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SOL (MSHA) V. TEXAS UTILITIES
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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 86-119
A.C. No. 41-00356-03538

v.

Sadow Mine

TEXAS UTILITIES GENERATING
COMPANY,

RESPONDENT

DECISION

Appearance: Thomas F. Lillard, Esq., Christopher R. Miltenberger, Esq., Worsham, Forsythe, Sampels, and Wooldridge, Dallas, Texas, for the Respondent; Max A. Wernick, Esq., Jill D. Klamm, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary.

Before: Judge Weisberger

Statement of the Case

On August 11, 1986, the Secretary (Petitioner) filed a Petition for Assessment of Civil Penalty for alleged violations by the Respondent of 30 C.F.R. 77.501 and 30 C.F.R. 77.509. Respondent filed its Answer on September 2, 1986. Pursuant to notice, the case was heard in Austin, Texas on December 23, 1986. William J. Ciesielka testified for the Petitioner, and Garren Stroud, Thomas Nelson, and Robert Freyensee testified for the Respondent. After taking testimony from the above persons, the hearing was adjourned to allow the Parties to brief the issue as to whether Respondent would be allowed to cross-examine Inspector Ciesielka with regard to prior inconsistent statements and actions indicating bias. The Parties submitted Briefs and Reply Briefs. On February 4, 1987, an Order was issued allowing Respondent to further cross-examine Inspector Ciesielka. On February 19, 1987, the Petitioner filed a Motion for Continuance which was not opposed by the Respondent. The motion was granted, and the case was scheduled for April 7, 1987, in Austin, Texas. On March 16, 1987, Petitioner filed a Motion for Indefinite Stay. This motion was denied in an Order of March 19, 1987. On

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April 1, 1987, Petitioner filed with the Commission a Petition for Interlocutory Review of the Orders dated February 4, 1987 and March 19, 1987, and also made a Motion to Suspend the hearing scheduled for April 7, 1987. The Commission, in an Order dated April 6, 1987, denied the Secretary's Petition for Interrogatory Review and also denied to stay the hearing scheduled for April 7, 1987. At the hearing, William J. Ciesielka testified for the Petitioner, and Paul Teinert, III, Garren Stroud, Robert Freyensee, Gary Lane, Sam Philip Jordan, and Jim Roach testified for the Respondent.

Petitioner filed its Brief and proposed Findings of Fact on June 18, 1987, and Respondent filed its Brief and proposed Findings of Fact on June 19, 1987. Reply Briefs were filed by Petitioner and Respondent on June 28 and June 29, 1987, respectively.

Stipulations

The Parties have stipulated as follows:

a. The undersigned has jurisdiction over the Parties and subject matter in this proceeding.

b. The Sandow Mine No. 1, Mine I.D. No. 41Ä00356Ä03538, had an annual tonnage in 1985 of 6,252,848. At the time of the December 23, 1986 hearing, the projected tonnage of 1986 was 5.5 million.

c. The Respondent had 39 inspection days in 1983; 36 in 1984; 44 in 1985; and 18 in 1986; and 77 over the previous 24 months.

d. Respondent had 5 assessed violations in 1983; 29 in 1984; 60 in 1985; and 82 assessed violations over the previous 24 months.

e. The fine proposed by Petitioner will not adversely affect the Respondent's ability to continue in business.

f. William Ciesielka, the Mine Safety and Health Administration ("MSHA") Inspector, who issued the contested citations, was a duly authorized representative of the Secretary.

g. On February 26, 1986, an inspection was conducted by an authorized representative, William Ciesielka, which resulted in the issuance of the two orders which are in issue.

h. The orders were issued with regard to two employees who were involved in the digging of a trench, in a substation area, that included a transformer that received 33,000 volts of power coming into the transformer.

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i. The two employees involved, in digging the ditch, were pick and shovel men, and were not electrically qualified personnel within the meaning of the Act and the regulations.

j. The two employees, in the substation area, did not work on electrical switches. All work on the electrical circuits or switches had been done prior to the entry of the two employees into the substation area.

k. The switch coming out of the transformer had energized lines going into the top of the switch, and the switch was in the open position. The switch was not tagged at the time of the inspection.

l. The trench, being dug by the two employees, was 10 feet long, and located approximately 2 to 4 feet from the bottom of the switch.

m. The switch or circuit breaker was capable of being locked.

n. The abatement of Order No. 2838513 occurred within 3 minutes of notification of the alleged violation. The operator removed the two employees from the area and undertook efforts to activate the disconnect which prevented the 33,000 volts from flowing into the transformer.

o. The abatement of Order No. 2838513 occurred within 10 minutes of issuance. The operator pulled the power, which prevented electricity from going into the transformer station, and the pole used to pull the circuit breaker was tagged.

p. The electrical work being performed was confined to the 480 volt circuit breaker switch.

Issues

The issues are whether the Respondent violated 30 C.F.R. 77.501 and 30 C.F.R. 77.509(c), and, if so, whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violations were the result of the Respondent's unwarrantable failure. If Sections 77.501, supra, and 77.509(c), supra, have been violated, it will be necessary to determine the appropriate civil penalty to assessed in accordance with Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. et. seq., (the Act).

Regulations

30 C.F.R. 77.501, as pertinent, provides as follows:

No electrical work shall be performed on electrical distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. . . .

30 C.F.R. 77.509(c) provides as follows:

"(c) Transformer enclosures shall be kept locked against unauthorized entry."

Findings of Fact and Conclusions of Law

Order No. 2838513

Order No. 2838513 which was issued by MSHA Inspector William J. Ciesielka on February 26, 1986, provides as follows:

The 33 KV 2480 Transformer located at the bucket repair shed was not kept locked against unauthorized entry in that two mechanics (not electrical qualified) were inside the enclosure digging a trench. A qualified electrician was not at the site to directly supervise the work. A maintenance supervisor was in the area where he could observe the situation. Therefore this is an unwarrantable violation.

The substation in question, located at Respondent's Sandow Mine, contained a transformer, disconnecting device, and other electrical equipment, and was enclosed by a chain-link fence. According to the uncontradicted testimony of Respondent's witnesses, on February 26, 1986, Respondent's Electrical Foreman Garren Stroud instructed Respondent's electrician, Royce Mundine,

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to cutoff the power at the main breaker in this substation, remove the power cable from the bottom of the breaker, and remove the cable from the substation area so that a trench could be dug running from underneath the breaker box to the edge of the fence. After the electrical cables were disconnected, Stroud explained to Respondent's supervisor, Thomas Nelson, that a trench or ditch had to be dug in the substation, and Mundine "laid it out" (Tr. 143). According to the testimony of Stroud, Mundine instructed Robert Yurk and John Bland, the two mechanics who were to dig the ditch, about the hazards that could exist within the substation fence. In contrast, it was the testimony of MSHA Inspector Ciesielka that when he subsequently arrived on the scene, on the date in question, Yurk told him that "I don't know what I am doing in here. This is an electrical job, and I know nothing about electric." (Tr. 23). In resolving the conflict between these versions, I note that Stroud's testimony was corroborated to some extent by Nelson who testified that he was present when Yurk was told, prior to time the ditch was dug, what he was to avoid making contact with. Also, Stroud was actually with Mundine on the date in question, and thus is competent to testify as to what Mundine said. On the other hand, Ciesielka was not privy to any conversations between Mundine and Yurk. Thus, based on the credible testimony of Stroud and Nelson, I find that Mundine told Yurk and Bland, in general, the hazards to avoid in digging the ditch.

Further, according to the uncontradicted testimony of Nelson, Mundine was in the substation enclosure for about 15 minutes while the trench was being dug by Yurk and Bland. Nelson testified that he had been told by Mundine that, in digging the trench, "back up at all time so you won't back into the breaker box" (Tr. 142). Nelson further testified that he was in the substation while the men dug the ditch and he stood inside between the gate and the breaker. Specifically, Nelson testified that he was standing at the gate when Ciesielka and the Union Representative Paul Tinert arrived at the scene on the date in question. In this regard, Nelson's testimony was, in essence, corroborated by Robert Freyensee, Respondent's superintendent, who arrived at the substation, on the date in question, along with Ciesielka. On the other hand, Ciesielka testified that when he and Tinert approached the substation he observed two employees inside digging a trench, and that there was no other personnel inside. He also testified that when he arrived at the substation area, he observed Nelson coming up from the bucket shed area. In essence, Ciesielka's testimony was corroborated by Tinert. I carefully observed the demeanor of all the witnesses testifying on this issue, and find that Nelson and Freyensee were more credible.

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Thus, inasmuch as the credible evidence establishes that Nelson, Yurk, and Bland were inside the substation, at the request of Stroud, and had been apprised by Mundine, in essence, to avoid contact with the electrical equipment, and inasmuch as Yurk and Bland were being supervised by Nelson who was present in the substation, I find that the substation was unlocked to provide authorized entry. As such, I find that there has not been any violation by Respondent of 30 C.F.R. 77.509(c).

Order 02838514

Order 02838514 provides as follows:

Electrical work was being perform on an electrical distribution circuit without the disconnecting devices being locked out and suitably tagged by the persons doing such work. The circuit going from the 7200T0480V transformer at the bucket repair shed was being relocated and a trench dug in the substation area inside the fence. A maintenance supervisor was near by in the area during observance of this condition and the qualified electrician was away, returning later with the mechanical/electrical supervisor. Therefore, this is an unwarrantable violation.

On the date in question, within the substation area in question, there was located a disconnecting device also referred to as switch box or circuit breaker. This item was located in a box that had a cover on it. It was stipulated that the box was not tagged, but that the door was closed. There was no evidence that the door was locked, but Ciesielka agreed that to open the box would necessitate undoing snaps. A lever controlling power from the box was located outside the box, and was in a down position which would not allow electricity to flow out of the box. The lever was not lock or tagged. Cables at the top of the box were energized, but they were insulated. The box itself was not energized. Because the power cable had been removed from the box, there was no power going from the box to buildings and there was also no power going to a number 6 cable coming out of a second transformer inside the fenced in area.

In actuality there is no dispute that a disconnecting device, on the date in question, was not locked out and tagged. In essence, it is Respondent's position, that Section 77.501, supra, was not violated, inasmuch as all electrical work, in the substation, had already been completed when the disconnecting device was observed by Ciesielka to be untagged and unlocked.

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The second sentence of Section 77.501, supra, unequivocally prohibits having a disconnecting device that is not tagged or locked out. Although the first sentence of Section 77.501, supra, refers to persons performing "electrical work," there is no language in either of the two remaining sentences of Section 77.501, supra, to limit their application only to instances where electrical work is actually being performed. The manifest intent behind the requirement of having disconnecting devices locked out is to prevent the hazard of a injury being caused by a person coming in contact with an energized object which has been energized by a person inadvertently activating the disconnecting device. Such a hazard is more likely when electrical work is being performed, but also exists if authorized persons are in the area performing other work. Accordingly, I find that Section 77.501, supra, has been violated.

The failure to tag or lock the disconnecting device can only be considered to be significant and substantial if, as a result of this violation, there is a measure of danger to safety contributed to, with a reasonable likelihood that the hazard contributed to will result in a injury of a reasonably serious nature (See Mathies Coal Company, 6 FMSHRC 1 (January 1984)). Petitioner's argument that the violation herein of Section 77.501, supra, is to be considered significant and substantial, appears to be predicated upon the testimony of Ciesielka, that, in essence, whenever a person is working in an area that has even low voltages there is a hazard of electrocution upon making contact with an energized part. However, the testimony of Ciesielka upon cross examination, and the uncontradicted testimony of Stroud, Respondent's supervisor of electricians, establishes that the circuit breaker (also referred to as disconnect box, switch box or disconnecting device), itself was not energized. Further, their testimony establishes that the only way that one could come in contact with a energized part of the circuit breaker is to open it or shove something up the entry hole at the bottom of the device where the wire comes out. Also, although cables or conduits located on top of the breaker box were energized they were 6 and 1/2 feet off the ground and wrapped with insulation. Another breaker (Item 8 Respondent's Exhibit 2), was 8 feet off the ground. Also, although Ciesielka testified that there was a cable leading out of the breaker box, I find based upon the credible testimony of Stroud that it was not energized. Therefore, based upon all of the above, I conclude that, although the breaker box in question was not locked or tagged, it has not been established by Petitioner that this violation would have resulted in the likelihood of an injury. I thus conclude that the violation of Section 77.501, supra, was not significant and substantial. (See Secretary v. Mathies Coal Company, supra.)

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In its brief, Petitioner argues, in essence, that the fact that there was no lockout or tagging procedure on the disconnecting device constitutes "a serious lack of reasonable care." In this connection, Ciesielka testified that he considered the Respondent's negligence and rated it as "high" (Tr. 32). However, in discussing the Respondent's negligence, Ciesielka testified only to Respondent's alleged action in leaving unqualified people working without the direct supervision of a qualified person in an energized enclosure. He did not offer any analysis of Respondent's negligence with regard to the violation of Section 77.501, supra. Thus, I find that the Petitioner has failed to proffer sufficient evidence to support a finding that the violation by Respondent of Section 77.501, supra, resulted from its unwarrantable failure.

I have considered all of the criteria in Section 110(i) of the Act. All criteria have been stipulated to except the Respondent's negligence and the gravity of the violation. I conclude that the gravity was extremely low due to the lack of likelihood of an injury as a consequence of the violation herein. Also, I find that Petitioner has failed to establish any degree of negligences on the Respondent's part. I therefore conclude that a fine of \$20 is appropriate herein for the violation of Section 77.501, supra.

ORDER

It is ORDERED that Order No. 2838513 be DISMISSED. It is further ORDERED that Order No. 2838514 be modified to a Section 104(a) Citation. It is further ORDERED that Respondent pay the sum of \$20, within 30 days of the date of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge