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MSHA V. POWDERHORN COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

November 27, 1992

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. WEST 92-93
Petitioner : A.C. No. 05-00301-03671
 :
v. : Roadside Mine
 :
POWDERHORN COAL COMPANY, :
Respondent :

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Glenwood Springs,
Colorado,
for Respondent.

Before: Judge Cetti

Statement of the Proceedings

This case is before me upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the Powderhorn Coal Company (Powderhorn), the operator of the Roadside Mine, with a 104(a), non S&S, violation of the mandatory regulatory standard found in 30 C.F.R. 77.207 and proposed a \$20 civil penalty assessment.

The operator filed a timely answer contesting the alleged violation and the case was docketed for hearing.

Pursuant to notice, an evidentiary hearing on the merits was held before me on the primary issue of whether or not there was a violation of the mandatory safety standard 30 C.F.R. 77.207. Both parties filed helpful post-hearing briefs raising many points and arguments that I have considered in deciding this matter.

Stipulations

The parties stipulated to the following:

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1. The Mine Safety & Health Review Commission has jurisdiction.
2. Respondent is an operator within the meaning of and subject to the Federal Mine Safety and Health Act of 1977.
3. Citation No. 3582104 was issued by Mine Safety and Health Inspector David L. Head on June 24, 1991, charging a section 104(a) violation of 30 C.F.R. 77.207.
4. Powderhorn's total coal production was 187,167 tons for the 12 month period preceding the issuance of the citation.
5. Any determination in connection with this citation will not adversely affect Powderhorn's ability to continue in business.

Findings and Discussion

Federal Coal Mine Inspector David L. Head, an experienced electrical inspector, was assigned by his supervisor to make a complete electrical inspection of both the surface and underground area of the Roadside Mine located a few miles East of Palisade, Colorado. Inspector Head during his electrical inspection was accompanied by Mr. Henry Barbe of the Roadside Mine Safety Department who later became and presently is the mine's Safety Supervisor.

On June 24, 1991, Inspector Head issued the 104(a) non S&S citation in question, Citation No. 3582104, which states:

No illumination was provided at electrical substation (C) and switch panels located on east side of the surface shops area.

No illumination was provided on the path or walkway to the substation area.

The cited mandatory safety standard 30 C.F.R. 77.207 reads as follows:

77.207 Illumination.

Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.

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The testimony of Inspector Head that there was no illumination on the path or walkway to the surface substation in question or at the substation or its switch panels, other than miner's cap lamp that may or should be worn by a miner going to the substation, was undisputed.

Inspector Head testified that during his triple A inspection of the mine, he observed the surface substation in darkness as well as during daylight hours and he elaborated as follows:

- Q. And could you describe the conditions that you observed both at 10:45 a.m. and also in the darkness.
- A. In the darkness hours you could not see the substation from the bottom of the walkway or the pathway without knowing the substation was there. There was no illumination provided at all in that area.
- Q. Now, are you telling us today that at the time you wrote the citation there was absolutely no illumination whatsoever at the substation?
- A. That's correct. Tr. 20.

With respect to the location of the surface substation and purpose of the substation, Inspector Head testified that the substation sits on a ledge above the other facilities with a "25 to 30 foot vertical drop-off." There was a high voltage transmission line "directly across the substation approximately 15 to 20 feet high." Inside the fenced area there is an "enclosed type transformer and three disconnects of the 225 amps square D type. Each one is a main disconnect for the warehouse, the bath house, the office facilities and the shop area."

Inspector Head on being asked to explain in more detail what he meant by a "vertical drop-off" in his description of the location of the substation testified as follows:

- Q. Now, in your description of the location of the substation you said there was a vertical drop-off; could you explain that in a little more detail.
- A. Yes, sir. The vertical pathway that used to be used down there had a wire strung down from the top that they used to pull their selves up on to check the substation. That was immediately terminated at the time. The pathway was then determined as the direct route to the substation from the back of the mine over the portal area, which started out as a roadway. It's still cliff area, a vertical drop-

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off, and drops down to a path. There is tripping hazards, a lot of rocks, sagebrush, different types of things, to the substation area.

Q. So how would one traverse this pathway?

A. He would start at the--across the canyonway on the opposite side of the conveyor belt and start his climbing to the elevation of the substation, which would be on the opposite side of the canyon. You make a horseshoe-type exit--or approach.

Q. Could you describe in terms of difficulty how it is to traverse this particular pathway.

A. Without proper illumination at night, it would be very hard to have visual sight to get to the substation in the first place. It would be a lot of tripping hazards involved. You would have to have some artificial lighting.

Q. Would the elevation--you said there was a vertical drop-off with the substation. Would the elevation pose any particular difficulty for a person trying to traverse this pathway in the dark.

A. Yes, it would. Tr. 18-19.

A miner would have to go to the substation not only for monthly examination but also in an emergency, such as troubleshooting the problem of a breaker tripping out in one of the facilities. Inspector Head testified that a cap lamp worn by a miner does not furnish sufficient illumination to provide safe working conditions into the electrical substation with the voltage that was present in the substation. A cap lamp does not provide "sufficient quality of light" in the substation area to meet the safety standard in question. Tr. 23, 57.

Powderhorn contends that since cap lamps are used underground for light, they should be satisfactory for surface illumination. With regard to this contention, Inspector Head was questioned and testified as follows:

Q. Okay. And also during your cross-examination you were asked a series of questions why you thought it was okay for an electrician using a head lamp to work on a power source or power panel underground, but in your opinion that would not be sufficient at this particular

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substation; do you recall that line of questioning?

A. Yes, sir.

Q. Would you explain in your opinion as to why there is a difference.

A. On the underground high voltage circuit, the circuit would be locked out at the source. It would be grounded out from phase to ground. There would be no incoming power available to go into the substation to do any kind of work or troubleshooting at that time.

Q. And I know I'm perhaps stating a very obvious question, but the weather conditions underground are considerably different than on the surface; is that not correct?

A. Yes, sir. Underground would be a constant atmosphere. On the surface would be changes in the weather. Tr. 56.

Inspector Head testified that the quality of light supplied by a miners' cap lamp was not sufficient in the area in question to provide a safe work environment. Tr. 57. He noted that weather conditions underground are considerably different than on the surface. Underground there is a constant atmosphere while the surface is subject to weather changes.

At the time of the hearing, the mine was working a night shift as well as a day shift and a maintenance shift. Mr. Barbe testified that there have been night shifts since October or November of 1991 but there was only a single day shift starting at 7 a.m. at the time the citation was issued on June 24, 1991. He stated the miners' would get to the mine to get ready for the day shift about 6 a.m. Inspector Head recalled "there's been power outages at the mine at different times "including a failure during a night shift underground some time before the citation involved here was issued. Tr. 49.

Respondent concedes that the substation was subject to monthly inspections and that "typically, those inspections are conducted during daylight hours when there is plenty illumination from the sun." I accept this statement as well as Respondent's statement that "only on rare occasions would there be any possibility of going up there to substation C at night." Tr. 7 line

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11-15. Clearly this is why the citation designated the violation as a non S&S violation, injury unlikely, negligence low, and only a \$20 penalty proposed.

Inspector Head is an experienced, well qualified mine inspector. I credit his testimony. Based upon his testimony and on his informed judgment, I find that there was a violation of the safety standard 30 C.F.R. 77.207 as alleged in Citation No. 3582104. See Secretary of Labor v. Clinchfield Coal Company, issued March 12, 1979, MSHC 2027, review denied by the Commission in April 1979, affirmed in Clinchfield Coal Company v. Secretary of Labor, 620 F.2d 292 (4th Cir. 1980), 1 MSHC 2337 (1980). In that case the Court of Appeals upheld a finding of insufficient illumination based on the "informed judgment [of the inspector] of what constituted sufficient illumination."

On consideration of the statutory criteria in section 110(i) of the Act, I concur with MSHA's proposed \$20 penalty assessment for this non S&S violation. This is a modest but appropriate penalty under all the facts and circumstances established at the hearing.

ORDER

The Respondent is ORDERED TO PAY a civil penalty assessment in the amount of \$20, in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., DELANEY & BALCOMB, P.C., P.O. Drawer 790, 818 Colorado Avenue, Glenwood Springs, CO 81602 (Certified Mail)

shRobert J. Murphy, Esq.
Office of the Solicitor
U.S. Department of Labor
1585 Federal Office Building
1961 Stout Street
Denver, CO 80294
Edward Mulhall, Jr., Esq.
DELANEY & BALCOMB, P.C.
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818 Colorado Avenue
Glenwood Springs, CO 81602