

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 24, 1991

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 91-18
Petitioner	:	A. C. No. 46-01453-03930
	:	
v.	:	Humphrey No. 7 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington Virginia,
for Petitioner:
Walter J. Scheller, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of four civil penalties filed by the Secretary of Labor against Consolidation Coal Company under section 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 820.

Prior to the hearing the Solicitor submitted a motion to approve settlements and other dispositions for three of the four citations. I have reviewed the motion and determine that it is in accord with the provisions of the Act. Accordingly, as requested in the motion Citation No. 3314152 is modified to delete the significant and 'substantial designation and a penalty in the amount of \$250 is assessed; Citation No. 3314153 is vacated for the reasons explained by the Solicitor; and a penalty of \$370 is assessed in the original amount for Citation No. 3314148.

There remains for consideration Citation No. 3314143. A hearing was held on March 27, 1991. Post hearing proceedings were delayed because of many errors made by the court reporter in preparation of the administrative transcript, necessitating retranscription. This has now been done and the parties have filed post hearing briefs.

Citation No. 3314143 charges a violation of 30 C.F.R. § 75.517 for the following alleged condition:

The power cable serving power to the
loading machine operating on the 12 East 0490

section is not being adequately insulated. The outer jacket of the cable had been damaged and taped. However, the tape was worn exposing the insulated power leads.

30 C.F.R. § 75.517 which is a restatement of section 305(1) of the Act, 30 U.S.C. § 865(1), provides as follows:

Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.

At the hearing the parties agreed to the following stipulations (Tr. 3-4):

(1) The operator is the owner and operator of the subject mine:

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

(3) the Administrative Law Judge has jurisdiction in this matter:

(4) the inspector was a duly authorized representative of the Secretary: a true and correct copy of the subject citation was properly served upon the operator;

(5) payment of any penalty will not affect the operator's ability to continue in business:

(6) the operator demonstrated good faith abatement;

(7) the operator has an average history of prior violations:

(8) the operator is large in size:

(9) the Humphrey No. 7 Mine had no fatalities in 1989, 1990, or to date.

The MSHA inspector testified that he noticed a damaged place 6 to 7 inches long in the middle of the cable to a loading machine (Tr. 8, 12, 13, 29). That area of the cable had been previously damaged and retaped (Tr. 13). He said that when he picked up the cable he noticed some slight color but not much from an inner power lead of the cable (Tr. 8). He first stated he "believed" the color was green and when called on rebuttal said he "**assumed**" it was green (Tr. 10, 110). Seeing the color meant to him that the outer insulation was inadequate (Tr. 9).

The inspector testified that after he saw the color he bent the **cable** five or six times (Tr. 14). Originally, he asserted that he used minimal pressure because not much pressure was necessary **on a taped** area, but on rebuttal he could not remember how far he bent the cable (Tr. 15-16, 111).

The operator's inspector escort testified in contradiction to the MSHA inspector. According to the escort, the inspector picked up the cable and bent it further than normal bending until the **cable was** almost in a figure eight (Tr. 52, 53). The inspector bent the cable until his hands met and the cable was in a loop (Tr. 54). The escort stated that the inspector bent it in that manner five or six times while twisting it (Tr. 53). Only after he bent the cable did the inspector tell the escort, who was standing next to him, that there were exposed wires (Tr. 55, 63). Both the operator's escort and the operator's foreman testified that the inspector bent the cable far more than it would have been bent under normal mining operations (Tr. 53, 62, 67, 96). The escort testified that the taping was adequate before the inspector bent the cable and it was his view that the inspector himself exposed the inner leads by his excessive bending and twisting (Tr. 59, 61).

After listening to and observing the witnesses and reviewing the transcript, I find the evidence of the operator's witnesses more credible and I accept their version of what transpired. As noted above, the operator's escort stated that the inspector did not say anything about an exposed power wire until after the bending. The inspector could not remember if he told the escort the lead was exposed before bending the cable (Tr. 110, 111). It is clear to me that if the inspector had seen an exposed wire when he first picked the **cable** up, he would have told the escort who was by his side (Tr. 52, 63). I accept the evidence that the conductor in question was yellow not green as the inspector said and I particularly note that the inspector's testimony on this point during rebuttal was tentative in manner and tone. The inspector admitted that he bent the cable while the machine was **energized and** admitted that this was dangerous as well as stupid (Tr. 20-21). I find it hard to believe that an experienced MSHA inspector would engage in life-threatening actions such as bending and twisting a live cable which had an exposed wire. Accordingly, the fact that the power was on casts further doubt upon the inspector's testimony that he saw an exposed wire before he bent the cable. Based upon the foregoing, I find that the inspector did not see an exposed power wire before he bent the cable.

I conclude, therefore, that when the inspector undertook to bend the cable the place was taped and that, as the escort testified, the tape was adequate. In this connection, I again note that the inspector first testified he used minimal force but on rebuttal said he did not remember how far he bent the cable.

The consistent testimony of the operator's escort and section foreman shows that the inspector bent the cable into a loop while twisting it thereby subjecting the cable to more stress than it would have undergone in normal mining operations. Also, the section foreman's testimony that bending the cable excessively causes the adhesive of a taped place to come loose is accepted (Tr. 90). Accordingly, I conclude that the inspector himself created the violative condition and that therefore the citation must be vacated.

The post-hearing briefs filed by the parties have been reviewed. To the extent that the briefs are inconsistent with this decision, they are rejected.

ORDERS

It is ORDERED that Citations Nos. 3314143 and 3314153 be VACATED.

It is further ORDERED that Citation No. 3314152 be MODIFIED to delete the significant and substantial designation.

It is further ORDERED that the proposed settlement of \$620 for Citation Nos. 3314152 and 3314148 be APPROVED.

It is further ORDERED that the operator pay \$620 within 30 days of the date of this decision.



Paul Merlin
Chief Administrative Law Judge

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