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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

v.

ROBERTS ELECTRIC, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 85-24-M
A.C. No. 16-00352-05501 ZWI

Gramercy Alumina

DECISION

Appearances: Chandra V. Fripp, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
William V. Roberts, Jr., President, Bill
Roberts, Inc., Metairie, Louisiana, pro se.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 a civil penalty assessment of \$20, for a violation of mandatory safety standard 30 C.F.R. 55.12-12, as stated in a section 104(a), Citation No. 2237173, served on the respondent by MSHA Inspector Joe C. McGregor on November 24, 1982. The citation was issued after the inspector found an inadequate connection on an electrical box.

The respondent filed a timely answer and contest, and the case was docketed for hearing in New Orleans, Louisiana, during the term August 6-8, 1985, along with several other cases, in which the same inspector issued citations.

Issue

The issue presented in this case is whether or not the respondent violated the cited safety standard, and if so, the appropriate civil penalty which should be assessed taking

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into account the civil penalty assessment criteria found in section 110(i) of the Act.

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 that the respondent is an electrical contractor who regularly employs six employees. At the time of the inspection by Inspector McGregor, the respondent was performing electrical contract work at the Gramercy Alumina Mine, an operation owned and operated by the Kaiser Aluminum Company. The respondent employed 8 to 10 employees to perform this contract work. Respondent's representative indicated that his company has an annual work volume of approximately two million dollars. He also indicated that his company performs regular contract work at the mine in question, and he concedes that his company is often called upon to provide electrical contract services at the mine (Tr. 608).

Amendment to the Pleadings

Petitioner's counsel moved to amend the pleadings to reflect an alleged violation of mandatory safety standard 30 C.F.R. 55.12-8, rather than section 55.12-12, as alleged in Inspector McGregor's citation. In response to questions from the bench, Mr. Roberts stated that he was fully aware of the cited condition or practice, and that abatement was accomplished immediately upon notification to his supervisory employee at the mine who was supervising the work being performed that a citation would issue. Inspector McGregor conceded that he had cited the wrong standard, but he could not recall the reason for citing section 55.12-12. After further consideration of the motion to amend, I concluded that the respondent has not been prejudiced by the amended citation, and granted the petitioner's motion to amend (Tr. 8, 13-14).

Petitioner's Testimony and Evidence

MSHA Inspector Joe C. McGregor testified as to his background and experience and he confirmed that he issued the citation in question. He confirmed that he has been an MSHA

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inspector for approximately 7 years and has conducted approximately 300 inspections during this period of time. He stated that he has 20 years' mining experience, and has attended the MSHA Mining Academy at Beckley, West Virginia for an initial training session, and that he has retraining for 2 weeks every year. His electrical experience consists of an 8-week training course and on-the-job training as an inspector. He conceded that he is not an electrician and holds no electrician's papers or licenses (Tr. 16-18; 24-25).

Mr. McGregor stated that the respondent is an electrical contractor who performs work at Kaiser Aluminum's Gramercy Alumina Mine, and he described that operation as an alumina milling plant where raw aluminum ore is refined and processed. He indicated that Kaiser Aluminum imports its raw materials from Jamaica, and exports its finished product to several states. He confirmed that the Kaiser plant has an MSHA legal identity number, is regularly inspected by MSHA, and in his opinion, the mine in question is subject to MSHA's enforcement jurisdiction (Tr. 23-24).

Inspector McGregor testified that he issued the citation after observing an extension cord approximately 50 feet long hooked into an electrical box on the east wall of the plant steam turbine room. The cord entered the box through the front panel box door which was opened several inches to permit the cord to enter. The ends of the cord were bare because they had been stripped to facilitate the connection inside the box, and the cord was otherwise properly insulated. The panel door opened side-to-side, and Mr. McGregor stated that he was able to observe the exposed wires and the posts to which they were attached inside the panel box without opening the door further. The manner in which the connection was made did not allow the panel box door to close completely, and this left the bare wires inside the box accessible to employees. The cord in question should have entered the box through a proper fitting through a hole in the side of the panel box, rather than under the panel door. In addition, a strain clamp should have been used to keep the cord tight and to prevent it from being pulled or disconnected from the box (Tr. 18-22).

Mr. McGregor believed that the open electrical box door presented a shock hazard to the people working in the steam room, and he observed people in the turbine room. However, the cord was not in use at the time he observed the condition (Tr. 22-23).

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On cross-examination, Mr. McGregor confirmed that he is not a licensed electrician and has never worked for an electrical contractor or in an electrical shop. He also confirmed that the cord in question was not a "department store extension cord," and that it was a heavy duty cord. He did not know the voltage rating of the cord, and used no meters to determine this. He indicated that three wires were hooked up inside the box in question, and he assumed that the voltage was 120. He was told that the cord was used for power tools. Although the voltage ratings of electrical panel boxes are normally 120, 240, or 480, he did not know the rating of the box in question, and the box contained a disconnect switch with a pull handle (Tr. 24-29).

Mr. McGregor explained that he was familiar with the type of heavy duty extension cord in question, and he stated that electricians use them often to supply power to power tools which are used a good distance away from the power source. At times, the cords are equipped with plug-in boxes so that three or four additional power outlets may be used (Tr. 36-37). Although he saw no hand tools around, someone told him the cord was used for that purpose (Tr. 38). He agreed that such a temporary hook-up was made because a source of power was needed to operate hand tools.

Mr. McGregor did not believe it was normal to use a temporary hook-up as the one he observed, and in his view the normal procedure would be to tap into a box by going through proper fittings (Tr. 40). Although the act of "tapping into the box" was not a violation, Mr. McGregor believed that failure to use a proper fitting was (Tr. 40). He did not believe that punching a hole through the side of the box and fitting the cord through proper restraining fittings would have caused any problems (Tr. 40-41). Since the respondent indicated that his men had often performed work at the plant, Mr. McGregor believed that a plug-in device of some kind should have been installed on the box to provide a properly fitted source of power. He conceded that the contractor people performing the electrical work were qualified electricians and knew what they were doing (Tr. 42).

Mr. McGregor confirmed that as soon as the condition was called to the attention of the steam turbine room supervisor, an electrician immediately disconnected the cord and shut the box lid. Since he did not believe that any of the respondent's employees were working in the room the day of the inspection, Mr. McGregor believed that the connection was probably made the day before (Tr. 53). He conceded that he

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had no reason to believe that the connection was not temporary, but did not remember seeing any "flag" device attached to the cord to indicate that it was a temporary connection (Tr. 54).

Respondent's Testimony and Evidence

Respondent Bill Roberts asserted that the box in question has a protective cover plate which fits over the breakers and the interior of the box so that none of the electrical connections are exposed. He also contended that the box was in fact a disconnect switch. Since the cord was connected, it was impossible for the lid to close tightly over the cord. He also contended that there were no exposed bare wires, and that anyone contacting the switch enclosure or box could not be shocked. He conceded that if someone deliberately went out of their way to reach into the box opening, they could "possibly have gotten shocked," but he indicated that "people just don't stick their hands in boxes or go out of their way to make an unsafe condition" (Tr. 32). He also indicated that people have been working in the location in question for 10 to 20 years and that no one has ever been hurt by the type of temporary connection found by the inspector (Tr. 32-33).

Mr. Roberts stated that the heavy duty cord in question is rated at 600 volts, and he identified it as an oil resistant heavy duty "SO" cord with a one-eighth inch neoprene jacket covering the cables. He also indicated that "one can beat on it with a hammer" without puncturing it, that it was made "to run open and exposed," and that it was an approved cable for the application in question (Tr. 36). He drew a sketch of the connection in question on a blackboard in the courtroom, and except for the manner in which the door opened (side-to-side as opposed to up and down), Inspector McGregor agreed with the sketch depicting the manner in which the connection was made (Tr. 45-46).

Mr. Roberts stated that the connection in question probably existed for 1 day. He explained that temporary connections of this kind are made so that his men can drill for straps or pipe installations, and when they move about the plant and run out of extension cord, they have to tap in at another location in order "to keep the job moving throughout the power house." He described the turbine area as "a big machinery room," and he indicated that the area does not have many electrical receptacles. Although there are 440 volt receptacles for welding machines, his men were using a

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120-volt connection. He could not recall the specific work being performed by his men (Tr. 56-57).

Mr. Roberts also described the area as an isolated room which housed the steam turbines for the plant, and he likened it to a power house. He confirmed that the turbines are remotely controlled through the use of instrument panels, and that except for maintenance personnel who go into the area "once in a while," there is no one in the area (Tr. 57). He also indicated that the disconnect switch box was a 240-volt device, and the connection in question was made by "tapping" to each "leg" of 120 volts, with one tap to ground (Tr. 58).

On cross-examination, Mr. Roberts agreed that the "SO" cord in question was a "power wire," and he considered it "a power cord up to 600 volts" (Tr. 59). He stated that he previously worked at the Gramercy plant from 1964 to 1969, and was familiar with the plant and the turbine room where the condition was cited. He detailed his electrical design and contracting background and experience, and he testified as follows in response to questions from petitioner's counsel (Tr. 60-62):

Q. If, such as in the standard there's a distinction made between power lines and cable, what is that distinction in your mind, or is there a distinction to you?

A. Well, it depends on what you're referring to when you say power, and cable. Power designates voltage; cable designates wire.

Q. And in your opinion, this connection was a power wire cable?

A. Well, let me say this. Any cable that's got a voltage has got power. It could be one volt, it could be 40,000 volts.

Q. So then there's really no distinction?

A. I would say that--the only distinction between a power cable, you'd refer to a single cable--a single cable never normally runs over 32 volts.

A power cable could be classified anything over 32 volts. The code designates 32 volts and below as low voltage wires.

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Q. All right. I'm trying to understand your argument, and you can tell me if I'm wrong.

My understanding is that if--this was a temporary connection is your contention, and because it was temporary, that you were not required to do anything other than what you did to get this power.

If it was a permanent position, would you have done--a permanent connection, would you have done otherwise?

A. In a permanent connection on this particular situation, we would have ran a conduit. We wouldn't have ran a portable cable at all. Flexible wire--we would have put it in pipe. That is Kaiser's standard, and that's also the standard by the National Electrical Code--that it be run in a conduit, meaning a metal pipe, and we would have ran that in a metal pipe at Kaiser, had that been a permanent connection.

Q. So your contention is that this was temporary, and that's why it's not a violation of the standard?

A. Yes, ma'am.

Findings and Conclusions

Fact of Violation

The respondent is charged with a failure to comply with the requirements of mandatory safety standard 30 C.F.R. 55.12-8, which provides as follows:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

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The respondent conceded that the cord in question was a cable (Tr. 60-62). Given the voltage of the cord, and the fact that it was connected to provide power to certain hand tools, I conclude and find that the cord was a power cable within the meaning of section 55.12-8.

Inspector McGregor and petitioner's counsel were in agreement that had the cord in question been installed through a proper bushing or fitting, it would have allowed the lid of the panel box in question to close tightly, thereby not exposing anyone walking by the box to any hazard. Had this been done, they both agreed that no citation would have been issued (Tr. 47-50). Respondent agreed that had the connection been a permanent one, it would have to be provided with some type of a strain-relief connector or a bushed opening in the box (Tr. 34, 50). Respondent's contention is that the connection was temporary, that they are made "all the time," and that it did not present any shock hazard because the wires connected to the terminals inside the box were inaccessible unless someone chose to stick his hand inside the box through the box opening that was "cracked two inches" (Tr. 51).

There is nothing in the standard that supports the respondent's assertion that a temporary connection or use of a power cable is permissible, and that the standard only applies to a permanently wired cable which enters an electrical box. The standard simply makes no such distinctions. I believe that one may reasonably assume that the lid or door which was provided on the electrical box in question was there to insure that the lid or door was kept tightly closed to prevent persons from contacting the wires inside the box or to prevent damage to the wires. It is clear from the evidence in this case that the lid or door was not completely closed, and that the cord did not enter the box through proper fittings or holes with insulated bushings. Under the circumstances, I conclude and find that the petitioner has established a violation of section 55.12-8, and the citation IS AFFIRMED.

History of Prior Violations

The petitioner has stipulated that the respondent has never been issued prior citations (Tr. 6), and I have taken this into account in assessing the civil penalty for the citation in question in this case.

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

The evidence of record in this case supports a conclusion that the respondent is a small independent contractor subject to the Act. I further conclude and find that the civil penalty assessed for the violation in question will not adversely affect the respondent's ability to continue in business.

Negligence

Although the respondent asserted that it had connected the cable in question the same way on many prior occasions, this is no defense to the question of negligence. I conclude that the violation resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

The testimony and evidence in this case establishes that the violation occurred in an isolated area of the plant, and that the only persons possibly exposed to any hazard were qualified and trained electricians. I find that the possibility of any injury by anyone coming in contact with the electrical box in question was unlikely and remote. Assuming that contact was made, the respondent's un rebutted testimony is that the cable in question was an approved heavy duty cable which was well-insulated. Further, the cable was not in use, and the inspector observed no one in the area where it was connected. Under these circumstances, I conclude and find that the violation was non-serious.

Good Faith Compliance

The record establishes that abatement was achieved within a half-an-hour of the issuance of the citation. Mr. Roberts stated that his superintendent advised him that the cited condition was corrected before Inspector McGregor left the mine on the day the citation was issued (Tr. 10-11). I conclude and find that the respondent achieved rapid good faith compliance.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of

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the Act, I conclude that a \$20 civil penalty assessment for the violation in question is appropriate and reasonable in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$20, within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge