CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
DDATE:
19901220
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 91-56-R Citation No. 3306262; 10/15/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Blacksville No. 2 Mine Mine I.D. 46-01968

DECISION

Appearances: Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Contestant; Glenn Loos, Esq., U.S. Department of Labor, Office of the Solicitor, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Notice of Contest and Application for Extension of Abatement, and a Motion for Expedition of Proceedings all of which were filed by the Operator (Contestant) on November 15, 1990. Pursuant to telephone conference calls between the undersigned and counsel for both Parties on November 15 and November 16, 1990, this case was scheduled for hearing and was subsequently heard on November 20, 1990, in Morgantown, West Virginia. At the hearing, Spencer Allan Shriver and Paul Michael Hall, testified for the Secretary (Respondent), and Robert Church, Charles E. Bane, Sr., and John F. Burr, testified for Contestant. At the conclusion of the hearing, counsel for Contestant requested an allowance of 7 days subsequent to the receipt of the transcript to file a brief. Subsequent to a discussion, it was agreed that the Parties would file Briefs by December 6, 1990, and Briefs were timely filed by the Parties. The Parties waived the right to file a Reply Brief.

FINDINGS OF FACT AND DISCUSSION

I.

Spencer Allan Shriver, an electrical engineer employed by MSHA, testified that he had visited the subject mine on October 12, 1990, to investigate an accident. Upon investigation, Shriver was informed that a short circuit had occurred in the controller box of a locomotive at the mine,

burning a hole in its steel cover and blowing out some hot gases that burned the locomotive operator, Robert Fetty. Charles Wise, who was in the locomotive compartment along with Fetty, told Shriver that he had removed the fuse from its holder on the trolley pole, and installed a spare 300 ampere (amp) fuse that he had located in the trolley. According to Shriver, Wise then replaced the trolley pole on the wire, its power source, thus enabling him to operate a radio. Wise next notified the traffic dispatcher that Fetty had been injured and that the locomotive was disabled. Wise then proceeded with the locomotive to the bottom. When he was about 100 yards from the bottom he put the locomotive onto a spur, at which time a second short circuit developed.

According to Shriver, and not contradicted by Contestant, Wise had indicated to Shriver that he (Wise) was not a certified electrician. Shriver then issued a Section 104(a) alleging a violation of 30 C.F.R. 75.511 which repeats the language of Section 305(f) of the Federal Mine Safety and Health Act of 1977 (the Act), which, as pertinent, provides:

> No electrical work shall be performed on low-, medium-, or high-voltage 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.

It is undisputed that Wise was not a qualified person, as defined by the Regulations (30 C.F.R. 75.512), nor a person trained to perform electrical work, and that Wise in fact did remove a blown fuse and replace it with an unblown fuse. Thus the issue for resolution is whether 75.511, supra, applies to the facts presented herein. In other words, it must be resolved whether "electrical work" encompasses the changing of a fuse on a trolley pole. For the reasons that follow I conclude that it does not.

II.

The physical acts involved in removing a fuse and replacing it with another one is depicted in a video that was shown at the hearing. (Operator's Exhibit 3). Essentially, in replacing a fuse, the first step is to remove the trolley boom from the power line, its sole power source. This act is performed regularly by operators of trolleys who are not qualified electricians. The next step is to unwrap the tape which holds the fuse holder to the boom. The cover cap is then unscrewed from the fuse holder

revealing the fuse connector and the fuse. These two items are pulled apart, and the fuse is then pulled out and replaced with another fuse. A fuse with an amperage rating which is not the same as the one that had been replaced, will not fit in the same fuse holder.

The term "electrical work", is defined in neither the Act nor in the appropriate Regulations (30 C.F.R. et. seq.), Respondent's and Contestant's witnesses essentially agreed that there is no recognized definition in the mining industry of the term "electrical work", and that it has usually been defined by example.

Section 48-7-2.1(b)(14) of Title 48 of the Code of State Rules of West Virginia (48 C.S.R. 48-7-2.1(b)(14)), in interpreting West Virginia Code 22A-2-40(19) which contains the same language as Section 75.511, supra, lists as an example of work that is not required to be performed by an electrician or apprentice electrician as follows: "Replace blown fuses on trolley poles and nips." On the other hand, an MSHA publication, Coal Mine Inspection; Underground Electrical Inspections, effective June 1, 1983, sets forth as an example of work required to be performed by a qualified person or a person trained to perform electrical work, the following: 1. "1.2 Replacing blown fuses;" (Govt. Exhibit 7, pg. 3). Also, the MSHA Program Policy Manual, dated July 1, 1988, contains the same example (Govt. Exhibit 6). Although weight is to be accorded the Secretary's interpretation of Regulations,1 the interpretation clearly is not binding where it is not reasonable2 especially in light of the fact that a prior Manual dated March 9, 1978, did not include the changing of fuses as an example of electrical work (Exhibit O-14). In the same fashion, a letter dated October 25, 1979, from Joseph O. Cook, Administrator for Coal Mine Safety and Health, MSHA, to District Managers, Coal Mine Safety and Health, indicates that the letter was written in response to request for an interpretation of "electrical work," and advises that "electrical work" is generally considered to be the work required to install or repair electric equipment or conductors. The changing of fuses is not listed among the examples of electrical work set forth in the memorandum. (Exhibit O-8).

III.

In evaluating whether electrical work encompasses replacing blown fuses on trolley poles, an inquiry is appropriate as to what a reasonably prudent person familiar with the mining industry and the protective purpose of this section would have concluded with regard to its applicability. (See, Ideal Cement Company, Docket No. WEST 88-202-M, 12 FMSHRC _____ (slip op., November 27, 1990.)) This inquiry requires, as a first step, an analysis of the hazards, if any, involved in allowing nonqualified personnel to change blown fuses on trolley poles.

According to Shriver, if a fuse blows, it is reasonably likely that a short circuit had occurred in the equipment protected by the fuse. Accordingly, if an uncertified person replaces the fuse and reenergizes the circuit without inspecting the protected equipment, a short circuit may reoccur causing an injury due to the extremely high temperature of an electrical arc. He thus concluded that changing fuses is to be considered electrical work, as the equipment protected by the fuse should be evaluated by a certified person before the fuse is replaced, in order to avoid the possibility of an injury. However, as he conceded upon cross examination, there are no regulatory requirements requiring a certified electrician to examine effected equipment to determine the cause of a blown fuse. Indeed Shriver conceded upon cross examination that a nonqualified electrician would not be performing electrical work if he were to remove a trolley pole from its wire, remove its fuse, give it to a mechanic and then replace it upon being advised that the fuse is still good. He also conceded that placing a fuse in an empty fuse holder is not electrical work. Thus, as per Shriver's testimony, the act of replacing a blown fuse can be performed by a noncertified as well as a qualified electrician.

Also, Shriver indicated, in essence, that a circuit breaker, which performs the same function as a fuse, can be reset by a nonqualified person. Hence, according to Shriver's testimony, the resetting of the breaker is not electrical work. Shriver distinguished a circuit breaker from a fuse by indicating that a fuse can carry more than a hundred percent of its amperage rating for a few minutes. Thus an injury is possible, if a fuse is replaced without first checking the equipment for a short circuit. Shiver explained that, in contrast, a circuit breaker can tolerate amperage only a few percents above its rating and then will immediately operate and shut off power. However, the effect of this distinction is diluted, inasmuch as Shriver conceded that, essentially, in some conditions a breaker can be reset, and yet power would still remain on, resulting in a situation that could cause a cable to blow up.

Paul Michael Hall, the Chief Engineer of MSHA District 3, essentially agreed with the assessment of Shriver that a nonqualified electrician could, by mistake, replace a blown fuse with a fuse of the wrong size which would result in inadequate overload and short circuit protection. He explained that, should this occur in the event of an overload, there would be a possibility that high amounts of current would continue to flow, causing a fire. However Respondent did not impeach or rebut the testimony of Robert Church, Contestant's Safety Supervisor, that, in essence, it would not be physically possible for a nonqualified person to place a wrong fuse in the fuse holder on the trolley pole. He indicated that a smaller sized fuse would go into the holder, but would not make a ground contact. He also indicated that larger fuses, such as those rated for 60 or 90 amps, would not fit into the connector for the trolley fuse due to their size or configuration. Further, he indicated that although a 100 amp fuse is the same dimension as the 300 amp fuse in issue, they are clearly not interchangeable as, according to his uncontradicted testimony, the ends of the fuses are different, i.e., the 100 amp is round and the 300 amp fuse in question contains a metal part that protrudes from its end.3

In essence, Hall opined that a qualified electrician is required to replace a fuse ". . . to assure that equipment was going to be maintained in a safe operating condition, ... " (Tr. 103). He further indicated that if a short circuit in the controller occurs and a fuse blows, the controller should be repaired by qualified personnel before the blown fuse is replaced. However, upon cross examination, he indicated that resetting a circuit breaker is not electrical work, and, in essence, had the trolley pole in issue contained a breaker rather than a fuse, a qualified person would not have been required to reset the breaker in spite of the fact that there was a short circuit in the controller. Hence, I find that it is totally inconsistent for Respondent to maintain that (1) replacing a blown fuse is electrical work on the ground that the controller containing a short circuit must first be repaired, but on the other hand (2) had a circuit breaker been used, resetting it would not have been considered electrical work, even though the controller should be examined and repaired. In other words, if, in the circumstances presented herein, resetting a circuit

breaker is not considered electrical work, then similarly, replacing a blown fuse, in the same circumstances, should also not be considered electrical work.

Hall opined that the replacing of fuses is hazardous in a situation where more than one type of fuse is contained in a box and one is replaced while the other still is live. Not much weight is accorded this opinion, as it is not relevant to the situation herein, which involves a single fuse holder containing one fuse.

In essence, Hall asserted that a qualified person would generally be more aware of the hazards in replacing a fuse. However, in weighing the hazards of a possible electrical shock to a nonqualified person, it is significant to note, as explained by Church, that the hazard of an electrical shock attendant upon the act of changing a fuse, is the same as that involved in placing a trolley pole off or on the trolley wire, its power source. As indicated by John F. Burr, Respondent's manager of maintenance, this is a task performed regularly by trolley operators upon reversing direction. Hence, to have such a person replace a blown fuse would not expose him to any additional hazard.

Specifically, Hall indicated a qualified person would be more aware of the need to ensure that the pressure plates containing the fuse would exert the proper pressure on the fuse. However, both the Program Policy Manual, and the Coal Mine Inspection Manual: Underground Electrical Inspections, (Govt. Exhibits 6 and 7), list as electrical work "replacing blown fuses." (Emphasis added.) Accordingly, as conceded by Shriver upon cross examination, inserting an unblown fuse into an empty holder, or removing an unblown fuse, examining it, and replacing it, would not be considered electrical work. Hence, the distinction between the electrical work and nonelectrical work, with regard to replacement of fuses, cannot stem from the hazards dependent upon the physical acts in replacing a fuse, as these are the same whether the fuse is blown or unblown.

I thus conclude that the record fails to establish the existence of hazards, of more than a minor degree, attendant upon a nonqualified person being permitted to change a fuse. Accordingly, the record is insufficient to support a finding that a reasonably prudent person would have concluded that this work is "electrical work."

IV.

In evaluating whether a reasonably prudent person would consider the changing of a blown fuse on a trolley pole to be nonelectrical work, and allow a nonqualified person to change the fuse, an analysis must be made of the hazards attendant upon

requiring such an action to be taken only by a qualified person.4 If a fuse on a trolley is blown, electricity from the trolley wire would not be available to the trolley. Hence, the trolley phone which gets its power from the trolley wire, would be inoperable. Accordingly, communication from the trolley to the dispatcher would not be possible. Hence, if the trolley operator, a nonqualified person, could not change the blown fuse, he would be forced to abandon the vehicle and walk up to a mile to find a telephone to call for a qualified person to change the fuse. A trolley which has been so abandoned would be without power and accordingly, would not have any lights on.5 Hence, a

vehicle traveling behind the trolley, such as one carrying cars filled with coal, would run a risk of crashing into the nonoperative trolley and possibly derailing it, which could cause roof supports to be knocked out. Moreover, if the trolley was being used to transport an injured miner, medical treatment would be delayed, by requiring the nonqualified operator to wait for a qualified person to change the fuse.

Hence, I find that a reasonable prudent person familiar with the mining industry and protective purposes of the Act, would conclude that the hazards attendant upon requiring only a qualified person to change a blown fuse on a trolley pole outweighs the hazards involved in allowing such a person to perform this task.

For all the above reasons, it is concluded that having a nonqualified person replace a blown out fuse on a trolley pole does not violate Section 75.511, supra.6 Thus the Notice of Contest is SUSTAINED and IT IS ORDERED that Citation No. 3306262 be DISMISSED.

Avram Weisberger
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ
FOOTNOTES START HERE

1. See the legislative history and cases cited in Respondent's Brief at pages 15-16.

2. See, Miller v. Bond 641 F 2d 997, 1002 (D.C. Cir. 1981); See also, King Knob Coal Co., 3 FMSHRC 1417, 1420 n.3 1981).

3. See, for illustrative purposes, a comparison between Exhibits 0-7 and 0-8.

4. I am not unmindful of the diminution of safety cases relied upon by the Respondent at pages 10-12 of its' Brief. I find they are inapplicable, as in each case the operator sought to be relieved from complying with a mandatory standard on the ground that an action explicitly required by a standard would lead to a diminution of safety. In contrast, in the present case the issue is whether a standard, whose terms are not totally unambiguous, is to be applied to the specific situation presented herein. In resolving this issue, an inquiry must be made as to whether the terms of the standard encompass the alleged violative practice. Specifically, it must be resolved whether "electrical work" encompasses the act of replacing a blown fuse on a trolley pole. Certainly one of the factors that can be taken into account, in this contest proceeding, is an analysis of the hazards attendant upon the placement of this act within the purview of electrical work. In contrast, in Pennsylvania Allegheny Coal Company, Inc., 3 FMSHRC 1392 (1981), the sole basis for the Operator's position that it was not liable for violating a mandatory standard, was an assertion of diminution of safety. The Commission held that inasmuch as the Operator has not sought modification under Section 101(c) of the Federal Mine

Safety and Health Act of 1977 (the Act), that it was precluded from raising a defense of diminution of safety in an enforcement proceeding. In the instant case, Contestant has filed a petition for modification which has not yet been resolved. Accordingly, in considering whether the undefined, and thus not unambiguous terms of the standard at issue are to be applied to the acts in issue, it must be determined if such an application is reasonable. In making such a determination, one of the factors to be considered is the hazard attendant upon such an application. Further, this factor can clearly be considered as the Petition for Modification has not yet been resolved. (See, Sewell Coal Company, 5 FMSHRC 2026 n.3, (1983)).

5. Contestant's transportation vehicles are equipped with reflectors, that, if clean, can be seen for 700 to 800 feet along a straight track. However, in the mine in question, the track contains curves, and according to Charles E. Bane, Sr., Contestant's Regional Manager of Safety, the Morgantown mines have grades of up to 2 to 3 percent. Also the main line in the mine in question is not lit.

6. In light of this conclusion, it is not necessary to decide whether the time for abatement can be extended.