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SOL (MSHA) V. PEABODY 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. KENT 93-369
Petitioner	:	A.C. No. 15-14074-03634
v.	:	
	:	Martwick UG
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for Petitioner;
Carl B. Boyd, Jr., Esq., Henderson, Kentucky, for
Respondent.

Before: Judge Amchan:

STATEMENT OF THE CASE

I. The Grounding Violation

MSHA Inspector Darold Gamblin conducted an inspection of Respondent's Martwick underground mine on December 14, 1992 (Tr. 10-11). Upon reaching the 3 South Panel entries he encountered an electrical transformer supplying power to the equipment in the entries (Jt. Exh 1). At the transformer, he observed a power cable coupler, or cathead, that was being used to plug a cable running to a belt feeder transfer point into the transformer (Tr. 11 - 14). This cathead consists of two large metal parts. One is a female receptacle that is mounted on the transformer; the other is a male part to which the cable is attached, which is plugged into the female part (Tr. 8 - 9, 11 - 14, Jt. Exh. 4).

The cathead has an internal grounding device and an external grounding device. The internal grounding device would prevent an employee from being shocked or electrocuted by the cable, if the cable insulation were to break. However, the metal casing of the cathead might become energized unless the external grounding device is properly connected (Tr. 14 - 15).

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The external grounding device consists of two wires, one is attached to the male portion of the cathead; the other to the transformer or to the female portion of the cathead (Tr. 25, Jt. Exh. 4). In order to perform its function, the two wires must be connected to each other; when Mr. Gamblin observed them, they were disconnected (Tr. 25).

As the result of this observation, Mr. Gamblin issued Respondent Citation No. 3417313 alleging a violation of 30 C.F.R. 75.701. This standard requires that

Metallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary. (Footnote 1)

The Secretary proposed a civil penalty of \$189 for this alleged violation. Respondent concedes that a violation of the standard occurred but takes issue with Inspector Gamblin's characterization of the violation as "significant and substantial (Tr. 7, Jt. Exh. 1)."

The Commission formula for a "significant and substantial" violation was set forth in Mathies Coal Co. 6 FMSHRC 1 (January 1984):

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.

As in most cases litigated under this test, it is exclusively the third criteria, the likelihood of injury that is in question in the instant case. The totality of the Secretary's evidence on this point is as follows:

Question: In the usual course of mining, how could parts of this belt feeder cathead have become energized or hot or alive?

1This standard was enacted as part of 1969 Coal Act and is also found at 30 U.S.C. 867.

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Answer: If the insulation of the cable entering the cable coupler become broke down or through -- these are drug all over the bottom when they're moving the power. You know, the internal parts come in contact with the casing.

Question: And based on your experience, then, what would have happened if a miner had come into contact with the energized or hot parts of that belt feed cathead?

Answer: Injury would be reasonably likely.

Question: What kind of injury could someone suffer?

Answer: Electric shock (Tr. 17 - 18)

Question: How likely was it that the condition would lead to injury or illness if mining continued, if the mining process continued?

Answer: Reasonably likely. (Tr. 26)

Later, Inspector Gamblin explained that while normal practice would be to shut off the power by turning off the breaker on the transformer--before unplugging the cathead, this is not always done (Tr. 66-67,72). If the breaker is not turned off, the internal grounding device should protect the employee if it's functioning properly. The external ground is a back-up system which protects the employee from electrical shock if the internal ground is defective (Tr. 72-74).

Not surprisingly, Respondent disagrees with Inspector's Gamblin's opinion that injury is reasonably likely. Alan Perks, Peabody's Chief Maintenance Engineer, testified that normal mining procedure is to turn off the circuit breaker on the transformer before disconnecting the cathead. This, he believes, would eliminate any risk of injury (Tr. 88). Moreover, he stated that even if an employee were to disregard the normal practice it would be unlikely that he would be shocked:

I believe that there is a sufficient electrical connection by the mechanical interference fitting in these laches [of the two parts of the cathead] that if the shell became energized, the electrical current would flow through these connections and operate the ground trip relay of the transformer which would, in turn, kill the circuit breaker feeding power to this unit...

I view this [the external ground wires] as, I guess, an additional safety device. I think there is enough

electrical connection here to trip it under most situations, this [the external ground] just being an additional safety backup (Tr. 83).

Mr. Perks, who has a B. S. degree in electrical engineering from the University of Maryland, performed continuity testing on a cathead similar to the one cited by Mr. Gamblin (Tr. 83-84, 94-95). These tests indicated good continuity between the two parts of the cathead (Tr. 84). In Mr. Perks' opinion, this indicates that, if the metal casing of the cathead became energized, there would be sufficient transfer of current to operate the ground trip relay and shut off the circuit breaker on the transformer (Tr. 84).

APPLICATION OF THE MATHIES TEST

Determining the likelihood that injury will occur, the third element of the Mathies test, is a very difficult task. Injuries are normally the result of accidents, which by definition, are unusual occurrences. Before embarking upon the task required by Mathies I note that under the analogous provision of the Occupational Safety and Health Act, consideration of the likelihood of injury is precluded.

Section 104(d)(1) of the Federal Mine Safety and Health Act distinguishes between violations that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" and violations that do not. MSHA, pursuant to its regulations at 30 C.F.R. 100.4, generally assesses a \$50 civil penalty for violations that are "non S&S."

Section 17(k) of the OSH Act, 29 U.S.C. 666(k), defines a "serious" violation for which higher penalties are proposed than for "other-than-serious" violations. See OSHA Field Operations Manual, 3 BNA Occupational Safety and Health Reporter pages 77:2507 and 77:2701 et. seq.. A "serious" violation is one which exists "...if there is a substantial probability that death or serious physical harm could result from a condition which exists...in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

The Occupational Safety and Health Review Commission and the Courts of Appeals have repeatedly held that only the seriousness of an injury should one occur, not the likelihood of an injury occurring is to be considered in determining whether or not an OSHA violation is "serious." The Court of Appeals for the Ninth Circuit observed:

Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even

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if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. California Stevedore and Ballast Company v. OSHRC, 517 F.2d 986 (9th Cir. 1975).

The proposition that the likelihood of injury is irrelevant to whether an OSHA violation is "serious" has been reaffirmed on many occasions. Communications, Inc., 7 BNA OSHC 1598, 1602 (R.C. 1979); Trumid Construction Co., 14 BNA OSHC 1784, 1789 (R.C. 1990); Department of Labor v. Kerr-McGee, ___ F.2d ___, 15 BNA OSHC 2070 (9th Cir. 1993); East Texas Motor Freight, Inc. v. OSHRC, 671 F. 2d 845, 849 (5th Cir. 1982); Kent Nowlin Construction Co. v. OSHRC, 648 F. 2d 1278, 1282 (10th Cir. 1981). The probability of injury is considered in proposing OSHA penalties, although a higher penalty will be proposed for a "serious" violation than an "other-than-serious" violation, other considerations being equal, OSHA Field Operations Manual, supra.

The purpose of civil penalties under both the Mine Safety and Health Act and the OSH Act is to encourage future compliance. Characterizing a violation as "non-significant and substantial" and assessing a \$50 penalty hardly provides an incentive for the mine operator to make any greater effort to comply with the cited standard. Indeed, the import of Mr. Perks' testimony is that the standard at 30 C.F.R. 75.701 serves virtually no useful purpose in protecting miners. If the regulation is as unimportant as his testimony indicates, there is no reason why Respondent should make any particular effort to assure that the external ground wires on its catheads stay connected.(Footnote 2)

It would appear contrary to purposes of the Mine Act to assess such minimal penalties as are called for under 30 C.F.R. 100.4, if these violations may one day cause serious injury to a miner. In precluding consideration of the likelihood of an accident from the determination of whether a violation is serious, the OSHA case law is consistent with the statutory purpose of preventing accidents. Since the purposes of the Mine Safety and Health Act and OSHA are essentially identical, there

20 On the other hand, Mr. Perks' testimony is that there is sufficient electrical connection between the laches of the cathead to trip the circuit breaker in most situations. This suggests that there may be situations in which the functioning of the external ground may be the difference between life and death. Furthermore, Mr. Perks' testimony relies upon an "after-the-fact" determination that the electrical connection on a cathead, different than the one cited, was sufficient to trip the circuit breaker.

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should not be such a tremendous disparity in the case law under the two statutes unless there is a good rationale for such differences.

The undersigned believes greater harmonization of the tests for a "serious" violation under OSHA and a "significant and substantial" violation under the Mine Act is possible and desirable. In U. S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984), the Commission made it clear that "significant and substantial" is not to be determined solely upon conditions as they existed at the time the citation was issued, but should also consider "continued normal mining operations."

If MSHA promulgated a mandatory safety standard requiring the metal casings of electrical equipment to be grounded, it must have done so under the assumption that under normal mining conditions injuries would occur unless the standard was followed. I, therefore, assume that unless the record indicates that the conditions cited do not pose the hazard to which the standard is directed, that sooner or later, at this mine or at another, noncompliance with the standard will result in injury. As I see nothing in this record that indicates that the conditions for which Citation No. 3417313 was issued were distinguishable from the concerns for which 30 C.F.R. 75.701 was promulgated, I conclude that the injury was reasonably likely in the context of continued normal mining operations and that the violation was "significant and substantial."

I recognize that this decision is somewhat inconsistent with the rationale of the Commission's decision in Cement Division, National Gypsum Company, 4 FMSHRC 822 (April 1981). In that case, the Commission held for the first time that an "S&S" violation requires a showing that there exists a reasonable likelihood that the hazard will result in an injury of a reasonably serious nature. Part of its rationale was a concern that interpreting the significant and substantial language in sections 104(d) and (e) to encompass almost all violations would render that language virtually superfluous 4 FMSHRC at 826. However, the later U.S. Steel Mining decision is itself not entirely consistent with National Gypsum.

The vast majority of the Secretary's regulations are directed to hazards that will cause serious injury. If noncompliance with any one of these regulations persists industry-wide, serious injury is likely to occur. As U.S. Steel

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Mining is a more recent decision than National Gypsum, I feel obligated to follow it where the two opinions are not completely harmonious.(Footnote 3)

Many accidents result from several things going wrong at once. For this reason, a number of MSHA standards call for back-up safety devices. Without the refinement to National Gypsum and Mathies provided by the U.S. Steel Mining decision, the fact finder in adjudicating a case under one of these standards, is forced to speculate on the likelihood of several factors coming together at one time to produce injury. Otherwise violation of a standard requiring back-up protection would be "S&S" only in situations in which these factors are already present. In the latter situation, "significant and substantial" is hardly distinguishable from imminent danger.

The import of the National Gypsum test without the gloss of U.S. Steel Mining is that a violation of standards like those cited in the instant case, which provide "back-up" or secondary safety protection, could never be "S&S" unless a variety of factors combined to make injury imminent. To categorize all violations of these standards as "non S&S" is to invite lassitude by operators in complying with their terms and is totally inconsistent with the purposes of this statute.

THE UNMARKED CATHEAD

During his inspection of December 14, 1992, Inspector Gamblin also noticed two catheads by which the cables leading to the two continuous mining machines were plugged into the transformer. One of the catheads was marked to indicate the machine to which its cable was attached and the other was not marked (Tr. 36, 42). Mr. Gamblin issued Respondent Citation No. 3417315 alleging a violation of 30 C.F.R. 75.601. That standard provides:

...Disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and such devices shall be equipped or designed in such a manner that it can be determined by visual observation that the power is disconnected.

3I would also note that the National Gypsum decision is predicated in part on the concern of what might happen with regard to section 104(e)'s pattern provisions if "significant and substantial" were interpreted broadly. Commissioner Lawson noted in his dissent in Phillips Uranium Corp., 4 FMSHRC 549, 560 (April 1982) that there had been no enforcement action taken by MSHA under section 104(e). As best as the undersigned can determine from reported Commission and ALJ decisions, that is still true.

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As was the case with the prior citation, Respondent concedes that the violation occurred and takes issue only with MSHA's characterization of the violation as "significant and substantial (Tr. 7)." As was true with the prior citation, it is the third element of the Mathies test, the likelihood of injury that is at issue. The penalty proposed for this violation was also \$189.

Inspector Gamblin believes it is reasonably likely that an employee could attempt to work on a mining machine for which he or she mistakenly believed the power was disconnected due to the lack of identification markings on the one cathead (Tr. 40, 50, 56, 60-63). If this were to happen, the employee could be shocked or injured by the cutting head of the continuous miner (Tr. 40). Respondent contends that there are several reasons why an injury would be unlikely. First of all, an employee could determine which cathead belonged to which continuous miner by the process of elimination. By looking at the cathead which was marked, an employee would know that the unmarked cathead belonged to other continuous mining machine (Tr. 52).

The two catheads could also be easily distinguished by the fact that one was much cleaner than the other (Tr. 53). The reason that Respondent had two continuous mining machines in the section was that it was in the process of replacing one with the other, which had been recently rebuilt (Tr. 89). The older machine was to remain in the section with the rebuilt machine for only two or three days until Peabody was satisfied that the rebuilt machine functioned properly (Tr. 92, 103). Because the older machine had been in the section for quite a while, the cathead for its trailing cable was much dirtier than the cathead for the newer machine (Tr. 106 - 107).

Finally, Respondent contends that injury is unlikely because normal practice is for an employee to follow a trailing cable back to the transformer to make sure he unplugs the right one (Tr. 90). Moreover, Peabody company policy is that the individual employee who performs work on the continuous mining machine is to disconnect and lock out the power himself or herself (Tr. 109). This, according to Respondent, would make it very unlikely that an employee could be injured while working on a continuous miner because he or she thought the power was disconnected.

As with the prior citation, I have to assume that MSHA, in promulgating 30 C.F.R. 75.601 concluded that, if disconnecting devices are not plainly marked and identified, that, in the normal course of mining operations, an employee may be injured. Even if injury is likely to occur only once every ten or twenty years somewhere in the United States due to the violation of the standard, I would conclude that injury is "reasonably likely" within the meaning of the Mathies test.

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The Commission in U.S. Steel Mining Company, Inc., 6 FMSHRC 1834, 1836 1838 (August 1984) found a violation of section 75.601 to be "significant and substantial." It is useful to analyze that decision to see if the facts in that case are distinguishable from the instant case. There were two unmarked trailing cable plugs (which I assume are the same thing as catheads) at the time of the citation at U.S. Steel's mine, however they were very different in size and appearance. There were also marked catheads which the Commission found could be mistaken for the unmarked catheads.

The Commission rejected the company's argument that the "process of elimination" made it unlikely that the unmarked catheads would be confused with marked catheads. Indeed the Commission appeared to reject any factor depending on human behavior as negating likelihood. See footnote 4 on page 1838. A great deal of importance was placed on a fatal accident at the same mine in 1979 which resulted from the mix-up of catheads for two shuttle cars.

In all the factors present in the 1984 case, I can only discern one which distinguishes the instant situation in any meaningful way. That is the fact that the older continuous miner in the instant case was to be in the section for only two or three days and its cathead was noticeably dirtier than that of the rebuilt continuous miner.

I do not find this distinction sufficient to find the instant violation to be non S&S. The standard does not require marking and identification only when there is equipment that can be confused. I can only conclude that, when promulgating the standard, MSHA concluded that marking and identification of catheads was necessary to prevent injury in every situation in which they could be plugged in or disconnected from a power source. To find otherwise would be to question the wisdom of the standard which I believe neither I nor the Respondent is entitled to do--after the regulation has been properly promulgated.

Finally, to find that injury is unlikely due to relative cleanliness of the catheads would require the undersigned to speculate that an employee would in every situation make the logical connection between the appearance of the cathead and its connection to the new or old mining machine. I see no basis for concluding that this connection would necessarily be made.

ORDER

I affirm Citation Nos. 3417313 and 3417315 as "significant and substantial" violations. Considering the statutory factors enumerated in section 110(i) of the Act, particularly the low to moderate negligence of Respondent, its good faith in correcting

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the violations, and the gravity of the violation, I assess a \$189 penalty for each violation. Payment shall be made within 30 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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