

CCASE:

SOL (MSHA) V. ARCH OF ILLINOIS

DDATE:

19850115

TTEXT:

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 84-48
A.C. No. 11-00609-03511

V.

Captain Mine

ARCH OF ILLINOIS, INC.,
RESPONDENT

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for Petitioner;
Brent L. Motchan, Esq., St. Louis, Missouri,
for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations.

The respondent filed an answer contesting the proposed penalties, and a hearing was held in St. Louis, Missouri, on October 11, 1984. The parties waived the filing of post-hearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearing have been considered by me in the adjudication of this case.
Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the

Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision. Included among these issues is the question as to whether the cited violations are "significant and substantial."

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit PÄÄ1):

1. Respondent Arch of Illinois was known as Southwestern Illinois Coal Corporation prior to November 28, 1983.
2. The respondent owns and operates the Captain Mine, which is a strip mine producing bituminous coal.
3. The Commission has jurisdiction in this case.
4. On September 28, September 29, and September 30, 1983, MSHA Inspector Laverne Hinckle conducted inspections of the Captin Mine, and he issued the three citations which are in issue in this proceeding.

5. The respondent demonstrated good faith by abating the conditions described in the citations within the time allowed by the inspector.

6. During the calendar year prior to the issuance of the citations involved in this case the Captain Mine had a production of approximately 3,234,936 tons of coal.

7. During the calendar year prior to the issuance of the citations involved in this case the entity controlling the Captain Mine had a production of approximately 6,854,467 tons of coal.

8. If violations of the MSHA standards are found in Citations 2201879, 2324823, and 2324824, payment of the penalties assessed by the MSHA Office of Assessments would not affect the ability of the respondent to remain in business.

9. During the 24 month period preceding the issuance of the violations involved in this case, the respondent paid a total of 49 assessed violations. Twenty-five (25) of those forty-nine (49) paid violations were 20.00 single penalty assessment violations.

Discussion

Section 104(a) "S & S" Citation No. 2201879, issued on September 28, 1983, cites a violation of 30 C.F.R. 77.505, and the condition or practice cited is described as follows:

The 440 VAC 3 phase cable serving a generator type welder in the garage building, 3rd bay from the south wall was not equipped with a proper electrical fitting where it entered the fused disconnect. The jacket insulation was not in the fitting and the energized phase conductors were in contact with the disconnect enclosure.

Section 104(a) "S & S" Citation No. 2324823, issued on September 29, 1983, cites a violation of 30 C.F.R. 77.604, and the condition or practice cited is described as follows:

The 25,000 VAC trailing cable serving the 2570 dragline was not being adequately protected from damage by mobile equipment in that it had been covered with unconsolidated rock 4 to 6

inches in depth and then crossed by rubber tired equipment at least two times. The tire marks crossed the rock cover in two separate places. The trailing cable was energized at the time of this observation.

Section 104(a) "S & S" Citation No. 2324824, issued on September 30, 1983, cites a violation of 30 C.F.R. 77.604, and the condition or practice cited is described as follows:

The trailing cable supplying 440 VAC, WYE connector, resistance grounded power to a water pump behind the 181 loader in the 5671 pit was not being protected from damage by mobile equipment in that it had been run over in two places. The cable had tire marks on it and was impressed into the roadway in two locations. The cable was energized at the time of this observation.

Procedural Rulings

1. In its answer and notice of contest filed in this case, respondent raised an objection concerning the issuance of Citation No. 2201879 (improper cable fitting on a welding machine disconnect electrical box). Respondent's objection is an assertion that the inspector failed to allow respondent's representative to accompany him during the inspection when he detected the cited condition. The objection was withdrawn by counsel at the hearing (Tr. 12Ä13). Under the circumstances, I have not considered it.

2. At the close of MSHA's case in chief, respondent's counsel moved for a directed verdict as to the inspector's "S & S" findings concerning all three of the citations issued in this case. For purposes of the motion, although counsel conceded the fact of violations as to all three citations, he also indicated that he would leave that for my determination (Tr. 132Ä133). Counsel then amended his motion to include a request for vacation of all three citations on the ground that MSHA had not established a prima facie case that the cited conditions or practices constituted violations of the cited standards (Tr. 135). After consideration of the arguments in support of the motion, as amended, it was denied (Tr. 135).

3. During the hearing, respondent's counsel raised an objection when MSHA's counsel called Mr. Jerry Collier as a witness. The objection was based on the assertion by counsel that MSHA's counsel Carmona had not advised him in advance of the hearing that he intended to call Mr. Collier as a witness (Tr. 213).

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Respondent's counsel was reminded of the fact that during the discovery period in this case, MSHA's counsel indicated to him that he had made no final determination as to whether or not he would call additional witnesses (Tr. 215). MSHA's counsel Carmona indicated that he made a telephone call to counsel Motchan's office to advise him that he intended to call Mr. Collier, but that he had received no response to his call (Tr. 216).

After consideration of all of the arguments made on the record, including a proffer made by MSHA's counsel with respect to the proposed testimony by Mr. Collier, I rejected the respondent's objections, and I did so on the ground that the witness was available for cross-examination, and that respondent's counsel made no showing that he was prejudiced (Tr. 219).

Petitioner's Testimony and Evidence

Laverne Hinckle, testified that he has been employed as an MSHA coal mine inspector for eleven years, and he testified as to his duties, training, and responsibilities. He confirmed that while he holds no college degrees, he has three years of course study in electrical engineering at the University of Illinois, and that his prior work experience was as a chief electrician with several coal companies and the Westinghouse Corporation.

Mr. Hinckle confirmed that he inspected the mine on September 28, 1983, and that he issued the citations which are in issue in this case. With regard to Citation No. 2201879, he confirmed that he issued it after he observed that a nut which was installed on the electrical cable fitting on the welder disconnect box in question was not in place, and that the cable which entered the fitting location was "backed out" of the enclosure and that one of the insulated phase wires was in contact with the box.

Mr. Hinckle stated that he believed the citation was "significant and substantial," and that he did so after following the guidelines set forth in the National Gypsum decision. He also believed that there was a potential for an accident in the event of a fault condition, and in the event of a phase conductor failure.

With regard to Citation No. 2325834, Mr. Hinckle confirmed that he observed the trailing cable covered over with loose rock fill material, and he indicated that respondent's

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employees Fred Wagner and Tom Rushing agreed with him in this regard. He confirmed that photographic exhibits RÄ7, RÄ8, and RÄ9 accurately portray the cable in question. He also conceded that he was in error when he stated that the rock material was four inches to six inches, and that it actually ranged from "zero inches to four inches."

Mr. Hinckle stated that he observed tire marks on the trailing cable in question, and that the respondent's representatives agreed that this was the case. He also confirmed that after testing the cable, he found that it had not been damaged.

With regard to Citation No. 2324824, Mr. Hinckle identified photographic exhibits RÄ10 and RÄ11, as the cable which was run over, and he believed that it was run over by a Michigan rubber-tired payloader. He believed that the negligence was high because mine management should have discovered the condition and taken action before he did.

Mr. Hinckle confirmed that in making his "significant and substantial" findings, he followed MSHA's policy guidelines set out in a District 8 policy memorandum dated January 7, 1977, exhibit PÄ4. He conceded that his concern over a piece of equipment running over a cable was the potential for damage which may result from equipment constantly running over a cable, and he agreed that the language of the standard has personally caused him much difficulty in trying to interpret it (Tr. 42Ä43). Mr. Hinckle confirmed that he relied on MSHA's manual guideline and the memorandum by his district manager to support his citations, and MSHA's counsel stated that it was MSHA's position that the cited cables should have been protected by one of the methods detailed in those guidelines and interpretations (Tr. 44Ä47).

Inspector Hinckle confirmed that the 25 KV cable was inspected with a Megger instrument after it was deenergized, and since no damage was detected, the respondent was permitted to place the cable back into service. He did not require the respondent to use any of the means detailed in the guidelines to protect the cable from being run over again, and the inspection of the cable was sufficient action to warrant the abatement of the citation (Tr. 47Ä48; 56Ä57).

With regard to the 440 VAC WYE water pump power cable, Inspector Hinckle believed that it had been run over by a rubber-tired Michigan Payloader, which weighs approximately 20 tons, but that he was not sure (Tr. 60Ä62). Abatement was achieved by deenergizing the cable, inspecting it, and testing it electrically. It was then permitted to be placed back into service (Tr. 65).

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During a bench colloquy with the inspector regarding his application of any "S & S" guidelines, he explained his understanding of the term "S & S" as follows (Tr. 54Å55):

JUDGE KOUTRAS: Had it not--had you not issued the citation, the practice would have continued; is that correct?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So any citation you issue theoretically would be S and S, wouldn't it?

THE WITNESS: No, sir.

JUDGE KOUTRAS: If you follow that particular logic to the letter?

THE WITNESS: May I give an example that comes to mind?

JUDGE KOUTRAS: Okay.

THE WITNESS: Each piece of mining equipment underground is required to have a methane monitor on it, 75.313.

JUDGE KOUTRAS: Okay. Okay.

THE WITNESS: Okay, at the time an inspector finds a methane monitor which has malfunctioned for one reason or another and he cites this condition, at the same time he checks with his hand-held monitor. If he finds no gas, that citation is not S and S.

JUDGE KOUTRAS: Not S and S?

THE WITNESS: No, sir. The thinking here is that if it were allowed to continue and there was no gas, then there would not be reasonably likely anyone would be injured as a result of that methane monitor not being functioning.

JUDGE KOUTRAS: Now what if I were to tell you that an inspector in another district office with that same analogy would mark that citation S and S, notwithstanding the fact that he found no gas, on the theory that methane could be encountered at any time and, therefore, it is still and S and S?

THE WITNESS: May I make another--

JUDGE KOUTRAS: Go ahead.

THE WITNESS: I think that we are, you and I, certainly are discussing one of the major problems that we have in our enforcement activities in the United States today. We are not consistent.

During his subsequent testimony on cross-examination concerning four prior citations issued by two other inspectors from the same district office in 1982 and 1983 concerning violations of section 77.604, for equipment running over trailing cables, (exhibits PÄ7 through PÄ10), Inspector Hinckle stated as follows (Tr. 113):

Q. I do not see that any of these four violations, and they all involve the same standard, 77.604, have been marked significant and substantial.

A. I picket up on that, too. I noticed that as well.

Q. So did they apply a different standard than you did?

A. No, of course not.

Q. Can you explain this then why is yours significant and substantial and theirs are not?

A. The only explanation I have is they based their evaluation on the set of circumstances that they observed at the time they cited the violation and I based my judgment on a set of circumstances that might have been, as far as I know, totally different at the time I observed this violation that I cited. In other words, I was not at--I was not with either one of these men so I cannot--

Q. Well, it just seems strange to me that they have violations again for going over trailing cables. They say they're not significant and substantial and you say that yours are.

A. I based my judgment on the set of circumstances that I observed at the time I cited the violation.

Q. Don't they?

A. I can't answer for them, sir.

When asked how many times a cable would have to be run over before he would consider this practice as "S & S," Inspector Hinckle replied that "once would make it significant and substantial" (Tr. 115Ä116). He indicated that his position would be the same regardless of the fact that an examination and testing of the cable indicated that it had not been damaged (Tr. 116Ä118).

Mr. Hinckle testified that he believed both cables had been run over sometime during the shift on the same day of his inspections (Tr. 123). When asked to explain a statement attributed to him in a reply to an interrogatory prepared by MSHA's counsel that "the cable continued to be handled by several miners while it was energized after it was run over by heavy equipment," Mr. Hinckle conceded that he had no evidence to support any such statement, but that "by practice oftentimes this is true" (Tr. 124). He also conceded that at the time he observed the cited conditions he observed no one handling any energized cables (Tr. 130).

Respondent's Testimony and Evidence

Cliff Higgerson, confirmed that he is employed by the respondent as the mine electrical superintendent. He testified as to his background and experience, and confirmed that he has MSHA certified electrician papers. With regard to Citation No. 2201879, he stated that in the event one or two of the cable phase wires touched the connector box in question, no hazard would exist because the box is grounded. He did not believe that the violation was "significant and substantial, and he confirmed that the cable connector and box is required to be checked once a month (Tr. 136Ä139).

With regard to Citation No. 2324824, concerning the water pump cable, Mr. Higgerson confirmed that he observed the cited cable, and that after it was tested, no damage was detected. He also confirmed that the cable is moved by the crew, and that it is checked for damage daily and monthly. He was of the view that simply because the cable was run over, this did not amount to a "significant and substantial" violation. He also indicated that in the event normal mining operations were continued, the cable condition would have been discovered and that this would not be a significant and substantial violation.

With regard to Citation No. 2324823, regarding the 25 KV trailing cable, Mr. Higgerson confirmed that photographic exhibits RÄ10 and RÄ11 accurately depict the cable in question. He did not believe that the violation is "significant and substantial" simply because the cable was run over. He indicated that the cable which was in use was stronger and safer than the minimum type cables required to be used at the mine.

Tom Rushing, respondent's safety director, testified as to his background and experience, including 20 years at the mine in question. He confirmed that he holds mine foreman's papers and numerous MSHA training certificates. He identified photographic exhibits RÄ1 through RÄ6 as the welding machine box in question (Tr. 159Ä162).

With regard to Citation No. 2324823, Mr. Rushing identified photographic exhibits RÄ7 through RÄ9 as the cable in question. He stated that he observed no damage to the cable and saw no one handle the cable. He indicated that the cable is normally handled at least two times during each daily shift, and he stated that the location at which the cable was run over was not a roadway or haulage way and was not intended as a mobile equipment cross-over. He also indicated that the rock material which covered the cable was not intended to protect the cable from being run over, but was intended to protect it from rock materials falling on it when the dragline boom swings around (Tr. 163Ä166; 172Ä173).

With regard to Citation No. 2324824, Mr. Rushing confirmed that he was with the inspector at the time this condition was observed, and he identified photographic exhibits RÄ10 and RÄ11 as the cited water pump cable in question. He also confirmed that he observed the tire tracks, but that he observed no one handle the cable. He stated that the location where the cable was observed was not intended as a mobile equipment cross-over point, and he indicated that the respondent does not make it a practice to run over cables, and that anyone found doing so is subject to being disciplined (Tr. 167Ä168).

Ted Hansen, testified that he is employed by the Anaconda Wire and Cable Company as manager of mining marketing. He stated that he is a 1964 graduate of Marquette University, with a degree in electrical engineering, and that he has taken several post-graduate courses in management. He testified as to his prior experience as a process, development, and research engineer with Anaconda. He also indicated that he headed the research laboratory which was engaged in research concerning cable studies into compression cut resistance. He discussed several cable tests he conducted, and he confirmed that he published six technical papers concerning trailing cables, three of which dealt with the reliability of cable shielding. He also confirmed that he holds five patents for cable design, and has written a book on the subject.

Mr. Hansen stated that his company has supplied the respondent with trailing cables for several years and that

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he is familiar with the trailing cables which were cited by Inspector Hinckle in this case, and that he contributed to their design.

Mr. Hansen identified physical exhibit RÄ12 as the exact type of cable cited by the inspector with respect to the dragline citation, and physical exhibit RÄ14 as the type of cable cited in connection with the water pump cable citation. Based on the testimony and evidence adduced in this case, Mr. Hansen was of the opinion that running over the cables by rubber-tired equipment did not pose a significant and substantial mine safety hazard.

Mr. Hansen described several tests which he conducted with respect to the types of cables in question in this case, and these included hydraulic pressure applied to the test cable, equipment running over it, and rods being inserted into the cables to simulate damage. He also described the physical characteristics of the cables, including the manner in which they are manufactured with reliable shielding and grounding devices. In his opinion, running over such cables would not cause any damage, and he believed the only way such cables could be damaged was in the event a piece of equipment with "crawler treads" ran over the cable and cut into it (Tr. 180Ä191).

Mr. Hansen described in detail two cable tests which he conducted, and as to a third one he stated in pertinent part as follows (Tr. 182Ä183):

* * * In addition to those two tests, we finally went to a less scientific type of a test where we simply put the cables out near our receiving docks and let our--our trucks normally coming to our plant just run over the cables day in and day out. These trucks would weigh as much as 50,000 pounds and it would take anywhere from 1,000 to 5,000 cycles before we'd even bother to look at the cable to see if it's been injured yet. And usually after these number of cycles there is little damage to the conductors or the cable at all. Our purpose in doing this is to compare the new design with a reference design that we are satisfied with.

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Mr. Hansen referred to physical exhibit RÄ12, which is a piece of 25 KV trailing cable of the exact type cited by Inspector Hinckle, and he explained in detail its physical characteristics, including the grounding conductors and protective shieldings (Tr. 185). He also explained the differences in the shielded trailing cables used in surface mining as compared to the unshielded low voltage cables generally used in underground mining (Tr. 187Ä188).

Mr. Hansen stated that the cable shielding system is effective in taking any faults to ground, and that it is the safest cable that can be designed (Tr. 188). He explained further as follows (Tr. 188Ä192):

A. And along these lines is MSHA has tested our cables with this particular type of shielding with what they call the nail test. And that is where they actually drive a nail through the shield wires into the conductor and the grounding system produces a ground fault that will trip the relays without providing any shock hazard to the person who's standing there holding the nail while it's being driven through to the conductors. That was a design criteria and we have performed that test on all of these cables.

Q. When I asked the inspector to state the facts he relied on to come to the conclusion that the alleged violation was significant and substantial, he stated that the cable could have been internally damaged, a short circuit was possible while the cable was energized. Can you tell me how a short circuit would occur in that and then what would happen if a short circuit occurred?

A. If--when or if the insulation was ever damaged to the point where it would fail dielectrically, the short circuit would have to be phase to ground. In this kind of a circumstance, there is just simply no way you could have a phase to phase fault. And the significance of that is that the phase to ground system has relays and neutral resistance that will limit the amount of energy that is expended in such a ground fault. * * *

* * *

JUDGE KOUTRAS: Well, as I recall the inspector, Mr. Hinckle, when you were asking him some questions, Mr. Motchan, didn't he indicate that through the use of his own diagram which I've marked as Exhibit ALJÄ1 that should the shielding on one of the phase conductors which is the three that you've just described here become damaged through constantly being run over or for whatever reason, should two of those come together it would short this particular cable out. Isn't that what he said?

MR. MOTCHAN: I believe he said that yes, if these--

JUDGE KOUTRAS: Yes.

MR. MOTCHAN:--two conductors--

JUDGE KOUTRAS: If those two came together--

MR. MOTCHAN: Right.

JUDGE KOUTRAS:--that would cause a problem with the cable.

MR. MOTCHAN: Right.

THE WITNESS: That--that cannot happen with this design.

JUDGE KOUTRAS: Okay. And you--excuse me just one second. And you say the only time it can happen is if it's a phase to ground type of thing rather than the two conductors phase to phase; is that correct?

THE WITNESS: The only kind of faults you can have with this is the phase to ground fault.

JUDGE KOUTRAS: And how would that happen with that cable that's sitting there in front of you?

THE WITNESS: It would happen if somebody would drive a nail through the insulation into the--into the conductor or it will happen when a rope is tied around it and maybe they try to move fifteen hundred feet of it in one pull and they pull the jacket apart and subsequently pull the--and damage the shielding into the insulation. But then it would be a phase to ground fault. And that's usually the way these cables fail.

JUDGE KOUTRAS: Okay.

THE WITNESS: I don't personally know of a cable ever failing from a truck running over it.

JUDGE KOUTRAS: Do you know of any cables that have failed by--by equipment running over it?

THE WITNESS: Only when a D9 or a similar type vehicle with those treads run over it, then it cuts it in two.

JUDGE KOUTRAS: You mean the tank type crawler treads?

THE WITNESS: Yeah.

JUDGE KOUTRAS: And that would be a cutting process--

THE WITNESS: Yes.

JUDGE KOUTRAS:--rather than a deterioration caused through crushing and that sort of thing?

THE WITNESS: That's right.

Q. Well, what would happen if there was a phase to ground fault on this?

A. It would produce a ground fault current of the magnitude that would trip a ground fault relay.

Q. Okay. The relay being tripped I would take it that someone touching the cable would not be in danger?

A. No. You could be holding this cable during this fault process and you'd be lucky if you knew that a fault was taking place.

Lloyd R. Brown, testified that he is a full Professor of Electrical Engineering at the Washington University, St. Louis, Missouri, and he confirmed that he holds an A.B. degree in mathematics and physics, and a B.S. degree in electrical engineering from the University of Missouri. He also holds M.S. and Phd. degrees in electrical engineering from the Washington University. He stated that he has been a professor in electrical engineering for the past twenty years teaching undergraduate courses at the Washington University.

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Dr. Brown testified as to the citation concerning the breaker box fitting citation, No. 2201879, and he confirmed that he took the photographs which are a matter of record in this case, exhibits RÄ1, RÄ3, RÄ4, RÄ5, and RÄ6 (Tr. 207).

Dr. Brown testified that even if the insulation had come off one of the phase wires and one of the wires came into contact with the enclosure, there would be no shock hazard to someone touching the enclosure. He explained his opinion as follows (Tr. 207Ä208):

Q. If the insulation came off the phases, one or more phases, and they, in fact, touched the enclosure, would there be any shock hazard to someone touching the enclosure?

A. No, way. May I elucidate on that?

Q. Yes, phase.

A. This is a grounded box. Even if the system were grounded, all you would do would be to trip the breakers back at the main which in no way could you maintain a short on this box for any period of time. But of a secondary nature is this is what you call a floating delta system. There's nothing grounded on it. It's kind of like hauling a flashlight up here. There's batteries in that flashlight but you're not getting shocked off of it. If you were to touch it to ground, nothing more would happen. One wire to ground wouldn't make any difference at all. It would have just grounded one corner of this floating delta.

Q. What happens if two of the conductors touch?

A. Then you've got a phase to phase short which again will trip the breakers back at the main.

Q. Now would somebody or could somebody be electrocuted by touching the enclosure if one or two of the phases touched?

A. Absolutely no way. There's no way you can get electrocuted on that box.

With regard to the two cited trailing cables, Dr. Brown testified as follows (Tr. 208):

Q. Let me go into the other two citations involving the trailing cables. Did you view the cable at the mine?

A. I viewed samples--oh, yes, the--the actual cable I couldn't swear was the same cable. We went out in the field and saw--saw the unit in operation.

Q. Did you look at the 25 KV cable and at a two KV cable?

A. We did. I did.

Q. From what you've heard today and your own knowledge, do you feel there--that the conditions as existed in either one of the citations involving the trailing cables significantly and substantially contributed to a mine hazard?

A. I don't see any way that they could have caused anybody to get electrocuted.

And, at Tr. 210Ä211:

JUDGE KOUTRAS: * * * based on what you've heard today to you have any reason--any opinion as to whether or not it was significant and substnatial and do you understand what the concern of the inspector--of Inspector Hinckle is and what the concern of MSHA seems to be with regard to running over a cable of this kind, Doctor Brown, with equipment? Do you have any perception of what that concern might be?

THE WITNESS: Well, it's my impression that the concern is that somebody handling the cable afterwards might get a, certainly if not a lethal shock, one that would be physically damaging to them.

JUDGE KOUTRAS: And do you say that there's no--there's no cause for alarm, that maybe MSHA is over-reacting here or just what?

THE WITNESS: Well, my--my feeling is, Judge, that you've got a phase--each one of these for which has its own individual grounded shield. I don't see any way that you can get a fault in here that you're not going to get a phase to ground

shield that even if the ground fault equipment were not operating it still would blow the breaker back in the distribution system. And I think I heard a term that I just can't believe. There's no way that I can see that that equipment could ever get energized. You would have to literally break every one of these grounds completely sheared and still maintain the integrity of one of these phases in order to get your equipment energized which just looks to me to be impossible. You've got these outside grounds, you've got each individual shield around it, every one of those would have to be cut and yet maintain one of these and somehow get it tied to the machine which it isn't to start with. The--the whole concept is, excuse the term, ridiculous.

JUDGE KOUTRAS: And what--now you've heard some of the witnesses from the operator's point--standpoint in this case have voiced some concern about the practice, if you will, or some concern about mobile equipment crossing over this. What, from their point of view, is their concern?

THE WITNESS: I would be more concerned that if it got damaged you would have downtime and physical failures rather than loss of life. Certainly I think if you went over this a few times with a D9 cat I could visualize that you're going to have some failures in there.

JUDGE KOUTRAS: And you're saying that those failures would--would necessarily trigger the--the inherent safety features of this thing and would either de-energize the equipment or put the--put the cable out of commission?

THE WITNESS: That's correct, and somebody's going to have to go repair it.

JUDGE KOUTRAS: Or replace it or--

THE WITNESS: Or replace it, that's correct.

Petitioner's Rebuttal

Jerry Collier, MSHA Supervisory Electrical Engineer, Vincennes, Indiana, testified as to his background and

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experience, and confirmed that he holds a B.S. degree from the West Virginia Institute of Technology in Montgomery, West Virginia (Tr. 219-221). He testified that he did not participate in the inspections which were conducted by Inspector Hinckle in this case, but that he was familiar with the conditions or practices cited by the inspector (Tr. 222). He confirmed that with regard to section 77.604, MSHA's District 8 follows the enforcement policies set forth in the district manager's memorandum and the manual guidelines set out in exhibits P4 and P14 (Tr. 222).

During the course of the questioning of Mr. Collier, and in response to my questions concerning the theory of MSHA's case with respect to the two trailing cable citations, MSHA's counsel responded as follows (Tr. 225-226).

JUDGE KOUTRAS: Mr. Carmona, let me understand something first basically about the theory of MSHA's case here. Is--are you holding the operator here accountable for failure to adequately trench or otherwise guard this cable from being damaged? Are you charging them--is MSHA's position here that they failed to follow the policy?

MR. CARMONA: They failed--our position is that they failed to follow the policy and they failed to use any other method that is safe because they didn't--they didn't have procedures that provided protection to the cables.

JUDGE KOUTRAS: And that's because the inspector saw the tracks on the cable?

MR. CARMONA: Well, he saw it at the time. That's happened before. It's not only once.

JUDGE KOUTRAS: And yet the abatement here to this day the operator still hasn't--you know, I'm still a little in never-never land about the abatement. How were these two citations abated?

* * * *

JUDGE KOUTRAS: I got the impression that the two citations were issued because the inspector saw that--evidence that a piece of mobile equipment had run over it. He saw the tracks; correct, Mr. Carmona?

MR. CARMONA: Yes. Well, he has to have some evidence that the--the cable has been subject to some damage.

JUDGE KOUTRAS: Yes, I know but--but in the description of one cable where it was lying with unconsolidated rock, are you telling me that the inspector was of the view that he thought that the cable was there to be protected from being run over? And that he thought that that protection was inadequate? What if he'd have found 12 inches of unconsolidated rock? Would the citation have issued in this case?

MR. CARMONA: If it had been determined that it was run over, the cable, the citation would have been issued because MSHA does not consider that a proper protection. MSHA is talking about trenches that can be--protect the cable.

JUDGE KOUTRAS: Yes, but the--but the policy only requires that protection at designated roadways and cross overs, doesn't it?

MR. CARMONA: Well, what--is the place at which the cable is supposed to be crossed over they're going to cross over but the cable has to have protection.

Counsel Carmona asked Mr. Collier asked Mr. Collier to explain MSHA's policy, and he responded as follows (Tr. 226Ä227):

A. Yes. Of course, the reason for the policy memorandum back in 1977 was because of questions from our inspectors in the first place about how to--about how to interpret and enforce that particular regulation, 77.604.

Mr. Collier's interpretation and application of MSHA's enforcement policy with regard to section 77.604, including "S & S" violations, is reflected in the following testimony (Tr. 230Ä237).

JUDGE KOUTRAS: The mine operator installs a pump and he runs a thousand foot trailing cable right by the pump. There's absolutely no mobile equipment at all working in there in the normal course of a shift.

THE WITNESS: Yes, uh-huh.

JUDGE KOUTRAS: What is he required to do to protect that cable in the event some guy just happens to drive by in a truck and goes over the cable and leaves some marks that the inspector sees?

THE WITNESS: He's not required to do anything in a case like that.

JUDGE KOUTRAS: He's not required to do anything?

THE WITNESS: No, huh-huh.

JUDGE KOUTRAS: At what point in time is he required to do anything?

THE WITNESS: At the point in time that he decides that he wants to pass over that cable.

JUDGE KOUTRAS: So the driver, then, if he decides he wants to run over the cable, he either has to suspend it, build a bridge or dig a trench?

THE WITNESS: No. I wouldn't say the driver. The operator in our opinion would be responsible for doing whatever's necessary to protect that cable.

JUDGE KOUTRAS: Now the driver decides to go over the cable and leaves some telltale tracks and the inspector comes in and finds it, he's going to give them a citation, isn't he?

THE WITNESS: Yes, sir. Uh-huh.

JUDGE KOUTRAS: Now what if the--that--what if that is, in fact, the case, that it was not a duly designated cross over point? How, in a practical way, does the mine operator go about insuring the integrity of that cable? Are the--is the equipment man required to stop, call the mine operator and tell him look, I want to cross this cable. Come over and do something. Send a crew out here to suspend it or trench it or--

THE WITNESS: Well, sir, it'd be hard for me to speak to that. I can't dictate, you know, how they set their manning system and how they make their decisions at which point in time they're going to take action to--

JUDGE KOUTRAS: Do you see the--

THE WITNESS: --protect cables or comply with the regulation?

JUDGE KOUTRAS: Do you see the picture of the cable there in--with the water pump?

THE WITNESS: Yes, that would be this one right here, these two?

JUDGE KOUTRAS: Yeah, how do you think that piece of equipment came to run over that cable? That looks to me like it's down in a gulley and there's a big--what's that big pipe running over it. What would a piece of equipment be going in--does that look like a regular cross over or a roadway to you or what?

THE WITNESS: Well, again, it might not be a regular roadway or a regularly used cross over point but I would consider the fact that equipment was required to pass over it I would consider it at that point to be a roadway.

JUDGE KOUTRAS: But you used the word was required. Required means that somebody tells them this is a--what if some fellow just decided to go over that cable in a truck because he didn't know any better? He was taking a short cut. You say he was required to do it. Now required meaning to get to the other side of the road you have to drive over it or--

THE WITNESS: Okay, well, if I were in--making the inspection, I would issue a citation to the operator for not adequately protecting the trailing cables.

JUDGE KOUTRAS: And how would you go about making the determination whether that violation on that hypothetical was S and S?

THE WITNESS: Number one would be my experience with fatality investigation work and what I know by reading reports from other areas about what's happened in other areas that have created fatalities. You take like this cable right here for example, if I might speak of that. Whenever that--whenever material is placed over the top of that

cable, you don't--in the first place, you don't know whether there's been a splice made in that cable. One of the witnesses got up here and he talked about how strong this cable is and I'm sure it is strong. But unfortunately when it's put into operation things happen to it that cause people to have to make splices in it. It's been our experience in the past that people will not always put these shielding wires back over the top of the splice. They will not always connect the ground wires where they make the splice. And eventually the grounding system comes open. We haveno way of knowing what's--what's inside or underneath the material that's used to cover the cable.

JUDGE KOUTRAS: Well, let me ask you this. Let's assume, for example, that an operator installs twenty-five hundred foot of trailing cable to a dragline and he just uncrated.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And it has absolutely no splices in it.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And an end loader runs over it and you see the tracks. Are you telling me that based on your experience that you're going to mark that citation S and S?

THE WITNESS: Yes, sir, I think I would. Yes.

JUDGE KOUTRAS: On--and how would you support the S and S finding? On what evidence or what thinking would you--

THE WITNESS: The fact that we know that even though we have circuit breakers that protect the systems, based on the testing that we've done we do know that breakers fail, number one. We have a lot of other protective features, like ground monitors. And we find these cut out quite a bit to where they're not actually monitoring--what the ground monitor is used for is to monitor the continuity of the ground conductors in the cables, okay. And we find these cut out to the point where they're not performing their function.

JUDGE KOUTRAS: Now on the facts of this case now there's no evidence that this cable had any splices in it that was ever examined. As a matter of fact, after it was run over, it was tested and found to be absolutely in good working order.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And also in the--with regard to four other citations issued by other inspectors citing the very same condition, they didn't mark those S and S.

THE WITNESS: Uh-huh. Well, Judge, I also have to go by the MSHA guidelines, you know, on how we determine S and S. And if it's reasonably likely that if the condition goes uncorrected, and to me it is reasonably likely that something could happen, the sequence of occurrences could take place to result in somebody getting hurt or killed.

JUDGE KOUTRAS: In your experience have you ever known cable of this kind to cause any injuries or fatalities in a surface mining operation?

THE WITNESS: Not--not this particular--in a surface mining operation?

JUDGE KOUTRAS: No, that particular type of cable?

THE WITNESS: No, sir. No, sir.

JUDGE KOUTRAS: Then what experience would you rely on then to find that running over this particular type cable would be S and S?

THE WITNESS: Well, I can relate to you a fatality that happened underground. Now whether you'll accept it or not, I don't know.

JUDGE KOUTRAS: No.

THE WITNESS: But it resulted--it resulted in a fatality and what had happened the person that was electrocuted he was in the process of moving in a large heavy steel compartment. He got the compartment on top of the cable. Now here's the sequence of events that I'm talking about. A splice

had been made in that cable. There was no shielding on top of the splice. Whenever that box damaged the--the cable, and it did, in fact, damage the cable, the splice--at the splice, it energized the frame of the box and electrocuted the fellow.

JUDGE KOUTRAS: Well, now what kind of cable was that? Was it this--

THE WITNESS: That was an SHD--

JUDGE KOUTRAS: Was it this kind?

THE WITNESS:--GC cable. It wasn't a 25 KV cable. It was a five KV cable.

JUDGE KOUTRAS: But you introduced three or four other things into your--not your hypothetical, into the incident of the fellow getting electrocuted--

THE WITNESS: Yes, sir.

JUDGE KOUTRAS:--which was no shielding--

THE WITNESS: Yes, sir.

JUDGE KOUTRAS:--it had been spliced and it had been broken and it had been damaged.

THE WITNESS: Yes.

JUDGE KOUTRAS: Now how can you take those three or four factors and equate that to a 25--brand new KV cable that's been run over once and say that based on your experience with the other thing that this is going to be--that this is S and S?

THE WITNESS: Well, there again, if we look at it from our written guidelines concerning how we determine S and S, and if that condition goes uncorrected, if we leave that situation where we permit that act or that running over the cable with the equipment from now on, then I would say that these other conditions could take place.

JUDGE KOUTRAS: Do you know whether MSHA has any thoughts about amending the standard to specifically--your policy seems to be if you run over a cable that's a violation of the standard?

THE WITNESS: Uh-huh, yes.

JUDGE KOUTRAS: On what theory?

THE WITNESS: The fact that the cable's not adequately protected.

(Pause.)

THE WITNESS: To answer your question about do I think that we will eventually revise that, I happen to be a part of the rewrite committee right now that is rewriting the Part 75 regulation. It's my understanding that shortly after this we'll start on the 77, Part 77, and just based on what I've heard today, there's no question about it. We're going to have to rewrite that standard.

With regard to the contactor box citation, Mr. Collier stated that in the event the insulation wears off of an energized conductor and a ground or high resistance fault occurs in the system, and the bare wire comes in contactor with the frame of the box, a short circuit would result, and if anyone touched the box, he becomes part of the circuit and could be electrocuted (Tr. 242). However, he conceded that four other occurrences would have to take place before any electrocution hazard would be present, and he explained what they were (Tr. 242-244). He explained further as follows (Tr. 244-246):

JUDGE KOUTRAS: Do you think that Mr. Hinckle decided this was S and S based on all these other things that possibly could have happened here or do you think he just was of the view that since it wasn't on a proper fitting that even though--that it's a citation plus it was S and S because--

THE WITNESS: I don't--I really don't think I can answer that.

JUDGE KOUTRAS: Well, you saw the photographs of the box.

THE WITNESS: Yes.

JUDGE KOUTRAS: When would these other things come into play? Do you know what--what's in this--what's in this circuit besides that one box?

THE WITNESS: No, I don't know other than the fact that we have a circuit that comes from transformers--

JUDGE KOUTRAS: All right.

THE WITNESS:--through the shop area and into this box. We've got several parts of the circuit that--circuit that is exposed there. And there again you could have wiring in conduit. I don't know. I didn't see it.

JUDGE KOUTRAS: What would--

THE WITNESS: But if you--if you do have wiring in conduit then these are places where faults can occur and set up this second ground condition that I'm talking about.

JUDGE KOUTRAS: Well, would--do you think that you'd have to go into that and see whether that was, in fact, present before you can come to the conclusion that you--that it would be S and S because an electrocution would be possible?

THE WITNESS: It would support your case but the fact--there again, the fact that it has happened before. We see so many things that have happened over the years in mining to cause people to get electrocuted.

JUDGE KOUTRAS: What about in this--

THE WITNESS: These bear on our minds.

JUDGE KOUTRAS: What about in this case just on--if all you had was that one box there and nothing else was present in that particular circuit--

THE WITNESS: Uh-huh.

JUDGE KOUTRAS:--that could cause an additional fault that would escalate or elevate this to the hazardous condition that you feel could result?

THE WITNESS: Uh-huh. If--if that bare--if that insulated conductor became bare and contacted the frame of the box, and the other things were not there, there would be no hazard.

JUDGE KOUTRAS: And is it possible that that--that those other possibilities were not present when this citation was issued?

THE WITNESS: Yes.

JUDGE KOUTRAS: And if that was the case, would you still mark it S and S?

THE WITNESS: Yes, I would. I would still mark it S and S based on what I know can happen.

JUDGE KOUTRAS: But if the things that you know can happen weren't present in this hypothetical, why would this particular one be S and S?

THE WITNESS: Well, there again, if I let that condition just sit the way it is from now on--

JUDGE KOUTRAS: Uh-huh.

THE WITNESS:--I'm going to assume that these other things can take place.

JUDGE KOUTRAS: Well, how can they if you haven't added anything to the circuit?

THE WITNESS: Well, sir, I mean circuitry can break down just through aging.

Findings and Conclusions

Fact of Violations

Citation Nos. 2324823 and 2324824

The parties are in agreement that the inspector did not personally observe any mobile equipment running over the cited dragline and water pump trailing cables. The only evidence available to the inspector during his inspection were the visible tire tracks over the cables in at least two locations, and the concession by the respondent's representative who was with him that the cables had in fact been run over (Tr. 29, 38, 62). At the hearing, respondent's counsel produced several photographs taken shortly after the citations were issued depicting the tire tracks on or over the cables, and he conceded that the cables had been run over (exhibits RÄ7 through RÄ11; Tr. 40Ä41). Although counsel agreed that running over cables is not a good practice, he maintained that assuming that the violations are sustained, the inspector's "significant and substantial" (S & S) findings are not supportable (Tr. 39, 41).

Mandatory safety standard 30 C.F.R. 77.604, provides as follows:

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

MSHA's policy interpretation concerning section 77.604, is set forth at page IIIÄ241, March 9, 1978, MSHA Surface Manual (exhibit PÄ14), as follows:

Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway;
2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or
3. An equivalent form of protection.

When mobile equipment is observed running over unprotected trailing cables a violation of section 77.604 exists.

In addition to the policy interpretation, MSHA's counsel produced a copy of a January 7, 1977, district manager's memorandum addressed to all District 8 inspection personnel, informing them that where trailing cables cross roadways traveled by equipment, the cable must be protected by suspension, substantially constructed crossovers, or by burial in trenches dug across the roadway (exhibit PÄ4). This memorandum does not advise that running over an unprotected cable constitutes a violation of section 77.604.

MSHA's policy guidelines concerning the application of section 77.604, specifically refers to trailing cables located at roadways and haulageways. Since the two cited cables in question were not located at designated roadways or haulageways, the application of these policies in this case is questionable. In any event, I find the inspector's reliance on these policies in support of the citations to be contradictory. In both instances, even though the guidelines relied on by the inspector

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requires that trailing cables be suspended, bridged, buried, or be provided with "an equivalent form of protection," he did not require that any of these protective measures be implemented as a condition precedent to the abatement of the citations. Once the cables were inspected and found to have sustained no damage by being run over, the inspector allowed them to be immediately put back into service (Tr. 47Å48; 56Å57; 65). He explained his interpretation and application of the guidelines as follows (Tr. 48Å50):

JUDGE KOUTRAS: Why wasn't it--why wasn't the operator in this case required to suspend it in the air, substantially construct a cross-over or bury it in a trench to comply with the '77 guidelines?

THE WITNESS: Well, I don't think that would--I don't think I--I don't believe I have the authority to require this, particularly after, you know, they already know about it. They--

JUDGE KOUTRAS: Do you mean to tell me that the inspector goes out there to the Captain Mine today and sees a trailing cable out there that's energized, and it's being used, it's not adequately protected, that he can't issue a citation unless he has some evidence that something has rolled over it?

THE WITNESS: That's our--that's our guidelines from our manual, sir.

JUDGE KOUTRAS: Does that make sense? The standard says trailing cables shall be adequately protected to prevent damage by mobile equipment, and that's what it says. I go out there and I see this cable and it's not buried, it's not suspended, nothing's done to it, it's just exposed out there. There's all these trucks running around, scrapers, loaders, and there's this cable sitting out there, energized to a dragline, and it's not adequately protected. Why does an inspector have to see the tire marks? Or why does he have to see a piece of mobile equipment running over it before he can issue a citation? Would you agree that a cable out there that doesn't--that doesn't comply with the memo is adequately protected?

THE WITNESS: No, sir.

JUDGE KOUTRAS: So that's a violation, isn't it?

THE WITNESS: Yes, sir, but I believe that if I issued paper on that--in the case we're discussing that I would be right here again because I believe I've got to have evidence before I can issue a citation.

* * *

JUDGE KOUTRAS: It shows me the futility of this particular standard, quite frankly. I mean on its face it says cable should be adequately protected and Mr. Carmona has produced a memorandum and guidelines that's supposed to have set the standards. This is what's recommended to the industry, to protect trailing cables of this kind.

THE WITNESS: Yes, sir.

And, at Tr. 69Ä70:

JUDGE KOUTRAS: Let me ask you a question. Let's assume this operator sees a piece of mobile equipment running over a cable. And they stop, they deenergize the cable, and they check it out and find there's been absolutely no damage done to it, okay?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Is that a violation?

THE WITNESS: If I seen the mobile equipment on the cable, yes, sir, I would have to cite it.

JUDGE KOUTRAS: What if the operator says to you, "By the way, Mr. Inspector, this morning before you got here a piece of mobile equipment ran over this cable, that's why you see the tire tracks. Before you do anything now, Mr. Inspector, we want you to know that we--we de-energized that machinery, we pulled that cable out and we checked it. There was absolutely no damage to it." You'd say, "Aha, but I see the tire tracks and therefore I'm going to give you a citation?"

THE WITNESS: I don't believe I'd be right if I cited that--the conditions which you described, no, sir. I would have to accept the operator's good faith word that we know that this happened and we run the test that you would require if you had observed it. I think I would accept that--I would have to in all fairness to the operator and my oath.

Exhibits PÄ7 through PÄ10, are copies of four prior citations issued by two MSHA inspectors assigned to the same district office as Inspector Hinckle, for violations of section 77.604, because of mobile equipment running over cables. In each instance, the inspectors found that the violations were not "significant and substantial."

In two of the prior citations, (exhibits PÄ9 and PÄ10), the inspector abated the conditions after physical and electrical examinations indicated that the cables sustained no damage, and he did not require that the cables be suspended, buried, bridged, or otherwise protected.

In one of the prior citations (exhibit PÄ7), the inspector, in describing the condition or practice on the face of the citation, indicated that the cited cable should have been trenched and covered with soft material to prevent damage. However, he abated the citation after examining the cable and finding no damage, and he did not require any trenching. This same inspector required trenching for the final citation (exhibit PÄ8), before abating it.

Inspector Hinckle and district engineer Collier both expressed some reservations and difficulty in applying MSHA's trailing cable policy guidelines in this case. Mr. Collier was not with the inspector during the inspection, and did not observe the cited cables. He alluded to a committee which will soon begin work on revising some of the standards found in Part 77, and he observed that "We're going to have to rewrite that standard" (Tr. 237).

Inspector Hinckle did not determine the precise type of equipment which ran over the cables in question, but he believed that it may have been a "payloader." He apparently did not speak to any equipment operators to determine all of the circumstances, or the frequency of any such incidents. Upon inspection of the cables, he found no signs of any internal or electrical damages, and there is no evidence that the cables were spliced, cut, worn, or otherwise less than in

proper working order. Further, there is no evidence that the cable shielding was damaged, and upon examination of similar sample cables produced by the respondent at the hearing (exhibits RÄ12 and RÄ14), they appear to be of substantial construction.

Mine electrical superintendent Higgeson testified that the dragline cable is stronger and safer than the minimum type cables required to be used at the mine, and safety director Rushing testified that the cable was covered with dirt, rock, and fire clay to protect it from damage by rocks falling out of the dragline boom bucket as it swings over the cable, rather than by equipment running over it.

Mr. Rushing's testimony has not been rebutted by the petitioner, and Mr. Collier's suggestion that the operators who drove over the cables in question were using a "roadway" simply because they decided to cross at that those locations is rejected as speculative and unsupported. Although an MSHA district policy memorandum dated January 7, 1977, (exhibit PÄ4), concludes that protecting cables crossing roadways by covering them with dirt or coal to allow equipment to pass over them is not a suitable means of cable protection, it is not too clear whether Inspector Hinckle relied on this policy in citing the dragline cable, or whether he relied on the inspector's manual policy directive prohibiting equipment from simply running over a cable. In any event, it does seem clear that Mr. Hinckle believed that a violation occurred in both instances simply because he had some evidentiary support for the conclusion that the cables had been run over.

The testimony of Mr. Hansen, an electrical engineer who was personally and extensively involved in the development and testing of the cables for the manufacturer, including extensive laboratory and field test, establishes that the cables in question are of substantial construction, are designed to withstand damages from being run over by equipment, and are provided with grounding and shielding devices to preclude shock and fault hazards. Mr. Hansen's testimony is corroborated by the testimony of Dr. Brown, a professor of electrical engineering who has over 20 years of university teaching experience. Dr. Brown testified that based on his knowledge of the facts concerning the cable citations, including a site visit where he viewed both cables, he did not believe that any hazards were presented. Conceding that a heavy piece of equipment such as a "D 9 Cat" running over a cable "a few times" would result in some cable failure, Dr. Brown was of the opinion that the inherent safety features of the cables would deenergize the equipment, and provide adequate safeguards against any resulting electrical hazards.

On the facts of this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that the respondent failed to adequately protect the cited trailing cables from damage. Although the evidence establishes that the cables were run over at least once, that is all that the petitioner has established. With regard to any cable damage resulting from an unspecified piece of rubber-tired equipment running over the cables, the evidence establishes that no damages occurred. Further, respondent's evidence and testimony establishes that the construction and shielding of the cables provided more than adequate protection against any damage from the rubber tired equipment which ran over them.

I am convinced that Inspector Hinckle issued the citations because he believed that the mere act of a piece of equipment running over a trailing cable constituted an ipso facto violation of section 77.704, as stated in the last sentence of MSHA's inspector's manual policy directive. Having viewed Mr. Hinckle during the course of the hearing, I am also convinced that while he may have some personal difficulty with the policy, he was simply "doing his duty" by following the policy directive.

I reject MSHA's interpretation and application of section 77.604, in this case. I find nothing in the standard to support a conclusion that simply running over a trailing cable, where is no resulting damage established, constitutes a violation. It seems to me that if MSHA's intent is to prohibit a piece of equipment from running over a trailing cable at any location at a surface mining operation, it should promulgate a standard that says precisely that. In short, MSHA should consider adopting the language found in the last sentence of its policy manual directive (exhibit PÄ14), by promulgating it as a mandatory safety standard.

In view of the foregoing findings and conclusions, Citation Nos. 2324823 and 2324824 ARE VACATED, and the petitioner's civil penalty proposals as to these citations ARE REJECTED AND DISMISSED.

Fact of Violation--Citation No. 2201879

In this instance, the respondent is charged with failing to comply with mandatory standard section 77.505, which requires that all cables entering electrical compartments are properly fitted. The obvious intent of this standard is to insure that such cables are tight or snug as they enter the enclosure so as to preclude any strain on the electrical

connections within the enclosure, and to insure against the cable rubbing against the enclosure frame in such a manner as to cut or otherwise wear out the cable insulation. The inspector found that the cable was not equipped with a proper fitting or bushing, and that the cable conductors and jacket insulation were in contact with the frame of the enclosure.

The respondent does not dispute the fact that the cable which entered the enclosure in question was not properly fitted or bushed to prevent it from contacting the frame of the disconnect box, nor does it dispute the fact that the cable had been "pulled" or "backed out" of the box. Its dispute and disagreement is with the inspector's "S & S" finding.

I conclude and find that the petitioner has established a violation of section 77.505, by a preponderance of the evidence. It seems clear to me from the testimony and evidence presented by the inspector that the cable in question was not properly bushed or fitted as it entered the disconnect box. Accordingly, the violation IS SUSTAINED, and the citation IS AFFIRMED.

With regard to the inspector's "S & S" finding, I cannot conclude that the petitioner has established through any credible evidence that the violation posed a hazard or any reasonable likelihood of electrocution. I find the inspector's testimony in support of his "S & S" finding to be speculative and general, and it has been rebutted by the credible testimony of Dr. Brown.

Petitioner's rebuttal witness Collier was not with the inspector at the time of the inspection, and he did not observe the cited condition. Although he stated that he was familiar with the conditions, it seems obvious that any knowledge on his part came from reading the citation form and possibly speaking with Inspector Hinckle in preparation for the hearing. When asked whether he knew what was in the contactor box in terms of any electrical circuits, he responded "No, I don't know other than the fact that we have a circuit that comes from transformers" (Tr. 244).

In response to certain questions concerning his opinion as to whether or not the cited condition constitutes a significant and substantial violation, Mr. Collier responded that in the event the energized wire conductor insulation wears off, a chain of four subsequent events would have to occur before there would be any electrocution hazard. He described these events as (1) a ground or high resistance

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fault to the system; (2) the bare uninsulated wire coming in contact with the frame of the contactor box; (3) a resulting short circuit; and (4) someone touching the box would become part of the circuit and could be electrocuted (Tr. 242).

Mr. Collier conceded that it was possible that none of the four conditions he described were presented at the time the citation was issued. However, assuming that they were not, he indicated that he would still have found an "S & S" violation because he had to assume that events can take place and that electrical circuitry can break down through aging.

In view of the foregoing findings and conclusions, the inspector's "S & S" finding is REJECTED and VACATED. The citation is affirmed as a section 104(a), non-"S & S" violation.

Negligence

I conclude and find that the violation which has been sustained resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

Although I have concluded that the violation is not "S & S," I find that it was serious. Failure to insure that the cable entered the electrical box in question through a proper or snug fitting or bushing could in time lead to abrasions and wear on the cable.

Good Faith Compliance

The record supports a finding that the violation was timely abated by the respondent, and that it exercised good faith compliance.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business.

Based on the stipulated coal production for the mine and the respondent as a whole, I conclude and find that the respondent is a large mine operator. I also conclude that the penalty assessed by me for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations.

Exhibit PÄ6 is a computer print-out of the mine compliance record for the period September 28, 1981 through September 27, 1983. The parties agree that during this time period, the

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respondent paid a total of \$6,210 for 49 assessed violations. I take note of the fact that 25 of these prior violations were \$20 "single penalty" violations. Under the circumstances, I cannot conclude that for an operation of its size, that the respondent has a poor compliance record warranting any additional increase in the civil penalty assessed by me for the violation which has been affirmed.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of \$150 is appropriate and reasonable for the section 104(a) Citation No. 2201879, September 28, 1983, 30 C.F.R. 77.505.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$150 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge