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SOL (MSHA) V. US. STEEL MINING  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-783
Petitioner	:	A.C. No. 46-01816-03805
	:	
v.	:	Gary No. 50 Mine
	:	
UNITED STATES STEEL MINING	:	
COMPANY, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Javier I. Romanach, Esq., Arlington, Virginia, for  
Petitioner;  
Billy M. Tennant, Esq., Pittsburgh, Pennsylvania,  
for Respondent.

Before: Judge Fauver

This is a civil penalty case under the Federal Mine Safety  
and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a  
whole, I find that a preponderance of the substantial, reliable  
and probative evidence establishes the Findings of Fact and  
further findings in the Discussion below:

FINDINGS OF FACT

Safeguard No. 3238838

1. MSHA Inspector James Bowman conducted a regular  
inspection at Respondent's Gary No. 50 Mine on May 23, 1989.  
The mine produces coal for sale or use in or substantially  
affecting interstate commerce.

2. The inspector observed two vehicles whose trolley poles  
frequently came off the trolley wire as they traveled along the  
track, thereby de-energizing the equipment.

3. He found that the problem was caused, at different  
locations, by kinks, bends and twists in the wire and by an  
excessive distance between the track and the trolley wire.

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4. He found that the loss of power created a number of transportation hazards, including loss of illumination, communication and brakes, and the fact that as the pole swung loose it could propel or loosen rock, strike persons, and create arcs and sparks.

5. Based upon his evaluation of the hazards, Inspector Bowman issued Safeguard No. 3238838, which requires that trolley wire "be installed within a gauge where anti-swing devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason."

6. The conditions found by Inspector Bowman were abated by repairing the wire trolley and by moving the track closer to the wire.

Citation No. 3579261

7. MSHA Inspector Earl Cook conducted a regular inspection at Gary No. 50 Mine on February 4, 1992.

8. As he traveled along the 5K track entry in a jeep, the trolley pole came off the trolley wire at numerous locations, thereby de-energizing the equipment.

9. He found that this condition violated Safeguard No. 3238838 and therefore issued Citation No. 3579261.

#### DISCUSSION WITH FURTHER FINDINGS

Safeguard No. 3238838

Under the Act and regulations, MSHA inspectors have the authority to issue safeguards based upon hazards involving transportation of men and materials in underground coal mines. A safeguard regarding a specific transportation hazard may be issued at one mine even if that hazard is commonly encountered at other mines. Southern Ohio Coal Co., 14 FMSHRC 1, 5-8 (1992).

In Southern Ohio Coal Co., 7 FMSHRC 509 (1985), the Commission distinguished safeguards from safety standards adopted through rulemaking procedures. The latter are liberally construed, but safeguards issued by an inspector are to be narrowly construed. Thus, recognizing safeguards as an "unusually broad grant of regulatory power," the Commission stated:

... [A] safeguard notice must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard. We further hold that in interpreting a safeguard a narrow construction of the terms of the safeguard and its intended reach is required. [Id. at 512.]

In BethEnergy Mines, Inc., 14 FMSHRC 17 (1992), the Commission reaffirmed its holding in Southern Ohio Coal Co., stating:

... [A] safeguard must be interpreted narrowly in order to balance the Secretary's unique authority to require a safeguard and the operator's right to fair notice of the conduct required of it by the safeguard .... The focus of judicial inquiry is on whether the safeguard is based on specific conditions at a mine and, as to those specific conditions, whether it affords the operator fair notice of what is required or prohibited by the safeguard. [Id. at 25.]

See also Rochester and Pittsburgh Coal Co., 14 FMSHRC 37, 41 (1992).

On May 23, 1989, MSHA Inspector James Bowman inspected 6-B and 6-C track entries at the subject mine. He testified that:

When I went to those two sections, there was two vehicles on the track. I was following one and I think it was numbers 33 and 97, and the poles would come off in almost exactly the same -- would come off in exactly the same spots numerous different times on those two tracks. It was probably more than 30 times because I was, you know -- there were so many that I just quit counting. So, what I started looking for was the causes for the pole to come off the wire to de-energize the piece of equipment. And the causes of that was the gauge of the wire in relation to the rail and kinks, bends and twists in the wire. [Tr. 12.]

Pursuant to 30 C.F.R. 75.1403, Inspector Bowman issued Notice to Provide Safeguard No. 3238838, which stated:

The trolley wire was inadequately installed in 6-B and 6-C sections in that the wire gauge was much wider than the track. Kinks, bends and twists were present in the trolley wire, causing the trolley pole to de-energize on numerous occasions. The wire gauge is so wide that anti-pole swing devices can not be used at several locations along the 6-B and 6-C track entries by Jeep No. 97 and personnel carrier No. 33.

This is Notice to Provide Safeguard. All trolley wire shall be installed within a gauge where anti-swing devices can be used on all equipment and installed without excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason.

The safeguard thus noted two conditions that caused a transportation hazard of the pole coming off the wire. First, at various places the wire was not installed close enough to the track so that the trolley pole with an anti-swing device would stay on the trolley wire. Inspector Bowman testified that "what

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I saw was the wire so far outside the gauge that it was impossible for the wire to -- for the pole to stay on the wire because the anti-swinging device would not allow it to swing far enough to reach the distance that they had the wire from the rail." Tr. 17-18.

Second, the safeguard stated that "kinks, bends and twists were present in the trolley wire, causing the trolley pole to de-energize .... "

The safeguard required that trolley wire be installed within a gauge where anti-swing devices can be used on all equipment and installed without "excessive kinks, bends, and twists that de-energize track equipment while traveling along the track within reason."

The Secretary contends that "excessive" refers to any kink, bend or twist in the wire that causes the pole to fall from the trolley wire. The company contends that the word "excessive" means an excessive number of kinks, bends or twists that cause the pole to fall from the wire and that, in any event, if there is ambiguity the safeguard is not enforceable because it fails to give fair notice of the prohibited conduct.

I find that the term "excessive" as used in the safeguard reasonably refers to the degree of distortion in the wire caused by any kink, bend, or twist and that if any of these causes the trolley pole to fall from the wire it is "excessive" within the meaning of the safeguard.

The phrase "while traveling along the track within reason" reasonably means "at a reasonable rate of speed given the track conditions and equipment in the area," as stated by Inspector Bowman. Tr. 51.

Inspector Bowman testified that the two prohibited conditions (excessive distance of wire from track and any excessive kink, bend, or twist) created a transportation hazard of the trolley pole becoming disconnected from the trolley wire. This hazard created further hazards. The swinging pole could hit a person, it could propel or loosen rocks, it could cause sparks and arcs, and, by disconnecting the power, it would cause a loss of communication, lights, and brakes. In addition, when the distance from the track to the trolley wire was too wide to use the anti-swinging device, employees or supervisors might be tempted to block out or tie off the anti-swinging device in order to keep the pole connected to the wire. This would create a hazard of operating without this important safety protection.

I find that the safeguard was "based on an evaluation of the specific conditions at the mine and the determination that such conditions created a transportation hazard in need of correction" and that it "provided the operator with sufficient notice of the nature of the hazard at which it [was] directed and the conduct required of the operator to remedy such hazard." Southern Ohio

Citation No. 3579261

On February 4, 1992, Inspector Cook issued Citation No. 3579261, charging a violation of Safeguard No. 3238838 and 30 C.F.R. 75.1403, citing five locations where the gauge from the track to the trolley wire was too wide to keep the trolley pole (with an anti-swing device) from falling from the trolley wire and ten locations where kinks in the trolley wire caused the pole to fall from the wire.

The cited conditions were abated by sliding the track to within a gauge that would allow the pole to stay on the wire while using an anti-swing device and by removing the kinks in the trolley wire.

I find that the conditions cited by Inspector Cook were proved by the evidence and constituted a violation of Safeguard No. 3238838 and 30 C.F.R. 75.1403.

The company contends that if a violation existed, it was not "significant and substantial."

The Commission has held that a violation is "significant and substantial" if there is a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328, (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825, (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4, (1984). This evaluation is made in terms of "continued normal mining operations" without abatement of the violation (U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984)), and must be based on the particular facts surrounding the violation. (Texasgulf, Inc., 10 FMSHRC 498, (1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 1007, (1987)).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See judges' decisions in Consolidation Coal Company, 14 FMSHRC 748-752 (1991) and Mountain Coal Co., 14 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the 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" ( 104(d) (1) of the Act; emphasis added). Also, the statute defines an "imminent danger" as "any condition or practice ... which could reasonably be expected to cause death or serious

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physical harm before [it] can be abated," (Footnote 1) and expressly places S&S violations below an imminent danger. (Footnote 2) It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease was more probable than not.

As stated above, the violation of Safeguard No. 3238838 presented a number of safety hazards: a disconnected trolley pole would stop the power immediately causing a loss of lights, communication, and brakes; (Footnote 3) the disconnected pole could strike someone, it could propel or loosen rocks and it could cause sparks. Also, a wide gauge between the track and trolley wire could tempt employees or supervisors to block out the anti-swing device in order to keep the pole from falling from the wire. This would create another hazard of the pole striking them. Taken as a whole, I find that the hazards caused by the risk of a disconnected trolley pole presented a reasonable likelihood of an accident involving serious injury.

Considering the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$690 is appropriate for this violation.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Safeguard No. 3238838 was validly issued.
3. Respondent violated Safeguard No. 3238838 and 30 C.F.R. 75.1403 as alleged in Citation No. 3579261

#### ORDER

Respondent shall pay a civil penalty of \$690 within 30 days of the date of this decision.

William Fauver  
Administrative Law Judge

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1 Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

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2 Section 104(d) (1) limits S&S violations to conditions that "do not cause imminent danger...."

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3 With the power off, all vehicle lights would go off, and the vehicle phone would not transmit, although the driver could hear incoming messages. Electric brakes would be inoperative. Backup brakes would be available if they were working properly.

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