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CONSOLIDATION COAL V. SOL (MSHA)  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 93-29-R
v.	:	Citation No. 3121684; 10/7/92
	:	
SECRETARY OF LABOR,	:	Osage No. 3 Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 93-63
Petitioner	:	A.C. No. 46-01455-03960
	:	
v.	:	Osage No. 3 Mine
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent.  
Rebecca J. Zuleski, Esq., Furbee, Amos, Webb &  
Critchfield, Morgantown, West Virginia,  
for Petitioner.

Before: Judge Barbour

This proceeding involves a Notice of Contest filed on October 23, 1992, by Consolidation Coal Company ("Consol") pursuant to Section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act") and a Petition for the Assessment of a Civil Penalty filed on December 24, 1992, by the Secretary of Labor ("Secretary") pursuant to Section 110(a), 30 U.S.C. 820(a), of the Act. In the contest proceeding Consol seeks the vacation of Citation No. 3121684, issued on October 7, 1992, pursuant to Section 104(a) of the Act, 30 U.S.C. 814(a). The citation alleges a violation of 30 C.F.R. 75.520.(Footnote 1) Consol asserts that the citation was improperly issued because the condition for

1 Section 75.520 provides:

All electrical equipment shall be provided with switches or other controls that are safety designed, constructed and installed.

which it was cited did not violate Section 75.520. In the Civil Penalty proceeding the Secretary seeks the assessment of a civil penalty of \$50 for the alleged violation of Section 75.520. The specific issue to be resolved is whether a trolley switch with its handle and blade removed but with its fingers attached and being used as a dead block on the main haulage track constituted a safely designed, constructed and installed switch. A hearing on the merits was held in Morgantown, West Virginia, on November 13, 1992. (Footnote 2) Following the hearing, the parties filed helpful briefs, which I have fully considered in reaching this decision.

#### STIPULATIONS

At the commencement of the hearing the parties stipulated as follows:

1. Consol is the owner and operator of the Osage No. 3 Mine.
2. The Osage No. 3 Mine is subject to the jurisdiction of the Mine Act.
3. The Administrative Law Judge has jurisdiction to hear and decide the case.
4. Federal Mine Safety and Health Administration ("MSHA") Inspector Michael Kalich was acting in his official capacity when he issued Citation No. 3121684.
5. True copies of Citation No. 3121684 and subsequent Action No. 3121684-01 (the termination of the citation) were served on Consol and as required by the Act.
6. The condition cited was abated in a timely fashion.

#### THE EVIDENCE

##### THE SECRETARY'S CASE

The first witness called by the Secretary was Michael G. Kalich. Kalich, an electrical inspector with MSHA for almost six years, stated that approximately 40 per cent of his time has been spent conducting electrical inspections at Consol mines,

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2 The hearing was noticed solely for the contest proceeding, the civil penalty proceeding having not yet been filed by the Secretary. The parties agreed, however, that evidence would be taken at the hearing regarding the applicable civil penalty criteria and that the subsequently filed civil penalty proceeding would be consolidated for decision with the contest proceeding.

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including the Osage No. 3 Mine. (The mine is located in MSHA District 3, the district that has its headquarters in Morgantown, West Virginia.) Kalich testified that he is currently assigned full-time to inspect the Osage No. 3 Mine and has been so assigned for the past two years. However, even prior to being assigned to the mine, he occasionally had inspected there. Tr. 25-26. Thus, Kalich believed that he was thoroughly familiar with the mine.

Turning to the events of October 7, 1992, Kalich stated that he went to the mine to continue an ongoing electrical inspection. He arrived at the mine around 7:45 AM and went to the mine office where a discussion was underway involving Dale Denning, a regular (i.e., non-electrical) MSHA inspector, Spike Bane, safety director for Consol and Bill Kun, Consol's mine safety officer.

According to Kalich, the discussion centered upon the use as dead blocks of trolley switches when the fingers had not been removed from the switches. (Footnote 3) Kalich stated that the use of such section switches was an ongoing controversy at the mine and that Consol wanted to be cited for so using the switches in order to contest the citation and resolve through the administrative hearing process whether it had, in fact, violated the cited regulation. Because Denning was a regular inspector, not an electrical inspector, Denning was reluctant to issue the citation; therefore, Kalich agreed to do it. Tr. 27-28.

Kalich proceeded underground accompanied by Kun and the UMWA walkaround representative. The inspection party traveled the main haulageway to the No. 571 Block at the 14 North ITE Breaker where Kalich observed a trolley switch installed and used as a dead block. The switch had its handle and blade removed, and the handle and blade were not located near the switch, but the

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3 In the context of this case, the term "dead block" refers to an electrical device or control on a mine trolley system that separates portions of the trolley system wiring. Trolley wire enters the device from both of its ends. Each side of the wire is from a separate portion or block of trolley system wiring. The trolley wires do not meet, rather an air gap in the center of the device prohibits any direct current from crossing between the two ends of the trolley wires, in part to assure short circuit protection on each block of power. The air gap between the wires must be wide enough to prevent the current from crossing, and narrow enough so trolley cars will continue to run evenly when traveling along the track and changing from one portion of the electrical system to the other.

The type of trolley switch used as a dead block is depicted in Contestant's Exhibit 3. ("C. Exh."). As the exhibit makes clear, the wires enter both ends of the switch. The air gap between the ends of the wires is bridged by a switch handle and blade, which when opened (i.e., when used to connect the two wires), pivots between two metal flanges or protrusions at the end of the switch and slides into two basically similar metal flanges or protrusions at the other end. These flanges or protrusions are the section switch's "fingers".

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switch's fingers were still in place. Kalich believed that the presence of the switch in this condition was a violation of Section 75.520, and he accordingly issued the subject citation. Tr. 29.

The citation states:

At the 571 + 000 Block along the main haulage at the 14 North ITE Breaker the dead block in use was not properly maintained. A trolley switch with a handle removed was being used as a dead block. The switch fingers were still installed. The dead block is used to separate the 300 Volt DC power feeding from the Moorsville bore hole and the 1 Butt Rectifier. This condition enables the dead block to be easily jumped with the switch handle and poses an electrical arc or burn hazard and possibly renders the trolley short circuit protection useless. These conditions have been found cited at this mine in the past.

Secretary's Exhibit ("S. Exh.") 2.

Kalich testified that the citation was terminated the following day by Denning. To abate the citation, Consol removed the fingers from the switch. Tr. 30, G. Exh. 2 at 2. Kalich also testified that he modified the citation to reflect a finding that the cited condition constituted a significant and substantial contribution to a mine safety hazard. Tr. 30-31, G. Exh. 2 at 3-4.(Footnote 4) When asked to describe the unsafe nature of the condition cited, Kalich answered:

[T]he condition is unsafe because with the fingers still installed, it's very easy for anyone to jumper the dead block. The dead block would be jumpered with the switch handle or, . . . it could be jumpered with a fuse even.

Tr. 32.

Kalich was shown copies of pages from a catalog published by Dusquesne Mine Supply Company ("Dusquesne") and was asked to point out the type of switch that was used as a dead block.

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Interestingly, MSHA has proposed a civil penalty assessment of \$50, based upon its single penalty assessment provision, a provision inapplicable to S&S violations. 30 C.F.R. 100.4. See Proposed Assessment, Exhibit A, Docket No. WEVA 93-63.

Kalich identified Dusquesne as a manufacturer of trolley switches and stated that as best he could recall, Model No. 5,000-R was the type that he had cited. Tr. 34, C. Exh. 3 at 2.(Footnote 5) Using the catalog as a point of reference, Kalich turned to a schematic drawing of a switch and identified where the trolley wires were connected to the switch. He labeled these as positions "A". He also identified the handle and blade depicted in the drawing, which he labeled "B". Tr. 37, S. Exh. 3 at 4. He marked the fingers, "C". Tr. 37, S. Exh. 3 at 4. Finally, Kalich pointed out a diagram that he stated was specifically designed to be used as a dead block. Tr. 39, S. Exh. 3 at 3.(Footnote 6)

Kalich then described the purpose of a dead block. He stated that it separates and isolates two different sections of trolley wire. Separation and isolation allows trolley wire short circuit protection to be maintained on the isolated sections. Without a dead block the joined sections of wire are too long and short circuit protection may be rendered ineffective. Tr. 39-40.

While Kalich admitted that the use of a trolley switch with the handle and blade removed constituted an effective dead block in that it completely separated the different sections of trolley wire, he was of the opinion that the section switch so used was not safely designed, constructed and installed because the presence of the fingers "makes it real easy to jumpering the dead block." Tr. 40. He explained that the dead block could be jumpered by the reinstallation of the handle and blade into the fingers. He stated that he also had heard of jumping the dead block by laying a piece of trolley wire across the gap or by using jumper cables (i.e., nipped jumpers). Tr. 41. In Kalich's opinion, if power were lost on one of the sections of the trolley wire, rather than correct the condition that had caused the power loss, miners would be tempted to do the easy thing and jumper the dead block to restore power to the affected trolley wire section. While it would be more difficult to replace the handle and blade than to remove it, an untrained person could do it if he or she wanted to. Tr. 43.

Kalich also explained that after initially concluding the violation was not S&S, "I . . . went back to the office and thought about it for a while and . . . realized that we were

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5 Kalich also explained that there are other manufacturers of trolley switches, notably, Ohio Brass. However, he stated that their switch designs are basically similar. Tr. 35.

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6 This equipment is labeled "Dukane No. 5800 Section Insulator for trolley wire and feeded cables." It is similar to a section switch, except that it lacks the fingers, handle and blade of a section switch. See S. Exh. 3 at 3. Or as Kalich put it, "[the section insulator] doesn't have a place for a switch handle." Tr. 99.

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going to use this as a test case not just for . . . the Osage Mines [sic], but all the mines in the district . . . [a]nd . . . I reviewed accidents and . . . fatalities that have happened because of electric shock from the trolley wire or from mine fires. And . . . decided to make it S&S." Tr. 44-45.

He continued, that the dead block was on the main haulage where miners had access to all the operating sections of the mine and that "it would be pretty tempting for somebody to jumper the dead block if the rectifier or bore hole would . . . go down . . . and they would need the power in the area." Tr. 45.

He further explained that in the particular area of the dead block power feeds from two directions - - from the Mooresville Portal bottom to the dead block and from the One Butt rectifier to the dead block. If the power from the bore hole on the rectifier were shut down, "it would de-energize that section of trolley wire for approximately 2,000 feet and then you would still have power on one-half of the dead block. And if you inserted the knife blade . . . into [the fingers of the dead block] . . . then that would provide a path for . . . current to flow from the energized side to the de-energized side." Tr. 46. Kalich maintained that if this happened, frequently there would not be sufficient current available to cause the circuit breaker to de-energize the expanded circuit if there were a short. This in turn could lead to arcing and sparking and the catching fire of combustible materials in the vicinity of the electrical malfunction. Tr. 47. Such a fire could endanger all miners inby the ignition by subjecting them to possible burns and smoke inhalation. Tr. 50.

Kalich believed that 10 years ago a fire caused by inadequate circuit breaker protection due to jumping had occurred at Eastern Associated Coal Corporation's ("Eastern") Federal No. 2 Mine and that 5 years ago a similar fire had occurred at Consol's Arkwright Mine. Tr. 66-67.(Footnote 7) However, no such fire had ever occurred at Osage No. 3 Mine. Tr. 90.

In addition, Kalich believed that there was a shock and electrical burn hazard visited upon the miner jumpering a trolley switch dead block in that the insertion of the knife blade into the fingers could lead to arcing and sparking at the knife blade, or the miner inserting the blade could accidentally touch the energized portion of the trolley wire and be electrocuted. See Tr. 49- 50, 64, 65.

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7 Kalich stated that his knowledge of the Arkwright fire was based on what he had been told by another MSHA inspector. Tr. 92.



Regarding negligence, Kalich stated that mine management knew the fingers were on the dead block. Further, he stated that Consol had been cited at other of its mines in the MSHA district for using trolley switches as dead blocks. Tr. 55. He maintained that over the past two years and prior to issuing the subject citation, he had met with Consol management personnel "at least six times" to discuss the unacceptability of using as dead blocks section switches with fingers in place. Tr. 88. Thus, Consol management knew that the practice was unacceptable to MSHA.

Kalich stated that although Consol management advised him the reason the fingers were not removed from the section switches was to be able to jumper the dead blocks fast in case of an emergency need to evacuate an injured miner, he did not believe it. Kalich had never heard of an occasion wherein the two circumstances supposedly feared by Consol -- a miner being injured and a trolley line section being de-energized -- had occurred at the same time. Tr. 61. Rather, he believed the real reason Consol management wanted to keep the fingers on the dead blocks was to be able to continue production and the transportation of men and materials if a trolley wire section de-energized. Tr. 62. In fact, he stated, he had issued citations to Consol for violations of Section 75.520, where dead blocks had been jumpered for this very purpose. (Footnote 8)

With regard to the extent of the practice in MSHA District 3, Kalich testified that he had seen section switches with fingers used as dead blocks at Consol's Arkwright, Humphrey and Blacksville mines, as well as at Eastern's Federal No. 2 Mine. However, at mines owned by USX Corporation, section insulators had been purchased and installed, and section switches had not been used. Tr. 68.

According to Kalich, the policy in District 3 regarding the use as dead blocks of section switches evolved over the years. He stated that at first he did not recognize the hazards associated with the practice. However, as time passed he became more aware of the hazards. In 1990 he began informing mine

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8 Kalich also stated that he had issued citations to Consol for violations of 30 C.F.R. 75.1001 where section switches had been jumpered and short circuit protection had not been provided. Section 75.1001 states:

Trolley wires and trolley feeder wires shall be provided with over current protection.

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operators in District 3, including Consol, that he considered the use as dead blocks of switches with fingers to be violations of Section 75.520. Tr. 71(Footnote 9)

Kalich reached this conclusion solely on the basis of his own opinion. He stated and that there was and is no MSHA policy memorandum or written instruction of which he is aware regarding the use of section switches as dead blocks. Tr. 101, 104, 116-117.

Kalich believed that he and other inspectors in the district originally brought the problem to the attention of Michael Hall, Kalich's supervisor. Tr. 113. Gradually, it became a district-wide policy not to accept section switches with fingers attached as dead blocks.

With regard to abatement, Kalich stated that operators have an option. Either, they can remove the section switch and replace it with equipment designed to serve only as a dead block (i.e., a section insulator), or they can knock off the fingers with a hammer. Tr. 124.

Kalich acknowledged that prior to jumpering a section switch, short circuit protection could be provided if a miner went to the rectifier and reset the short circuit protection. Tr. 143-144.(Footnote 10) Kalich also stated that 30 C.F.R. 75.509 prohibits reinstalling a handle and blade while the trolley wire is energized. Tr. 168-169, 172.(Footnote 11) He further agreed that if there were compliance with this regulation the electrical hazard to the miner posed by the procedure of jumpering the section switch would be eliminated. However, Kalich believed that once power was restored, the hazard posed by not having proper short circuit protection would remain, assuming that there had been no compliance with Section 75.1001. Tr. 172. Even if there were

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9 The Secretary offered into evidence citations issued at Osage No. 3 Mine, Humphrey No. 7 Mine,, Blacksville No. 1 Mine, all of which were issued prior to the subject citation and all of which alleged violations of Section 75.520 for the use as dead block of section switches with fingers. G. Exh. 4, G. Exh. 5, G. Exh. 9, G. Exh. 10.

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10 Kalich testified that on some rectifiers, short circuit protection can be adjusted by turning a thumbwheel. Id.

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11 Section 75.509 states:

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

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full compliance with Sections 75.509 and 75.1101, Kalich believed that there would still be a violation of Section 75.520, "because the fingers would still be on the switch. If the fingers are removed from the switch then it's not a violation." Tr. 173.

#### CONSOL'S CASE

John Burr, the manager of electrical engineering in Consol's Maintenance Electrical Department, was Consol's first witness. Burr stated that he has 22 years of experience as an electrical engineer with Consol. Tr. 176. Burr testified that after the subject citation was issued he was called by Spike Bane and was asked whether he considered the use as a dead block of a section switch with the handle and blade removed and the fingers attached to be a violation of Section 75.520? Tr. 178. Burr stated that he did not and that when used as a dead block such a section switch was safely designed, installed and maintained. Tr. 201. Further, in his opinion, if the blade was reinserted and the procedure was done as prescribed by the regulations - - i.e., power was de-energized in both blocks (Section 75.509) and circuit breaker protection was properly set (Section 75.1001), there would be no hazard. Id. Also, as Burr noted, Section 75.511 requires that such work be done by a qualified electrician. Tr. 216.(Footnote 12)

Burr described the functional difference between a section insulator and a section switch (or as Burr termed it, a "line switch"). The section insulator is used when it is assumed that under no circumstances the operator will want to tie together the two blocks of power on both sides of the insulator. The section switch is used when the operator feels that there are times when the switch will have to be open and other times when it will have to be closed. Tr. 184-185.

According to Burr, Consol initially left the handles and blades attached to section switches that it had installed. However, MSHA District 3 personnel, subsequently, advised Consol that MSHA would not accept switches with the handles and blades attached because anyone could come along and throw the switches. At that point, Consol agreed to remove the handles and blades because the switches did not have to be opened on a regular basis. Tr. 187. At first, Consol stored the handles and blades

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12 30 C.F.R. 75.511 states in pertinent part:

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.

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in the area of the section switches because Consol fully intended to use the handles and blades when it opened the switches. After awhile, according to Burr, MSHA objected to this too, and pursuant to MSHA's objection, the handles and blades now are stored in the possession of qualified electricians and maintenance personnel and away from the switches. Tr. 188. Currently, MSHA is requiring the removal of section switch fingers as well.

Burr also stated his understanding of procedures usually undertaken at Consol if a section switch handle and blade has to be installed. The power is de-energized so that the procedure does not present a hazard to the miner doing the work and circuit breaker protection is provided, frequently, by adjusting a thumbwheel switch on the over current relay. Tr. 189, 191. (According to Burr, approximately 90 percent of the relays at the Osage No. 3 Mine have thumbwheel switches. Tr. 218.) In addition, Burr claimed that at every section switch used as a dead block Consol has hung a sign stating "Dead Block Do Not Put Blade In". Tr. 199-200, See C. Exh. 5.

Burr stated that the use of section switches as dead blocks is standard practice throughout Consol's mines. Tr. 209. Removing the fingers essentially destroys the dead block for use as a switch because the fingers, which are welded or wedged in place, must be "hacksawed" off. Tr. 210.

Bill Kun, the safety supervisor at Osage No. 3 Mine and a mine foreman, testified next. Kun described his version of how the contested citation came to be written. He stated that at approximately 7:30 AM, on October 7, 1992, Dale Denning, the regular MSHA inspect at Osage No. 3 Mine, arrived and told Kun he was going to "write every . . . dead block in the . . . mine that didn't have the fingers taken out." Tr. 247. According to Kun, Denning said that he had been told to do it. Kalich arrived about 10 minutes later and Denning said to Kun that he would let Kalich take care of it. Spike Bane then arrived and said that it was "Ok" to have a citation issued because Consol intended to contest the citation in order to "get it straightened out," that Consol contended there was "no violation at all." Tr. 250. Kun estimated that there are approximately 170 section switches at the mine of which 37 to 39 have the handles and blades removed in order to be used as dead blocks. Id.

Regarding the history of the controversy, Kun stated that prior to 1990, the only thing he was ever told by MSHA about the use of section switches as dead blocks was to not leave the blades at the location of the dead blocks. Spencer Shriver was MSHA's electrical inspect then, and he is the person who told Kun. Tr. 253. Later, Shriver also told Kun that the fingers should be removed from the section switches. Tr. 258.

Kun estimated that section switches cost between \$360 to \$400 apiece and section insulators each cost between \$260 to \$270. Tr. 255. Kun further stated that when blades are removed they are kept with the maintenance department and with a certified electrician "because they're the ones that have been instructed to put them in if need be." Tr. 260.

Consol's next witness was Gary Mair, general manager of Dusquesne Mine Supply Company. Mair testified that with respect to products that it produces for the mining industry, the company is primarily involved in the manufacture of trolley system items. Tr. 266. Mair also stated that he was advised of the existence of the subject citation by Spike Bane. Tr. 269.

Mair said that he believes that section switches made by Dusquesne are safely designed. Tr. 270. He testified that the basic product design was set 12 years ago and has never experienced a failure. He further stated that each section switch is properly constructed, and he described the process by which each is made. Tr. 271-272. He also stated that at Osage No. 3 Mine, the switches are properly installed. Tr. 172. Because of the way the switches are manufactured, Mair said that there are only two ways to remove the fingers -- saw them off or try to knock them off with a hammer. Tr. 277. He acknowledged that section switches could be replaced with section insulators (Tr. 284), and he confirmed that section switches cost approximately \$100 more apiece than section insulators. Tr. 280.

Mair stated that section switches and section insulators differ (aside from the handles and blades on the section switches) only in that the section switches have fingers and the section insulators do not. Their main frames are essentially the same. Tr. 281.

As its last witness, Consol called Michael Hall to testify. Hall is the chief electrical engineer for MSHA District 3. Hall also is the supervisor of the District 3 electrical section and has been since 1978. Tr. 287. As such, he supervises the 7 or 8 electrical inspectors in District 3, including Kalich.

Hall explained that in the 70's and 80's, District 3 had accepted section switches with handles and blades removed as dead blocks. Tr. 293. Then MSHA began getting reports from inspectors that they were finding section switch handles and blades hanging right beside the section switches, an indication that the blades were being inserted to jumper the dead blocks. Tr. 297. Hall explained the problem confronting MSHA as follows:

"[T]hese switches that . . . had the switch handle - -  
- switch blade removed, we were finding people were  
bypassing these switches

with various devices, either with a switch blade or with a fuse or some other method which caused the person who was doing that to be exposed to unsafe voltages."

Tr. 299. Hall also believed that the practice caused short circuit problems which in turn could cause burn injuries to miners or a mine fire. Tr. 311. Hall admitted that MSHA personnel had done no testing or experimentation to assess any shock, burn and fire hazards associated with the practice. Tr. 302.

Hall stated that MSHA's concern was its fear that the section switch used as a dead block would be used in an unsafe manner. Tr. 326. Hall agreed that with respect to the use as dead blocks of section switches with fingers, a violation of Section 75.520 is premised upon the assumption that miners will not at all times act in compliance with Sections 75.1001, 75.509 and 75.511. Tr. 327. The fingers on the section switches are an incentive to miners to violate those regulations because they make it too easy to jumper the dead block. Tr. 328.

#### THE VIOLATION

Because I conclude that the cited section switch was safely designed, constructed and installed and that, in any event, MSHA, in regulating a future work practice through the application of Section 75.520, stretched the standard beyond reasonable and permissible bounds, I hold that a violation of Section 75.520 did not exist.

In specifying that "[a]ll electric equipment shall be provided with switches or other controls that are safely designed constructed and installed," Section 75.520 repeats Section 305(o) of the Mine Act. 30 U.S.C. 865(o). The legislative history of the interim mandatory standard states:

This section requires that electric equipment be provided with switches or other safe control[s] so that the equipment can be safely started, stopped, and operated without danger of shock, fire, or faulty operation.

S. Rep. No. 411, 91st Cong., 1st Sess. 68, reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 194 (1975). No argument has been presented that the cited section switch was not a "switch or other control of electric equipment." Indeed, when used as a dead block, the section switch segregated and

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controlled the current available to the power block sections of the trolley wire that it separated. Therefore, I find that the cited equipment had to conform to the requirements of Section 75.520.

That being the case, the question is whether the equipment was "safely designed, constructed and installed." There is no doubt, I think, that in and of itself, the cited section switch was safely designed and constructed. "Design" is defined as "the drawing up of specifications as to structures, forms, positions, materials, texture, accessories . . . in the form of a layout for setting up, building or fabrication." Webster's Third New International Dictionary (Unbridged) at 611-612 (1986). "Construct" is defined as "to form, make, create by combining parts." Id. 489. Thus, design and construction of the referenced switches and controls refers to their structural integrity, to the manner in which they have been conceived on paper, modeled and to the manner in which they have been fabricated. In this regard, the question is whether there is anything inherently unsafe about the cited component resulting from its configuration and structure? Clearly -- or so it seems to me -- the answer is "no".

There was general agreement that there is no standard definition of "dead block", but that the purpose of such equipment is to separate blocks of power on a trolley line. To effectuate the separation there must be an effective air gap between conductors that enter the dead block mechanism from both sides. Mair testified that the basic design of a section switch and a section insulator is the same -- except for the blade, its handle and the fingers -- and that the design in question, which has been unaltered for the past twelve years, has never experienced a failure. His testimony was not rebutted. There was simply no evidence offered that the configuration and structure of the cited equipment was, in and of itself, hazardous. I conclude, therefore, that the cited section switch was safely designed and constructed.

The next question is whether the section switch was safely installed? In *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991), the Commission noted that the word "install" means "to set up for use or service." Webster's at 1171. The use or service of equipment involves putting the equipment to a given purpose once it is in position to function and thus involves the relationship of miners to the equipment in the ongoing mining process. In the context of Section 75.520, this means that a switch or control, once in place, must not pose a hazard to miners during normal ongoing mining operations.

Of course, the entire thrust of the Secretary's case is that the cited section switch posed such a hazard. Kalich repeatedly explained that the use as a dead block of a section switch with

its fingers attached made it too easy for the dead block to be jumpered with resulting hazards possible both to the miner performing that operation and to other miners as well. In Kalich's opinion, the miner jumpering the switch could be subjected to a shock hazard from working in close proximity to the energized trolley wire. Tr. 44-45, 64-65. Further, other miners could be subjected to the fire hazards presented when adequate short circuit protection was not provided in conjunction with the jumpering of the dead block. Tr. 43, 47, 50. Hall echoed Kalich's concerns. Tr. 311.

While I do not doubt that these hazards can and do exist, they are anticipatory. As both Kalich and Hall freely admitted, they rest upon the assumption that miners will purposefully act in derogation of regulations which, if complied with, eliminate the hazards altogether -- i.e., that they will not de-energize the circuits and equipment as required by Section 75.509, that they will not provide adequate short circuit protection once the section switch has been jumpered as required by Section 75.1001, and that jumpering will not be done by a qualified person or under the direct supervision of a qualified person as required by Section 75.511. See Tr. 49, 168-169, 172, 327.

Further, there are safe ways to jumper a section switch, even if the fingers are attached to the switch, See e.g., Tr. 49. As the testimony of Kalich and Hall made clear, it is not the use of the section switch as a dead block and its jumpering that is unsafe, it is the manner in which the jumpering is done. Thus, -- and this gets to the heart of the matter -- it is not the design, construction or installation of the cited equipment that is the focus of the contested citation and the reason for its issuance but a work practice that may in the future be associated with the equipment -- a practice that would be eliminated by compliance with existing regulations.

There are serious flaws with this approach to compliance. One is that MSHA must cite existing violations of regulations, not those that it anticipates may occur at some unspecified time in the future. (Footnote 13) Another is that prohibition of a hazardous work practice is best regulated through specifically addressing the practice -- as, for example, in the standard regarding

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13 The citation of existing violation is, of course, exactly what MSHA does when it finds that in jumpering a section switch, an operator fails to de-energize the circuit, fails to have the work performed by a certified person, or fails to provide short circuit protection. See e.g., Secretary of Labor v. Ronald Weaver, 14 FMSHRC 1647, (September 1992) (citation issued for failure to comply with Section 75.1001).



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repairs or maintenance on mobile and stationary machinery (30 C.F.R. 75.1725(c)) -- rather than by trying to prohibit the practice through stretching beyond reasonable limits the interpretation of an existing regulation.

This is particularly true when, as here, the regulation MSHA seeks to expand is broad to begin with. The Commission has noted that Section 75.520 is the type of broadly worded standard that is not unenforceably vague, provided a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition requirement of the standard. *Mettiki*, 13 FMSHRC at 768-769. It has further stated that the standard cannot be "so ...uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* at 768 (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982)).

As the testimony establishes, the history of MSHA's enforcement actions with regard to the use as dead blocks of section switches with their fingers attached is one premised upon changing interpretations of what the standard requires. First, the section switches were accepted provided their handles and blades were removed. Tr. 118-119, 293. Next, they were accepted, provided the handles and blades were removed and were kept elsewhere. Tr. 127, 187-188, 253. Finally, they were accepted provided the handles and blades were kept elsewhere and the fingers were removed. Tr. 258, 301. It seems to me that this changing interpretation of what is required by the standard establishes that, at least as applied to the facts of this case, persons of common intelligence must necessarily guess at its meaning and reasonable could differ as to its application.

I am sympathetic to the concerns of Kalich and Hall regarding the dangers they believe to be inherent in the practice of jumpering dead blocks when such work is not done by a certified person or under the supervision of a certified person and when there has not been compliance with Sections 75.509 and 75.1001. I do not doubt for an instant that in establishing a "fingerless section switches" policy for MSHA District 3 they were motivated by a commendable concern for the safety of those miners who come within their jurisdiction and of whose well-being they are required ever to be mindful. Lacking a specific regulation concerning the practice and, perhaps, lacking guidance from MSHA as well, they acted to protect miners from themselves. While their motives were laudatory, their means were not; for in so doing I believe that they acted beyond the proper scope of Section 75.520.

In view of the foregoing, I conclude and find that Citation No. 3121684 does not set forth a violation of Section 75.520 and accordingly must be vacated.

ORDER

It IS ORDERED that Section 104(a) Citation No. 3121684, dated October 12, 1992, and citing an alleged violation of 30 C.F.R. 75.520, is VACATED. Consol's contest of the citation is GRANTED.

It is further ORDERED that MSHA's proposed civil penalty assessment for the alleged violation of Section 75.520 is DENIED and its petition is DISMISSED.

David F. Barbour  
Administrative Law Judge

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