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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.

PITTSBURG & MIDWAY COAL
MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 86-191
A.C. No. 48-00086-03508

Kemmerer Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John A. Bachmann, Esq., The Pittsburg & Midway Coal
Company, Denver, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges Pittsburg and Midway Coal Company, (P & M), with violating three safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the Act).

A hearing on the merits took place on January 6, 1987 in Salt Lake City, Utah. The parties filed post-trial briefs.

Issues

The issues presented are whether the violations occurred; if so, what penalties are appropriate.

Citation No. 2831954

This citation alleges a violation of 30 C.F.R. 77.603 which provides:

77.603 Clamping of trailing cables to equipment.

Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections.

The violative condition is described in the subject citation as follows:

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The junction box located in pit #1ÄVD supplying power to the #809 overburden shovel does not have a straining clamp on the 7200 Volt A.C. trailing cable. The cable is very tight and not preventing a strain on the electrical connections.

Summary of the Evidence

Melvin Potter, a person experienced in mining, has been an MSHA electrical inspector for eight years. On May 6, 1986, he inspected the Kemmerer Mine operated by P & M (Tr. 5Ä7).

During the course of his inspection, as he went by a junction box in the 1ÄVD pit, he could not see a straining clamp (FOOTNOTE 1) on it (Tr. 7). The restrained cable was the trailing cable for the shovel. The voltage in the cable was 7200 AC (Tr. 7, 8).

A company electrician opened the junction box. Inside the box he observed a wooden clamp, but it was not fastened and it was loose from the cable (Tr. 8, 9). If it had been fastened it would have served as a straining clamp for the 1000 or more foot cable. When the inspector observed the trailing cable it was taut and there was strain on it (Tr. 10).

Failing to secure the trailing cable could cause a phase to ground fault or a phase to phase fault. A phase to phase would energize the junction box and the rest of the system with 7200 volts (Tr. 13Ä15). If a miner touched the box he would be electrocuted (Tr. 14).

In the inspector's opinion, it was reasonably likely that an injury could occur if the condition was not remedied.

In cross examination the inspector agreed that the citation, as written, states there was no straining clamp on the cable (Tr. 40).

However, there was a wooden block clamp in the box. But the clamps were laying down in the box and not around the cable (Tr. 42).

When the inspector pointed out the failure to have a restraining clamp in the box the electrician immediately put on a wooden clamp (Tr. 56Ä58). The electrician said they had worked on the box before the inspection and had apparently left the clamp off.

Photographs, Exhibits R1 and R2, were not taken at the time of the inspection (Tr. 56).

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Called as a rebuttal witness, Inspector Potter identified his notes made at the inspection. They indicated there was no clamp on the cable (Tr. 242).

Richard Dovey, testifying for respondent, serves as P & M's manager of safety and training (Tr. 60, 61).

The witness accompanied the inspection team. They initially discussed the necessity of P & M placing firefighting equipment on a utility's substation.

On two occasions the morning of the inspection the inspector had driven by the 1ÄVD area. There was no external clamp on the box. They called the electricians to shut down the shovel. A photograph was taken on a identical junction box (Tr. 65, 55; Ex. R3). The witness, Dave Ravnikar, Rex Playstead and Inspector Potter were present at the time of the inspection.

When we approached the box Mr. Potter directed the inspection party to stop because he could not see a strain clamp. However, when the box was opened he observed the wooden blocks were located in their proper place. That is, two wooden blocks with a hole cut in them held the cable (Tr. 68). The blocks measure 8 inches by 8 inches with a hole approximately two and one eighth inch (Tr. 69). The blocks cannot come out when the lid is closed.

Company policy requires the shock blocks and straining clamps on the trailing cables. This protects strain from the inner mechanism of the box and it protects the cable against scuffing on the metal edges of the boxes (Tr. 71).

In the opinion of the witness the clamp qualifies as a trailing clamp under 77.603. The connectors inside the box were protected from strain as a result of the clamp (Tr. 71, 72). After the inspection an external Clellen grip was installed. The company representatives didn't tell the inspector they already had a clamp in place because they hadn't decided if the inside clamp in place was a legitimate cable strain (Tr. 73).

Witness Dovey's basic statements to MSHA's supervisory mine inspector in Sheridan, Wyoming was the same as his testimony (Tr. 182Ä185). However, the supervisor indicated that all of the citations would stand as written (Tr. 185, Ex. R7).

Dovey didn't disagree that the screws in the restraining clamps were missing (Tr. 186).

Discussion

The evidence is conflicting as to whether a violation of the regulation occurred.

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Inspector Potter testified the junction box did not have an external straining clamp. He agrees the citation was written in this fashion. But when the junction box was opened it was found the box contained wooden blocks around the cable. These blocks suffice as a straining clamp. Since the wooden blocks serve as a restraining clamp it follows that P & M did not violate the regulation.

I credit respondent's evidence that the cable was resting on the two wooden blocks. I disregard the inspector's evidence that blocks were unfastened and loose from the cable. Blocks measuring 8" x 8" in a junction box are not likely to become loose in a box of this type. In addition, it was not shown how any screws, even if missing, would affect the ability of the blocks to serve as a straining clamp when the junction box was closed.

Citation No. 2831954 should be vacated.

Citation No. 2831955

This citation alleges a violation of 30 C.F.R. 77.701 which provides:

77.701 Grounding metallic frames, casings, and other enclosures of electric equipment.

Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary.

The violative condition is described in the citation as follows:

A 110 volt AC space heater located in the electrical supervisor's office is not equipped with a proper ground. The heater was energized and in use.

Summary of the Evidence

On the same inspection Mr. Potter found an ungrounded 110 volt AC metal-cased heater in the electrical supervisor's office. It had two phase wires plugged into a 110 volt outlet. It lacked a third wire for grounding (Tr. 16). In addition, there was no solid connection to any metal water lines having a low resistance to earth. Further, there was no grounding of any other type (Tr. 17). Failure to ground this type of heater could cause shock, serious burns or a fatality. If this condition continued and a fault occurred you could reasonably expect a shock or serious burn (Tr. 18, 19).

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The inspector did not check the inside of the heater to see whether or not it was double insulated (Tr. 43). The back of this appliance had a "UL" stamp of approval on it (Tr. 43).

The methods approved by the Secretary for grounding equipment (30 C.F.R. 77.701-1) are the methods to be used for AC equipment (Tr. 43, 44).

The inspector did not check to see whether the power system from which this heater received its power was ungrounded. However, he explained that the heater itself was not grounded. And if a fault occurred on the heater, the fault could not go to ground (Tr. 46, 48).

The inspector was not sure if MSHA has a policy concerning the grounding of appliances (Tr. 49).

In the inspector's opinion, the metal heater could have been grounded by an extra wire back into the wall socket. Also a three prong plug would have grounded it (Tr. 50, 51).

Witness Dovey, testifying for respondent, confirmed that the heater lacked a three prong plug. However, the building where the device was plugged was grounded and equipped with circuit breakers (Tr. 111).

Witness Dinkel, called as an expert witness for the Secretary in rebuttal, indicated that equipment of this type must be grounded regardless of UL approval (Tr. 220-222).

Witness Veneskey, testifying for P & M, expressed the opinion that 77.701 applies to appliances (Tr. 159). The witness expressed his views as to the 77.516 and the National Electrical Code (Tr. 160-162). The heater fits into the NEC criteria (Tr. 162). The witness was not aware of any MSHA requirement that appliances when brought out to the mine be modified to include a ground plug if they do not have one from the manufacturer (Tr. 163).

In cross examination, the witness agreed the possibility existed that the metal frame might become alive through a failure of insulation or a contact or an energizing of the parts (Tr. 164, 165, 168).

Discussion

Section 77.701 is not applicable or that it applies only to electrical equipment from ungrounded AC power system. P & M, in

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support of its position, cites the Secretary's regulations, 77.516 and 77.701. (FOOTNOTE 2)

An analysis of relevant regulations indicates that 77.516 was enacted under "Subpart F-Electrical Equipment-General". I would be inclined to agree with P & M's views but 77.701, violated here, was enacted in "Subpart H-Grounding". In sum, the Secretary has enacted general regulations relating to equipment as he did in Subpart F and he may generally require that such equipment meet the NEC. He may then impose stricter limitations, as he did, in relation to the grounding of such equipment as in 77.700.

P & M further states that 77.701 controls the scope of 77.701. It contends that 77.701 by its terms limits 77.701 to ungrounded equipment. I do not agree. Section 77.701 by its terms generally covers grounding. There is no indication the subsequent regulation was enacted so as to limit 77.701.

The cases and textbook cited by P & M deal with general rules of statutory construction and they are not inopposite the views expressed herein.

P & M's final argument is that MSHA has issued no policy or interpretation requiring the replacement of two-prong plugs.

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Therefore, the inspector's abatement requirements amount to nothing more than his personal preference.

The regulation, in effect, provides that potentially energized parts shall be grounded by methods approved by the duly authorized representative of the Secretary, that is, the inspector.

Several methods of grounding were available but in the instant case a three way plug was required. It was not shown in this case that the inspector exceeded his authority.

Citation No. 2831955 should be affirmed.

Citation No. 2831956

This citation alleges a violation of 30 C.F.R. 77.502 which in its entirety provides:

77.502 Electric equipment; examination, testing, and maintenance.

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

The violative condition is described in the citation as follows:

The electrical equipment located in the Sorenson Draw tunnel is not being properly inspected and maintained, in that the 24 volt telephone system has electrical wires exposed and a toggle switch added allowing coal dust to enter inside the telephone.

Summary of the Evidence

Inspector Potter inspected the 24-volt telephone in the Sorenson Draw tunnel. He found the metal encased battery powered system had a switch and two connectors on the outside of the phone. It also had external connecting terminals that run to the surface (Tr. 19, Ex. R1, R2). There was coal dust on the terminals and on the batteries (Tr. 20, 32). The external bare clamps which carry 24-volt current and the toggle switch were not on the phone. This allowed coal dust to enter the phone where the wires were located. The bare wires were attached to a bare clamp on the outside of the phone (Tr. 21, 22). There was also coal dust in and around the clamps. The terminals, an inch and half apart, could have provided a source of ignition (Tr. 22). Coal dust would provide the fuel for the explosion. Small explosions can keep expanding throughout an area (Tr. 24).

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The tunnel has conveyor belts; also one or two maintenance people work there (Tr. 24).

The toggle switch was on the outside of the phone (Tr. 24, 25). It was not dust tight. You could see through to the switch when you opened the door of the telephone (Tr. 25).

In the inspector's opinion, there was sufficient coal dust on the interior of the phone to create a hazard (Tr. 26). The opening in the phone could create a flame path to the exterior of the phone (Tr. 27). Most phones have a sealed rubber type boot over the switch (Tr. 27, 28). The boot prevents dust from entering into the electrical components of the phone. The inspector had never seen a telephone with an unprotected toggle switch (Tr. 28). The telephone was tagged "approved for methane only". Approval for methane is not equivalent to approval for dust (Tr. 29). Coal dust is more volatile than methane. Methane will burn itself out but coal dust just "keeps going" (Tr. 30).

This was a permanently installed phone and the tunnel was always dusty (Tr. 30, 31). In view of these conditions you could reasonably expect a mine explosion. This tunnel has been cited for coal dust in the past (Tr. 31).

In cross examination, the inspector read from the definition 30 C.F.R. Part 23(d) (Tr. 34). Under the definition permissible phone could or could not be permissible in both gassy and dusty locations (Tr. 36, 37). This particular phone was methane proof, a higher standard than dust proof.

Witness Dovey, testifying for respondent, described the use of the telephone. During the inspection Dovey did not see any light coming through the toggle switch hole. Further, there was no hole at the toggle switch (Tr. 91).

After the citation was issued Dovey researched the telephone. He produced the maintenance manual for the telephones in the tunnel. The manual had been obtained from the electrical department. Dave Ravnkar also stated that the toggle switch had not been added (Tr. 93, 94). Dovey copied the identifying number from the telephone. But he didn't recall the manufacturer (Tr. 96). Further, he didn't recall the ID number. In addition, he couldn't say if it was the number that appears on the front page of the exhibit. However, he took the document down to compare it to see if he had exactly the same phone (Tr. 96). Dovey didn't know who published the exhibit (R5). The maintenance department maintains manuals for the equipment at the mine (Tr. 97). Such records are generally maintained with a mine issuance number but there is no such number on the phone (Tr. 97, 98). But he had taken the information from the door on the phone (Tr. 98). A manufacturer's name was present but Dovey did not recall it (Tr. 98). Dovey also didn't know if there had been any after acquired phones (Tr. 98).

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Comparisons between Exhibit R5 and photographs of the telephone previously received in evidence indicates there was no speaker, nameplate or labels on the telephone as depicted in the offered exhibit (FOOTNOTE 3) (Tr. 94-102, Ex. R5).

Dovey is familiar with the concept of permissible communication systems in coal mines. Such a system can be placed in a dusty, gaseous area. This particular tunnel has never been classified (Tr. 106). According to the company brochure the phone system was permissible (Tr. 107). This particular phone has a sticker saying it is "MESA-approved permissible." Permissible equipment is sealed to prevent dust or gas from entering (Tr. 108). It is, accordingly, dust ignition proof.

The telephone was maintained in a proper operating condition (Tr. 109). The connectors on the telephones were in the proper holes (Tr. 109, 110). The toggle switch was intact and tight. There was no dust in the telephone. It was a 12 volt phone and the batteries were connected in parallel (Tr. 110).

TERRANCE DINKEL, called as an expert rebuttal witness by the Secretary, was identified as an electrical engineer for MSHA (Tr. 193-195).

In Dinkel's opinion the telephone system was not intrinsically or inherently safe. Intrinsically safe means a device has insufficient energy to ignite the atmosphere present. A 24-volt or a 12-volt, or a flashlight battery can ignite coal. The light coming through the switch indicates the units were not sealed (Tr. 197, 198, 203). Section 27.7(d) of C.F.R. 30 requires batteries to be in sealed containers. Since there was dust inside the cabinet it was not sealed (Tr. 199, 201).

The telephone, as inspected by Mr. Potter, was potentially dangerous. It is a matter of time before moisture and dust accumulate and cause a short (Tr. 205).

Protection from methane does not constitute protection from coal dust. Coal can conduct current from one terminal to another (Tr. 211). Even though approved for methane a faulted circuit could ignite the coal dust lying in its path (Tr. 219).

Witness Dinkel further stated that a device designated permissible by MSHA is permissible in both dusty and gassy locations (Tr. 226).

In rebuttal Inspector Potter testified the telephone was tagged as "permissible MESA for methane only" (Tr. 240).

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The inspector's notes made at the time of the inspection stated there was dust on the inside of the compartment. You could rub your fingers and they would come up black (Tr. 242, 243, Ex. P2). However, the wind and coal dust was blowing in the tunnel but the dust in the telephone did not go into suspension (Tr. 245). There was some coal dust in suspension in the tunnel (Tr. 246).

James T. Veneskey, a person experienced in mining, serves as the director of safety for P & M (Tr. 152-154).

In the opinion of the witness a 12 or 24 volt system will not ignite coal dust. Coal dust must be in suspension before it will explode (Tr. 157). With the MSHA approval label the telephones were intrinsically safe but not designed to be totally dust proof. But they were to be used in a dusty and gassy atmosphere (Tr. 157-159). The enclosure was not permissible so as to reduce a flame path (Tr. 158).

Witness Dovey testified there was a sticker on the telephone stating "MESA permissible" (Tr. 239).

Discussion

The pivotal issue here concerns whether the telephone was "potentially dangerous" within the meaning of 77.502.

In connection with this citation I credit the testimony of Inspector Potter and witness Dinkel. Briefly, the inspector found coal dust on the terminals and on the batteries in the telephone. In addition, bare wires were attached to a bare clamp on the outside of the phone. Both witnesses concluded the terminals, an inch and a half apart, could provide a source of ignition for the coal dust. The telephone, with a hole at the toggle switch, in a coal dusty tunnel, was "potentially dangerous" within the meaning of the regulation.

P & M contends MSHA is attempting to penalize it through the use of conjecture and deceit. Specifically, it contends MSHA's case is based on the failure to maintain electrical equipment, i.e., exposed electrical wires and a defective toggle switch. But at the trial MSHA mutated the case into allegations of a dangerous accumulation of coal dust.

I disagree with P & M's claim. The facts presented at the hearing are fairly within the allegations of the citation. The violative condition is described as follows:

The electrical equipment [sic] located in the Sorenson draw off tunnel is not being properly inspected and maintained, in that the 24 volt telephone system has electrical wire's exposed and a toggle switch added allowing coal dust to enter inside the telephone.

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P & M states that, in any event, MSHA's evidence is woefully lacking of proof to establish the conditions necessary to create a hazardous condition. P & M cites The Pittsburg and Midway Coal Mining Company, 7 FMSHRC 2072 (1985). It is true that in the above case Judge Koutras concluded that accumulations of coal dust which are merely black in color are not dangerous. 7 FMSHRC at 2104.

The evidence in the instant case shows a minimal amount of coal dust accumulation. Inspector Potter saw dust over the inside of the phone. You could rub your fingers across the compartment and they would come up black (Tr. 242, 243). However, the potentially dangerous condition consisted of all of the facets involved here. These were the hole at the toggle switch, the coal dust between the terminals of the batteries (an ignition source) and the coal dust blowing in the 14 foot by 20 foot tunnel (Tr. 245, 246).

More persuasive than Judge Koutras' decision is the Commission decision in Pittsburg and Midway Coal Mining Company 8 FMSHRC 4 (1986). In this case the Commission was dealing with a related standard, 30 C.F.R. 77.202 (FOOTNOTE 4)

Specifically, the Commission stated as follows:

P & M argues on review that the judge erred in finding a violation because the judge did not require the Secretary to establish the existence of a present, actual ignition source in the vicinity of the accumulation at the time of the inspection. Rather, the judge concluded that under section 77.202, if a "potential" ignition source is present in the vicinity of an accumulation, the accumulation is dangerous within the meaning of the standard. 6 FMSHRC at 1349. We agree with the judge's conclusion. It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners.

Further, the Commission observed that:

Section 77.202, like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers. %y(3)5C 8 FMSHRC at 6.

In sum, in the instant scenario, the telephone was "potentially dangerous".

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P & M also contends the telephone was permissible for this location and therefore complied with 30 C.F.R. 23.2(d). (FOOTNOTE 5)

On this issue the credible evidence shows that the telephone was marked as "approved for methane only" (Tr. 28, 29). Further, according to MSHA's electrical engineer, Dinkel, methane gas is not a conductor but coal dust can be (Tr. 210, 211, 217). Even though permissible for methane the presence of coal dust would still present a potentially hazardous situation (Tr. 218, 219). In addition, to the above factors, the telephone was obviously not permissible in view of the hole at the toggle switch.

P & M further argues that it was impossible for Inspector Potter to see a hole at the toggle switch. He did not have a flashlight and the location of the telephone and its position in the tunnel preclude such an observation.

I disagree. Witness Davey indicated there was light in the tunnel behind the telephone as well as directly overhead (Tr. 89, 90). Inspector Potter indicated there were lights on the ceiling, sides and behind (Tr. 39, 40). When the telephone door was opened you could see through the hole at the toggle switch (Tr. 39).

For the foregoing reasons Citation 2831956 should be affirmed.

Civil Penalties

The statutory criteria to assess civil penalties is contained in Section 110(i) of the Act.

The evidence establishes that P & M has a minimal adverse prior history. The company has three violations for the two year period ending May 5, 1986 (Ex. P1). The record fails to disclose the size of the operator. The record does not present any information concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I conclude that the payment of penalties will not cause the operator to discontinue its business. Buffalo Mining Co., 1 IBMA 226 (1973) and Associated Drilling, Inc., 3 IBMA 164 (1974). The operator was negligent as to the ungrounded space heater inasmuch as this condition was open and obvious. The operator also was negligent as to the telephone equipment. Periodic checks, such as are required by 77.502, would have disclosed these defects. The gravity of each violation was high. A miner could have been

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burned or electrocuted by the electrical space heater. The defective telephone could have caused an explosion. The operator is to be credited for statutory good faith since the violative conditions were abated.

On balance, I deem that a civil penalty of \$150 is proper for each citation affirmed herein.

Briefs

The parties 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 portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent did not violate 30 C.F.R. 75.603 and Citation No. 2831954 should be vacated.
3. Respondent violated 30 C.F.R. 77.701 and Citation No. 2831955 should be affirmed.
4. Respondent violated 30 C.F.R. 77.502 and Citation No. 2831956 should be affirmed.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation No. 2831954 and all penalties therefor are vacated.
2. Citation No. 2831955 is affirmed and a civil penalty of \$150 is assessed.
3. Citation No. 2831956 is affirmed and a penalty of \$150 is assessed.

John J. Morris
Administrative Law Judge

FOOTNOTE_ONE

1 A straining clamp goes on the cable to prevent strain on the cable inside the box itself (Tr. 7).

FOOTNOTE_TWO

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77.516 Electric wiring and equipment; installation and maintenance.

In addition to the requirements of 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electric Code in effect at the time of installation.

77.701 Approved methods of grounding of equipment receiving power from ungrounded alternating current power systems.

For purposes of grounding metallic frames, casings and other enclosures of equipment receiving power from ungrounded alternating current power systems, the following methods of grounding will be approved.

(a) A solid connection between the metallic frame; casing or other metal enclosure and the grounded metallic sheath, armor or conduit enclosing the power conductor feeding the electric equipment enclosed;

(b) A solid connection to metal waterlines having low resistance to earth;

(c) A solid connection to a grounding conductor extending to a low-resistance ground field; and,

(d) Any other method of grounding, approved by an authorized representative of the Secretary, which insures that there is no difference in potential between such metal enclosures and the earth.

FOOTNOTE_THREE

3 The judge sustained the Secretary's objection and excluded Exhibit R5 (Tr. 103, 105, 191-192, 248).

FOOTNOTE_FOUR

4 The standard reads: Coal dust in the air of, or in or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.

FOOTNOTE_5

5 The cited definition reads:

(d) "Permissible" as used in this part means completely assembled and conforming in every respect with the design formally approved by MSHA under this part. (Approvals under this part are given only to equipment for use in gassy and dusty mines.)