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SOL (MSHA) V. FMC WYOMING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

January 7, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-239
Petitioner : A.C. No. 48-01052-03515
 :
v. : FMC - Skull Point Mine
 :
FMC WYOMING CORPORATION, :
Respondent :

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;

Matthew F. McNulty III, Esq., VAN COTT, BAGLEY,
CORNWALL & McCARTHY, Salt Lake City, Utah,
for Respondent.

BEFORE: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent FMC Wyoming Corporation ("FMC") with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act")

A hearing on the merits was held in Salt Lake City, Utah on September 1, 1993.

The parties filed post-trial briefs.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

A. FMC is engaged in mining and selling bituminous coal in the United States and its mining operations affect interstate commerce.

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B. FMC is the owner and operator of Skull Point Mine, MSHA I.D. No. 48-01052.

C. FMC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

D. The Administrative Law Judge has jurisdiction in this matter.

E. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

F. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

G. The proposed penalties will not affect Respondent's ability to continue in business.

H. The operator demonstrated good faith in abating the violations.

I. FMC is a medium size mine operator with 839,453 tons of production in 1991.

J. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3243012

This citation, issued under section 104(a) of the Act, alleges FMC violated 30 C.F.R. 77.501. (Footnote 1)

1 The cited regulation provides:

77.501 Electric distribution circuits and equipment; repair.

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except

The citation reads:

Electrical repairs were being performed on a 70 amp 3 phase 48C VAC lighting distribution circuit circuit breaker located in the tipple motor control center panel, Mec 2 (equipment #508). Disconnect devices for the circuit were not locked out and suitably tagged by the person performing such work.

Citation No. 3243013

This citation, issued under section 104(a) of the Act, alleges FMC violated 30 C.F.R. 77.1710(c). (Footnote 2)

The citation reads:

Protective gloves were not being worn by an electrician while trouble-shooting and/or making repairs on a 70 amp 3 phase 480 VAC lighting distribution circuit circuit breaker.

Based on the credible evidence I enter the following:

FINDINGS OF FACT

1. MICHAEL MOE, an hourly employee, was employed by FMC for seven years as a master electrician. (Tr. 11, 80).
2. On March 10, 1992, Moe grounded a screw driver in the circuit breaker; this caused a panel flash. (Tr. 12).

that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

- 2 77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below.

(c) Protective gloves when handling materials or performing work which might cause injury to the hands, however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

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3. As a result of the grounding Moe was not shocked but he sustained burns to his hands, face and neck; he was unable to work for two months and was hospitalized for 8 or 10 days. (Tr. 12, 13, 17).

4. Moe began his work by shutting off a 480 volt circuit breaker in order to tighten some loose connections on the bottom side of the breaker. Turning the breaker to "off" de-energizes the lower half but not the upper side of the breaker. (Tr. 16; Exhibit R-4 shows the breaker box; the burned area is shown at the left edge of the left breaker slightly to the left of the left screw shown in the center of R-4).

5. In his trouble-shooting Moe determined one of the leads in the circuit breaker was loose. (Tr. 14).

6. The motor controlled by the electricity was not running; the breaker had functioned properly because it had tripped. (Tr. 14).

7. When Moe was using the amp meter to check the equipment he was not wearing gloves. (Tr. 15).

8. The equipment Moe was working on was a motor control panel containing a motor starter, a circuit breaker and thermal overloads. Its function was to reduce voltage to start 480 volt motors. (Tr. 16).

9. The screw driver was ten inches long. As Moe was tightening the loose wire he leaned the screw driver against the metal frame of the motor control center. (Tr. 16).

10. There was a disconnect device on the motor control panel. (Tr. 18). To de-energize the top portion of the panel you could go to a different building and de-energize a large breaker that shuts down the entire system. As an alternative each individual unit can be de-energized by pulling out one or all of the 12 individual units. (Tr. 19, 25).

11. Moe did not lock or tag out the equipment when working on the top part of the motor control center. (Tr. 19).

12. Moe remembered receiving an FMC policy manual (Ex. R-2) that talks about lock-out and de-energization policies. (Tr. 22).

13. As a result of this accident Moe was disciplined by FMC. (Tr. 23).

14. Troubleshooting is finding any problem and fixing it. The fixing of any problem would constitute a repair. (Tr. 23,

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24). Moe thought he was repairing the equipment when he was injured. (Tr. 25).

15. RONALD J. RUDY accompanied Moe on the date of the accident. (Tr. 29, 30).

16. Moe was not wearing gloves on March 10th. (Tr. 32).

17. PAUL PRICE has been an MSHA electrical engineer for over 13 years. His duties include the investigation of electrically oriented accidents. (Tr. 34, 35).

18. The motor control panel is an electrical distribution circuit. Basically it takes a larger amount of electricity and distributes it as reduced loads. (Tr. 36).

19. When an electrician is working on a distribution circuit MSHA requires that the circuits be locked out and tagged; further, when troubleshooting a worker must wear gloves. (Tr. 36).

20. When he was using the meter and examining the system Moe was troubleshooting. For such work gloves are required. (Tr. 37).

21. Gloves would protect someone from being electrocuted while troubleshooting. MSHA's records indicate workers have been hurt while troubleshooting without using gloves. (Tr. 38).

22. It is illegal to troubleshoot while the circuits are energized. (Tr. 39).

23. As a result of not de-energizing the equipment there are three hazards: burns, electrocutions, and blasts. (Tr. 42).

24. In this case a loose connection caused a wire to be warm to the touch. (Tr. 43).

25. MSHA's program policy manual does not require gloves while an electrician is working. (Tr. 44).

26. The use of gloves would not have prevented Moe's accident. (Tr. 45).

27. Moe did not lock out or tag out before working on the energized portion. (Tr. 48).

28. RON HALE testified for FMC. He is in charge of all maintenance at the mine. In addition, he is a master electrician. (Tr. 55-56).

29. In his investigation Hale found leather gloves three and one half feet from the electrical panel. The gloves were next to Moe's volt meter and hard hat. (Tr. 75).

30. FMC's lockout procedure is contained in Exhibit R-2. Moe was familiar with the procedure. (Tr. 61).

31. During the annual refresher training, lockout procedures and de-energization were discussed. (Tr. 65).

DISCUSSION AND FURTHER FINDINGS
AS TO CITATION NO. 3243012

Moe grounded his screwdriver when he tightened the loose screw shown in the recessed portion of the upper part of the circuit breaker in Exhibit R-4. At the time he was performing electrical work on the distribution circuits. The evidence further shows that while performing this work the disconnecting devices were not locked out. Moe indicated the disconnecting device is located in a different building. An alternative disconnect could have been accomplished by removing the breaker can, but neither was done.

It is true that the breaker switch was in the "off" position (see Ex. R-4). However, even with the breaker lever on the "off" position the upper portion of the breaker remained energized. The loose screw being tightened by Moe and the blast scar were in the upper portion of the can.

The Judge is aware of the testimony of Ron Hale. From his investigation Hale concluded Moe was working on the "T leads" which were de-energized. (Tr. 59, 69).

At some point, as Hale contends, Moe was also most likely working on the de-energized "T-leads" located in the bottom half of the breaker can. However, when Moe caused the panel flash, he could only have been working on the top energized portion of the circuit breaker. (See Fact, par. 4). Hale confirms this scenario, since he did not dispute the fact that the top half was energized. He further identified the burn mark shown on Exhibit R-4. (Tr. 76-78).

In its oral argument FMC has confused the upper and lower portion of the breaker can. I find that electrical work was being performed on the energized upper portion when Moe tightened the loose screw. Moe admits he did not lock out or tag the equipment when he was performing such work. (Tr. 19).

The facts establish that a violation of 30 C.F.R. 77.501 and Citation No. 3243012 should be affirmed.

DISCUSSION AND FURTHER FINDINGS
AS TO CITATION NO. 3243013

The uncontroverted evidence shows Moe was not wearing protective gloves while troubleshooting. Moe was troubleshooting when he was using the amp meter to check the equipment.

On the uncontroverted evidence, Citation No. 3243013 should be affirmed.

SIGNIFICANT AND SUBSTANTIAL

The citations herein where denominated by the Secretary as "Significant and Substantial."

An "S&S" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "Significant and Substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc. 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In considering the Mathies formula, I find there were underlying violations of two mandatory safety regulations, namely 77.501 and 77.1710. Further, a measure of danger was contributed to by the violations. The third facet, a reasonable likelihood that the hazard contributed to will result in an injury is established as to Citation No. 3243012 by the injury and hospitalization of electrician Moe.

The reasonable likelihood that the injury in question will be reasonably serious is established by the hospitalization of electrician Moe.

FMC contends the S&S allegations cannot be sustained. However, the facts and Commission precedent establish a contrary conclusion as to the failure to de-energize (77.501). The S&S allegations as to Citation No. 3243012 should be affirmed.

The failure to wear gloves is a separate violation from the failure to de-energize. It is true that MSHA requires workers to wear gloves only when troubleshooting the equipment. (Tr. 36, 37). I further agree he was repairing but not troubleshooting when the panel flash occurred. However, part and parcel of Moe's activities at the time of this accident included troubleshooting without gloves and, since workers have been hurt, even electrocuted in such circumstances, an S&S violation is established as to Citation No. 3243013.

OK and VW Coal Company, 13 FMSHRC 1063, 1067 (July 1991), relied on by FMC is not inopposite the views expressed here.

CIVIL PENALTIES

The statutory criteria for assessing civil penalties are contained in section 110(i) of the Act, 30 U.S.C. 820(i).

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FMC's favorable history indicates it was assessed 11 violations for the two years ending March 11, 1992. (Ex. M-1).

The proposed penalties will not affect FMC's ability to continue in business. (Stipulation).

The S&S allegations as to Citation No. 3243013 should be vacated.

FMC was not indifferent to de-energizing electrical equipment and it also furnished gloves to its electricians. In view of this evidence, I conclude the assertion of moderate negligence must be reduced for this non-supervisory employee.

As previously discussed, the gravity of the violations was high.

FMC demonstrated good faith in attempting to achieve prompt abatement.

On balance, I believe the penalties set forth in this order are appropriate.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 3243012 is affirmed and a penalty of \$2,000.00 is ASSESSED.

2. Citation No. 3243013 is affirmed and a penalty of \$1000 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Matthew F. McNulty III, Esq., VAN COTT, BAGLEY, CORNWALL & McCARTHY, 50 South Main St., Suite 1600, P.O. Box 45340, Salt Lake City, UT 84145 (Certified Mail)

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