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SOL (MSHA) V. U.S. STEEL
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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 PROCEEDINGS Docket No. PENN 87-37 A.C. No. 36-05018-03629
v.	Docket No. PENN 87-38 A.C. No. 36-05018-03630
U.S. STEEL MINING COMPANY, INC., RESPONDENT	Docket No. PENN 87-127 A.C. No. 36-05018-03646
	Docket No. PENN 87-157 A.C. No. 36-05018-03648
	Cumberland Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under the Federal Mine Safety and Health Act 30 U.S.C. 801 et seq., by the Secretary of Labor against U.S. Steel Mining Company, Inc.

The parties agreed that the issues in these cases are identical. Accordingly, they proposed to try only Docket No. PENN 87Ä37 and have the decision in that case determine the result in the others. I accepted this proposal and consolidated the cases for hearing and decision (Tr. 4Ä6).

The parties agreed to the following stipulations:

(1) the operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) the Administrative Law Judge has jurisdiction over these cases;

(4) the inspector who issued the subject citations was a duly authorized representative of the Secretary;

(5) true and correct copies of the subject citations were properly served upon the operator;

(6) copies of the subject citations and determinations are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the purpose of establishing the truthfulness or relevance of any statements asserted therein;

(7) imposition of a penalty will not affect the operator's ability to continue in business;

(8) the alleged violation was abated in good faith;

(9) the operator's history of prior violations is average;

(10) the operator's size is large.

PENN 87Ä37

The subject citation, dated September 18, 1986, sets forth the condition or practice as follows:

As observed on September 18, 1986 at 9:30 a.m. the trailing cable receptacles were not properly identified or labeled so as to identify the electrical equipment plugged into the power center receptacles for the feeder, roof drill, welder, shuttle car no. 2, fan no. 2, scoop charger, ram car no. 2. Charger and the continuous mining machine in the 8 Butt East 009Ä0.

Section 306(b) of the Act, 30 U.S.C. 866(b), and section 75.601 of the mandatory standards, 30 C.F.R. 75.601, provide:

Short circuit protection for trailing cables shall be provided by an automatic circuit breaker or other no less effective device approved by the Secretary of adequate current-interrupting capacity in each underground conductor. Disconnecting devices uses to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such manner that it can be determined by

visual observation that the power is disconnected.

The MSHA Underground Manual for Inspectors dated March 9, 1978, provides in pertinent part with respect to section 75.601:

> A visual means of disconnecting power from trailing cables shall be provided so that a miner can readily determine whether the cable is de-energized. Enclosed circuit breakers are not acceptable as visible evidence that the power is disconnected. Plugs and receptacles located at the circuit breaker are acceptable as visible means of disconnecting the power. These devices shall be plainly marked. For example, the loading machine cable disconnecting device shall be plainly marked (LOADER), the shuttle car cable disconnecting device shall be plainly marked (S.C. No. 1 or S.C. No. 2) or the disconnecting devices shall be readily identifiable by other equally effective means.

The MSHA Inspector's Electrical Manual dated June 1, 1983 sets forth the following regarding section 75.601:

> A visible means of disconnecting power from each trailing cable shall be provided so that a miner can readily determine whether the cable is de-energized. Enclosed circuit breakers are not acceptable as visual evidence that the power is disconnected. Plugs and receptacles located at the circuit breaker and trolley nips are acceptable as visual means of disconnecting the power.
>
> These devices shall be plainly marked for identification to lessen the chance of energizing a cable while repairs are being made on the cable. For example, the loading machine cable plug shall be plainly marked "LOADER," the shuttle car cable plug shall be plainly marked "S.C. NO. 1" or "S.C. NO. 2."

The proper use of disconnecting devices has a long history at the Cumberland Mine. As set forth in an MSHA Investigation Report and as described by an MSHA electrical supervisor who had participated in the investigation, a fatality occurred in 1979 when two shuttle cars were being repaired at the same time (Government Exhibit 4, Tr. 144, 152Ä159, 191). A mechanic working on the first car was electrocuted when a mechanic who had finished working on the second car mixed up the cars' trailing

cables and mistakenly plugged in the cable of the first car, electrifying it. The tag and lock out which had originally been placed on the first car were subsequently removed by mistake with the result that the first car could be energized while it was still being repaired. The trailing cable plugs of the shuttle cars were not identified to correspond with the receptacles and circuit breakers at the load center. The receptacles and circuit breakers were marked shuttle car No. 1 and shuttle car No. 2, while the trailing cable plugs were marked shuttle car No. 105 and shuttle car No. 106. In addition, the trailing cable marked as No. 106 was attached to a shuttle car marked No. 110. Finally, in order to energize the first car, the mechanic manually overrode the circuit breakers. As the MSHA electrical supervisor explained, the fatality had multiple causes (Tr. 191). One of them was the method of labelling.

In 1982, a citation was issued at Cumberland for a violation of 75.601 due to unmarked trailing cable plugs. The Commission affirmed the citation and found the violation was significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1834 (1984).

MSHA's electrical supervisor testified that under the mandatory standards MSHA could require that the tag and receptacle, but not the circuit breaker, be identified by reference to the piece of equipment (Tr. 136Ä137, 167, 173Ä174, 191). The witnesses agreed that at the Cumberland Mine from the 1979 fatality up to the end of 1986 trailing cable plugs, receptacles as well as circuit breakers were identified in terms of the equipment (Tr. 136Ä137, 245Ä246). The system at Cumberland was not followed at U.S. Steel's Maple Creek Mine (Tr. 87). The electrical supervisor stated that Maple Creek was an isolated exception (Tr. 143). Both the supervisor and the MSHA electrical specialist who also testified, asserted that the only approved policy was the one where the plug and receptacle both were tagged by specifying the equipment (Tr. 107, 139). In the latter part of 1986 the system at Cumberland was changed so that only the label on the plug referred to the equipment (Tr. 245Ä246, 256).

Accordingly, when the inspector visited the Cumberland Mine on September 18, 1986 he found that the trailing cable plugs were labelled with the name of the piece of equipment to which they were attached, but that the receptacles which were identified as Circuit 1, 2, etc., were not so labelled. Circuit breakers were identified in the same way as the receptacles (Joint Exhibit 1, Tr. 17Ä18).

The Secretary's position is that the plug and the receptacle constitute a disconnecting device, whereas the operator maintains that only the plug is the disconnecting device. As the parties point out in their briefs, the term "disconnecting device" is neither defined in the Act nor in the regulations. After consideration of the matter, I accept the testimony of the MSHA

electrical specialist that the plug and receptacle are one thing (Tr. 107) and conclude that both together are a disconnecting device. Only when one is separated from the other does a disconnection occur. Therefore, they both together should be viewed as a unit for purposes of the mandatory standard. The operator's brief refers to the testimony of its electrical engineer that the reference to disconnecting device in 30 C.F.R. 75.511 means plug because he would not lock out a receptacl (Tr. 218). However, the engineer further noted that he would not say that locking out a receptacle is never done and that he knew manufacturers make provisions so a lock can be placed on a receptacle (Tr. 218Ä219). Also, although the MSHA electrical supervisor testified that disconnecting device as used in 30 C.F.R. 75.903 is a plug, he further explained that 75.903 and its subpart, are not concerned with trailing cables and that there is a difference (Tr. 175, 177).

The record demonstrates that the Secretary's position regarding the labelling of plugs and receptacles measurably advances the cause of safety as contemplated and required by the Act. I find convincing the testimony of the MSHA electrical supervisor that when a miner wants to energize or de-energize a piece of equipment he does not look at the plug, but rather goes directly to the circuit breaker he believes is being used for the equipment in question (Tr. 147Ä148). A hazard arises when unbeknownst to him someone has changed the plug (Tr. 148). Thus, when neither the circuit breaker nor the receptacle is identified in terms of the particular piece of equipment, the miner, merely relying upon the fact that a certain circuit and breaker are customarily used for a given item of equipment, would be in danger if the plug were changed without his knowledge. The wrong piece of equipment could be energized shocking a miner or there could be a delay in de-energizing, thereby prolonging the time of exposure to electrical shock (Tr. 29Ä30, 122).

These hazards are magnified when more than one piece of equipment is being worked on or repaired at the same time. As the MSHA electrical specialist explained, cables of machinery around the load center resemble spaghetti, the way they are all wrapped around each other so that it is difficult to distinguish which cable is which (Tr. 115Ä116). Without a ready means of identification, a miner might energize the wrong trailing cable leading to a piece of equipment still being worked on, thereby causing an accident by shocking a miner (Tr. 116). The Commission has accepted evidence that it would not be unusual for two shuttle cars on the same section to be down for repairs at the same time. U.S. Steel, supra, at 1838. And in this case the operator's electrical engineer admitted multiple equipment breakdowns and shut-downs are customary (Tr. 239). I accept the testimony of the MSHA electrical specialist that labelling the plug and the receptacle in the same way, i.e., referring to the equipment, sets up a pattern of behavior which individuals will memorize through habit (Tr. 114).

The view expressed by the operator's witnesses that the best system would be one where the miner follows the trailing cable back to the piece of equipment is unpersuasive (Tr. 240, 252). The equipment could be a substantial distance away so that it would take too much time where seconds count to avoid an electrical shock. In addition, it would be impractical to expect miners to undertake such a course of conduct. I acknowledge the operator's arguments that MSHA's requirements mean less flexibility and convenience (Tr. 222Ä223, 247). But under the Act safety considerations are paramount. Indeed, it is the very broad flexibility and freedom inherent in the operator's approach which create the hazards described herein.

Finally, I find particularly compelling the fact that the Secretary's position in this case is the one he has espoused since the law was enacted. The electrical supervisor testified that disconnecting devices have always been identified to include the plug and receptacle and the policy now is the same as it was in 1979 (Tr. 138, 166Ä167). The 1978 and 1983 manuals provide that plugs and receptacles are acceptable as visible means of disconnecting power. I do not believe that the 1983 manual's reference just to plugs as examples of disconnects signifies any change in policy. The 1983 examples are illustrative, not exclusive. The general language of the manuals, which identifies both items as visible means of disconnecting power, represents MSHA's declared policy. Admittedly, the inspector's manual is not binding upon the Commission. However, where, as here, the manuals have fairly and rationally interpreted the mandatory standard since its enactment, they are entitled to weight and should be followed. See, Alabama ByÄProducts, 4 FMSHRC 2128, 2132 (1982). Under such circumstances deference should be given to the interpretation of the Secretary, as the official charged with enforcement under the Act. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C.Cir.1986). Although there appears to be some conflict on the matter, I accept the testimony of the MSHA supervisor already set forth that although this policy was not followed at U.S. Steel's Maple Creek Mine, that was an isolated exception (Tr. 139). Compare (Tr. 211Ä214). Therefore, this inconsistency in enforcement is not a basis for disapproving MSHA's general position. Southern Ohio, 8 FMSHRC 1231 (1986). Moreover, the MSHA supervisor testified that MSHA is awaiting the outcome of this case before any action is taken at Maple Creek with regard to that mine's labelling system (Tr. 143). Under the circumstances, I agree with the Solicitor that estoppel would not be appropriate.

In light of the foregoing, I conclude that a violation of 30 C.F.R. 75.601 occurred. It next must be determined whether this violation was significant and substantial.

The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981). In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (1984), the Commission explained:

> In order to establish that a violation of mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety-hazardÄthat is, a measure of danger to safetyÄcontributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U.S. Steel Mining Co., 6 FMSHRC 1834, (August 1984).

In the instant case, it is established that a violation occurred, and that the violation contributed to a discrete safety hazard, i.e., electrical shock (Tr. 29). As already set forth, the evidence of record indicates that multiple equipment shut-downs during a shift are customary (Tr. 239) and that it is difficult to distinguish between the different cables at the load center (Tr. 115Ä116). Accordingly, I conclude it was reasonably likely that the wrong piece of equipment would be energized or that delay would occur in de-energizing the correct piece of equipment which would cause serious injury to that miner. There is no dispute that the resultant injury, which could be a bad burn or a fatality, would be of a reasonably serious nature (Tr. 29).

At the hearing and in its post hearing brief, the operator argued that the most readily available and quickest means and of de-energizing equipment is the "crash" button located at the load center. The operator further asserts that the use of the crash button in an emergency situation eliminates the hazard associated with de-energizing equipment. This argument fails. First, when a miner resorts to the crash button, the accident has already occurred. The crash button does not address the hazard of initially turning power on the wrong piece of equipment, but only concerns de-energizing equipment (Tr. 95, 238). Second, in the context of de-energization, the crash button is not the preferred

method of de-energizing quickly. The accepted method is to open the circuit breaker (Tr. 125Ä126). If the crash button is utilized, the auxiliary fans would stop functioning which in turn would kill the ventilation to the working place (Tr. 100). And finally, the crash button controls the outby breaker that feeds the power center. Once the crash button is thrown, power to the section can be restored only by traveling to the outby breaker and manually resetting it. The outby breaker generally is located a substantial distance from the power center (Tr. 123Ä125).

In light of the foregoing and for purposes of section 110(i) of the Act, 30 U.S.C. 820(i), I conclude the violation was serious. In addition, I find the operator was guilty of ordinary negligence. The operator was aware of MSHA requirements with respect to disconnecting devices. The isolated exception at the Maple Creek Mine did not relieve the operator of the responsibility to comply with the MSHA policies well known to it.

The post hearing briefs of the parties which were very helpful, have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

As set forth above, the parties agree that the decision in PENN 87Ä37 will control the other three dockets. The finding of a violation and the conclusions regarding the statutory criteria for PENN 87Ä37 are therefore, applicable to the other cases.

Accordingly, it is ORDERED that all the citations of the subject cases are hereby affirmed.

It is further ORDERED that the following civil penalties are assessed:

Docket No.	Citation No.	Penalty
PENN 87Ä37	2678740	$200
PENN 87Ä38	2681964	$200
PENN 87Ä127	2687405	$200
PENN 87Ä157	2687467	$200

It is ORDERED that the operator pay $800 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge