

CCASE:
SOL (MSHA) V. GARDEN CREEK POCAHONTAS
DDATE:
19931007
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 92-101
Petitioner	:	A.C. No. 44-04517-03675
v.	:	
	:	Docket No. VA 92-126
GARDEN CREEK POCAHONTAS	:	A.C. No. 44-04517-03680
COMPANY,	:	
Respondent	:	Mine: Virginia Pocahontas
	:	No. 6

DECISION

Appearances: James V. Blair, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Charlie Jessee, Esq., Jessee & Read, Abingdon,
Virginia, for Respondent.

Before: Judge Barbour

These civil penalty proceedings were initiated by the Secretary of Labor ("Secretary") against Garden Creek Pocahontas Company ("Garden Creek") pursuant to sections 105(a) and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. 801 et seq. In Docket No. VA 92-101 the Secretary alleges Garden Creek in two instances violated certain mandatory safety standards for underground coal mines found in Part 75, Title 30, of the Code of Federal Regulations ("C.F.R."), and in Docket No. Va 92-126 the Secretary alleges one additional violation. The Secretary further alleges that one of the violations in Docket No. Va 92-101 constituted a significant and substantial contribution to a mine safety hazard (a "S&S" violation). All of the alleged violations were cited at Garden Creek's Virginia Pocahontas No. 6 Mine ("V-P 6"), an underground coal mine located in Buchanan County, Virginia.

Garden Creek denied the existence of the violations and the Secretary's S&S allegation. Pursuant to notice, the matters were heard in Abingdon, Virginia. At the close of the hearing, counsels chose to forego briefing the issues, solely relying upon oral summations.

SETTLEMENT

Before the hearing counsel for the Secretary submitted a motion to approve the partial settlement of Docket No. VA 92-101. In essence, the motion stated the parties agreed that Garden

Creek would pay the penalty proposed for Citation No. 3762880.

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Counsel reiterated the agreement on the record and I stated I would make approval of the settlement part of my decision.
Tr. 3.

Citation No.	Date	30 C.F.R.	Assessment	Settlement
3762880	12/12/91	75.316	\$620	\$620

The citation states the approved ventilation system and methane and dust control plan for the mine was not complied with in that methane in concentrations of 5.1 percent to 6.4 percent was detected at the top end of a bleeder entry. The approved plan required bleeder entries connected to areas from which pillars had been extracted to be maintained in such a manner as to control air flow through the gob and to induce the drainage of gas from all portions of the gob. This was not being done, as shown by the detected methane.

The citation also contains the inspector's finding that the violation of section 75.316 was S&S and due to Garden Creek's moderate negligence. Finally, the citation was issued in conjunction with an imminent danger order of withdrawal that closed the entire mine until the methane was reduced and the danger of explosion and fire was eliminated.

The parties have agreed the violation occurred. Clearly, it was S&S and very serious. I accept counsel's representation that it was due to moderate negligence on Garden Creek's part and that Garden Creek exhibited good faith in abating the violation. A computer printout of previously assessed violations establishes the mine has a large history of prior violations. Exh. P-1. There is no indication payment of the proposed penalty will affect Garden Creek's ability to continue in business.

Having considered the above factors, I conclude the settlement is reasonable and in the public interest. It is therefore APPROVED.

CONTESTED VIOLATIONS

STIPULATIONS

The parties stipulated as follows:

1. [VP-6] is a coal mine and is owned and operated by Garden Creek.
2. The products of VP-6 enter commerce and VP-6 is therefore subject to the Mine Act.
3. The ALJ has jurisdiction to hear and decide these cases.

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4. The inspector who issued the citations is a duly authorized representative of the Secretary.
5. True and correct copies of the citations were properly served upon Garden Creek.
6. The imposition of any civil monetary penalty authorized by section 110 of the Mine Act will not affect the ability of Garden Creek to continue in business.
7. The violations were abated in good faith.
8. The communications (telephone) cable referred to in the two violations is not controlled by 75.516. The hanging of the communications cable as described in the two violations does not constitute a violation.

See Tr. 5-7.

DOCKET NO.VA 92-101

Citation No.	Date	30 C.F.R.
3800262	12/17/91	75.516

DOCKET NO. VA 92-126

Citation No.	Date	30 C.F.R.
3763241	03/03/92	75.516

The citations allege violations of 30 C.F.R. 75.516, the mandatory safety standard that specifies the type of support required for power wires in underground coal mines. Section 75.516, which repeats section 305(k) of the Act, 30 U.S.C. 865(k) states:

All power wires (except trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires) shall be supported on well-insulated insulators and shall not contact combustible material, roof, or ribs.

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Citation No. 3800262 states:

Beginning approximately 100 feet inby survey station 6656 of the No. 2 belt conveyor entry on 2 Dev. 0-East section and extending on inby for a distance of approximately 300 feet the 110 volt belt control cable, the communication line and the CO monitor cable are not supported on well-insulated insulators. The cables are tied together with nylon rope the entire 300 feet.

Exh. P-2.

Citation No. 3763214 states:

Beginning at crosscut number 35 of the No. 1 belt conveyor entry for the 0-East 4 Dev. section and extending on inby for a distance of approximately 1000 ft. the CO monitor cable, the telephone cable and the 110 volt control cable are hung together with nylon rope. The cables are also contacting the metal frame of the mono-rail at two different locations. Two-tenths [.2] of methane was detected in the affected area.

Exh. P-3. The alleged violations were abated when the cables were hung on insulated insulators. Exh. P-2, Exh. P-3.

Randall Ball, an inspector for the Secretary's Mining Enforcement and Safety Administration ("MSHA"), issued both citations. He found that neither was S&S. He also found that although the first was due to Garden Creek's low negligence, the second, which was cited approximately six weeks after the first, was due to Garden Creek's moderate negligence because, in his opinion, Garden Creek knew from the first citation that the condition constituted a violation. Tr. 12.

The issues are:

1. Whether Garden Creek twice violated section 75.516?
2. If so, what civil penalties should be assessed for the violations?

THE EVIDENCE

THE SECRETARY'S WITNESSES

RANDALL BALL

Randall Ball was the Secretary's first witness. Ball testified he believed the CO monitor cables and belt control cables were current-carrying conductors, that is, "power wires" within the meaning of section 75.516 and that the nylon rope by which they were suspended was combustible. Tr. 11, 34-35. (As noted, the parties stipulated the communications cables, although mentioned in the body of the citations, were not subject to section 75.516. Stip. 8.)

Although Ball referred to both the CO monitor cables and the belt control cables in the citations, his testimony made clear that he was not certain the CO monitor cables should have been included. He stated initially that a CO monitor cable was a power wire subject to section 75.516, but on cross examination, he stated he did not really know and that he included references to the CO cables in the citations because he was unsure whether or not they were covered. He explained that he was "not that electrically inclined." Tr. 22, see also Tr. 17. (On redirect, Ball explained further that he had "based . . . [the citations] mostly on the belt control cable." Tr. 36.)

Ball had no such doubts about the belt control cables. He felt certain suspension of such cables from nylon rope constituted a violation of section 75.516. Tr. 23, 24. Ball described the belt control cables as running parallel to and 3 or 4 feet above the belts, depending upon the height of the entries. Tr. 15. Ball noted that in discussing section 75.516, the Department of Labor, Mine Safety and Health Administration Program Policy Manual (the "Manual") defined a "power wire" as "a current-carrying conductor which may be bare, insulated, or part of a cable assembly." Tr. 35. He stated that the belt control line controlled power to the belt conveyor. Tr. 23. He also stated that at the time he wrote the citations he believed the line had a voltage of 110-volts. Tr. 23.

Counsel for Garden Creek pointed out that at Vol II, Part 18 of the Manual, "power conductor" was defined in part as, "[a] conductor that supplies electric power to an electric component or device on a machine or to a related detached component of a machine" and that "control circuit conductors" were excluded from the definition. Tr. 27; see Exh. R-6A. Ball was asked if, given this definition and the exclusion of control circuit conductors, he still believed a belt control cable was a "power conductor" within the meaning of the regulation.

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Ball responded that he had not looked at or otherwise considered the definition of "power conductor" prior to the hearing. Tr. 39. He insisted that the citations were based on the fact the belt control cables were power wires carrying electricity. Tr. 27-28. As such, he believed the cables should have been hung on insulated insulators because section 75.516-1, which defines "well-insulated insulators," states in part that J-hooks may be used "for permanent installation of control cables such as may be used along belt conveyors." Tr. 28. However, any other type of insulators would have been acceptable, provided they were well-insulated and were noncombustible and would not have conducted electricity. Tr. 36.

Ball testified at the time he issued the first citation on December 17, 1991, he thought the nylon rope was combustible, even though he had never conducted any test to determine whether or not it was. Tr. 18. But between December 17 and March 3, 1992, when he issued the second citation he had seen James Franklin, a MSHA district conference officer, ignite the nylon rope with a cigarette lighter. Tr. 11-12. Thus, in his view, the power wires were not supported on well-insulated insulators and they were contacting the combustible nylon rope.

Ball maintained that when section 75.516 refers to "well insulated insulators" it means, in part, that insulators must be noncombustible, and he read the portion of the Manual that states "[a]cceptable insulators are constructed of noncombustible, nonabsorptive insulating material adequate for the high-voltage being used." Tr. 15; Exh. P-4 at 2.

He believed the hazard avoided through the use of noncombustible insulators was that of fire caused by a defect in the power wires. Tr. 15. Although, he was of the opinion that nylon could conduct electricity, he described the likelihood of it doing so as "minute." Nonetheless, it was still "possible." Tr. 19.

JAMES C. FRANKLIN

James Franklin, a district conference officer for MSHA Coal Mine Safety and Health, District 5, Norton, Virginia, was the Secretary's next witness. He explained that as a conference officer he represented MSHA at meetings held after enforcement actions had been taken by inspectors and at which operators presented arguments as to why the enforcement actions should be modified or vacated. Tr. 42.

Franklin was present at the meeting where the first citation was discussed. According to Franklin, Garden Creek took the position that the nylon rope with which the cables were hung was an acceptable insulator. As Franklin remembered it, a company safety specialist stated that Garden Creek had tested the rope

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and found it be noncombustible. Tr. 44. The representative had brought some pieces of the rope to the hearing and Franklin described what happened: "[M]y cigarette lighter was laying on the table so I picked up a piece of it, set it on fire and it burned like a candle. So based on that I told him it didn't meet the requirements[.]" Tr. 44-45. (Franklin admitted that he did not know the flame spread index of the nylon -- that is, how hot it had to become before it would show any symptoms of catching fire. Tr. 46-47.)

Franklin maintained that after the demonstration with the cigarette lighter Garden Creek's representative agreed the rope was combustible, but then maintained the belt control cable was not a power-carrying or current-carrying conductor. Tr. 45.

ROY D. DAVIDSON

Roy Davidson, an electrical engineer who both conducted electrical inspections for MSHA and provided electrical technical assistance to operators on MSHA's behalf, was the Secretary's final witness. According to Davidson, each of the belt control cables had three conductors, two that carried power for the control of the belt circuit and one that was the ground conductor. The cables provided the electricity for turning the belts on and off. They have a 110-volt potential, i.e., standard household current. Tr. 53. Davidson was asked if he believed it possible for the belt control cables to set the nylon rope on fire? Davidson responded that he had not tested nylon rope but that "[g]enerally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter. An arc can short circuit from an electric current. It's a very high heat. There's enough energy to produce fire." Tr. 55.

In Davidson's opinion, the danger section 75.516 is designed to eliminate is of an ignition source being created if a cable deteriorates or is damaged and its conductors contact one another. Under such circumstances the conductors could create a "tremendous amount of heat." Tr. 56.

Davidson acknowledged that section 75.516 refers to "power wires." Davidson, nonetheless, believed that as used in section 75.516, the term "power wires" includes cables because power wires are among the components of cables. Moreover, the standard's specific exceptions for trailing cables on mobile equipment and for those of special design implied to Davidson that unless excepted, power carrying cables are covered. Tr. 62.

With regard to the CO monitor cable, Davidson stated that it carried enough energy to ignite methane, but he was not certain it carried enough to ignite other combustible material. Tr. 56.

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Davidson described his understanding of a "well-insulated insulator." He stated that the Manual defines one as being adequate for the voltage of the circuit. Whether an insulator is adequate could be determined by the dielectric rating of the insulator, a rating given to insulators by private testing companies, such as UL Testing. Tr. 57. To the best of his knowledge nylon rope never had been subjected to independent testing and been given a dielectric rating. Id.

On cross examination, Davidson identified a piece of the belt control cable used at the mine. R. Exh. 8. He also stated the belt control cable had a "P-122 MSHA" label on it, which is an MSHA approval seal. Tr. 60-61; Exh. R-8. The label meant the cable had a flame resistant outer jacket. Tr. 60. Davidson testified that each of the three conductors in the belt control cable were insulated -- they were not bare wire conductors. There were three paper-like fillers amidst the three conductors to make the entire cable assembly uniformly round, and the insulated wires were in contact with the noncombustible cable jacket. Tr. 60-62.

Finally, Davidson agreed that the Manual, at Volume II, Part 18, excluded control circuit conductors from the definition of power conductor/control conductor. Tr. 67; Exh. R-6A. However, he maintained the definition applied only to Part 18, the regulations setting forth the requirements for MSHA approval of permissible equipment. Tr. 67. According to Davidson, belt control cables are not approved under Part 18. Tr. 68.

GARDEN CREEK'S WITNESSES

MARVIN L. SMALLWOOD

Garden Creek's only witness, Marvin Smallwood, is the chief electrical engineer for the Virginia Division of Garden Creek's parent company, Island Creek Corporation. First, Smallwood testified regarding the CO monitor cables. He stated such cables carried DC power, a maximum of 24-volts. The power was supplied by batteries. Smallwood further stated the cables were considered communications cables and were not covered by section 75.516. In Smallwood's view, the CO monitor cables could not generate enough heat to set anything on fire. Tr. 74-75. Smallwood put it, "You are into milli-watts." Tr. 77. Further, there was not enough energy carried by the CO monitor cables even to constitute the transmission of power. Id.

According to Smallwood, the belt control cables were "control cables" as defined by the Institute of Electrical and Electronic Engineers ("IEEE") and the American National Standards Institute ("ANSI") and control cables did not have to be hung on well-insulated insulators. The cited belt control cables operated at between less than 1-watt and up to 5-watts of energy,

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the approximate energy of a house nightlight, and as such would not heat anything enough to cause a fire. Tr. 79-80, 88. In fact, belt control cables carried such low current they were not power wires or power conductors. Tr. 79. ("It's hard electrically to define 1-watt of energy as power." Id. "When you think of power you tend to think of it being able to do something and there's just not enough energy there in my opinion." Tr. 89-90.)

Despite his belief that the belt control cables were not required to be hung on well-insulated insulators, Smallwood maintained the nylon rope that was used to hang the cables had "excellent insulation characteristics." Tr. 79. Smallwood stated that he was not aware of any testing by IEEE or ANSI to measure the nylon rope's dielectric capability, but that he had tested the rope and concluded it had infinite resistivity when impressed with 1000-volts, which was eight times greater than the operating voltage involved. Tr. 85.

Smallwood also stated that he did not know of any testing for combustibility of the nylon rope, other than that which was done by Franklin with the cigarette lighter. Tr. 85-86.

PARTIES' ARGUMENTS

THE SECRETARY

Counsel for the Secretary maintains that both the CO monitor cables and the belt control cables were power wires in that they were wires carrying power. According to counsel, the section of the Manual that excludes control circuit conductors from those things considered to be power conductors applies only to section 18.46 of the regulations and cannot be used to find that the belt control cables are not covered by section 75.516.

Counsel also argues the evidence establishes the nylon rope with which the cables were hung was combustible and, therefore, the cables were not hung on well-insulated insulators and were in contact with combustible material in violation of the standard. Tr. 99-100.

GARDEN CREEK

Counsel for Garden Creek counters that section 75.516 pertains to "power wires" and that a wire is a single conductor. The belt control cables were each a combination of three wires, not one. Further, the wires in each cable were surrounded by a noncombustible jacket and thus were not in contact with combustible material. The nylon rope was a "very good electrical insulator" and MSHA's "cigarette lighter test" did not prove the rope was combustible because it did not establish the ignition temperature of the nylon. Moreover, the CO monitor cable was

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equivalent to a communication cable, which the parties stipulated was not subject to section 75.516. Tr. 101-104.

THE FACT OF VIOLATION

Section 75.516 requires "[a]ll power wires," with the exception of those specifically mentioned -- i.e., trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare of insulated ground and return wires -- to be supported on well-insulated insulators and it prohibits contact by such wires with three things -- combustible materials, roof and ribs. The fact of violation can be resolved by answering four questions that track the wording of the standard. Were the cited cables "power wires"? If so, were the power wires excepted by the standard? If not, were the power wires supported on well-insulated insulators? And/or were the power wires in contact with combustible materials, with the roof or with the ribs?

Were the cited cables "power wires"?

The standard does not define power wires, but, as was noted during the testimony, the Manual does. In providing guidelines for the interpretation and application of section 75.516, the Manual states " `Power wire' means a current-carrying conductor which may be bare, insulated, or part of a cable assembly." Manual, Vol. V, Part 75 at 65 (July 1, 1988), reproduced in Exh. P-4 at 2. The Commission has recognized that in certain circumstances the Manual may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in the [Commission] according it legal effect." King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981); see also Western Fuels-Utah Inc., 11 FMSHRC 278, 285-286 (March 1989). On the other hand, the Commission has declined to follow the Manual where its interpretation is clearly inconsistent with the plain language of the standard. Garden Creek Pocahontas Co., 11 FMSHRC 2148, 2152 (November 1989). Here, the Manual's definition of "power wire" is not clearly inconsistent with the language of the standard. Indeed, it compliments it.

The essence of a power wire is that it conducts current. Power wires can be used singly or several can be bound together to form a cable. As Davidson recognized, the standard implies that if power wires are combined to form a cable, they do not lose their essential nature as power wires for purposes of the standard. The standard's reference to "[a]ll power wires (except trailing cables on mobile equipment, specially designed cables . . . or bare or insulated return wires)" indicates that in the context of the standard the reference to "power wires" includes cables as well. Section 75.516 (emphasis added); See also Tr. 62. Thus, in my view, if the CO monitor cables and the

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belt control cable were wires bound together to carrying current, that is, if they were current-carrying conductors, they were "power wires" within the meaning of the standard. That both were, is substantiated by the record.

Davidson stated his belief the CO monitor cable carried current Tr. 56. Smallwood agreed and was more specific -- the cable carried DC battery supplied power at a maximum of 24-volts. Tr. 75. Since neither the standard nor the Manual's definition of power wire couch the standard's application in terms of the amount of current carried, I conclude that in order to be a "power wire" within the meaning of section 75.516, a wire or cable must simply carry current, which the CO monitor cables did.

The same can be said of the belt control cables. Ball testified the cables controlled the power to the beltlines, and he thought, carried 110-volts. Tr. 23. Davidson was more precise. The cables provided current to the controllers that turned the belts on and off and had a 110-volt potential, the same voltage as standard household current. Tr. 53-54. Smallwood concurred that the cables carried current, although he was of the opinion the current was insufficient to pose a hazard. Tr. 74-75. There being agreement that the belt control cables carried current, I conclude that they too were power wires within the meaning of section 75.516.

Further, I cannot overlook the fact that in defining "insulated insulators", section 75.516-1 clearly contemplates that "control cables such as may be used along belt conveyors" are considered to be power wires within the meaning of the standard.

I agree with Garden Creek's counsel that if the definition of "power conductor/control conductor" contained in Vol II, Part 18 of the Manual were applied to section 75.516, the Manual might well indicate the belt control cables should be excluded from the standard. However, as Davidson testified and as counsel for the Secretary noted, Volume II, Part 18 of the Manual never was meant to apply to section 75.516. Rather, the Manual's headings make clear the interpretation, application and guidelines for enforcement contained therein apply only to the referenced parts of 30 C.F.R. Thus, the definition relied upon by Garden Creek applies to section 18.48, a section pertaining to the construction and design specifications required for MSHA approval of circuit-interrupting devices, and not to section 75.516.

For all of the foregoing reasons, I find the subject cables were "power wires" within the meaning of section 75.516.

Were the cited power wires excepted from section 75.516?

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As previously noted, section 75.516 excepts from coverage, trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires. The testimony of all of the witnesses makes clear that whatever else the subject cables may have been, they were not trailing cables, high-voltage cables or ground or return wires. Hence, I find the CO monitor cable and the belt control cables were not excluded from the purview of the cited standard.

Were the cited power wires supported on well-insulated insulators?

Section 75.516-1 states that "[w]ell insulated insulators is interpreted to mean well-installed insulators," a definition Commission Administrative Law Judge Gary Melick aptly has termed "convoluted" and, as he also has noted, that may require "creditable creativity" to decipher. Consolidation Coal Co., 15 FMSHRC ___, Docket No. PENN 92-854 (August 9, 1993) (ALJ Melick). The Secretary seems, implicitly at least, to have recognized the regulatory inadequacy of defining section 75.516 with a non sequitur, for the Manual makes clear that "well-insulated insulators" must be more than "well-installed insulators." (The Secretary also has amplified in the Manual the meaning of "well-installed insulators" in terms of adequate support for the cables installed thereon and, more specifically, in terms of the tensile strength required. However, the installation of the cited power wires is not at issue in this proceeding.) To be "well insulated," the insulators must be constructed of "noncombustible, nonabsorptive insulating material adequate for the voltage being used." Manual, Vol.V, Part 75 at 65. Exh. P-4 at 3-4.

Thus, the material used for a well-insulated insulator must have specified physical properties. First, it must be noncombustible. "Noncombustible" is defined as "[a]ny material that will neither ignite nor actively support combustion in air at 1,200p F when exposed to fire." U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) 754 ("DMMRT"). Second, it must be nonabsorptive. That is, it must lack the ability to take up moisture by molecular or chemical action. See Id. at 4. Third, it must be adequate for the voltage being used in that it must have an adequate dielectric strength. (For example, the Secretary has stated that an insulated J-hook may be accepted as "well-insulated" if it has a "dielectric strength of not less than eight times the voltage of the circuit." Manual, Vol V. Part 75 at 66 (Exh. P-4 at 3.)

In the context of this case the Manual's definition means the Secretary must establish the nylon rope used to hang the cited cables was not noncombustible, nonabsorptive or not

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composed of material adequate for the voltage being used. The burden of proof is on the Secretary.

The evidence offered by the Secretary with respect to the noncombustibility and nonabsorptive properties of the nylon is, in my judgement, inadequate to support a conclusion regarding those properties. Ball, himself had not conducted any test on the nylon to gauge its combustible properties. Tr. 18. Ball admitted he did not know the ignition temperature of the nylon rope. Tr. 32. Rather, his belief the rope was not noncombustible was based upon having seen Franklin light a piece of the rope. Tr. 11-12, 18.

Franklin testified that Garden Creek's safety specialist brought pieces of the rope to the conference, that Franklin picked up a piece and set it on fire with his cigarette lighter, and that it "burned like a candle." Tr. 45. Franklin too did not know the ignition temperature of the nylon. Tr. 46-47.

Davidson was forthright in testifying to his lack of first-hand knowledge regarding the combustible nature of the rope. ("I'm not familiar with the nylon rope." Tr. 54. "The nylon rope in particular, I have not any test with this nylon." Tr. 55.) His opinion as to its combustibility was based upon his general belief that defective control cables could provide enough energy to produce more heat than a cigarette lighter. ("Generally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter." Tr. 55.) In addition, Davidson stated that he had seen a nylon rope burn when it was used to bridge two conductors carrying 4,160-volts -- but, he added "its a different nylon rope than this." Tr. 58.

The DMRT definition establishes that the word "noncombustible" has a specific meaning recognized in the mining industry. (If the Secretary intended a different meaning, no evidence was offered to that effect.) For the Secretary to have proved that the nylon material was not "noncombustible," his evidence should have matched the definition. It did not.

No evidence was offered as to what the nylon rope used to hang the cables would do when exposed to flame in air at 1200p F, and I cannot infer on the basis of a void record the temperature of the flame of the cigarette lighter Franklin used to ignite the rope at the conference. Nor can I even infer from Franklin's testimony that the rope brought to the conference by Garden Creek's safety specialist was in the same condition as when it was used to hang the cable. Franklin's testimony was extremely limited in this regard. He simply stated that Garden Creek's representative brought some pieces of the rope to the conference.

The evidence with respect to the nylon rope's nonabsorptive properties was equally unpersuasive. Ball "assumed" the nylon rope would hold water or moisture, but he added "I haven't checked it." Tr. 16, see also Tr. 17-18. Davidson believed the way the different strands of the rope were interwoven "would provide cavities enough for moisture to accumulate," testimony that may relate to the design or configuration of the rope, but does not appear to relate to the ability of nylon to take up moisture by molecular or chemical action. Tr. 58. (The rope itself, or a piece similar to it, or a picture or drawing of the rope was not offered as evidence, so it is difficult to envision exactly to what Davidson was referring.) Indeed, if anything, Davidson seems to have believed nylon had at least some nonabsorptive properties, for he also stated, "[F]rom my experience with nylon[,] it doesn't absorb moisture very well." Id. As with the question of the noncombustible nature of the nylon rope, I believe the Secretary has failed to establish the cited rope did not meet this part of the definition of "well-insulated."

Further, in my opinion, the Secretary also failed to offer sufficiently persuasive evidence that with respect to whether the nylon rope was not adequate for the voltage being used. Davidson testified MSHA makes a determination of "adequacy" by referring to a material's dielectric rating. Tr. 57. Obviously, testimony regarding the dielectric rating of nylon would have been the best evidence. No such testimony was offered.

This was not necessarily fatal to proving the rope was not adequate to the voltage being used, for it may be there is no dielectric rating of nylon. Tr. 57, 85. (Although I tend to doubt it.) Even so, the Secretary presumably could have come forward with other detailed and convincing testimony as to why the rope did not offer the resistance to the passage of electric current necessary for the cited cables. He did not. Rather, the record contains only Davidson's account of a demonstration conducted by "Kentucky Utility" involving 4160-volts and a different kind of nylon rope, a test hardly pertinent to the facts at issue. (I should also note that although Franklin testified MSHA has a policy with regard to the approval of insulators that involves their dielectric strength, he could not testify about it because it was "not [his] area of expertise." Tr. 48.)

Because I find the Secretary has not established the nylon rope was not noncombustible, nonabsorptive and not adequate for the voltage being used, I conclude he has failed to establish the power wires were not supported on well-insulated insulators.

Were the power wires in contact with combustible material,
roof or ribs?

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Section 75.516 prohibits the subject cables from physically touching combustible material, roof, or ribs. Consolidation Coal Co., 15 FMSHRC ___, slip op. at 4. The Secretary contends that the nylon rope used to hang the cables and with which the cables were in contact was "combustible material." (There is no allegation on the Secretary's part the cables were touching the roof or ribs.)

"Combustible" is defined as "[c]apable of undergoing combustion or of burning. Used especially of materials that catch fire and burn when subjected to fire." DMMRT at 239. As Ball and Davidson testified, the purpose of the requirement is to prevent power wires or cables from igniting the combustible material should the wires or cables for some reason become defective. Therefore, for the Secretary to establish that this part of the standard was violated it is incumbent upon the Secretary to prove the particular cables cited could, if damaged, ignite the particular "combustible material" cited. It is not enough for the Secretary simply to establish in general that the particular "combustible material" will burn. Many materials, even some which are used as insulators, will burn if subjected to a high enough temperature for a long enough time.

Here in my view, the Secretary's evidence again falls short. Precious little evidence was offered with respect to whether, if the CO monitor cables were defective, they could ignite the nylon rope. Davidson stated, "I'm not sure on their particular CO monitor system how much energy it's got for igniting combustible material." Tr. 56. Ball was not even sure he should have included the CO monitor lines in the citations. Tr. 22, 36.

Testimony was more extensive concerning the belt control cables, but it too was insufficient. Ball thought the belt control cable carried 110-volts but did know for sure. Tr. 23. Nor did he know the ignition temperature of the rope. Tr. 33. Although he believed "wires coming in contact with each other would generate heat," and although he may have been right, that alone does not permit the conclusion that the wires of the cited cables would generate enough heat to burn the nylon used to hang them.

Franklin's belief in the combustibility of the nylon rope was based solely upon the fact he had ignited a piece it with his cigarette lighter. Tr. 44-45. He did not testify regarding the effect of damaged cables upon the rope and he did not know how hot the nylon rope had to get before showing symptoms of catching fire. Tr. 47.

Davidson, while offering the opinion a damaged belt control cable could cause enough heat to produce a fire, was not, in my opinion, sufficiently responsive to the precise issue at hand -- whether the cited belt control cables if damaged could ignite the

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nylon rope from which they were hung? The following exchange between the Secretary's counsel, Davidson and me illustrates the general and less-than-fully-responsive nature of Davidson's testimony:

Q. Would it be possible that the belt control cable could set this [nylon] rope on fire?

A. The belt control cable has the energy if there's an arcing short circuit . . . to generate heat to cause a fire. I'm not familiar with the nylon rope, but it has enough energy there to cause enough heat to produce a fire.

* * *

The Court: Wait a minute. Ask him the question again . . . Didn't you ask him if nylon rope could be set on fire?

[Secretary's counsel]: By the belt control cable.

The Court: Right. What's your answer to that?

A. The nylon rope in particular, I have not any test with the nylon rope. [sic] Generally, there's enough energy in control cables to provide more heat than can be generated from a cigarette lighter. An arc can short circuit from an electrical current. It's a very high heat. There's enough energy to produce a fire.

* * *

Q. What is the danger if [the belt control cable] contacts combustible materials]?

A. Because if the cable deteriorates or becomes damaged and two conductors come in contact with each other they can produce a tremendous amount of heat which could be an ignition source.

Q. And, as you stated, that could set this nylon rope aflame?

A. Any combustible material could be set on fire.

Tr. 56.

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As noted, the question is whether the belt control cables if damaged could have ignited the cited nylon rope. Davidson repeatedly disclaimed familiarity with nylon and his statement that "any combustible material could be set on fire" is equivocal. He may have meant either that heat from the conductors in the cited cables could have ignited the particular rope in question or simply that any material that is "combustible" could be set on fire.

Also, even if I credit Davidson's general assertion that "there is enough energy in control cables to provide more heat than can be generated from a cigarette lighter" I cannot make the logical leap of faith that because Franklin's cigarette lighter burned the nylon rope at the conference, defective belt control cables could have burned the rope used to hang the cited cables. As I have noted, there is no assurance that rope burned at the conference was in the same condition as that used to hang the cables.

In short, when the nature of Davidson's testimony is considered together with the fact that Davidson had not tested nylon and admittedly was unfamiliar with it, I find it does not support a conclusion the cited nylon rope could have been ignited by the cited belt control cables. (This being so, I need not evaluate Smallwood's assertion the cited belt control cables did not carry sufficient power to cause a fire. Tr. 80.)

CONCLUSION

Because I conclude the Secretary has not established the cited cables were not supported on well-insulated insulators and were not in contact with combustible materials, I hold that the Secretary has not proved the alleged violations of section 75.516. This, of course, does not mean the Secretary may never under similar circumstances allege and prove violations of the cited standard, only that he has not done so in this instance.

ORDER

In Docket No. VA 92-101 the Secretary is ORDERED to vacate Citation No. 3800262, 12/17/91, 30 C.F.R. 75.516, within thirty (30) days of the date of this proceeding.

In Docket No. VA 92-126, the Secretary is ORDERED to vacate Citation No. 3763241, 3/3/92, 75.516, within thirty (30) days of the date of this proceeding.

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In Docket No. VA 92-101, Garden Creek is ORDERED to pay a civil penalty in the settlement amount of six-hundred twenty dollars (\$620) within thirty (30) days of the date of this proceeding for Citation No. 376880, 12/12/91, 30 C.F.R.

75.316. Upon receipt of payment, this matter is DISMISSED

David F. Barbour
Administrative Law Judge

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