CCASE:
SOL (MSHA) V. HARMAN MINING
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 92-132 A.C. No. 44-06259-03565
v.	:	
	:	Greenbrier Mine No. 1
HARMAN MINING CORPORATION, Respondent	:	

DECISION

Appearances: Patrick L. DePace, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Thomas C. Means, Esq., Crowell and Moring, Washington, D.C., for Respondent

Before: Judge Melick

This case is before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging the Harman Mining Corporation (Harman), in its original form, with two violations in a citation and order issued pursuant to Section 104(d)(1) of the Act.1 The mandatory standard

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1 Section 104(d)(1) of the Act provides as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds such violation

originally charged in both the citation and order, 30 C.F.R. 75.520, requires that "all electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed."

The citation at issue (No. 3783586) charges as follows:

> The 240 volt pump cable supplying power to the water pump on the 5th Right Section did not have a plug-in installed on the end of the cable. The bare wires were stuck into the receptacle on the power center.

The order at issue (No. 3783587) charges as follows:

> The 240 volt pump cable supplying power to the water pump at the mouth of 5th right did not have a plug-in installed on the end of the cable. The bare wires were stuck into the receptacle on the belt transformer box.

On July 24, 1992, the Secretary moved to amend her petition in this case to charge, based on the same alleged facts, that a different standard, 30 C.F.R. 75.514, had been violated in the citation and order.2 The standard at 30 C.F.R. 75.514 provides as follows.

> All electric connections or splices in conductors shall be mechanically and electronically efficient, and suitable

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fn. 1 (continued)

> to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to subsection (c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

2 It appears that the issuing inspector had attempted to make the same modifications on June 16, 1992, prior to the filing with the Commission on July 24, 1992, of the instant petition for civil penalty. The Commission noted in Wyoming Fuel Company, 14 FMSHRC 1202 (1992), that such attempted modifications are actually proposed amendments to the initial citation similar to an amendment of pleadings under the Federal Rules of Civil Procedure.

> connectors shall be used. All electrical connections or splices in insulated wire shall be insulated at least to the same degree of protection as the remainder of the wire.

Harman opposes the Secretary's motion and, in a motion to dismiss, argues that it would suffer legal prejudice by the amendments.

Regarding the Secretary's authority to modify or amend charging documents such as citations, the Commission recently stated in Secretary v. Wyoming Fuel Company, 14 FMSHRC 1282 (1992), as follows:

> Section 104(a) citations are essentially 'complaints' by the Secretary alleging violations of mandatory standards. The Secretary's attempted modifications, alleging, based on the same facts, that a different standard had been violated, are essentially proposed "amendments" to the initial complaints, i.e., citations. The Commission has previously analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a) [Footnote omitted]. Cyprus Empire Corp., 12 FMSHRC 911, 916 (May 1990). In Cyprus Empire, where the operator conceded that it was not prejudiced thereby, the Commission affirmed the trial judge's modification of a terminated citation to allege violation of a different standard. ID.
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> In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. See 3 J. Moore, R. Freer, Moore's Federal Practice, Par. 15.08[2], 15-47 to 15 49 (2d ed 1991) ("Moore's"). And, as explained in Cyprus Empire, legally recognizable prejudice to the operator would bar otherwise permissible modification.

It is not argued in this case that the Secretary has been guilty of bad faith or that she has acted for the purpose of delay, nor is it alleged that the trial of the issue would be unduly delayed by the proposed amendments. Harman maintains, however, that it would suffer legal

prejudice if the proposed amendments (modifications) were permitted. Under the unique facts of this case I agree.

It is undisputed that when the citation and order were issued the mine was no longer in production and was already in the process of permanent abandonment. Subsequently, after the termination of the original citation and order, the cited pump, power center, and electrical connecting cables were disassembled and the pumps and power centers sent to an off-sight storage location in furtherance of the planned abandonment. On May 9, 1992, the mine fan was turned off, the mine openings were fenced off, and by May 16, 1992, the mine was physically sealed. Since then the mine has been inaccessible with the cited electrical connecting cables sealed inside.

It is further undisputed that on or about May 11, 1992, the Mine Safety and Health Administration (MSHA) was informed that the mine had been closed as of May 9, 1992, and permanently abandoned. The first modification of the citation and order was not attempted by MSHA until June 16, 1992, more than one month after the sealing and permanent abandonment of the mine.

Harman supports its claims of prejudice in this case in large part on the testimony of Harman's highly qualified expert witness, Larry Hambrick. Hambrick, a graduate electrical engineer, is a former assistant professor of electrical engineering technology and chief electrical engineer for the Island Creek Coal Company. He is presently a senior project engineer for the Westinghouse Electric Corporation.

Hambrick opined that the original charges in the citation and order under 30 C.F.R. 75.520 could readily be defended without the need for testing or investigation. According to Hambrick, cable termination plugs are not in fact switches or controls within the meaning of that section. Hambrick testified that if faced with charges under 30 C.F.R. 75.514, however, further investigation and testing would be necessary. In particular, he opined that it would be necessary to study the connection that was made and examine any exposed conductors to determine how far the conductors were stripped and how far the conductors were inserted into the connection -- questions relevant to the efficiency and suitability of the connection and exposure to a hazard and critical to the "significant and substantial" and gravity issues.

Hambrick further noted that to defend against charges under section 75.514, he would have performed infra-scanning tests to determine whether any "hot spots" or inefficient connections existed. He observed that it was possible that the wires inserted in the receptacle were indeed efficient and that it would have been possible to fasten the wires inside the receptacle to make good contact. Accordingly, he noted that it would also be essential to have examined the power center and the wire cable that was actually in use.

Hambrick further noted that to properly defend against charges under section 75.514, it would also be essential to examine the circuit breaker to determine, among other things, whether the equipment had a ground fault device and the size of the circuit breaker to determine what, if any, hazard might have existed under the circumstances. Hambrick indicated that he would also have tested and examined the cable, including the stranding, to determine its flexibility. He opined that it would have also been important to not only test the circuit breaker and ground fault capabilities of the power center but also determine access to the receptacle, i.e., was it in a location where people could come into contact with it.

Regarding the issue of mechanical efficiency, Hambrick opined that it would also have been important to know what, if any, strain relief was provided on the cable. Hambrick noted that whether a chained device or kellem grips were used would be relevant to this question. Finally, Hambrick opined that "plug-ins" are distribution devices and not control devices and that, indeed, there is such a separation in the field of electrical engineering between power controls and power distribution that they are separate disciplines of study into which electrical engineers may specialize.

Within this framework of evidence, I conclude that indeed Harman Mining Corporation would suffer legally cognizable prejudice if the Secretary was granted her motion to amend the petition for civil penalty in this case to change the charges in the citation and order from those under the standard at 30 C.F.R. 75.520 to charges under the standard at 30 C.F.R. 75.514. From the essentially undisputed evidence it is clear that Harman could reasonably have believed that charges under the standard at Section 75.520 could have readily been defended on the grounds that the plug-in device was not a control or switch within the meaning of that standard.

Harman would therefore not have found it necessary to perform any tests, or, for that matter, pay any particular attention to the specific facts surrounding the alleged violation. Upon the subsequent sealing and abandonment of the mine and the undisputed inability to reconstruct the cited equipment, power center, cables, and other conditions critical to issues that clearly would become relevant to new charges under Section 75.514, Harman would be at extreme disadvantage in attempting to defend itself. It would indeed suffer legal prejudice by the proposed amendment.

Under the circumstances, the Secretary's motion to amend is DENIED. In light of this determination the Secretary is directed to notify the undersigned and counsel for Harman Mining Corporation, in writing, within 15 days of the date of this Decision, whether she intends to proceed on the original charges under 30 C.F.R. 520 in Citation No. 3783586 and Order No. 3783587.

Gary Melick
Administrative Law Judge
703-756-6261

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