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SOL (MSHA) V. U. S. COAL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 93-119  
Petitioner : A.C. No. 40-01977-03619  
v. :  
 : No. 2-3 Mine  
U. S. COAL, INC., :  
Respondent :

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for petitioner;  
Charles A. Wagner, III, Esq., Wagner, Myers &  
Sanger, Knoxville, Tennessee, for Respondent.

Before: Judge Fauver

This is an action for civil penalties under 105(d) of the  
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801  
et seq.

Having considered the hearing evidence and the record as a  
whole, I find that a preponderance of the substantial, reliable,  
and probative evidence establishes the following Findings of Fact  
and further findings in the Discussion below:

FINDINGS OF FACT

1. On April 16, 1992, Lonnie Phillips, a certified  
electrician at Respondent's No. 3-2 Mine in Scott County,  
Tennessee, was called to repair an electrical malfunction in a  
continuous mining-machine.

2. The electrician opened the electrical panel cover and  
began work with a screwdriver without first de-energizing the  
power circuits and without locking out and tagging disconnecting  
devices for the 480-volt circuit he was working on. His  
attempted repair work was not "troubleshooting" within the  
meaning of federal safety regulations.

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3. While trying to repair the energized circuit, the electrician received a severe electrical shock. Other miners saw him shaking, and cut the power off. He continued to shake, and it took five miners to hold him down and transport him to the surface. He was taken to a hospital by helicopter, suffering from electrical shock and burns to his hand.

4. Federal Mine Inspector Don A. McDaniel investigated the accident and issued Citation No. 3383505, alleging a violation of 30 C.F.R. 75.509, which requires all power circuits and electrical equipment to be de-energized before work is done on the circuits and equipment, and Citation No. 3383506, alleging a violation of 30 C.F.R. 75.511, which provides that no electrical work shall be performed on circuits or equipment without first locking out and tagging disconnecting devices.

5. On each citation, Inspector McDaniel indicated that the violation was significant and substantial, affected one person, and was due to a high degree of negligence.

6. The parties stipulated that annual production for all of Respondent's mines is about 190,000 tons, and that the proposed civil penalties would not affect the operator's ability to remain in business. The parties further stipulated that there were no prior citations for violations of 30 C.F.R. 75.509 and 75.511, and that all penalties assessed against Respondent during the previous 24 months, except for those currently in litigation, have been paid by the operator.

7. Because of his injuries, Lonnie Phillips was absent from work for 2 to 3 months. After he returned, he showed signs of memory loss and impaired thinking that were not present before the electrical shock. Because of his impaired mental condition, which included an inability to understand, remember and follow work rules and standards, the company terminated his employment.

#### DISCUSSION, FURTHER FINDINGS

The statutory standards for assessing civil penalties for violations are set forth in 110(i) of the Act, as follows:

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil

penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

If an operator contests the Secretary's proposed civil penalties, the Secretary brings an action before the Commission. Hearings before a Commission judge are de novo and the judge applies the six statutory criteria without consideration of the Secretary's administrative formulas and regulations for proposing civil penalties. See *Sellersburg Stone Co. v. Fed. Mine Safety & Health Review Commission*, 736 F.2d 1147 (7th Cir. 1984).

Respondent is a relatively small operator. It demonstrated good faith in attempting to achieve rapid compliance after notification of the two violations. (Footnote 1)

I find that the electrician violated the safety standards cited and committed gross negligence in doing so. The inspector routinely cautioned Respondent's mine management and electricians not to work on energized circuits and reminded them of the safety standards requiring that circuits be disconnected, locked out and tagged. He specifically talked to Lonnie Phillips about locking and tagging out circuits before working on them. I find that Mr. Phillips knew of the requirements of the relevant safety standards and was grossly negligent in attempting to repair the electrical circuit without de-energizing it, locking the disconnecting device and tagging out the circuit.

I also find that the violations were "significant and substantial" (as defined in 104(d) of the Act) because it was "reasonably likely" that the violations would result in injury. *Mathies Coal Co.*, 6 FMSHRC 1 (1984).

Under the Mine Act, an operator is liable without fault for its employees' violations of the Act and safety standards promulgated under it. *Southern Ohio Coal Company*, 4 FMSHRC 1459, 1462 (1992). Respondent is therefore liable for the violations of its electrician.

The major issue here is whether the electrician's negligence is imputable to the operator for civil penalty purposes.

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1Inspector McDaniel testified that the practices cited were corrected by the company holding a safety meeting, at which Inspector McDaniel again cautioned management and the electricians as to the rules for de-energizing circuits and locking and tagging them out before doing electrical work.

As a general rule, negligence of rank and file employees is not imputed to the operator for civil penalty purposes. The question in such cases is whether the operator was negligent by its own acts or omissions in supervising, training and disciplining its rank and file employees to ensure compliance with safety standards. Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (1982); Old Dominion Power Co., 6 FMSHRC 1886, 1895-6 (1984); Nacco Mining Co., 3 FMSHRC 848, 850 (1981). However, the negligence of a supervisor, foreman or other agent of the operator is imputable to the operator for civil penalty purposes. This rule furthers the Congressional purpose in providing for penalties, i.e., to ensure the operator's compliance with the requirements of the Mine Act. A "designated person to conduct electrical examinations of electrical equipment" is regarded as an agent of the operator and his negligence is imputable to the operator. Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991); Mettika Coal Corp., 13 FMSHRC 760 (1991).

In Nacco, supra, the Commission held that the negligence of a supervisor is not imputed to the operator if two general conditions are met: (1) the operator had taken reasonable steps to avoid the kind of accident in question; and (2) no other miners were put at risk by the supervisor's conduct.

Applying these principles, I find that electrician Phillips' gross negligence is imputable to Respondent.

The inspector testified that although he marked the citations to show that one person was affected by the violations, other persons could have been affected. By using a screwdriver to work on an energized circuit, the electrician ran the risk of energizing the frames of equipment and causing electrical shock to other miners. Also, by negligently using a screwdriver to work on a live 480-volt circuit, the electrician endangered other miners who might try to rescue him if he became electrically shocked -- i.e., by their touching energized equipment, a cable, or the electrician's body while it was conducting electricity.

I therefore find that electrician Phillips created a serious risk to himself and to other miners by violating the cited standards.

Considering all of the criteria for civil penalties in 110(i) of the Act, I find that a civil penalty of \$4,000 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.
2. Respondent violated 30 C.F.R. 75.509 as alleged in Citation No. 3383505.
3. Respondent violated 30 C.F.R. 75.511 as alleged in Citation No. 3383506.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 3383505 and 3383506 are AFFIRMED.
2. Respondent shall pay civil penalties of \$8,000 within 30 days of the date of this Decision.

William Fauver  
Administrative Law Judge

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