuit breaker on the power center being set at 4000 amperes rather than the 2500 amperes provided for in the Act for the type of cable being used.

The Secretary contends in his brief that the violation would most probably result in the cable over-heating and as a consequence cause a fire or explosion. It was conceded that large numbers of miners would normally not be in the immediate area of the cable, but miners traveling along the area where the cable lay or performing pre-shift and on-shift inspections would be exposed. Also, if a fire or explosion occurred in that portion of the cable located in the intake air entry, smoke and fire would be carried forward into the face areas and present a hazard to miners working there.

Inspector Martinez, a MSHA designated coal mine inspector-electrical, testified that should a short circuit occur in the cable, with the circuit breaker set at 4000 amperes, the breaker would not trip out and the cable would become over-heated and catch fire. This would occur because of an excess of current flow (Tr. 37, 38). Further, Martinez stated that the burning of the cable caused by fire or explosion would cause smoke which would be ventilated down the face because of the location of the cable which would be inhaled by the miners resulting in asphyxiation, lung damage, and possible death. Also, the fire in the cable could cause a fire in the coal seam or float coal dust and possibly methane (Tr. 40, 93).

Kaiser refutes the testimony of inspector Martinez and argues that the construction of the cable and its specific location between the power center and distribution box made it highly unlikely it would suffer any damage that would cause a short circuit or ground fault resulting in an excessive load of electrical current. Also, because of the thermal trip system built into the circuit breaker and the existence of a ground fault system also installed, there was no probability of the occurrence described by Martinez happening. Fred Rivera, an electrical engineer and Kaiser's electrical foreman, testified that the setting of the circuit breaker at 4000 amperes rather than 2500 amperes, under the circumstances involved here, did not create a hazard. Also, the chance of fire or an electrical shock due to the high setting was practically impossible due to the construction of the cable (Tr. 116, 120).

The critical questions in this case are highly technical and Rivera's credentials as an electrical engineer and his apparent candor as a witness give considerable credibility and weight to this testimony regarding the equipment utilized at the area cited here. The most credible evidence in this matter clearly demonstrates that the cable used to connect the power center to

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the distribution box serving the longwall conveyor was approximately 500 feet long consisting of 4/0 Essex, three phase, SHD cable. Because of its location, this cable is not exposed to the same hazards as the trailing cables that connect the distribution boxes to the moving equipment. That cable can incur damage resulting in a short circuit from being run over by equipment or a rock falling on it. The cable between the power center and distribution box is five times the size of the cable connecting the box to the equipment.

The circuit breaker in the distribution box is set to trip at 800 amperes for each piece of equipment connected to it and would trip-out and disconnect should there be a problem between it and the equipment it serves. The only problem considered in this citation is that which could arise with the cable between the power center and the distribution box. This would likely be a short circuit caused by damage to the cable. In addition to the circuit breaker in the power center involved here, there is a ground fault protection designed to trip out and disconnect the electrical power should a phase wire become grounded causing at least 5 amperes to run through the ground. This would occur should the cable be damaged.

Also, incorporated in the system is further protection in the form of a thermal trip set to disconnect at 600 amperes. This is designed to trip out the electrical current should it detect a load of 600 amperes or more for four or five seconds. This is similar to having too many appliance cords plugged into an electrical socket and over-loading the circuit which causes the fuse to trip.

Rivera stated that the cable is very substantial with a thick outer sheath covering three power conductors which include a metallic shield wrapped around the outer insulation of the phase indicator which is a quarter of an inch thick. In the circumstances where this particular cable was located, it was highly improbable that the cable would receive external damage that would cause a short circuit (Tr. 116, 120). If damage occurred to the cable from external causes, such as a puncture to the outer shell, this would cause contact with the grounding conductor sending current of less than 5 amperes and tripping the breaker before a short circuit occurred. If the cable were to heat for four to five seconds, the thermal rating of the breaker trips at 600 amperes which disconnects the current. If it were possible to maintain 3000 amperes, as an example for four to five seconds, this is what would happen (Tr. 118). A short circuit usually causes a surge of current far in excess of the 4000 amperes that the circuit breaker was set at and would immediately trip the breaker anyway. The final opinion of Rivera was that the likelihood of a fire or electrical shock resulting from this particular circuit breaker being set at 4000 amperes instead of 2500 is practically impossible (Tr. 120).

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In light of the foregoing, I conclude that there is not a reasonable likelihood of an injury to a miner as a result of the violation herein and that the Secretary has failed to prove by a preponderance of the evidence that the violation was significant and substantial.

Also, by failure to sustain his burden of showing that the violation was significant and substantial, the 104(d)(1) order can not stand.

PENALTY

In Island Creek Coal Co., 2 FMSHRC 279,280 (February 1980), the Commission held that section 110(a) of the Act, 30 U.S.C. 820(a), mandates a penalty for the violation of any mandatory safety standard regardless of the impropriety of a 104(d)(1) order. Kaiser must therefore be assessed a penalty for their violation of 75.601-1 which is a mandatory safety regulation.

The six criteria for assessing a penalty are set out in 30 U.S.C. 820(i). The size of the operator is large. No claim was made that the proposed penalty will adversely affect Kaiser's ability to continue in business, and no such adverse consequences will be assumed. I find that Kaiser was negligent in not taking steps to ensure compliance, i.e., making the settings tamper proof. Kaiser's knowledge of the general problem of excessive circuit breaker settings is evident from their own internal memos and the two prior citations.

The possibility of injury is small. As discussed above, the collateral protection provided by the ground fault and thermal trip settings make it very unlikely that an injury would occur. If an injury did occur it would probably be serious or fatal. If the cable began to burn or smoke it could cause asphyxiation or a methane explosion. Generally there are no employees working in the area between the power center and the distribution box. However, if an explosion did occur, there is a possibility that the smoke could be carried to the working face where the longwall shear was being operated. This would expose miners to smoke inhalation or asphyxiation.

CONCLUSIONS OF LAW

Upon the entire record, and in consonance with the factual findings embodied in the narrative portion of this decision, it is concluded:

1. That the Commission has jurisdiction to decide this matter.
2. That Kaiser violated the mandatory standard published at 30 C.F.R. 75.601-1.

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3. That the violation was caused by an unwarrantable failure on the part of Kaiser to comply with standard 30 C.F.R. 75.601-1.

4. That the violation was not of such a nature as could "significantly and substantially" contribute to the cause and effect of a safety or health hazard.

5. That Kaiser's notice of contest or application for review of citation No. 326835 is sustained as to the finding that the violation was "significant and substantially" and the designation of this citation as being a section 104(d)(1) violation is removed and amended to be a 104(a) violation.

6. That \$200.00 is the appropriate penalty for the violation.

ORDER

Accordingly, the 104(a) type citation No. 326835 is ORDERED AFFIRMED: and Kaiser is ORDERED to pay a civil penalty of \$200.00 in connection with such affirmed citation within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTE START HERE-

1 There being no controversy over the type of cable and setting on the circuit breaker in this case, only that portion of the table applicable herein is set out.