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SOL (MSHA) V. SILVER VENTURES
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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 PROCEEDINGS Docket No. WEST 82-215-M A.C. No. 05-03585-05501 Docket No. WEST 83-53-M A.C. No. 05-03585-05504
v.	
SILVER VENTURES CORPORATION, RESPONDENT	Comstock-Lake Mine

DECISION

Appearances: Margaret Miller, Esq., and James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Alfred G. Hoyl, Silver Ventures Corporation, Rollinsville, Colorado, pro se.

Before: Judge Carlson

This consolidated case, heard under the provisions of the Federal Mine Safety and Health Act of 1977 (the "Act"), arose out of inspections conducted on June 2, 1982 and September 22, 1982 at respondent's underground precious metals mine near Idaho Springs, Colorado. As a result of these inspections, the Secretary issued five citations alleging violations of various mandatory safety standards promulgated under the Act.

REVIEW AND DISCUSSION
OF THE EVIDENCE

General Background.

In 1982, respondent Silver Ventures was engaged in the opening of a gold and silver mine. Shaft driving was in progress, and surface installations were not yet completed. The June and September inspections with which this decision is concerned took place against that background.

Citation No. 573968, Docket No. WEST 82-215-M

During Inspector Richard W. Coon's June 2, 1982 inspection of respondent's mine he examined three wires extending from a switch box in the air building, a surface structure where the

ventilating fan and compressor are located. According to the inspector, the three wires extended from the bottom of the box to about six inches from the floor in what he described as a walkway along an interior wall of the building. The wires had been cut, and insulating material had been stripped from the ends of each. The wire thus made bare, he testified, had been wrapped with a single layer of plastic electrical tape. After determining that the wires were energized with 440 volts, the inspector issued a citation (FOOTNOTE 1) charging a violation of the mandatory safety standard published at 30 C.F.R. 57.12-30. That standard provides:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

The inspector believed that the wires represented a "dangerous condition" because the tape wrapping did not provide sufficient insulation. This, coupled with the high voltages involved and the accessibility of the wires to miners, offered a likelihood of a fatal injury.

Mr. Hoyl, respondent's president, testified that the ends of the wires were covered with "two to three" wraps of plastic tape, rather than one as the inspector contended. Moreover, the area in which the wires hung was not in the walkway, he testified; access to equipment in the building could be better achieved by another route. Finally, he suggested that the inspector knew that the wires had been placed there only temporarily to allow use of a welding machine during installation of the air house equipment.

The evidence convinces me that the violation occurred. The wrappings of plastic tape were clearly insufficient. In so finding I rely not only upon the inspector's testimony, but also upon the photographs of the wraps (petitioner's exhibit 2). Whether the wires were wrapped one, two, or three times with tape, the wraps provided much less insulation than the thick factory coating shown in the photograph. It is simply not reasonable to believe that a couple of thicknesses of plastic tape will render a 440 volt conductor safe. (FOOTNOTE 2)

The other matters raised by the respondent do not relate to the question of violation, but to the appropriateness of the proposed $36.00 penalty. Assuming that the wires did not extend into a frequently used walkway, it is nevertheless plain that they were in an area where anyone could walk. The concededly temporary purpose of the wiring goes to the potential duration of the violation, not its existence.

The inspector classified this wiring violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as one where ". . . there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The record in the present case shows that the insufficiently insulated wiring, located as it was, created a realistic possibility that an unwary miner could receive a serious or fatal electrical shock. The violation was significant and substantial.

Citation No. 573969, Docket No. WEST 82-215-M

In his inspection of respondent's dry house or change room on June 2, 1982, Inspector Coon found what he cited as another electrical violation. According to his testimony, wiring extending from a switch box on an interior wall of the room lacked the protection of an insulated fitting or bushing around the "knockout plug" through which the wiring exited the metal box. This, in the inspector's view, violated the standard published at 30 C.F.R. 57.12-8. As pertinent here, that standard provides:

> Power wires and cables shall be insulated adequately where they pass nto or out of electrical compartments. * * * when insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The inspector indicated that bushings are necessary to avoid abrasion of the insulation surrounding the electrical wires.

By way of defense, the respondent, in the person of Mr. Hoyl, maintained that the wiring in question was a temporary installation furnishing power to a welding machine. He also insisted that the wiring emerged from the back of the box and thence through a wall to the outside of the building, not from the bottom of the box as the inspector testified. Most important, according to Mr. Hoyl, an MSHA official had looked at this particular wiring installation during an earlier "compliance assistance" visit and found it satisfactory for temporary use.

I accept all of these representations as true. None, however, constitutes a valid defense against the citation. Respondentg does not deny that the wiring, wherever it may have emerged from the box, was not protected by a constitutes a wherever it may have emerged from the box, was not protected by a bushing. The bushing requirement set forth in the standard is absolute. As to the "approval" given the temporary wiring during an earlier "compliance assistance visit," no evidence discloses that the MSHA inspector noticed the absence of a bushing. On the contrary, the evidence tends to show that discussions with that inspector focused upon the question of whether the temporary wiring needed to be encased in a conduit for its entire length.

I therefore conclude that respondent violated the standard. The matters raised by Mr. Hoyl may properly be considered to affect the size of the civil penalty.

Citation No. 573970, Docket No. WEST 82-215-M

During the course of Inspector Coon's June inspection he noted that five power switch boxes located in the air house and dry house lacked labels disclosing their respective purposes. He testified that he could not readily determine such purposes by the mere location of the boxes. These conditions, in the inspector's view, violated the following standard, published at 30 C.F.R. 57.12-18:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

According to Mr. Coon, the failure to affix labels created a danger that a miner could inadvertently energize the wrong piece of equipment, thus possibly putting fellow miners in jeopardy.

Respondent concedes that the switches lacked labels, but stressed that everything involved was new at the time and that the company had simply lacked the time to use the plastic tape labeler which was already on hand.

The facts of record show a violation. The provisions of the standard make no implied allowance for any citation-free interim between installation and labeling.

Citation No. 574807, Docket No. WEST 82-215-M

While underground in the mine on June 2, 1982, Inspector Coon noted what he perceived to be a violation of the safety standard published at 30 C.F.R. 57.13-21. That standard provides:

> Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or

> larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

According to the inspector, an air-operated water pump at the base of the shaft had no automatic shutoff valve and lacked safety chains (or restraining cables) on the end of the high-pressure air hose that connected to the pump. The hose was an inch in diameter. Mr. Coon testified that the pump was in operation when he observed it, and that when he pointed out the absence of a chain or cable restraint device, a member of the crew obtained one from a nearby storage area in the shaft and attached it immediately. The inspector maintained that an unrestrained hose, should it become uncoupled during operation, could whip about, thus inflicting injury on any nearby miners.

Mr. Hoyl, on behalf of respondent, pointed out that it was established practice to use cable restraints on the pump in question. He said that such restraints are easy to lose and speculated that the one which had been on the hose had simply dropped off and been lost in the muck. He also maintained that the crew had not started the machine at the time of Inspector Coon's observations.

The inspector, on cross examination, agreed that respondent had a supply of restraints in the mine, and that the pump had recently been moved (and therefore disconnected). He nevertheless testified in a convincing way that he was certain that it was in operation when he noticed the absence of any sort of hose restraint.

I credit that testimony, and consequently find that the violation is established.

Citation No. 2009724, Docket No. WEST 83-53-M

Inspector Coon visited respondent's mine a second time on September 22, 1984. On that occasion he inspected the hoist. The undisputed evidence shows that the Silver Ventures hoist operates on rails on an inclined shaft which, at the time of inspection was over 100 feet deep. The hoist, according to Mr. Coon, lacked an overspeed device as required by the standard published at 30 C.F.R. 57.19-7. That standard provides:

> All man hoists shall be provided with devices to prevent overtravel. When utilized in shafts exceeding 100 feet in depth, such hoists shall also be provided with overspeed devices.

Inspector Coon testified that the overspeed device had been on the hoist in June when he examined it, but had since been

removed. The hoist operator, he said, informed him that the device had been removed because of "some vibration problems." This was done some three weeks before; the device had been "sent . . . down to be repaired," the hoistman told the inspector. The inspector testified that the hoist conveyance was moving men up and down the shaft while he was present on September 22, 1982.

Under cross examination he conceded that he had not actually seen the overspeed device in June. Rather, he said, he had inspected the hoist operator's log entries which showed both the overtravel and overspeed devices had been checked daily to confirm that they were operational. He denied that a worm gear drive operating through a speed reducer would furnish protection equivalent to that provided by a separate overspeed device.

In addition to Mr. Coon, another inspector, Mr. Edward Machesky, testified for the petitioner concerning this citation. Machesky indicated that he had been present twice at the mine site prior to Inspector Coon's June inspection. According to Machesky, he was present at the compliance assistance visit in April of 1982, and was present again in early May of that year for a complaint triggered by a worker complaint concerning the unauthorized use of the hoist conveyance to move men. Machesky insisted that during the first visit the lack of an overspeed device was pointed out to management, and that it was agreed that materials but not miners could be moved by the hoist. (Other evidence shows that miners could gain access to all levels of the shaft by a series of ladders.) He maintained that the second visit, in response to a telephone complaint, was limited primarily to interviews with mine personnel to determine whether the hoist had been "misused" to haul miners. The evidence gathered, Machesky testified, did not warrant issuance of any citations. He insisted, however, that no permission had been given during either inspection to hoist miners without an overspeed device.

Mr. Hoyl, testifying for respondent, first stressed that in his belief the hoist required no separate overspeed device since the skip or conveyance was raised or lowered by a low-speed motor with "electric dynamic braking" as well as manual braking and a deadman switch. Hoyl insisted that the entire hoist was intensely examined by the inspectors on the May visit and it had no overspeed device then. The company did attach such a device "just prior" to Inspector Coon's September 22 visit, but the belt was too short. Longer belts were on order when Coon issued the citation. Beyond all this, according to Mr. Hoyl, he had an understanding with other MSHA officials, particularly one Paul Tally of the Denver office, that the existing safeguards on the hoist were sufficient.

I found Mr. Hoyl a credible witness throughout, and I therefore accept that he genuinely believed that the hoist was safe for moving miners. I also accept that he believed that at least some MSHA officials agreed with him. I am not convinced,

however, any MSHA official did in fact agree. It is clear that neither Coon nor Machesky did, and I find it difficult to believe that any official, in the face of the clear words of the standard, would take such a position. Far more likely, I think, was a mutual misunderstanding between MSHA and Mr. Hoyl.

Upon the evidence I must find that an overspeed device is a specific mechanism, operating quite beyond those existing features described by Mr. Hoyl. The later installation of such a device strengthens the finding. Besides, the plain words of the standard clearly contemplate the necessity for such a separate device on all man-hoists which fall within the shaft-depth definitions of the standard.

Finally, even if someone connected with MSHA had indeed told Mr. Hoyl that he could lift men or women on the hoist without an overspeed device, such a clearly erroneous piece of advice could not fully exculpate the company--not, at least, in the absence of evidence of a deliberate design to mislead the company to its detriment. There is no such evidence in this case. We must also bear in mind Inspector Machesky's strong testimony that in May he specified to management that miners could not ride in the skip.

The evidence shows a violation of the cited standard, although the surrounding circumstances militate against a heavy penalty.

Penalties

The petitioner seeks relatively small penalties for the three electrical violations and the air hose infraction. Specifically, he proposes a $36.00 for the wiring in the air house (citation 573968), and $20.00 for each of the other violations comprising docket No. WEST 82-215-M (citations 573969, 573970, and 574807). Additionally, he proposes another $20.00 for the single hoist violation comprising docket No. WEST 83-53-M (citation 2009724).

Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the mine operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to continue in business, and the gravity of the violation itself.

The evidence in the present case shows Silver Ventures to be quite small, with no history of prior violations. It also tends to show that most of the violations were transitory, the products of the start-up phase of a new operation. Moreover, the record shows that, overall, the respondent displayed a commendable interest in complying with all safety requirements from the day the project began. Its good faith was never in question. Where penalties are concerned virtually all factors weigh heavily in respondent's favor.

I must note, however, that the representatives of the Secretary of Labor appear to have been well aware of all of these mitigating considerations, since the proposed penalties were all minimal. On balance, I must conclude that the modest penalties proposed by the petitioner should be imposed.

Consequently, I hold that $20.00 is the appropriate penalty for each of the citations here involved except for the wiring violation described in citation 373968. For that violation $36.00 is appropriate.

CONCLUSIONS OF LAW

Upon the entire record, and in conformity 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 respondent, Silver Ventures Corporation, violated the standard published at 30 C.F.R. 57.12-30 as alleged in Citation No. 573968 in Docket No. WEST 82-215-M; and that $36.00 is the appropriate penalty for the violation.

3. That respondent violated the standard published at 30 C.F.R. 57.12-8 as alleged in Citation No. 573969 in Docket No. WEST 82-215-M; and that $20.00 is the appropriate penalty for the violation.

4. That respondent violated the standard published at 30 C.F.R. 57.12-18 as alleged in Citation No. 573970 in Docket No. WEST 82-215-M; and that $20.00 is the appropriate penalty for the violation.

5. That respondent violated the standard published at 30 C.F.R. 57.13-21 as alleged in Citation No. 574807 in Docket No. WEST 82-215-M; and that $20.00 is the appropriate penalty for the violation.

6. That respondent violated the standard published at 30 C.F.R. 57.19-7 as alleged in Citation No. 2009724 in Docket No. WEST 83-53-M; and that $20.00 is the appropriate penalty for the violation.

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ORDER

Accordingly, it is ORDERED that all citations herein are affirmed, and that respondent shall pay penalties totaling $116.00 within 30 days of the date of this decision.

John A. Carlson
Administratrive Law Judge

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~FOOTNOTE_ONE

1 The inspector also issued a withdrawal order under section 107(a) of the Act. The propriety of the withdrawal order is not at issue in this proceeding.

~FOOTNOTE_TWO

2 The inspector's testimony that the tape manufacturer, in response to an inquiry, recommended at least six wraps is accorded little weight because of its hearsay character.