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SOL (MSHA) V. BANNER COAL  
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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. VA 85-26  
A.C. No. 44-04614-03505

v.

No. 1 Plant

BANNER COAL COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Craig W. Hukill, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Arlington, Virginia, for Petitioner;  
Joe Douglas Kilgore, Banner Coal Company,  
Inc., Coeburn, Virginia for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for an alleged violation of the regulatory standard at 30 C.F.R. 77.807Å3. The general issues before me are whether Banner Coal Company, Inc., (Banner) has violated the cited regulatory standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial". If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 2277631, alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. 77.807Å3 and charges as follows:

"The energized high voltage power lines (12,440 volts) passing over the stock pile area ranges in hight [sic] from 26 feet to 34 feet. The front-end loader measures 18 feet high when the bucket is extended to its full hight [sic]. The coal trucks, dumping under the high voltage lines, are 27 feet

high. Both the front-end loader and the coal trucks can reach within the 10 feet minimum distance clearance required to be maintained from high voltage power lines."

It is not disputed that the cited standard requires that when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage powerline and the clearance between such equipment and powerline is less than 10 feet such powerlines must be deenergized or other precautions taken.

On February 28, 1985, Bruce Dial, an inspector for the Federal Mine Safety and Health Administration (MSHA) was performing an inspection at Banner's No. 1 Plant. It is undisputed that energized power lines carrying 12,440 volts passed over a portion of the coal stockpile at the plant. In addition a Hough 100 model front-end loader was then operating beneath the power lines with its bucket extended to its full height of 18 feet from the ground. Both tandem and tractor-trailer coal trucks were also dumping on the stockpile in close proximity to the power line and the larger trailers, when extended to the full dumping position, measured 27 feet from the ground.

Inspector Dial measured the height of the high voltage power line using a Warren Knight Abney Level. It was 26 feet at the lowest point he was able to measure i.e. a location 10 feet horizontally from the lower support pole. Dial observed that as coal was being added to the stockpile the distance between the top of the stockpile where the equipment was operating and the high voltage power line was decreasing thereby increasing the potential hazard.

Banner disputes only the accuracy of Dial's measurement of the height of the power lines using the Abney Level. Banner President, Joe Douglas Kilgore, telephoned a civil engineer and a land surveyer who purportedly informed him that a 20% error is possible using the Abney Level and that the instrument would not be accurate. Kilgore did not however take his own measurements or seek to have any more accurate measurements made even though the cited area remained roped off for more than 3 months. Accordingly, there is no affirmative evidence contradicting the measurements taken by Inspector Dial. In any event even had the measurements been in error by as much as 20% there would nevertheless have been a violation of the cited standard.

According to Dial, electrocution of a truck driver was likely under the circumstances since the extended bed of the tractor-trailer reached 27 feet and the power line was then only 26 feet above stockpile. Under the circumstances it would be reasonable to expect that the truck bed could strike

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the low power line causing serious injuries or electrocution to the operator. Another MSHA inspector, Daniel Graybeal also observed that there had been 4 fatalities within the MSHA district over the previous 6 years from mining equipment contacting high voltage power lines. Within this framework of evidence it is clear that the violation herein was serious and "significant and substantial." See Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Inspector Graybeal had also previously inspected the Banner No. 1 plant in September 1984. Graybeal did not cite Banner for any violation of the standard at issue because he saw no equipment operating in close proximity to the power line. It is not disputed however that Graybeal discussed the potential problem with Banner president Kilgore warning him that he was required to maintain a 10 foot clearance from the power line. Kilgore was further warned not to stockpile coal beneath the power line to the point where a 10 feet clearance could not be maintained. Under the circumstances I find that Kilgore was negligent in permitting the build-up of the coal stockpile beneath the power lines to the point where the minimum clearance was not maintained.

In assessing a civil penalty in this case I have also considered that the mine operator is small in size, has a limited history of violations and abated the cited condition in a good faith and timely manner. Indeed the evidence shows that Banner expended \$1,705 to have the Old Dominion Power Company raise the level of the power lines. Considering these factors I find that a civil penalty of \$250 is appropriate.

ORDER

Banner Coal Company, Inc. is ordered to pay a civil penalty of \$250 within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge