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SOL (MSHA) V. TEXASGULF  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 93-254-M  
Petitioner : A.C. No. 31-00212-05542  
v. :  
 : Lee Creek Mine  
TEXASGULF INC., :  
Respondent :

DECISION

Appearances: Leslie John Rodriguez, Esq., Office of the  
Solicitor, U.S. Department of Labor, Atlanta,  
Georgia, for the Petitioner;  
T. Carlton Younger, Jr., Esq., Texasgulf, Inc.,  
Raleigh, North Carolina, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the  
petitioner against the respondent pursuant to section 110(a)  
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.  
820(a). Petitioner seeks a civil penalty assessment in th  
amount of \$50 for an alleged violation of mandatory safety  
standard 30 C.F.R. 56.12067. The respondent filed a timely  
answer contesting the alleged violation, and a hearing was held  
in Raleigh, North Carolina. The parties waived the filing of  
posthearing arguments, but I have considered their oral arguments  
at the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether  
the respondent has violated the cited standard as alleged in  
the proposal for assessment of civil penalty; and (2) the  
appropriate civil penalty that should be assessed for the  
violation based upon the civil penalty assessment criteria found  
in section 110(i) of the Act. Additional issues raised by the  
parties are identified and disposed of in the course of this  
decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. 30 C.F.R. 56.12067.
4. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 5-6):

1. The respondent is subject to the jurisdiction of the Mine Act.
2. The presiding judge has jurisdiction to hear and decide this matter.
3. The respondent is a large mine operator.
4. The cited conditions were timely abated by the respondent in good faith.
5. The respondent's history of prior violations is reflected in an MSHA computer printout (Exhibit P-18).

Discussion

Section 104(a) non-"S&S" Citation No. 4094761, issued on February 2, 1993, by MSHA Inspector Terry Scott, cites an alleged violation of 30 C.F.R. 56.12067, and the cited condition or practice is described as follows:

The transformer casing at the "I" portable substation (high voltage) was within 3 feet of the chain link fence.

Petitioner's Testimony and Evidence

Billy B. Foster, respondent's General Foreman, was called as an adverse witness and testified that he is an electrical engineer and is the second line supervisor over the electrical maintenance personnel. Referring to photographic Exhibits P-1, P-2, and P-3, Mr. Foster pointed out the cited transformer casing in question and described its component parts. He also explained and described the other electrical equipment shown in the photographs. He stated that the transformer casing appears to be

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"butted right up against" the chain link fence shown in the photographs and that there is little space between the transformer casing "fins" and the fence (Tr. 11-19).

Mr. Foster stated that in his 34 years of experience he has never seen or heard of an energized transformer casing (Tr. 20). Mr. Foster identified and marked the energized parts shown in Exhibit P-1, and the energized wires, insulators, and small transformers shown in Exhibit P-2 (Tr. 20-24).

Petitioner's counsel stated that the photographs depict substation "J", which is representative of the identical equipment located at substation "I" and the remaining non-conforming substations on mine property that include equipment less than three feet horizontal from the fence (Tr. 26). Counsel further explained that Inspector Scott observed 26 transformers at the time of his inspection and issued the citation citing only one of the substations because of MSHA's current policy not to issue multiple citations for similar violations (Tr. 27).

Respondent's counsel contended that all of the transformers are not similar, and he pointed out that the inspector only cited substation "I" and that the evidence should focus on that particular equipment. Counsel further pointed out that the configuration for substation "I" is substantially different from those shown in the photographs in question (Tr. 29-30).

Petitioner's counsel stated that MSHA does not have a photograph of the cited substation "I" and he could not explain why one was not obtained. Counsel stated that the respondent's photographs, Exhibits R-1 through P-5 depict the cited substation "I" (Tr. 30-31).

Mr. Foster confirmed that photographic Exhibits R-1 and R-2 represent substation "I" with the MSHA approved abatement, and that Exhibits R-3 through R-5, show the conditions found by Inspector Scott. The cited transformer casing, which includes the "radiator" type fins, and the "skin and body" of the transformer, is shown in Exhibit R-3 (Tr. 31-32). After viewing the photographs, and confirming that he made no measurements, Mr. Foster "assumed" that the casing in question is less than three feet from the fence and he stated that "I'd have to go by what the citation says" (Tr. 31-33).

Mr. Foster stated that the fence shown is six feet high and he did not recall the distance from the height of the fence to the inside of the transformers. He stated that the incoming voltage on the "I" substation is 23,000 volts and that the outgoing voltage is 4,160 volts (Tr. 34).

Respondent's counsel confirmed that photographic Exhibits R-1 through R-5, are of the cited substation "I". He explained that the substation is mounted on a skid and that the fence immediately surrounding the substation is installed around the perimeter of the skid. The skid is used to facilitate the moving of the substation from one location to another. The outer fence shown in Exhibits R-1 and R-2, was installed to achieve compliance and abate the citation.

Petitioner's counsel confirmed that if the skid-mounted fence were moved further away from the transformer and other substation equipment to provide three-feet of clearance, or a "walkway" between the equipment and the fence, MSHA would consider this to be in compliance with the cited standard (Tr. 34-36). Respondent's counsel stated that this could be done, but that it would require the reconstruction of the skids. However, he believed that the cited substation was in compliance with only the skid-mounted fence around it (Tr. 34-38).

On cross-examination, Mr. Foster stated that an ungrounded transformer casing could present a dangerous hazard if it became energized. However, the grounding would prevent this from happening and this is the primary consideration in the design and maintenance of a substation. Mr. Foster pointed out the energized parts in Exhibits R-1 through R-5, and he stated that measurements taken established that the nearest distance from the fence to any energized parts was three-feet three-inches. He also indicated that the six-foot high fence distance does not include the barbed wire installed at the top of the fence (Tr. 41).

Dennis H. Miller, respondent's safety and health supervisor, was called as an adverse witness. He stated that the substations have always been mounted on skids without the fence mounted directly on the skid. The fence was installed on the ground and it was grounded. He confirmed that the skid-mounted fence shown in Exhibit R-3, was the one cited by Inspector Scott, and that the additional outer fence was installed to abate the citation. Both fences are still in place (Tr. 42-44).

Mr. Miller stated that the purpose of the fence is to keep unauthorized and unqualified persons from the substation. Referring to Exhibit R-3, Mr. Miller could not state the distance between the transformer casing and the fence, or from the "high voltage" sign on the fence to the coils, and he confirmed that he made no measurements (Tr. 45). Assuming that the fence were less than three-feet away, Mr. Miller did not believe that there was a hazard of employees reaching and touching the transformer casing. Mr. Miller stated that he has never heard of an energized transformer casing (Tr. 45).

In response to further question, Mr. Miller stated that the outer fencing gate is locked and precludes access to the skid mounted substation (Tr. 47). He stated that the transformer casing for substation "I" is not energized and that if someone touched it nothing would happen (Tr. 51-52).

MSHA Inspector Terry A. Scott, testified as to his experience, which included work as a high voltage lineman, an underground electrician repairman, and work with transformers similar to the ones at issue in this case. He has also had transformer training and completed a two-year course in industrial electricity at Mayo State Vocational School in Paintsville, Kentucky (Tr. 54-58).

Mr. Scott stated that when he observed the transformer on February 2, 1993, it was mounted on a skid that was approximately 12 to 14 inches high, and that the fence was mounted on the skid as shown in photographic Exhibit R-3 (Tr. 58). Referring to the photograph, Mr. Scott testified that he measured the distance from the fence to the "Danger-High Voltage" sign, and that the distance to the fence from one side of the transformer casing was 14 to 18 inches, and on the other side, the distance to the fence was 8 to 12 inches (Tr. 58-59). An additional substation "J" shown in photographic Exhibit P-4, was also measured and the measurements were similar (Tr. 60). The petitioner's counsel confirmed that since the measurements reflected that the transformer parts were less than three feet from the fence, there was a violation of section 56.12067 (Tr. 60).

Mr. Scott stated that he issued the citation because the transformer casing was less than three feet from the fence that was installed on the skid around the substation (Tr. 62). He believed that the intent of the three-foot clearance requirement in section 56.12067, between the fence and the transformer "is for working inside the area," and "to keep anyone from poking or sticking any kind of objects in toward the transformer or into the energized parts" (Tr. 62).

Mr. Scott stated he abated the citation after the respondent installed a portable outside fence that eliminated the hazard when the gate is locked, and that the purpose of the fence is to keep unauthorized personnel out of the substation, (Exhibits R-1 and R-2; Tr. 62). The outside portable fence prevents anyone from touching the transformer live parts because it is more than three feet away (Tr. 63).

Mr. Scott stated that he was aware of a ground fault that occurred on a transformer. He explained that a ground fault occurs when a live wire touches a part of the grounded frame (Tr. 63).

Mr. Scott stated that during his inspection he spoke with Karl Simons, respondent's electrical engineer, and safety superintendent Howell Miller, and Mr. Simons contended that the cited transformer was totally enclosed because it had a fence around it. However, Mr. Scott believed that a "totally enclosed" transformer was one with no terminals on the exterior (Tr. 66).

In response to further questions, Mr. Scott stated that the abatement shown in Exhibits R-1 and R-2, which still includes the skid mounted fence less than three inches from the transformer casing, is still in compliance even though no one is able to work on the transformer because of the lack of clearance, because he was informed that no one goes inside the fence to work (Tr. 68). He confirmed that if the skid mounted fence were taken down, and the exterior portable fence with a locked gate were kept in place, it would comply with section 56.12067 (Tr. 68).

Mr. Scott confirmed that he cited only the transformer casing for being less than three feet of the skid mounted fence, and that he did not contend that any transformer energized parts or wiring were within three feet of the fence (Tr. 69). The respondent's counsel took the position that the three items noted in the standard must be considered together, and that the casing, as well as the energized parts or wiring, must all be in fact energized in order for the standard to apply (Tr. 69-70).

On cross-examination Mr. Scott confirmed that he issued the citation because the transformer casing was within-three feet of the skid mounted fence (Tr. 71). He was of the opinion that the standard applies to unenergized casings, and stated that "anybody that knows anything about electricity knows that transformer casings are not energized" (Tr. 72). He explained that an ungrounded or improperly grounded casing is not energized unless a ground fault occurred (Tr. 73).

Mr. Scott explained his understanding of the meaning and intent of the words used in the cited standard, and he indicated that the word "casing" is independent of the words "energized parts" and "wiring" (Tr. 73). He also indicated that his supervisor concurred in his interpretation (Tr. 76). He confirmed that if the fence were less than three feet from any wiring, energized or not, it would be a violation (Tr. 76).

Mr. Scott confirmed that he measured the distance from the fence to the transformer casing with a wooden ruler from outside the fence, and he doubted that he could get his hand through the fence and confirmed that the only way to access the fence would be with a key to the lock (Tr. 80).

Mr. Scott believed that the intent of the standard was to protect people working in the particular area and to prevent

people from poking anything into energized parts. He indicated



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that his primary concern is to prevent the casing or energized parts from being close to the fence where someone was able to touch it with some foreign object (Tr. 82).

Mr. Scott confirmed that he has discussed the moving of the substations with company officials and agreed that mounting the fence on the skid is solving some problems. However, he believed that the skids need to be extended to move the fence three feet from the transformer casing, and he did not believe that this would be a problem and that the skids could be fabricated in the mine shop (Tr. 85-86).

Mr. Scott further stated that section 56.12067, pertains to transformers, the transformer casing, and wiring, regardless of whether it is energized or deenergized wire (Tr. 87). He confirmed that he later learned from the National Electrical Code about the three-foot work area clearance requirement between a transformer casing and the fence (Tr. 88). When asked to reconcile the fact that the skid-mounted fence with less than three-foot clearance between the fence and transformer casing is still in place after abatement, Mr. Scott responded "I made a mistake. I should have had this fence removed. That's about all I can say about that" (Tr. 89). He believed that the abated conditions as depicted in photographic Exhibits R-3, R-4 and R-5, are not in compliance with the standard (Tr. 89).

Terrance D. Dinkel, electrical engineer and technical adviser, MSHA Safety and Health Technology Center, Denver, Colorado, holds a Bachelor's Degree in electrical engineering from the university of Colorado and a Master's Degree in Management from the American Technology University. He confirmed that he did not view the cited transformer substation "I", but did view the others that were photographed, including substation "J". He identified a copy of an MSHA letter of interpretation relating to mandatory safety standard 30 C.F.R. 77.509, applicable to surface coal mines, and which contain language substantially identical to that found in the cited standard section 56.12067 (Exhibit P-16; Tr. 101-106).

Mr. Dinkel identified a copy of a U.S. Bureau of Mines Information Circular regarding fences or barriers for outdoor transformer stations (Exhibit P-17). He stated that he has never known of an "energized casing", but that it can theoretically exist. If a transformer casing elevated on a pole becomes energized there is no hazard if no one can reach it. In his opinion, the intent of the eight foot fence elevation found in section 56.12067, is to keep unauthorized personnel and bystanders away from the transformer installation, and the three-foot clearance requirement is to assure sufficient clearance for qualified people when they go in and do their work (Tr. 113-114). He stated that photographic Exhibits R-1 and R-2, which show the skid-mounted fence and the second outer fence, do

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not reflect total abatement of the cited condition because of the still existing restricted clearance for people who have to work around the transformer (Tr. 115).

On cross-examination, Mr. Dinkel stated that the Bureau of Mines circular information is no longer in effect (Tr. 116). He confirmed that the respondent's transformer stations are secured with locked fences and fence doors (Tr. 116-117).

#### Respondent's Testimony and Evidence

Dennis H. Miller testified that he discussed the citation with Inspector Scott when he issued it and there was a disagreement as to whether the transformer casing was an energized piece of equipment. Mr. Miller stated that the discussion took place in his office and that electrical superintendent Karl Simons was present (Tr. 125). Mr. Miller confirmed that the transformers need to be on skids because they are moved often as mining advances. There are about 30 skid-mounted transformers at the site and they are moved at least twice a year (Tr. 126).

Mr. Miller explained that at one time the skid had no fence around it, but that in 1988 or 1989, he had a discussion with MSHA inspector Thel Hill, and as a result of this the fencing was installed on the skids (Tr. 128-129). He stated that the height of the fence from the ground to the top is six feet, and with the added barbed wire, it is higher. According to the measurements taken, the distance from the energized transformer parts to the closest part of the fence is 3.3 feet. He believes that the cited substation is in compliance with the standard in question (Tr. 130).

On cross-examination, Mr. Miller stated that at the time of his conversation with Mr. Hill, Mr. Hill was shown a substation and was informed about what the company intended to do "and that proposal was agreed with" (Tr. 132). Mr. Miller further explained that the company proposal was made orally to Mr. Hill (Tr. 133).

Billy Foster was recalled by the respondent, and he confirmed that he accompanied Mr. Hill and Company safety specialist Billy Salter to look at a fenced substation as part of the respondent's proposal to install fences around the skid-mounted transformers. Mr. Foster stated that additional MSHA inspectors viewed the skids on different occasions, and he identified them as Ed Jusso and Ron Lilley (Tr. 135). He confirmed that the work was done with some outside help from a fencing and welding contractor, at an estimated total cost of \$90,000 to \$120,000 (Tr. 137).

On cross-examination, Mr. Foster could not recall the particular substation that was shown to the inspectors "because they were coming in at different times, and we had different units out of service each time" (Tr. 137). He stated that no reference was made to section 56.12067 when the inspectors viewed the substation, and he could not state whether the cited substation "I" was ever viewed (Tr. 139). Mr. Foster confirmed that after the inspectors stated "that looks okay to me," he believed it was sufficient for compliance (Tr. 139). He confirmed that nothing was reduced to writing, that the discussions with the inspectors were informal, and the skid mounted fenced configuration was not questioned further until the contested citation in this case was issued (Tr. 141).

Johnny B. Dagenhart, electrical engineer, Clapp Research Associates, Raleigh, North Carolina, was accepted as an expert witness in electricity and electrical engineering (Tr. 143). He stated that he was "somewhat familiar" with the respondent's operations and visited the mine site on one occasion the week prior to the hearing. He confirmed that he was familiar with the transformer fencing and the MSHA regulation in question, and he is of the opinion that the respondent is in compliance with that regulation (Tr. 143-144).

Mr. Dagenhart was of the further opinion that only energized transformer casings and wirings and energized parts should be covered by the regulation. He believed that the skid-mounted transformer installation as installed by the respondent supplies equivalent protection. He stated that the overriding concern in installing fences around transformers and substations is "to protect from inadvertent contact of persons with exposed energized parts" (Tr. 145).

Upon review of the MSHA letter of April 4, 1985 (Exhibit P-16), which mentions the application of section 110-34(e) of the National Electric Code, Mr. Dagenhart stated that this section does not apply to transformer substations because it refers to working spaces in front of switches, cabinets, and other such devices. He further stated that "utility-like functions" are covered by the National Electrical Safety Code (Tr. 147).

On cross-examination, Mr. Dagenhart stated that there are exposed energized bushings on the top of the transformer, but that the casing is not energized. In the event of a ground fault, if the casing is not grounded, it may become energized (Tr. 149). He further explained as follows at (Tr. 153):

- A. Well there -- If you're in physical contact with a transformer that is properly grounded, there's not gonna be a problem under normal circumstances. If a ground fault occurs,

naturally that equipment casing becomes energized for a brief period of time, the time it takes for a fuse or a breaker to deenergize that transformer, for that period of time.

However, with the grounding of a transformer and the grounding of a fence, the two are simultaneously grounded to the same point. And electrically, there's no difference between the casing of that transformer and the fence around it.

So the argument about touching a transformer during a ground fault, the same thing can happen if you're leaning up against the fence when a ground fault occurs. So it's really a difficult situation to say that -- It's impossible to say that the transformer is more hazardous than the fence in this case. And under normal circumstances they're both fine.

Mr. Dagenhart stated that other than location, the outer fence installed on the ground is no different than the skid-mounted fence and it has to be grounded back to the transformer and the transformer casing (Tr. 156).

Thel Hill, retired MSHA inspector, was called in rebuttal by the petitioner. He confirmed that he inspected the respondent's operations from 1978 through 1989, but that he did not recall any conversations concerning the skid mounted transformers. He confirmed that Mr. Salter always accompanied him during his inspections, and he could not recall seeing any transformer protection plans or designs (Tr. 158-159).

#### Background

The respondent operates an open pit phosphate mine, and its electrically operated equipment is frequently moved to different mining areas at the site as they are being developed. Electrical service is provided by transformers mounted on "sleds" so that they can readily be moved to the new mining locations. The respondent originally relocated its transformers by preparing a new site, moving the skid mounted transformers to the new site, and building a separate fence around the relocated transformers. In order to move the facility again, a crane was used to lift the fence so that the skid-mounted transformer could be moved to the next location. However, out of concern for overhead power lines, the respondent concluded that it would be more prudent and safe to erect a fence around the skid on which the transformer is located, thus avoiding the possibility of the crane contacting

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the overhead power lines. The skid-mounted transformer, with the attached fence around it, would then be moved to the new location. The respondent maintains that this procedure and transformer configuration had the approval of an MSHA inspector who has since retired.

The cited alleged violative condition in this case was abated by leaving the skid-mounted fence in place and simply installing a second portable fence with a locked gate around the skid-mounted fence enclosing the transformer substation. The substation is now surrounded by two fences; an "inner" fence mounted on the transformer substation skid that still does not provide a three-foot access clearance to the transformer, and a second "outer" portable fence that has a locked gate preventing access to the skid altogether.

#### Petitioner's Arguments

The petitioner asserts that since the cited skid-mounted transformer casing was less than three feet from the fence, a violation of section 56.12067, has been established. The petitioner takes the position that the regulatory language "energized parts, casings, or wiring" should be interpreted and applied alternatively or separately, and that the cited transformer casing in question was properly cited, regardless of whether it was energized or not. Assuming that I find that the standard does not apply to the transformer, petitioner's counsel asserted that it can be established that "energized parts and wiring" were within three feet of the fence, and that this establishes a violation (Tr. 8-9; 151-152).

#### Respondent's Arguments

The respondent takes the position that the present skid-mounted transformer configuration, with the protective fence around the perimeter of the skid, complies with the requirements of section 56.12067, and provides an equivalent and practical safe method for relocating the frequently moved transformer and keeping unauthorized personnel out.

The respondent further argues that section 56.12067, should be construed to apply to energized parts, energized casings, and energized wires. Since the cited transformer casing is not, and was not energized, the respondent concludes that a violation has not been established (Tr. 9-10; 77).

Findings and Conclusions

Fact of Violation

The respondent is charged with an alleged violation of 30 C.F.R. 56.12067, which provides as follows:

Installation of transformers.

Transformers shall be totally enclosed, or shall be placed at least 8 feet above the ground, or installed in a transformer house, or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring (Emphasis Added).

Contrary to the petitioner's suggestion that energized parts and wiring were also within three feet of the fence, the inspector confirmed that he only cited the transformer casing and that he was not contending that any energized parts or wiring were within three feet of the fence (Tr. 69). Under the circumstances, and in the absence of any amended citation, the petitioner is bound by the citation as issued, and it has the burden of proving that the transformer casing, which I find was less than three feet from the fence, was in violation of section 56.12067.

The respondent's suggestion that the petitioner is estopped from citing it with a violation because a former inspector approved the transformer configuration in question IS REJECTED. The inspector in question could not recall any discussions with the respondent concerning the transformers. Even if he had approved the installation of the skid-mounted fence in question, MSHA would not be bound by this and at most, it would only serve to mitigate any penalty assessment if a violation were found.

In *Secretary of Labor v. King Knob Coal Company, Inc.*, 3 FMSHRC 1417 (June 1980), the Commission rejected the doctrine of equitable estoppel with respect to a mine operator's liability for a violation. However, the Commission viewed the erroneous action of the Secretary (mistaken interpretation of the law leading to prior non-enforcement) as a factor which may be considered in mitigation of the civil penalty. Further, Commission Judges have consistently rejected an operator's reliance on prior inspections and the lack of citations, and have held that the lack of prior inspections and the lack of prior citations does not estop an inspector from issuing citations during subsequent inspections. See: *Midwest Minerals Coal Company, Inc.*, 3 FMSHRC 1417 (January 1981); *Missouri Gravel Co.*, 3 FMSHRC 1465 (June 1981); *Sertex Materials Company*, 5 FMSHRC 1359 (July 1983); *Emery Mining Corporation v. Secretary of Labor*, 5 FMSHRC 1400 (August 1983), *aff'd*, 10th Cir. U.S. Court of Appeals, 3 MSHC 1585.

The inspector believed that the intent of section 56.12067, is (1) to provide and maintain at least a three-foot clearance between the transformer and related equipment and the fence so as to provide ready access to the equipment for anyone working on it, and (2) to prevent anyone from poking or sticking objects through the fence into the transformer or energized parts (Tr. 62). The inspector further believed that the installation of an additional outside portable fence with a locked gate around the skid mounted fence that enclosed the substation to abate the violation eliminated the hazard, and as long as the outer fence gate is locked, he concluded there would be no violation because "the purpose of the fence now is to keep unauthorized personnel out of the substation", and "no one can touch the live parts. No one can touch the transformer casings" (Tr. 62-63).

The inspector confirmed that the installation of the second portable fence would effectively prevent anyone from entering the transformer substation. However, notwithstanding this abatement action, he further confirmed that the skid-mounted fence is still in place and is still less than three feet from the transformer casing, and is not in compliance with section 56.12067. He earlier testified that the fence was in compliance, even though there was a lack of clearance because he was told that no one works inside the fenced area (Tr. 68). When asked to reconcile these rather contradictory enforcement and abatement actions, the inspector stated that he had made a mistake and should have had the skid-mounted fence removed (Tr. 89).

MSHA's technical adviser Dinkel was of the opinion that the fence height requirement stated in section 56.12067, is intended to keep unauthorized personnel and others away from the transformer installation, and that the three-foot clearance requirement is intended to assure sufficient clearance for qualified personnel while working on the equipment.

MSHA's policy manual guidelines do not address section 56.12067, or section 77.509(a), a standard that applies to transformer installations at a surface coal mine with language substantially identical to that found in section 56.12067. However, the petitioner introduced a copy of an April 14, 1985, letter by MSHA's Coal Mine Safety and Health Administrator in response to an inquiry from a manufacturer of skid-mounted substations (Exhibits P-16). The inquiry by the manufacturer states as follows:

Most substations have a high voltage house and a low voltage house throat connected to a transformer or a high voltage structure connected to cover-mounted bushings then throat connected to the low voltage

house. In the first case, there are no exposed live parts on the transformer- they are throat enclosed. In the second case, exposed live parts are above NEC requirements or throat enclosed.

For these two instances and in trying to comply with Section 77.509, part(a) of the code, is a fence necessary? If so, is it necessary to maintain three feet clearance around the cooling radiators when they are in a different segment than the bushings?

MSHA's response to the inquiry states in relevant part as follows:

. . . . In the first case, a substation fence is not required by 30 C.F.R. 77.509, provided there are no exposed live parts on the high-voltage house, low-voltage house, or power transformer. However, if any of these components of the substation contain exposed live parts, then the entire substation is required by 30 C.F.R. 77.509 to be enclosed by a fence. (Emphasis added).

In the second case, . . . . a substation fence is required by 30 C.F.R. 77.509 because the power transformer contains exposed live parts. (Emphasis Added).

Finally, the intent of the clearance requirements specified in 30 C.F.R. 77.509(a) is to provide adequate work space around all equipment in a substation. Consequently, the three-foot clearance requirement in 30 C.F.R. 77.509(a) applies to cooling radiators on power transformers even when they are in a different segment than the bushings.

Petitioner's counsel conceded that the aforesaid letter is an "opinion letter" and not an MSHA policy statement (Tr. 104). He further asserted that it was introduced in support of his position that the intent of the standard is also to provide a three-foot clearance for any work performed on the transformer (Tr. 105).

The citation issued by the inspector in this case simply states that the transformer casing was within three feet of the fence. It seems to me that if the inspector intended to cite the respondent with a failure to maintain a three-foot "walkway" clearance around the transformer substation, he should have said so in his citation and supported it with some credible evidence that work is in fact performed on the transformer inside the fenced area. He did neither.



I take note of the possible application of more appropriate standards that may apply to inadequate work clearances. For example, section 56.11001, found in Subpart J, dealing with travelways, requires a safe means of access to all working places. Section 56.11008, requires the conspicuous marking of restricted clearances that create hazards to persons. Section 56.12019, requires suitable clearance where access is necessary at stationary electrical equipment or switch gear.

Although the respondent's counsel suggested that any transformer repair work is not done on location, that the fence is taken down and the transformer is moved elsewhere for this work, that the transformer configuration does not allow for anyone to do work inside the skid-mounted fence area, and that a switch is simply thrown (Tr. 50, 120), he elicited no testimony or evidence to support these proffers.

The burden of proof in this case lies with the petitioner, and it was incumbent on the petitioner to prove its case. The petitioner presented no evidence to establish that work was in fact performed inside the skid-mounted transformer fenced area, or that mine personnel do in fact venture inside that area to perform work. The only sworn testimony on this issue is the inspector's admission that "they told me they don't go in there to work" (Tr. 67), and this is supportive of the respondent's position.

I conclude and find that a piece of electrical equipment, such as a transformer, would be considered "energized" when the electricity supplying it with electric power is turned on. Insofar as the transformer casing is concerned, the evidence reflects that under normal operating conditions the transformer casing itself is not considered to be energized, notwithstanding the fact that the transformer is supplied with electricity and is energized.

Respondent's electrical expert Dagenhart believed that the installation of a fence around the transformer substation was intended to prevent persons from inadvertently contacting exposed energized transformer parts (Tr. 145). Mr. Dagenhart does not consider a transformer casing to be an energized part unless it is ungrounded, in which case he would consider the casing to be "energized under any circumstances" (Tr. 149). He also agreed that in the event of a ground fault, the casing would become energized during the time it would take a fuse or circuit breaker to deenergize the transformer, and that in the event of any grounding or fuse breaker failure the casing could remain energized indefinitely (Tr. 153, 155).

The inspector believed that the three-foot clearance requirement found in section 56.12067, is intended to provide working space between the fence and the transformer and to keep

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anyone from poking or sticking objects into the transformer or energized parts (Tr. 62). He confirmed that his belief in this regard was based on his understanding of the National Electrical Code (Tr. 88). Petitioner's counsel conceded that the code is not incorporated by reference as part of section 56.12067, (Tr. 98-90; 110).

The inspector believed that a transformer casing would only be energized if there were a ground fault, and that this would constitute a hazard (Tr. 61, 72-74). He confirmed that the casing is considered a part of the transformer and that there is wiring inside the casing (Tr. 74). The inspector agreed that he could not place his hand through the fence, and he confirmed that his primary concern was that in the event of a ground fault, and with the casing close to the fence, someone would be able to touch the casing with a foreign object (Tr. 80, 82, 88-89).

MSHA technical Advisor Dinkel, an electrical engineer, believed that an energized casing within reach of someone would be a hazard. He further believed that the 8-foot fence requirement found in section 56.12067, is intended to keep unauthorized persons away from the transformer substation, and that the 3-foot clearance requirement is to provide adequate work space when work is performed inside the fenced substation.

Although I have some doubt that the clear intent of the three-foot clearance requirement found in section 56.12067, is to provide a walkway or ready access to the equipment, I cannot conclude that the inspector's belief in this regard was an unreasonable interpretation and application. However, in the absence of any evidence that the respondent ever performed any work on the transformer inside the skid-mounted fenced substation area, or that such work would be performed at that location in the normal course of mining operations, I cannot conclude that the petitioner has proved that the failure to provide such an access area inside the skid-mounted fence around the transformer constituted a violation of section 56.12067.

I conclude and find that the primary intent of section 56.12067, in requiring a substantial fence around the transformer station is to prevent unauthorized persons from venturing inside the fenced area and inadvertently contacting exposed energized parts. The respondent's suggestion that the words "energized parts, casings, or wiring" must be read together, and that in order to establish a violation in this case it must first be established that the cited transformer casing was energized before a fence may be required IS REJECTED. The petitioner's credible and un rebutted evidence establishes that ground faults that may energize a transformer casing do occur, and that when they do, they present a potential hazard of shock or electrocution. Under the circumstances, I believe that interpreting and applying the standard to require a fence only

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after a casing becomes energized would be less than prudent and unreasonable. However, on the facts of this case, and even though the cited casing was within three feet of the fence, I cannot conclude that it was unprotected and presented a hazard. As noted earlier, there is no evidence that anyone worked in and around the skid-mounted transformer substation, and the inspector conceded that he could not place his hand through the fence to reach the transformer casing. Under all of that circumstances, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

ORDER

In view of the foregoing findings and conclusions, section 104(a) non-"S&S" Citation No. 4094761, February 2, 1993, citing an alleged violation of 30 C.F.R. 56.12067, IS VACATED, and the petitioner's civil penalty proposal IS DENIED AND DISMISSED.

George A. Koutras  
Administrative Law Judge

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