

CCASE:  
MONTEREY 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

MONTEREY COAL COMPANY, : CONTEST PROCEEDING  
 Contestant :  
 v. : Docket No. LAKE 92-216-R  
 : Citation No. 3842177; 1/24/92  
 :  
 SECRETARY OF LABOR, : No. 1 Mine  
 MINE SAFETY AND HEALTH :  
 ADMINISTRATION (MSHA), : Mine ID 11-00726  
 Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
 MINE SAFETY AND HEALTH :  
 ADMINISTRATION (MSHA), : Docket No. LAKE 92-252  
 Petitioner : A.C. No. 11-00726-03701  
 v. :  
 : No. 1 Mine

MONTEREY COAL COMPANY, :  
 Respondent :

DECISION

Appearances: Miguel J. Carmona, Esq., U.S. Department of Labor,  
Office of the Solicitor, Chicago, Illinois, for  
the Secretary of Labor;  
Thomas C. Means, Esq., Crowell & Moring,  
Washington, D.C., for Monterey Coal Company.

Before: Judge Weisberger

Statement of the Case

At issue in these consolidated cases is the validity of a citation issued on January 24, 1992, by MSHA inspector Jimmy Ray Lee alleging a violation of 30 C.F.R. 75.606 as follows: "The trailing cable supplying power to the number 1332 ratio feeder was not protected to prevent damage from mobile equipment. The cable had tire tracks on it for a distance of eight feet and was pushed into the mine floor 2 inches." Section 75.606 supra provides as follows: "Trailing cables shall be adequately protected to prevent damage by mobile equipment."

Pursuant to notice, the cases were scheduled for hearing, and were heard in St. Louis, Missouri, on December 15, and 16, 1992. At the hearing, Jimmy Ray Lee, Jerry Collier, and Lonnie Conner, testified for Petitioner. Raymond Houlihan, Floyd W.

Johnson, Paul Mihalek, Robert Whitmore, Allan Silkwood, and Richard Mottershaw, testified for Respondent. Subsequent to the hearing, Respondent filed a post-hearing brief on January 27, 1993. On January 29, 1993, the Secretary filed a post-trial brief. On February 5, 1993, Respondent filed a reply brief.

#### I. Findings of Fact

1. The floor of the entry in question is 18 feet wide. A roadway in the entry is 10 feet wide with loose material on either side. The widest vehicle that travels the roadway in this area is nine feet wide.
2. On January 24, 1992, a cable, which was attached to a feeder and was not energized, was lying not in the floor of the entry but was approximately three feet from the rib in loose material that had accumulated from sloughage off the rib. The cable was close to the demarcation between this material and the roadway, but it was not in the roadway. The cable was not in the normal path of the vehicles that travel the entry in question. (Footnote 1)
3. An eight foot long section of the cable had rubber tire track marks on it indicating that it was run over, for approximately an eight foot distance, by either a rubber-tired battery or diesel mobile vehicle. MSHA inspector Jimmy Ray Lee issued a citation alleging a violation of Section 75.606 supra.
4. The cable had been pushed approximately two inches into the material by the vehicle that had run over it.
5. There is no evidence in the record as to why and exactly when the cable was run over.
6. The composition of the material into which the cable had been pushed when it was run over was clay mixed with rock dust. There were also pieces of crushed stone in the material. There is no specific measurement of the depth of the loose material, or the fire clay which was underneath it. However, underneath the clay was limestone, a hard material.

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1According to Allan Silkwood, the safety superintendent of the subject mine, employees are instructed to drive toward the right side inby, in order to avoid the cables and other equipment that are placed along the left side inby. Thus, there appears to be corroboration for the opinion of Floyd W. Johnson, the construction coordinator at the mine, that a vehicle travelling the normal path would not have hit the cable in issue and run over it. However, it appears not to be controverted that, in fact, a vehicle did run over the cable in question for a distance of eight feet.

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7. Lee examined the cable visually and by touch. No damage to the outer insulation was noted. Nor was any abnormality detected upon this examination which would indicate the existence of internal damage. Also, a megger test was performed which indicated a reading of infinity. This reading exceeded the requirements for a determination that the inner insulation around the three power conductor and two ground wires was not broken. After these examinations, Lee moved the cable to within a few inches of the rib, and abated the citation.

8. Jerry Collier, a supervisory electrical engineer employed by MSHA, opined that had the cable not been moved in abatement, it could have been run over again, and its insulation could have been punctured by a sharp object laying on the floor. He also indicated that in the process of being run over, the cable could be crushed, which could cause a conductor to act as a knife, and cut another conductor or ground cable, causing an electrical short and possible arcing. He indicated that if the cable were to be repeatedly being run over and crushed, the inner conductors would be bared.

Floyd W. Johnson, Respondent's construction coordinator, testified, in essence, that he never encountered a megger test indicating a fault with insulation as a consequence of a cable being run over by a vehicle with rubber tires. He opined that, accordingly, even if vehicles would continue to run over the cable, it would not be further damaged, as it was "smashed into the ground. No longer was anything coming in contact with it" (Tr. 172). In contrast, Collier indicated that there can be internal damage to the conductors even if there is no such indication in the megger test. In this connection, Robert Whitmore, a staff electrical engineer for Respondent, agreed that it is possible that internal damage would not show up in a megger test. Thus, I accept Collier's opinion and find that it is possible that there was internal damage to the conductors. Since there is no evidence why and exactly when the cable was run over, I cannot find that had the cable not been repositioned in abatement, it would not have been run over again given continued mining operations.

## II. Discussion

### A. Violation of Section 75.606 supra

As correctly argued by Respondent, Section 75.606, supra imposes a standard regarding the adequacy of protection against damage. It is essentially Respondent's position that because the cable was not in fact damaged, as established by visual inspection, inspection by touch, and megger testing, it must be concluded that the standard was not violated, as the cable was adequately protected. Respondent also refers to the protective aspects of the construction of the cable, the placement of the

cable outside the roadway on loose gob where it was cushioned, the lack of evidence that it was run over more than once, and the agreement of the witnesses that it was run over by a vehicle with rubber tires. Respondent also argues that had Congress intended to require the placement of the cable to afford protection against damage it would have done so, as it so specified in other sections of the Act.(Footnote 2) I do not accept Respondent's arguments for the reason that follow.

In analyzing the scope to be accorded the wording of Section 75.606, supra(Footnote 3), reference is made to the Legislative History of Section 207(f) of the Federal Coal Mine, Health and Safety Act of 1969 ("The 1969 Act") (Public Law 91-173). The Senate Report indicates as follows regarding its analysis of Section 306(f) of the Senate Bill (S.2917), whose language was continued in Section 206(f) supra of the 1969 Act as follows: "Trailing cables must also be protected against damage from other mobile equipment. As the wheels or tread links of mining machines pass over trailing cables, the insulation is torn from the cables causing shock hazards and short circuits which can easily result in a mine fire. In 1968 two mine fires were caused by not protecting cables from damage by mobile equipment." (S. Rept. 91-411, 91st Congress, 1st Sess., September 1969, at 71, (Reprinted, in Legislative History of Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), ("Legislative History"), at 197. Hence, in enacting section 306(f) supra, Congress was concerned with the recognized hazard of insulation being torn from cables as a result of being run over by wheels of mining machines. Clearly, exposure to this hazard can result from the cable's location, as well as from inadequate insulation. In other words, the cable can be protected from damage by its construction, as well as by its location. Conversely, improper placement of the cable, as well as inadequate insulation, can expose the cable to the hazard of insulation being torn from it as a result of being run over. Congressional concern would be thwarted if the protection mandated by Section 306(f) supra of the 1969 Act would be interpreted narrowly not to include the location of a cable.

The evidence in the record tends to establish that the cable, when cited, was not damaged. However, an analysis must be made not only of the condition of the cable at the time Respondent was cited, but also the continuation of mining

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2Respondent cites, in this regard, 30 U.S.C. 868(h), and 30 U.S.C. 870.

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3The wording of Section 306 (f) supra, was incorporated by reference in the Federal Coal Mine Health and Safety and Health Act of 1977, ("the 1977 Act") set forth as a regulatory safety standard in Section 75.606 supra.

operations must be taken into account. In this connection, I take into account the following factors: the presence of pieces of crushed stone in the material where the cable was lying, the presence of a hard limestone floor underneath the loose material and clay, the location of the cable in the material close to the demarcation between the loose material and the roadway, the relative narrow tolerance between the 9-foot wide vehicles that travel the roadway and the 10-foot wide roadway, the fact that the cable was indeed run over at least once (Footnote 4), the lack of an explanation to indicate that the incident in question in which a vehicle ran over the cable was a one-time-only event, and the possibility that there may have been internal damage to the conductors in the cable in spite of the megger test. Within this framework I conclude that had the cable not been moved, there was a possibility of additional incidents of it being run over, leading possibly to damage to the insulation of the cable, or to the interior conductors. Hence, I conclude it has been established that the cable was not adequately protected to prevent damage by mobile equipment. I find that Respondent did violate Section 75.606 supra as alleged.

B. Significant and Substantial

The law is well established with regard to the requisites in establishing that a violation is significant and substantial as alleged herein by Lee.

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).

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<sup>4</sup>See, U.S. Steel Mining Co., 6 FMSHRC 155 (January 1984) (Judge Melick) (violation of Section 15.606 supra upheld where a cable was found under a tire); See also, National King Coal 13 FMSHRC 33,38 (January 1991) (Judge Cetti) (violation of 75.306 supra established where a cable was damaged by mobile equipment. As dictum, it was noted that MSHA does not have to prove that a cable was damaged in order to sustain a finding of a violation of Section 75.606). For the reasons set forth above, I choose not to follow U.S. Steel Mining Co., 6 FMSHRC 1664 (Sept 1984) (Judge Koutras) (citation alleging a violation of Section 75.606 supra, was ordered vacated, where the cable that had been run over was not damaged).

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).

I have already found a violation herein of a safety standard. Also, I found that the violation herein contributed to the hazard of damage to the insulation of the cable and inner wires. Should this occur, an electrical shock could result to a person handling the cable. Arcing or an electrical short could also result, triggering a fire. Hence, I find that the first two elements of Mathies, supra, have been met. Thus, the issue for resolution is whether there was a reasonable likelihood of the occurrence of an injury producing event i.e. electric shock to a miner, or a short or arcing causing a fire or an explosion.

At the time the condition was cited, the cable was not energized. However, Lee testified that immediately prior to the issuance of the citation he observed two miners walking from the coal feeder (Footnote 5) to which the cable was attached, toward the power

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<sup>5</sup>The feeder is used solely in connection with coal production. When cited, the area in question was devoted to construction and not coal production.

center. These employees told him that they were going to energize the cable.(Footnote 6)

In essence, according to Lee, once power would have been restored to the cable, injuries would likely have resulted. In this connection, he said that miners handle the cable when the feeder is moved to another location, and hence could come in contact with a damaged cable, leading to electrical shock, burns, or even a fatality. Collier cited statistics indicating 21 electrocutions between 1970 and 1987 as a result of mishandling cables, 132 non-fatal injuries between 1983 and 1987 due to damaged cables resulting in a loss of 1,675 workdays, 40 accidents involving persons handling cables and contacting bare cables, and seven fatalities resulting when persons handled cables and touched bare conductors.

Collier opined that there was a reasonable likelihood that the cable in question was damaged. He indicated that there can be internal damage to the cable that does not show up in a megger test. In this connection, he testified that even a little damage can set up a hazardous condition. He cited a fatal accident that occurred in 1981 where only a pinhole in a cable (as a result of carbon tracking) led to a loss of insulation on the interior bare wires which resulted in a fatality. He also opined that should the violative condition have continued, there was a reasonable likelihood that a serious accident would have resulted. He indicated, in essence, that when mobile equipment runs over a cable, it has "a crushing effect" (Tr. 79). He also indicated that contact with a sharp object on the floor when the cable is run over, could lead to a puncture which could result in a real hazard. He also indicated that when the cable is run over, the conductors eventually will be damaged even is there if no immediate failure.

It is undisputed that in order for an injury, fire, or explosion to occur, there first must be some damage to the cable. Although the cable was run over, an examination by visually inspecting it and touching it, did not reveal any damage to the cable's outer jacket. While the cable might have been subject to additional incidents of being run over, it would appear that the likelihood of damage was mitigated by the fact that the one-and-three-quarter inch diameter cable had been pushed approximately two inches into the material upon which it was resting. This

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<sup>6</sup>Raymond Houlihan, the construction foreman, was asked whether men were assigned to work on the feeder the day the citation was issued, and he indicated that he could not recall. I find this testimony is not sufficient to rebut Lee's specific testimony that men told him that they were going to energize the cable.

material was described as soft, and on top of a layer of fire clay that also was described as soft. Further, mobile equipment in the area that could possibly run over the cable all had rubber tires. In addition, the cable was not in the roadway itself where vehicles travel, but on soft material adjacent thereto. Although Collier testified regarding the numbers of injuries occasioned by contact with exposed cables, these figures do not indicate how many incidents occurred as a result of a cable having been run over. Nor do these statistics indicate whether the exposed cables had been previously visually inspected or subject to a megger test. In this connection, according to Johnson, over a 13 year period he had inspected "a lot" of cables that had been run over by rubber-tired equipment, and never saw or found a damaged cable. He also said "I have never megged one that's showed bad" (Tr. 165) [sic]. Richard Mottershaw, Respondent's Safety Regulatory Compliance Specialist, testified in the same fashion. (Footnote 7) Respondent's statistics indicate that from 1970 through 1992 there have not been any incidents of reportable electrical shock accidents from trailing cables. Also, the cable at issue is described by its manufacture as having rope-lay-stranded conductors which "...insure excellent flexibility and resistance to wire breakage", and, "An extra-heavy-duty jacket is reinforced with webbing to provide maximum protection from mechanical damage, the cause of most portable cable failures." (Exhibit C-1)

It is possible that internal damage could have existed and yet not have been revealed in the megger test. However, Robert Whitmore, Respondent's staff electrical engineer, testified that in the absence of damage to the outer jacket of the cable, any internal damage not revealed by the megger test, would not result in any danger to miners, especially if the conductors are tested one phase at a time. He indicated that this was the manner in which the cable in question was tested. His testimony in this regard has not been rebutted or impeached by Petitioner.

Therefore, for all the above reasons, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event as a consequence of the violation herein. Hence it is concluded that the violation was not significant and substantial.

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<sup>7</sup>Robert Whitmore, employed by Respondent in a staff electrical engineering position, testified that the No. 1 Mine's electrical supervisor told him that in the eleven months subsequent to the issuance of the citation in issue, the cable has remained in service, and there have not been any accidents, injuries, or maintenance trouble with this cable.

C. Penalty

1. Negligence

Lee indicated that he had issued 3 or 4 citations covering the same violation. However, there is no specific evidence as to how long the cable in issue had been lying near the edge of the demarcation between the loose material and the roadway before it was cited on January 24. Whitmore indicated that the cable was not in that position when he left the area the previous day. According to Houlihan, the cable had been in the area for about two months and had not been run over before the accident at issue occurred. According to Mottershaw, the cable had been used for several months without injury.

It is Respondent's policy, as set forth in the testimony of Houlihan, that a cable must be inspected visually by walking around it before it is energized. Also, once it has been ascertained that a cable has been run over, it is Respondent's policy to visually check it, and perform a megger test before it is energized. Based on all the above, I conclude that Respondent was negligent herein only to a slight degree.

2. Gravity

Should the violative condition have resulted in a breach of the cable's insulation, it could have led to either an electrical shock, electrocution, fire, or explosion. However, as discussed above, infra, the possibilities of this occurring are somewhat remote. Considering these factors, as well as the remaining statutory criteria, set forth in Section 110(i) of the Act, as stipulated to by the parties at the hearing, I find that a penalty of \$125 is appropriate for this violation.

ORDER

It is ORDERED that the citation herein be amended to reflect the fact that it is not significant and substantial. It is further ORDERED that the Respondent pay a civil penalty of \$125 within 30 days of this decision.

Avram Weisberger  
Administrative Law Judge

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