

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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 92-935
Petitioner : A. C. No. 46-01318-04064
v. :
 : Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the Secretary of Labor;
Daniel Rogers, Esq., Consolidation Coal Company,
Pittsburgh, Pennsylvania, for Consolidation Coal
Company.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a petition for assessment
of civil penalty filed by the Secretary (Petitioner), alleging a
violation by the Operator (Respondent) of 30 C.F.R. 75.517.

An
answer was duly filed, and pursuant to notice, the case was
scheduled for hearing on December 2, 1992, in Washington,
Pennsylvania, and heard on that date. Richard Gene Jones, and
Michael G. Kalich, testified for Petitioner, and Richard Lee
Moats, testified for Respondent. The parties filed post-hearing
briefs on January 22, 1993.

Findings of Fact and Discussion

I. Violation of 30 C.F.R. 75.517

On March 12, 1992, Richard Gene Jones, an MSHA Inspector,
inspected the 5-North Conveyor System of Respondent's Robinson's
Run No. 95 Mine. He observed a 12/4 power 120 volt cable that
was not in place hung on the wall, but instead was lying on the
ground in rib sloughage. When he picked it up, he noticed that
the outer jacket rubber insulation was torn for approximately
five inches. He also indicated that beneath the area where the
rubber insulation was torn, some of the insulation surrounding

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the copper wires had been "peeled" or "scraped" and he could see the wiring inside (Tr.30). Jones issued Citation No. 3107821 alleging a violation of 30 C.F.R. 75.517 in that the 12/4 power

cable "is not insulated adequately and fully protected. Near the off-track side switch there is a location in the cable with an extensively damaged 5-inch place that exposes the electrical damaged conductors... ." (sic) Section 75.517, supra, provides, as pertinent, that power cables "shall be insulated adequately and fully protected." (Footnote 1)

According to Jones, the purpose of the rubber outer jacket is to provide protection to the cable wires from moisture, and dust. It also protects the cable from being hit by foreign objects. According to Jones, the outer jacket also provides electrical insulation.

The outer jacket of the cable in question was completely removed for a distance of approximately 8 inches in length. The width of the exposed area extended approximately 180 degrees around the circumference of the cable. Further, the insulation surrounding the individual interior copper wires was damaged, and was no longer providing physical protection against moisture and dust. Nor was it providing electrical insulation, i.e. protection from phase-to-phase, and phase-to-ground contact. Respondent's witness, Richard Lee Moats, did not rebut or impeach the testimony of Jones in these regards. Nor did Respondent offer any other evidence impeaching or contradicting Jones' testimony in these regards. Accordingly, based on Jones' testimony, I find that inasmuch as the cable in issue was not insulated adequately and fully protected, Respondent herein did violate Section 75.517, supra.

II. Significant and Substantial

Initially, it was Respondent's position at the hearing that, in essence, a violation of Section 75.517, supra, does not occur in the absence of the proof that the violative condition was caused by the Operator's negligence. I do not find this argument persuasive, as it is well established that the mandatory safety regulations impose strict liability on the operator. (See, Western Fuels-Utah, 10 FMSHRC 256 (1988); Asarco, Inc., 8 FMSHRC 1632 (1986)). As such, if the facts establish that a certain condition is violative of a mandatory standard, an operator is liable even in the absence of any negligence on its part. A discussion of the Operator's negligence is set forth subsequently in this decision (Section III, infra) as it relates to the issue of the operator's penalty.

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According to Jones the violation herein is significant and substantial. A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

With regard to the first element of Mathies, supra, I have already found that the evidence establishes a violation of Section 75.517, a mandatory safety standard.

According to Jones, should the power cable be energized, a person coming into contact with the unprotected non-insulated section of the exposed power cable could suffer burns, electric shock, or heart fibrillation. He also indicated that should phase-to-phase, or phase-to-ground contact occur as a consequence of the lack of the rubber insulation around the copper wires, arcing could result, which could cause a fire, especially in the presence of methane. In the main, this testimony of Jones has not been contradicted, and, in essence, finds support in the testimony of Michael G. Kalich, an MSHA electric inspector, who also testified for the Petitioner. I thus find that the second element of Mathies, supra, has been met. Accordingly, the critical issue to be determined is whether the third element of Mathies, supra, has been met, i.e., whether there was a reasonable likelihood of either a person coming in contact with the energized exposed portion of the cable, or of phase-to-phase, or phase-to-ground contact in the cable when energized.

The cable was attached to a coal feeder at one end. The other end of the cable was attached to an on/off switch which allows a miner to operate the coal feeder from a remote position.

When cited by Jones, the cable was not energized, as the section was idle, and was not producing coal. The circuit breakers which energized the cable were both in the off position. Hence, there was no hazard at that time.

However, it is critical, when making a determination as to whether a condition is significant and substantial, to evaluate that condition in terms of the continuation of normal mining operations. (See U.S. Steel, 6 FMSHRC 1573, 1574). In this connection, Kalich explained that, when production would resume, the circuit breakers at the power center and feeder would be re-set, thus causing electric power, 120 volts, to flow to the damaged area of the cable in question. Richard Lee Moats, a mine escort who testified for Respondent, stated that the foreman of a section normally instructs his crew, at the beginning of the shift before work commences, to check all cables and, as such, the crew would have located the damaged area prior to reintroducing electric power. Moats is neither a member of a work crew working in the area, a foreman, or supervisor of a foreman. Accordingly, I do not place much weight on his testimony as to specifically what occurs in the area in question in normal mining operations.

According to Moats, on the date the citation was issued, after the power was turned off, he examined the damaged area. He indicated he saw that two of the copper wires had been severed. On the other hand, Jones testified that it was extremely hard to

see the wires as they were too extensively damaged to check. He said that it was difficult to tell if the wires were touching. However, he indicated that he did not examine the wires to see if they were touching. I observed Moats' demeanor, and I find his testimony credible that, upon looking inside of the cable, he did see that two wires were not touching, and I accept his testimony in this regard.

According to Moats, since two of the wires were severed, the femco monitoring system would prevent the circuit breakers at the power center from being reset, and power would not flow to the wires in question. In contrast, according to Kalich, if two of the wires in the cable are severed, current will still flow to these wires. Further, in rebuttal, Kalich stated that the femco system at the power center serves as protection only from the power center to the feeder, and does not monitor the 12/4 cable in issue, whose only protection is a 10 amp fuse. He indicated that the feeder contains a transformer which reduces 480 volts of current entering the feeder to 120 volts, which is transferred out to the cable in question. Kalich explained that, accordingly, if two of the wires in the cable are severed, only 120 volts would go beyond the transformer in the feeder to the high side of the transformer. Kalich explained that accordingly, there would not be enough current to trip the breaker, which is set for 480 volts. Moats, who was recalled in rebuttal, did not contradict the specific testimony of Kalich in these regards. Accordingly, and based on Kalich's extensive work experience as an electrical inspector, I accept his testimony in these regards.

According to Jones, when he originally passed the cable in question and observed that it was not in its place on the rib, but instead was on the ground in sloughage, he bent to pick it up to put it back on the rib. In this regard, he indicated that men in the working crew automatically pick up cables that are laying on the floor. Respondent did not contradict or impeach the testimony of Jones in this regard. I therefore accept it.

According to Kalich, arcing would result even if two of the wires were severed, as they could come in contact when the cable is picked up. Also, Kalich indicated that even if the wires barely touched, arcing could result, which could lead to a fire. He also noted that normally it could take up to a minute for a fuse to blow, and that, in the one minute interval, arcing upon phase-to-phase or phase-to-ground contact can occur.

I find the testimony of Moats that two of the four wires were severed, to be insufficient to diminish the likelihood of contact between the wires, given the fact that the interior wires were bare for approximately three inches, as testified to by Jones and not contradicted by Moats. Further, according to the uncontradicted testimony of Kalich and Jones, since the damaged cable was in coal sloughage, and the coal seam is considered to

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be very volatile, arcing from the cable can result in ignition. This testimony was not contradicted by Respondent or impeached.

Jones also noted the presence of methane on the date of the citation. Although the amount of methane found at the face was within the permissible range, and the area in question was approximately 450 feet from the face, it should be noted that the mine is considered to be a liberator of methane, as it liberates a million cubic feet in a 24 hour period.

According to Moats, on the date the citation was issued, an emergency stop located at the feeder was locked out. Accordingly, it would have to be unlocked and then reset to allow power to flow. Moats indicated that, based upon his review of a schematic diagram, Government Exhibit No. 3, he concluded that with the emergency stop switch activated, power is cut off to the cable in question. Moats, in his testimony, however, did not specifically refer to the flow of power in this schematic diagram to support his opinion. In contrast, Kalich, indicated the specific circuit that is affected by the emergency stop.(Footnote 2) He also indicated that the flow of power to the remote switch, via the cable in question, is a separate circuit.(Footnote 3) Hence, according to Kalich with the emergency stop switch activated power still flows to the cable in question. Moats did not rebut this testimony. Hence, due to the detailed nature of this testimony and the expertise of Kalich, I accept it.

Within the framework of all of the above, I conclude that there was a reasonable likelihood of either a person coming in contact with the exposed portion of the cable when energized, or of arcing from the cable when energized causing a fire. Jones and Kalich essentially testified that a person coming in contact with the bare exposed wire in the cable would reasonably likely suffer from burns, electrical shock, or fibrillation. Their testimony also indicated that in the event of fire caused by arcing, smoke inhalation, carbon monoxide poisoning, or other injury would have been reasonably likely to have occurred. Respondent has not rebutted this testimony and, accordingly, I have accepted it. Therefore, for all the above reasons, I conclude that it has been established that the violation herein was significant and substantial (See U.S. Steel, supra).

III. PENALTY

I find, based on the testimony of Petitioner's witnesses, that once power would be restored, and normal operations' would resume, should one contact the bare exposed wire, or should

2The green and yellow lines on Government Exhibit No. 3.

3See the red lines below "A" on Government Exhibit No. 3.

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arcings occur, serious injuries could result. Thus, the violation was of a high degree of gravity.

According to Kalich, the rib near where the cable at issue was located appeared as if a bumper of a car, or something sharp, had hit it or rubbed against it. He also noted the presence of sloughage such as loose, fine coal, which also supported this conclusion. He said that when he made his inspection at approximately 9:25 a.m., the shift was idle, and the coal that had been knocked from the rib appeared fresh. He thus opined that the incident knocking the cable off its place on the wall and removing the insulation, occurred during the midnight shift. He further opined that during an inspection of the belt which was required to be performed between 5:00 a.m. to 8:00 a.m., the person making the inspection would have passed this area and should have observed the cable in question. He also indicated that when he cited the cable, a supervisor was working 100 feet outby and, although he would not have seen the cable, he would have passed this area during the shift. On the other hand, Jones could not establish with any certainty the exact time when the incident occurred. Considering all of the above and, taking into account the further factors set forth in Section 110(i) of the Act, I find that a penalty of \$250 is appropriate.

ORDER

It is ordered that within 30 days of this decision, Respondent pay a civil penalty of \$250 for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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