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SOL (MSHA) V. OK & WV COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
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Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 91-13
A. C. No. 34-01633-03520

v.

No. 1 Mine

OK & WV COAL COMPANY,
RESPONDENT

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor,
U. S. Department of Labor, Dallas, Texas, for the
Secretary of Labor (Secretary);
A. F. Robinson and R. V. Bell, Madison,
West Virginia, for OK & WV Coal Company (OK & WV).

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks civil penalties for two alleged violations of mandatory health and safety standards cited following an investigation of a fatal electrical accident at the subject mine on January 12, 1990. Pursuant to notice, the case was called for hearing in Tulsa, Oklahoma, on May 21, 1991. Ronnie Wilburn, Paul Cash, James Vince Smedley and Harold Shaffer testified on behalf of the Secretary. OK & WV did not call any witnesses. At the close of the hearing, both parties waived their right to file post hearing briefs, and each made a closing argument on the record. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. OK & WV was the operator of an underground coal mine in Okmulgee County, Oklahoma, from August 1989 to August 1990, known as the No. 1 Mine. The mine is currently operated by another company.

2. The mine produced 31,834 tons of coal in 1989 and 32,098 tons in the first quarter of 1990. The operator decided "it was impossible to make money there and we decided to sever our contract and try to dissolve our business in Oklahoma" (Tr. 103). I find that OK & WV was a small mine operator.

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3. From the time the mine opened and until January 12, 1990, OK & WV was cited for 36 violations, none of which involved 30 C.F.R.

75.509 or 75.511. In view of the fact that the mine operated for such a short period of time, I find that this history is not such that penalties otherwise appropriate should be increased because of it.

4. Dover Varney was employed at the subject mine in January 1990, as an electrician. He was an experienced and certified electrician, one of four employed at the mine. He had 13 years mining experience, and had worked 4 months at the subject mine. Mr. Ronnie Wilburn, the chief electrician and Mr. Varney's supervisor, believed that Varney was the ablest electrician at the mine including Wilburn.

5. The crew on the day shift at OK & WV on January 12, 1990, was having trouble with the continuous mining machine beginning about 12:30 p.m. When they attempted to operate the machine, the circuit breaker knocked out the power. The first shift electrician Paul Cash was working on it.

6. The chief electrician Wilburn and second shift electrician Dover Varney went underground at about 2:00 p.m., on January 12, prior to the beginning of the second shift. Cash and Varney deenergized the miner and took off the control panel. They disconnected the pump motor and planned to tram the miner from the area. However, when they energized the miner and replaced the panel, they were unable to start the miner.

7. Leaving the miner energized, they again removed the control panel. Varney looked in the compartment and saw that the circuit breaker was "kicked." He checked the No. 1 circuit with his voltmeter which showed no voltage. Wilburn, who stated that he "wasn't that familiar with the machine," told Varney that he thought there was still power on the machine (Tr. 40). Cash, who was crawling away toward his tool box, and whose cap lamp had dimmed, said "Dover, one breaker doesn't kill all the power in that box" (Tr. 50).

8. Varney replied, as he reached in the panel, "if it has power on it, it's the first one I've ever. . . ." At that moment he received the electric shock from the 450 volt circuit. This occurred about 5:00 p.m.

9. The trailing cable was deenergized. CPR was administered and Varney was taken to the surface and transported to the hospital by ambulance. He was pronounced dead on arrival at 5:22 p.m.

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10. Varney was not wearing gloves at the time of the fatal accident. The electricity apparently entered his body through his forearm just below the elbow. He was kneeling on the wet floor at the time.

11. Chief electrician Wilburn was standing about 5 feet from Varney when the accident occurred. He was facing Varney and talking to him as found in 7. and 8. above. Cash, as I found above, was crawling away from the machine.

12. The cover to the control panel on the miner contained a printed instruction that the trailing cable must be deenergized before working in the compartment. Wilburn, however, was not aware of this instruction prior to the fatal accident.

13. On January 15, 1990, Federal Coal Mine Inspector Harold Shaffer investigated the accident. He issued a 103(k) Order, a 104(d)(2) Order charging a violation of 30 C.F.R. 75.512, and a 104(a) Citation charging a violation of 30 C.F.R. 75.1720(c).

14. On January 16, 1990, Inspector Shaffer issued a modification of the 104(d)(2) Order to show the correct section of 30 C.F.R. as 75.511.

15. The order was terminated on January 16, 1990, after a training course on locking out and tagging procedures was presented to the mine's electricians by the mine manager and an MSHA-qualified instructor.

16. When the case was called for hearing, the Secretary moved to amend the Proposal for Penalties and the 104(d)(2) Order to charge a violation of 30 C.F.R. 75.509 rather than 30 C.F.R. 75.511. OK & WV did not object and the motion was granted

REGULATIONS

30 C.F.R. 75.511 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. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

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30 C.F.R. 75.509 provides:

All power circuits and electric equipment shall be deenergized before work is done or such circuits and equipment, except when necessary for trouble shooting or testing.

30 C.F.R. 75.1720 provides in part:

. . . each miner regularly employed in the active workings of an underground coal mine shall be required to wear the following protective clothing and devices:

* * *

(c) Protective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

ISSUES

1. Whether the evidence establishes that OK & WV failed to deenergize electric equipment before working on such equipment?

2. If so, was it necessary to have the equipment energized for trouble shooting or testing?

3. Whether the requirement that protective gloves be worn applies to the facts shown in this proceeding?

4. If the two violations charged occurred, what are the proper penalties therefor?

CONCLUSIONS OF LAW

1. OK & WV was subject to the provisions of the Mine Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. On January 12, 1990, OK & WV in the person of electrician Dover Varney performed work on electric equipment, namely the electric panel of a continuous mining machine without deenergizing the machine.

3. It was not necessary to have the machine energized while performing the work for trouble shooting or testing.

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4. Therefore, a violation of 30 C.F.R. 75.509 is established by the evidence in this proceeding.

5. The protective clothing standard requires gloves to be worn when performing work which might cause injury to the hands. The Secretary's Program Policy Manual July 1, 1988, interpreting Section 75.1720(c) requires that "miners wear gloves whenever they troubleshoot or test energized electric power circuits or electric equipment." (Gx 11).

6. Therefore the failure of Varney to wear gloves when testing the energized electric circuit of the continuous miner was a violation of 30 C.F.R. 75.1720(c).

7. The fatal electrical accident resulted from the violation of 30 C.F.R. 75.509 referred to in conclusion 4. Therefore, the violation was extremely serious.

8. OK & WV in the person of its chief electrician was aware of the violation and observed its occurrence. On the other hand, the chief electrician warned the victim of the danger. Further, the victim was a highly qualified and certified electrician who should have known not to reach in an energized circuit compartment. These factors mitigate OK & WV's negligence.

9. Considering the facts established on this record in the light of the criteria in Section 110(i) of the Act, I conclude that a civil penalty of \$2500 is appropriate for the violation of 75.509.

10. The evidence does not establish that the violation of 30 C.F.R. 75.1720(c) was related to the fatal accident. The electric current entered the victim's body on his forearm below the elbow which would not have been covered by a glove. He was kneeling on the wet floor. OK & WV made gloves available, but apparently did not require the miners to wear them. The violation was of moderate gravity and resulted from ordinary negligence.

11. Considering the facts established on this record in the light of the criteria in Section 110(i) of the Act, I conclude that a civil penalty of \$100 is appropriate for the violation of Section 75.1720(c).

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2929848 issued January 15, 1990, as amended is AFFIRMED.

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2. Citation No. 2929857 issued January 16, 1990, is AFFIRMED.

3. OK & WV shall within 30 days of the date of this order pay to the Secretary of Labor the following civil penalties:

CITATION/ORDER	30 C.F.R.	AMOUNT
2929848	75.509	\$2500
2929857	75.1720(c)	\$ 100
	TOTAL	\$2600

James A. Broderick
Administrative Law Judge