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SOL (MSHA) V. CONSOLIDATION COAL CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 88-243 A.C. No. 46-01318-03818
v.	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

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

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against Consolidation Coal Company for three alleged violations.

Citation No. 2897188

This citation was issued for a failure to report to MSHA an injury which was originally believed to have a reasonable potential to cause death. 30 C.F.R. 50.2(h)(2) and 30 C.F.R. 50.10. At the hearing the Solicitor advised that MSHA was vacating the citation based upon a report of the ambulance attendant. Therefore, I dismissed the penalty petition insofar as this item was concerned. I advised both counsel, and particularly the Solicitor who has the burden of proving a violation, that if a case such as this goes to hearing, appropriate medical evidence must be presented.

Order No. 2897193

The subject order issued under section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2) recites as follows:

> Welding operations were being performed outside of the Robinson Run shop on a lowboy haulage car and the area was not shielded.

> On 02Ä03Ä88 a 104 dÄ2 order no. 2897259 was issued in the Robinson Run shop for welding operations being performed and the area not shielded, therefore this order will not be terminated untill [sic] all persons required to performe [sic] welding operations are trained in the use of shields.
>
> Jeff Haskins, Maintenance Foreman
>
> Note! The work area inside the shop was shielded.

30 C.F.R. 77.408 provides:

> Welding operations shall be shielded and the area shall be well-ventilated.

The essential facts are not in dispute. Jim Flanagan, an hourly employee, was welding on a lowboy haulage car in the doorway to the shop (Tr. 23, 50, 83). The lowboy was half in and half out of the shop (Tr. 26, 86). A shield had been placed around that portion of the lowboy facing the inside of the shop (Tr. 25, 27, 35, 66). However, no shielding was placed on the side of the welding operation facing out into the yard (Tr. 25, 27, 35, Operator's Exhibits Nos. 3Ä8). Various employees of the operator could be in the general area and use a door to the shop which was located about 20 to 25 feet from the welding operation (Tr. 29Ä30, 33, 35Ä36).

The mandatory standard is clear. Welding operations must be shielded. Since the standard has no exceptions, the shielding requirement must be held to apply to all sides. Therefore, I conclude a violation existed. I cannot accept the operator's argument that distance constitutes a shield. There is no basis to read such a caveat into the standard. To do so would introduce an element of uncertainty into the standard, because a determination would have to be made in every situation as to how much distance constitutes a shield and under what circumstances. So too, the welder's body cannot be accepted as a shield, because he can change his position at any moment.

The violation was cited in a 104(d)(2) order. The Commission had held that the special findings in such an order may be challenged in a penalty proceeding. Quinland Coals, Inc., 9 FMSHRC 1614 (September 1987). The inspector stated the operator was guilty of unwarrantable failure because the mine foreman who was in the shop area should have known of the violation (Tr. 38, 52Ä53). The inspector later testified that the mine foreman did not tell the welder to erect shielding on the outside (Tr. 37, 54).

The Commission has held that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence. Emery Mining Corporation, 9 FMSHRC 1997 (Dec. 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (Dec. 1987); Southern Ohio Coal Company, 10 FMSHRC 138 (Feb. 1988); Quinland Coals, Inc., 10 FMSHRC 705 (June 1988). The inspector's testimony falls far short of establishing unwarrantable failure under the Commission's criteria. Indeed, insofar as the record and the brief filed on behalf of the Secretary indicate, the inspector and the Solicitor are unaware of governing Commission decisions although MSHA has acknowledged and explained these decisions. See MSHA Policy Memorandum 88Ä2C and 88Ä1M, dated April 6, 1988. Accordingly, the unwarrantable finding must be vacated. The evidence shows only ordinary negligence.

The inspector originally designated this violation as significant and substantial, but the conference officer deleted this designation because the miners are required to wear safety glasses (Tr. 41Ä42). The term "significant and substantial" is not synonymous with gravity. In this case I conclude the Solicitor failed to show any degree of gravity. The inspector testified he knew of situations where individuals, who came in close proximity to welding operations received injuries (Tr. 32). He then defined close proximity as 6 feet (Tr. 39). However, he testified that he did not know who would pass within 6 feet of the welding operations in this case (Tr. 40). The door to the shop was located 20 to 25 feet away from the welding operations but no evidence was presented as to what, if any, injury might be sustained by persons using this door. I of course, cannot speculate on such a matter. Under the circumstances, therefore, the violation must be held nonserious.

A penalty of $25 is assessed.

Order No. 2897194

The issue presented here is whether the cited wire was a trolley wire or a power wire. If it was a power wire, as the Secretary contends, it had to be insulated under 30 C.F.R. 75.517. Insulation wraps around the wire and completely covers it (Tr. 112). If it was a trolley wire, as the operator asserts, it only had to be guarded in accordance with 30 C.F.R. 75.1003. Guarding comes down over the sides of the wire, leaving the underneath exposed (Tr. 113).

After consideration of this matter and in light of all the evidence of record, including the testimony of the witnesses, I conclude that the cited wire was a power wire which should have been insulated in accordance with 30 C.F.R. 75.517.

The record discloses that there were a number of different electrical wires in the affected area, each with its own characteristics and functions. The cited wire carried power

among the trolley wires in the track yard which was above ground (Operator's Exhibits 11Ä17, Tr. 117).(Footnote 1) It crossed a number of trolley wires (Tr. 109).

The operator argues that the subject wire is a trolley wire. I cannot accept this position. The term "trolley wire" is defined as:

> The means by which power is conveyed to an electric trolley locomotive. It is hung from the roof and conducts power to the locomotive by the trolley pole. Power from it is sometimes also used to run other equipment. B.C.I.

A Dictionary of Mining, Mineral and Related Terms (U.S. Department of the Interior 1968).

The testimony at the hearing accords with the dictionary definition. A trolley wire runs right over the track and supplies power directly to the equipment (Tr. 107). A trolley wire is designed to allow electrical contact between it and a metal slide of the pole attached to the equipment (Tr. 147Ä148). The underneath side of a trolley wire is exposed so that the necessary electrical contact can occur (Tr. 151). If the trolley wire were insulated, i.e. fully wrapped, there could be no contact (Tr. 151). As already noted, the subject wire did not conduct power by means of a trolley pole to a locomotive or any other piece of equipment; it merely carried power from one trolley wire to another (Tr. 117). Additionally, a trolley wire is smaller than the cited wire and is made of copper to withstand the friction of another piece of metal touching it (Tr. 148).

Another type of wire used in the affected area was a trolley feeder wire. Based upon the evidence, I conclude the subject wire cannot be considered a trolley feeder wire. As the operator's safety supervisor testified, the purpose of a trolley feeder wire is to carry power from the initial power source over long distances to trolley wires (Tr. 142Ä143). Because the trolley feeder wire is larger than the trolley wire it can carry substantial voltage over greater distances without generating as much heat (Tr. 147Ä148). Although, the wire cited by the inspector was the same dimension as a trolley feeder wire, this alone would not make it a trolley feeder wire since its purpose was different from that of a trolley feeder wire.

The operator's contention that the cited wire is a trolley wire or trolley feeder wire because it is part of the trolley wire "system", is unpersuasive. Such an approach presents too vague and uncertain a standard upon which to decide this case. Moreover, the purposes of the Act are better served by the conclusion that the wire in question was a power wire. The insulation required for a power wire completely covers all sides of the wire. It is obviously safer than guarding which covers only on the top and sides. Guarding with an exposed underside is allowed for trolley wires, because there must be an electrical contact between the wire and the pole attached to the piece of equipment being powered. Since the wire in this case did not come in contact with any pole or equipment, there was no need for its underside to be exposed. In light of the foregoing, I conclude a violation existed.

The violation was cited in a 104(d)(2) withdrawal order on the ground that the operator was guilty of unwarrantable failure. The inspector stated that because the foreman was in the area, which was pre-shifted every day, he should have known of the violation (Tr. 104, 114, 128, 130). Here again, as with the prior citation, the inspector and the Solicitor made no reference to the criteria now laid down by the Commission for determining the existence of unwarrantable failure. And here again, nothing in the record shows aggravated conduct of the sort required by the Commission and illustrated by MSHA in its Policy Memorandum, cited supra. On the contrary, the uncontradicted evidence discloses that the cited wire had been in use since 1980 without a citation being issued (Tr. 137). Although such a circumstance does not preclude subsequent enforcement, it does show the absence of aggravated conduct on the part of the operator. In light of the foregoing, the finding of unwarrantable failure must be vacated. The operator was guilty of only ordinary negligence.

I accept the inspector's testimony that a shock hazard existed because miners in the area carried bars which could come in contact with the uninsulated portion of the wire (Tr. 111, 121Ä122). On this basis I find the violation was serious. The inspector's finding of significant and substantial must however, be set aside. As already noted, the term "significant and substantial" is not synonymous with gravity. The Commission has defined "significant and substantial" in a precise and detailed manner and has established a four-step test to determine its existence. National Gypsum Co., 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984), U.S. Steel Mining Co., 6 FMSHRC 1834 (1984); OzarkÄMahoning Co., 8 FMSHRC 190 (1986); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987); Texasgulf Inc., 10 FMSHRC 498 (1988). No evidence was presented to show

whether the cited violation was significant and substantial under the Commission's guidelines. Furthermore, the Solicitor asked no questions on this issue and the inspector said nothing about it. Accordingly, this finding cannot stand.

In accordance with the foregoing findings of a violation of ordinary gravity and negligence and in light of the stipulations regarding the other statutory criteria, a penalty of $250 is assessed.

ORDER

I have reviewed the briefs filed by counsel. To the extent that the briefs are inconsistent with this decision, they are rejected.

As already noted, the stipulations regarding the remaining criteria under section 110(i) of the Act, have been accepted.

Accordingly, it is ORDERED that Citation No. 2897188 be vacated, and that Order Nos. 2897193 and 2897194 be affirmed.

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

Order No.	Penalty
2897193	$ 25
2897194	$250

It is ORDERED that the operator pay $275 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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Footnote starts here:-

~Footnote_one

1 The cited wire does not appear on the operator's photographs because the operator removed the wire after the citation was issued. The wire's route was pencilled in on the photos (Tr. 102, 133, 154).