CCASE:
SOL V. CONSOLIDATION COAL
DDATE:
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TTEXT:

FMSHRC-FCV
JUNE 20, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. WEVA 87-343
A. C. No. 46-01452-03643

v.

Arkwright No. 1 Mine

CONSOLIDATION COAL COMPANY,
Respondent

DECISION

Appearances: Joseph T. Crawford, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania.

Before: Judge Weisberger

Statement of the Case

On September 28, 1987, the Secretary (Petitioner) filed a petition for an assessment of Civil Penalty for alleged violations by the Respondent of the following regulations on June 9, 1987: 30 C.F.R. $ 75.515, 30 C.F.R $ 75.1725{a), 30 C.F.R. $ 75.902, and the following regulations on June 10, 1987: 30 C.F.R. $ 75.518-1, and 30 C.F.R. $ 513-1. Respondent's Answer was filed on October 22, 1987.

A Prehearing Order was issued on November 4, 1987, setting a hearing on this matter for January 13, 1988, in the event that no settlement was reached. On January 4, 1988, an Order was entered continuing the hearing based upon Respondent's request for continuance, which was not objected to by Petitioner.

On January 20, 1988, the case was reassigned to the undersigned. Pursuant to notice, the case was rescheduled and heard in Wheeling, West Virginia, on March 22, 1988. Edwin Fetty and Alex Volek testified for Petitioner. John Farley, II, Donald S. Bucklew, and Harold P. Schaffer testified for Respondent.

Petitioner filed its Proposed Findings of Fact, Conclusions of Law, and Memorandum Law on June 7,1988, and Respondent filed

its Posthearing Brief on June 7, 1988.

Stipulations

At the Hearing the Parties entered into the following stipulations:

a. That jurisdiction of this matter properly rests with the Federal Mine Safety and Health Review Commission.

b. That the operator has a history of 389 assessed violations at this mine.

c. The size of the operator is reflected by the following data:

(i) Arkwright Number 1 employees approximately 225 employees.

(ii) Daily production of Arkwright Number 1 equals approximately between 7000 and 9000 tons, while annual production equals approximately 1,400,000 tons.

(iii) The Respondent Operates 33 mines.

(iv) The annual production of all the Respondent's mines is approximately 41,221,321 tons.

(v) The annual dollar volume of sales by the Respondent for 1988 will not be released by the Respondent.

(vi) DuPont E.I. DeNemours and Company is the parent company; Consolidation Coal Company is a wholly-owned subsidiary.

d. The violations were abated within the required time period in each instance.

e. Approximately two (2) miners were exposed to the hazard created by each violation.

f. Injury incidence rate:

	Fatal	Non Fatal*	No. Days Lost*	Total*
Arkwright No. 1				
1986	0			
1987	0			
Consolidation Coal Company				
1986	.09	3.23	1.49	4.81
1987	.02	. 6.47	1.58	8.07
Nation				
1986	.05	5.68	1.69	7.43
1987	.04	7.11	2.17	9.33

*Data on non-fatal injuries and lost work days at Arkwright No. 1 for 1986 and 1987 will be furnished upon receipt.

With regard to paragraph 5(c)(ii) Arkwright I employees approximately 225 employees and not 4,000 as stated there.

With regard to paragraph 2, the daily production of Arkwright Number 1 equals approximately 7,000 to 9,000 tons.

Issues

The Respondent, the Owner/Operator of the subject underground mine was cited, along with the independent contractor, who owned and operated the equipment in issue, for violations of the following regulations: 30 C.F.R $ 75.1725(a), $ 75.902, $ 75.518-1, and $ 75.513-1. The issues are whether the Respondent was properly cited, and whether the Respondent violated these regulations as well as 30 C.F.R. $ 75.515. If these issues are found in the affirmative, it must be determined, in each case, 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. Also, it will be necessary, for each violation of Respondent, if any, to determined the appropriate civil penalty to be assessed in

accordance with section 11(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801, et seq., (the Act).

Proper Party

It appears to be the position of the Respondent, in reliance upon Phillips Uranium Corporation 4 FMSHRC 549 (April 1982), that the independent contract herein, Frontier-Kemper, is the most responsible party, as it, rather then Respondent, owned and operated the various equipment involved in Citation Nos. 2698629, 2698630, 2698631, and 2698632. In this connection, John Farley, II, the Project Manager for Frontier, the independent contractor, testified that prior to the commencement of its work at Respondent's mine, it was agreed that Respondent was to do the preshift and onshift examination, take the employees of the independent contractor in and out of the mine, perform hazard training, and supply power. On the other hand, the independent contractor was to perform all electrical work on its own equipment, and the Respondent was not in any way to direct the work force of the independent contractor. Farley also testified that "very seldom" were Respondent's employee at the work site. Harold P. Schaffer, Respondent's supervisor, testified, in essence, that Respondent's employees conducting its preshift examinations inspected only for hazardous conditions and did not inspect any of the independent contractor's equipment as that was to be done by certified persons. Farley also indicated that the blower, which is the subject of Citation No. 2698629, was designed specially for the independent contractor. Indeed, Farley further testified that even the independent contractor's electrician on the site was not familiar with this piece of equipment.

In the Phillips case, supra, only the operator, rather than the independent contractor, was cited for violations involved in the specialized task of shaft construction at the operator's mine. The Commission, in Phillips, supra, at 552 quoted with approval from Old Ben Coal Company, 1 FMSHRC 1480 (1979), to the effect that the inclusion of an independent contractor within the definition of "operator" in the Act, reflects the Congressional intent to "... subject contractors to direct enforcement of the Act." In Phillips, supra, in reversing the judge who below had upheld the citations and orders issued to Phillips, the operator, the Commission reasoned as follows:

> "The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors; the violations would be entered into Phillips' history of violations, rather than the

> contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases. Compared to Phillips' burden in bearing the full brunt of the effect of the violations committed by the contractors, the contractors would proceed to the next jobsite with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices." (Phillips, supra, at 553).

In contrast, in the instant case, the independent contractor was also cited, and even was served with 104(d) Orders, for the exact violations, which are the subject of Citation Nos. 2698629, 2698630, 2698631, and 2698632. Accordingly, the rationale behind the Commission's decision in Phillips, supra, is inapposite to the instant case, and thus is not controlling of the issue presented herein, i.e. as to whether the independent contractor and the operator are jointly liable.1/

In Bituminous Coal Operators Association v. Secretary of Interior, 547 F.2nd 240 (4th Cir. 1977), the Court held, that under the Coal Act of 1969, the owner of a mine is liable for the independent contractor's safety violations without regard to the owner's fault. It is significant, that as stated by the D.C. Circuit, in International Union United Mine Workers of America, v. FMSHRC, (slip op., February 23, 1988, No. 87-113), "The Senate committee report on the bill, that later that year became the Mine Act, expressly took note of and approved the BCOA decision. S. Rep. No. 181, 95th Cong., 1st Sess. 14, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 3401, 3414." The holding in Old Ben, supra, has, in essence, been followed by the 9th Circuit in Cyprus Indus. Minerals Company v. FMSHRC, 664 F.2nd 1116 (9th Cir. 1981). In the Cyprus case, supra, at 1119, the Court stated that "...mine owners are strictly liable for the actions of the independent contractor violations (sic).... ." (See also Republic Steel Corporation, 1 FMSHRC 5, 9 (1979); Old Ben Company, 1 FMSHRC 140, 1481-83 (1979); International Union Mine Workers v. FMSHRC, supra).

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1/ In this connection, I find irrelevant Old Dominion Power Co., 6 FMSHRC 1886 (August 1984) and Calvin Black Enterprises, 7 FMSHRC 1151 (August, 1985) cited by Respondent, as neither of these cases dealt with the issue of whether an independent contractor and a owner can be jointly liable. (In Old Dominion supra, the issue presented was whether a contractor was properly cited. In Calvin Black, supra the Commission affirmed the citation issued to a owner.operator.)

Accordingly, based upon.the above line of cases, I conclude that it was proper herein to cite Respondent, along with the independent contractor, for violations concerning equipment owned and operated by the independent contractor.

Citation No. 2698627

Citation No. 2698627 alleges that the energized 4160 volt cables entering the metal disconnect switch box which was located on the main butt section "... are not provided with proper fittings where they are entering the metal box. The cables are loose running through 3 inch pipe."

Regulation

30 C.F.R. $ 75.515 provides, as pertinent, that "Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings."

Edwin Fetty, an Electrical Inspector for MSHA, testified, in essence, that the cable in question was energized, and extended through a piece of pipe into the box. He said that he did not observe any fitting. He offered his opinion that the phrase "proper fitting," as contained in section 75.515, supra, meant a "secure" fitting. Essentially, it was his opinion, that the only "proper fitting," was a strain clamp, which in fact was provided to abate this violation. In contrast, Donald S. Bucklew, Respondent's maintenance foreman, testified that the cable in question entered the disconnect box through a conduit which was a little larger than the cable, and which was welded to the disconnect box. He described the conduit as being a quarter inch metal and running from approximately 1 inch into the box, to 4 to 5 inches outside the box. He said that the cable, in being inserted in the conduit, was shoved through a tape, or rubber bushing, which was wrapped inside the conduit. Fetty testified that this connection was "not common."

I adopt the version testified to by Bucklew with regard to the description of how the cables in question entered the box, due to my observations of his demeanor, and the detailed nature of his testimony. I find that the Petitioner has not established that the cables in question, did not pass "through proper fittings." Aside from Fetty's opinion that a proper fitting is only a strain clamp, and that the connection used by Respondent was "not common," there was no evidence presented as to prevailing practice. Further, Fetty indicated that because the cable was energized he did not test the cable by pulling it to see whether the connection used by Respondent held.

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Accordingly, inasmuch as Petitioner has not established that the cable entering the disconnect box did not pass "through proper fittings," I find that Respondent herein did not violate 30 $ 75.515, supra.

Citation No. 2698629

On June 9, 1987, Citation No. 2698629 was issued which provides, as pertinent, as follows: "The over temperature device installed on the 2 lube rotary positive blower, Model 23000, to cause the blow to shut down when the temperature rises to approximately 325 degrees F, is not maintained in an operatable condition. When the normally opened contact tips on the switch are closed, the blower continues run. When the contact closes it should cause the blower to shut down. ***"

Regulation

30 C.F.R. $ 75.1725(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition . . .

It was the testimony of Fetty, in essence, that when he closed the contact tips on the over temperature device on the rotary blower, the blower continued to run, whereas it should have shut down to prevent it from over heating. He said that he was aware that the over temperature device had a time delay on it, and that when it was tested in his presence an electrician closed the contacts for a "long time" which was to his recollection more than a few seconds, and the blower still did not shut down. He stated that he thus concluded that the device was not "properly maintained."

John Farley, project managed for the contractor, testified that James Walker, the independent contractor's electrician, had contacted the headquarters of the independent contractor on June 9, 1987, after Fetty made his inspection, in order to determine how to fix the over temperature device. Fetty said that the electrician was told that the device had a 6 second delay and when the latter rechecked it it worked properly. Indeed, when Fetty abated the violation on the following day, he noted that the over temperature device was ". . . now in an operative condition. It will cause the blower to shut off when the normally open contacts are closed." There is no evidence that any repair was done to the device between Fetty's inspection on the 9th and subsequent abatement on the 10th. Fetty, who acknowledged that the device had a time delay on it, did not contradict the testimony of Farley that the amount of the time delay was 6 seconds. Fetty's testimony that, when tested on the

9th, the contacts were closed "for a long time," i.e. "more than a few seconds," does not positively establish that the delay lasted more than the time delay of 6 seconds. Thus, there is insufficient evidence, that, when tested on the 9th, the over temperature device did not function as it should. There is no evidence that a 6 second delay renders this device unsafe. I find thus that it has not been established that this device was not maintained in a "safe operating condition." Accordingly, I find that there has not been any violation by Respondent herein of section 1725(a), supra.

Citation No. 2698630

On June 10, 1987, Fetty issued Citation 2698630 which provides, in essence, that the energized 460 oil pump mower installed on the 2 lube rotary blower in the main butt section ". . . is not provided with a fail safe device to cause the circuit breaker to open when either the pilot or ground wire is broken." The citation alleges that the above condition is a violation of 30 C.F.R. $ 75.902 which provides that ". . . On or before September 30, 1970, low- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken, or other no less effective device approved by the Secretary or his authorized representative to assure such continuity, except that an extension of time, not in excess of 12 months, may be permitted by the Secretary on a mine-by-mine basis if he determines that such equipment is not available. Cable couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled."

In essence, Fetty testified that the pump motor in question has three phases and that there were no fail-safe devices which would cause the circuit breaker to open and deenergize, when either the pilot or ground wire would be broken in any point in the circuit. Fetty's testimony has not been contradicted. Accordingly, I find that it has been established that the Respondent herein violated section 75.902, supra, by not having a fail-safe ground check circuit for the pump motor in question.

It was the testimony of Fetty that without a fail-safe device, if the ground wire would have been detached, the circuit-breaker would not deenergize the system. He said that if the insulation in the motor would break down or there would be damage to the conductor, this could result in voltage in the frame of the motor causing injury to one touching the frame. However, on crossexamination, Fetty agreed that there was a

grounding protection of the cable and if there was a problem with the insulation and an individual touched the motor frame he would not be affected.

Although I find that there has been a violation of section 75.902, supra, with some measure of danger contributed to by the violation, there is insufficient evidence to conclude that there was a "reasonable likelihood that the hazard contributed to will result in an injury," and I thus conclude that the violation herein was not significant and substantial (Mathies Coal Company 6 FMSHRC 1, 3-4 (January 1984)).

For the reasons discussed above, infra, I conclude that gravity of the violation was low. Also, based upon the testimony of Farley, I conclude that the equipment herein, which contained the violative condition, was owned and operated exclusively by the independent contractor. Further, based on Farley's testimony, I conclude that Respondent did not have any contractual obligations to inspect the contractors equipment or supervise the work of its employees. I thus conclude that the negligence of Respondent herein was low. I also have considered the various other statutory factors in section 110(i) of the Act, as stipulated to by the Parties. I conclude based upon all of the above that the Respondent pay $20 as a civil penalty for the violation of section 75.902, supra.

Citation 2698631

On June 10, 1987, Fetty issued a citation which alleges essentially that the energized 500 mcm cable supplying 460 volt power for the 500 hp blow motor on the main butt section, ". . . is not provided with proper short-circuit and over load protection. The cable is protected by a 1200 amp sylvania circuit breaker set on 1200 amps according to the information on the face of the circuit breaker."

30 C.F.R. $ 75.518 provides that "Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short-circuit and overloads." 30 C.F.R. $ 518-1, as pertinent, provides that such a device" . . . which does not conform to the provisions of National Electric Code, 1968, does not meet the requirements section 75.518."

Fetty testified as to the essentials of the citation issued on June 10. Respondent did not rebutt this testimony and in fact stipulated as to these facts. Fetty explained that in his opinion, in essence, the setting at 1200 amps is too high for a cable supplying power to a 540 amp blower motor, as, in the event of a short-circuit, the breaker would not trip out and the

current would continue to flow until 1200 amps are reached, thus, taking longer to clear the circuit. Respondent maintains, in essence, that the amperage of the setting on the circuit breaker at 1200 amps is not relevant inasmuch as the breaker at Respondent's power center, set at 2500 amps, will trip at that point and thus deenergize the 500 hp motor. I find however, that the circuit breaker, being set at 1200 amps was not installed in such a way, "as to protect" the equipment of the blower served by the cable, and thus is violative of 30 C.F.R. $ 75.518, supra. I also note that it was the uncontradicted testimony of Fetty that Respondent's engineer John Cormack agreed that the setting was too high. Thus, I find that the Respondent herein did violate section 75.518, supra, as alleged in the citation.

Fetty indicated that in an event of a roof fall or damage to the cable leading to a short-circuit, an arc will result which will continue to present a hazard as power will not be shut off until 1200 amps are released. Further, it was Fetty's opinion that due to the setting at 1200 amps, there will be increased heat passing through the cable which will cause a breakdown of the cable if there is rock or a bent cable. In this connection, Fetty said that in his opinion the cable was old as it did not have any markings on it. It was his opinion that sooner or later there would be an accident due to the breakdown of the cable causing arcing. I find that although there is some measure of danger contributed to by the breaker being set at 1200 amps, this danger is not very high considering the testimony of Bucklew, which I adopt as it has not been contradicted, that the breaker at Respondent's power center is set to trip at 2500 amps, and will thus deenergize the 500 hp blower motor. Further, I note, that on cross-examination, Fetty had agreed that the cable leading to the motor in question was warm and not hot, and that although there were some signs of abrasions on the outer jackets the insulation was intact. I thus find that Fetty's opinion that, "sooner or later" an accident will occur due to break down of the installation causing arcing, falls short of establishing a "reasonable likelihood" that the hazard of arcing will occur (Secretary v. Consolidation Coal Company, 6 FMSHRC 189, at 193 (February 1984)). Accordingly, I find that it has not been established that the violation herein is significant and substantial (Mathies Coal Company, supra).

For the reason discussed above, infra, under Citation No. 2698630, I conclude that the Respondent herein exhibited only low negligence in violating section 75.518, supra. Further, for the reason discussed above, infra, I conclude that the gravity of the violation herein to be low. Further, I have considered the remaining statutory factors in section 110(i) of the Act, as stipulated to by the Parties. Based upon all of the above, I

conclude that the Respondent shall pay a fine of $20 as a civil penalty for the violation of the above regulation.

Citation No. 2698632

On June 10, 1987, Fetty issued Citation No. 2698632 which alleges that the cable supplying 460 volts for the 500 hp motor on the blower in the main butt section, ". . . is not sufficient size to have adequate current carrying capacity. Full load current of the motor is 540.2 according to the name plate information and a 500 mcm cable is being used." This citation alleges a violation of section 30 C.F.R. $ 75.513-1, which provides that "An electric conductor is not of sufficient size to have adequate carrying capacity if it is smaller than is provided for in the National Electric Code, 1986." Fetty testified that the code requires a size of 125 percent of the full load, and that in this case, the full load of the motor was 540.2 amps. He said he performed calculations and that the cable in question was "too small." Fetty also indicated that the cable was hot and that there were signs of deterioration. This testimony was not contradicted by any of Respondent's witnesses. Accordingly, I find based upon this testimony of Fetty, that there was a rise of temperature with some sign of damage to the installation material. Accordingly, I conclude that it has been established that the cable was of insufficient size as defined in section 75.513, supra.

It was Fetty's testimony that with a cable being too small in size, therefore carrying too many amps, there will be an increase in heat which will break down the insulation, with arcing, smoke, asphyxiation, and possible high burns being reasonably likely to occur. It was his opinion that continued operation of too small sized cable will lead to insulation breakdown which will cause contact with the ground conductors which will lead to a short-circuit. He also indicated that although the area was rock dusted, there were wooden timbers, oil on the blower, and spalling coal. It was the testimony of Farley, which was not contradicted, that the equipment was being run at only 60 percent of full capacity, and the amps were continually monitored. As such, I conclude that it has not been established that there was a "reasonable likelihood" of the hazard of arcing or fire occurring (See, Secretary v. Consolidation Coal Company, supra). Accordingly, I find that it has not been established that the violation herein was significant and substantial (Mathies, supra).

I find that the negligence of Respondent herein be low, as analyzed with regard to Citation No. 2698629. Also, for the reasons which I discussed above, infra, in discussing whether the violation was significant and substantial, I conclude that the

gravity herein of the violation was low. Also, I have considered the other statutory factors in section 110(i) of the Act as stipulated to by the Parties. Based upon all of the above, I conclude that a penalty herein of $20 is reasonable and proper for the violation of section 75.513, supra, by the Respondent.

ORDER

It is ORDERED that Citation No. 2698627, and Citation No. 2698629 be DISMISSED. It is further ORDERED that Respondent pay the sum of $60, within 30 days of this Decision, as a civil penalty for violations of Citation Nos. 2698630, 2698631, and 2698632.

Avram Weisberger
Administrative Law Judge

Distribution:

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