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

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 83-30-M  
A.C. No. 39-00055-05506

v.

Homestake Mine

HOMESTAKE MINING COMPANY,  
RESPONDENT

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Kansas City, Missouri,  
for Petitioner;  
Robert A. Amundson, Esq., Amundson & Fuller, Lead,  
South Dakota,  
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citation 2097609

This citation alleges respondent violated 30 C.F.R. 57.11-2.

At the hearing respondent moved to withdraw its notice of contest and to pay the proposed penalty.

Pursuant to Commission Rule 11, 29 C.F.R. 2700.11, the motion was granted. The final order herein formalizes the order entered during the hearing.

This citation alleges respondent violated 30 C.F.R. 57.12-19, which provides as follows:

57.12-19 Mandatory. Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear.

#### Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. Further, the proposed penalties, based upon the assessments, would not have a detrimental effect on the company's operation. In addition, the citations that are in issue here were properly delivered to the company during the course of an inspection.

#### Summary of the Evidence

At the 4850 level, in the Ross electrical substation, MSHA Inspector Iver A. Iverson found that the area where two 2300/480 A.G. volt transformer banks were installed lacked adequate clearance. Further, the confined space constituted a hazard to employees (Tr. 267-268).

In this substation every employee operating the insulating switch was forced to hold the hot stick over the transformer bank. When closing or opening the switch the worker would be standing against live 480 volt (insulated) conductors and the transformer case (Tr. 227). The normal position to operate the oil circuit disconnect could not be obtained due to the restricted space between the insulated conductors, the transformer case and the oil circuit enclosure switch (Tr. 227).

The distance between the transformer bank conductor and the switch enclosure frame was 28 inches. The transformers were approximately 52 inches high (Tr. 227, 267). A person had to reach over the top of the transformer and a live conductor to reach the equipment (Tr. 228). The placement of the transformer banks did not provide a suitable and safe working clearance to safeguard against employees. The employees could be fatally injured by a high voltage electrical shock when making bodily contact with the live electrical energized components (Tr. 228; Exhibits P4 through P9).

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MSHA's regulation requires "suitable clearance" but does not define it. MSHA uses a table of working clearances taken from the NEC, (National Electrical Code, Section 110-16) (Tr. 243-245).

The NEC guide for suitable clearances takes into consideration the voltages involved. There are different conditions but from zero to 150 volts the minimum clearance is three feet. From 150 to 600 volts the distance is a minimum of three feet with listed exceptions and qualifications.

On cross examination Inspector Iverson agreed that Article 9 of the NEC provides that the code does not apply to "underground mines" (Tr. 244, 257-259).

Clarence F. Bender, Homestake's electrical foreman, testified for Homestake and he indicated that the condition in the distribution substation was temporary. In Bender's opinion electricians could safely work in the area when disconnecting the circuit breakers (Tr. 273-275, 282-284, 292, Exhibit B).

Iverson didn't tell the company what he believed constituted a suitable clearance but Bender assumed Iverson was relying on the National Electrical Code, a recognized authority (Tr. 285).

Bender stated that all of the conductors in the area were insulated. Even if an electrician's pouch touched the transformer nothing would happen because of the insulation. However, if the integrity of the insulation wrapping disintegrates then a worker would be subject to electrocution (Tr. 286).

Witness Kermit Kidner, an electrical maintenance engineer for the company, testified that a severe motion is not required to open or close the circuit breakers. A hot stick is used to pull the disconnect. In his opinion there is suitable clearance to do the work to be performed by qualified personnel in the substation. At this location there was no other space available to place this equipment (Tr. 303-318).

#### Discussion

This case presents a basic credibility conflict between MSHA's Inspector Iverson and respondent's witnesses Bender and Kidner.

I credit MSHA's evidence and I conclude that respondent violated the regulation. There was not "suitable clearance" provided in the substation. The summary of the evidence basically outlines the violation. In sum, the miners were closing

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and opening isolating switches and circuit breakers within a space as narrow as 28 inches (Tr. 265, 267). It is necessary to stand in front of the equipment to perform these acts. Inspector Iverson, who had been a licensed electrician in the State of Arizona, was qualified to render his opinion on this subject (Tr. 268). I accept his opinion and reject Homestake's contrary evidence.

In its post-trial brief Homestake argues that MSHA cannot rely on the National Electrical Code to establish a violation. I agree. The NEC merely supports Inspector Iverson's opinion. I do not consider that the NEC, in and of itself, establishes this violation.

In support of its position that the NEC is not enforceable per se Homestake cites Massey Sand and Rock Co., 1 FMSHRC 545 (June 1979); Peabody Coal Company, 1 MSHC 2071 (March 1979) and Shamrock Coal Company, 1 FMSHRC 1973 (December 1979).

The cited cases hold that interpretative bulletins and other MSHA memoranda do not have the force and effect of a regulation. I agree that the National Electrical Code falls within the same category. But to reiterate: this case turns on the testimony of the expert witness and not on the NEC. The cases relied on by respondent are, accordingly, not persuasive authority.

#### Civil Penalties

The statutory criteria for assessing civil penalties are contained in 30 U.S.C. 820(i) of the Act.

The penalty proposed in the settlement of Citation 2097609 is proper and it should be affirmed.

Considering the statutory criteria in connection with Citation 2097749 it appears that the gravity of the violation is relatively high. Miners were exposed to the possibility of electrocution. Homestake's negligence is likewise apparent since the company installed the equipment in this substation.

In view of these factors and in considering the stipulation of the parties I deem that the proposed penalty of \$241 for Citation 2097749 is proper and should be affirmed.

#### Briefs

The Solicitor and Homestake's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. The proposed settlement of Citation 2097609 is proper and it should be approved.
3. Respondent violated 30 C.F.R. 57.12-19 and Citation 2097749 should be affirmed together with the proposed penalty of \$241.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2097609 and the proposed penalty of \$20 are affirmed.
2. Citation 2097749 and the proposed penalty of \$241 are affirmed.

John J. Morris  
Administrative Law Judge