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SOL (MSHA) V. BHP MINERALS INTERNATIONAL
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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 PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 92-329
Petitioner	:	A.C. No. 29-00097-03540
	:	
	:	Docket No. CENT 93-272
	:	A.C. No. 29-00097-03545
v.	:	
	:	
	:	Navajo Mine
	:	
BHP MINERALS INTERNATIONAL,	:	
Respondent	:	

DECISION

Appearances: Nancy B. Carpentier, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for Petitioner;
K. T. Johnson, Jr., Esq., BHP Minerals International, Inc., San Francisco, California, for Respondent.

Before: Judge Amchan

Overview

These cases involve 6 citations issued as the result of two inspections at Respondent's Navajo surface coal mine in northwestern New Mexico. The first inspection occurred in the spring of 1992 and the second in the spring of 1993.

Five of the citations allege violations of electrical safety standards. Three allege violations of 30 C. F. R. 77.516 for insufficient clearance in front of a circuit breaker box. One alleges an improper setting on a circuit breaker and another alleges a failure to examine a breaker box inside of a contractor's trailer. The one non-electrical citation alleges improper storage of an 11-foot high, 4 1/2 foot wide tire.

For the reasons stated below, I vacate all the citations at issue except for the one alleging a violation with regard to Respondent's failure to perform an electrical inspection in its

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contractor's trailer. I affirm a non-significant and substantial violation in this instance and assess a \$50 civil penalty.

The tire storage violation

On June 1, 1993, MSHA inspector Larry Ramey observed a 11 foot high, 4 1/2 foot wide tire, which weighed 4 tons, stored vertically in the front of the tire shop at the Navajo mine (Tr. 13-15, 29-30). The tire was not restrained in any way, except possibly for a chock on one side (Tr. 21-22, 34-35, 49-51).(Footnote 1)

Ramey issued Respondent citation 4061294 for this condition, alleging a violation of 30 C. F. R. 77.208(a). That standard provides that, "Materials shall be stored and stacked in a manner which minimizes stumbling or fall-of-material hazards." The citation was characterized as non-significant and substantial because although the tire was standing next to an exit door at the front of the building, employees generally used the back entrance (Tr. 15-17).

The cited standard does not state that tires may not be stored vertically; its requirements are of a very general nature. Therefore, the test as to whether Respondent violated the standard is whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized that vertical storage of this tire violated the regulation, Ideal Cement Company, 12 FMSHRC 2409 (November 1990), Alabama By-Products Company, 4 FMSHRC 2128, 2129 (December 1982).

I conclude that the Secretary has not met his burden of proving a violation of this standard. Jack Vaughn II, the supervisor of Respondent's tire shop, testified without contradiction that wide-based tires are generally stored upright to keep the beads (the inside edge of the tire) from coming together (Tr. 29-32, 43-44). Mr. Vaughn worked for B. F. Goodrich and for Goodyear Tire Company (Tr. 28-29). He testified that all the companies he worked for stored wide-based tires upright, without the use of tireracks (Tr. 46). He has never seen such a tire fall (Tr. 47)

I have not resolved the conflicting testimony regarding the presence or the absence of the chock because Mr. Ramey would have issued the citation even if the tire was chocked. The essence of the citation is the vertical storage of the tire without a means to prevent it from falling (Tr. 44-46, 51). Moreover, the record indicates that there was little, if any chance, that the tire would roll due to the absence of a chock (Tr. 30, 45-46).

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Mr. Vaughn testified that it is "very, very unlikely that the tire would fall" (Tr. 29). While I assume that there is some possibility that the tire could fall, or roll, I cannot conclude that a reasonably prudent person, familiar with the storage of tires in the mining industry, would recognize that storing wide-based tires vertically is sufficiently hazardous that use of tire racks, horizontal storage, or other means of restraint, was necessary.

Mr. Vaughn's testimony indicates that industry practice is to store the wide-based tires vertically. While industry practice may not be controlling as to what a "reasonably prudent person" would do in this situation, there is no evidence in this record that the industry practice is not reasonably prudent. Therefore, I conclude that Respondent's vertical storage of the tire in question did not violate section 77.208(a).

The setting on the circuit breaker for the compressor of the high wall drill

On April 28, 1992, MSHA electrical inspector Daniel Head observed a circuit breaker for the 350 horsepower, 480-volt, 3-phase motor for an air compressor of a high wall drill belonging to Respondent (Tr. 61-64). The highest setting on the circuit breaker according to Head was 6,000 amperes, which is the point at which the breaker will shut off power to the compressor motor if there is a short circuit (Tr. 64-66).

Inspector Head concluded that the circuit breaker setting was too high to comply with the requirements of the National Electric Code and therefore issued citation 4060870, alleging a violation of 30 C. F. R. 77.506. That regulation provides:

Automatic circuit breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuits and overloads.

The danger of setting a circuit breaker too high is that in case of a short circuit, dangerous amounts of current may reach the motor in the event of a short circuit, even if the tripping of the circuit breaker is delayed 1/200 or 1/300 of a second, thus exposing miners to electrical burns or shock (Tr. 66, 109-112). The parties agree that the criteria for complying with section 77.506 are found in the National Electric Code (NEC) and more specifically NEC section 430-52. That section provides that the setting of an instantaneous trip circuit-breaker be no more than 1300% of the motor's full-load current (Respondent's brief at page 7, Petitioner's brief at page 4).

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The dispute between the parties is whether the circuit breaker setting in this case exceeded 1300%. Inspector Head utilizes a figure of 400 amperes for the full load current of the motor (Tr. 64-65). He obtained this number from the nameplate of the motor (Tr. 65). Respondent, through Lynn Byers, the chief mechanic at the Navajo mine, contends that the motor's full load capacity is 438 amperes, which you derive from the manufacturer's instructions (Tr. 97-102). Inspector Head appeared at times to concede that one was not limited to the nameplate in calculating the full load capacity (Tr. 76-78, 91). Therefore, with regard to this issue, I credit Mr. Byers and find that the full load capacity of the motor was 438 amperes, or as the Secretary's expert Terrence Dinkel testified, "a few amps less," (Tr. 97-102, 121-122).

The parties also disagree as to the setting on cited circuit breaker. Inspector Head concluded that the breaker would trip at 6000 amperes, which is in excess of the 5694 amperes, which is 1300% of the full load capacity of the motor--using Mr. Byers figures (Tr. 73-76). Mr. Byers, however, believes that the circuit breaker will trip at 5400 amperes, within the 1300% of the full load motor current allowed by the NEC (Tr. 104).

Terrence Dinkel, an electrical engineer in MSHA's technologies center (Tr. 115), testified that Mr. Byers was correct in stating that General Electric, the manufacturer of the circuit breaker, advises that the circuit breaker will trip between 9 and 11 times the breaker rating of 600 amperes (Tr. 102-105, 120-121). However, Mr. Dinkel further stated that given this range one must assume the average figure of 10 times the breaker rating as the point at which the circuit breaker will trip (6000 amperes) (Tr. 120-121).

I credit the testimony of Mr. Dinkel and find that Respondent's circuit breaker was set to trip at 6000 amperes at the high setting. This figure exceeds the 1300% limit in the NEC. Nevertheless I do not conclude that Respondent violated section 77.506.

Neither the cited regulation nor the NEC is crystal clear in specifying the allowable circuit breaker settings for motors with a 600 ampere thermal rating. As with the prior citation, I believe the Commission must apply the "reasonably prudent person" test in adjudicating this citation. As the proper setting for Respondent's circuit breaker was far from obvious, I cannot conclude that a reasonably prudent operator's electrician would have recognized that BHP's circuit breaker was set in violation of the standard or the NEC.

Mr. Byers was a master electrician at the Navajo mine for 12 years and appears to be quite competent in his field (Tr. 93-94). I see nothing in the record that would lead me to conclude that

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Mr. Byers did not act in reasonably prudent manner in setting the cited circuit breaker or that he should reasonably have known that it was not set in conformance with the standard or the NEC. Applying the test set forth in *Alabama By-Products*, supra, I conclude that the standard did not provide Respondent with notice of its requirements that was adequate to sustain a violation under the circumstances in this case.

Failure to examine the electrical panel box in a contractor's trailer

An independent contractor of Respondent, Navajo Engineering Construction Authority (NECA) maintained a trailer on Respondent's property (Tr. 126-128, 149). This trailer was used infrequently by the contractor for such purposes as filling out timecards and planning its work (Tr. 149-150).

In May, 1992, MSHA inspector Ramey found an electrical circuit breaker box inside this trailer, which did not comply with MSHA's electrical standards (Tr. 129-130). Most notably there were exposed buss bars which are live electrical parts. These buss bars are in an opening several inches long and several inches wide. They are recessed approximately 2 inches from the face of the panel box (Tr. 139-141, 150-151). The Secretary cited NECA for the specific violations found and also issued citation 3588747 to Respondent alleging a violation of 30 C. F. R. 77.502 for failing to inspect the panel box during the prior 2 months (Exhibit P-5).

Respondent concedes that it did not inspect the panel box in the contractor's trailer (Tr. 153); however, it argues that it was under no legal obligation to do so, and that the record does not establish that its contractor failed to inspect the circuit-breaker box.

Mr. Byers' conceded that, "[o]f the hundreds and hundreds of detailed inspections of areas and individual equipment, we missed it (Tr. 153)." From this concession, I infer that Respondent had assumed the responsibility for conducting the necessary examinations of its contractors' electrical equipment. I also infer from the violations found by MSHA that the panel box had not been inspected by NECA. Even if Respondent were relying on NECA to inspect the electrical installations in its trailer, BHP would be liable for its contractor's failure to do so, Bulk Transportation Services, Inc., 13 FMSHRC 1354, 1359-60 (September 1991). Therefore, I affirm citation 3588747.

Respondent's violation of section 77.502 was non-significant and substantial

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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.

I conclude that it was not reasonably likely that anyone would be shocked or burned in the normal course of mining operations, due to the hazards created by Respondent's failure to inspect the NECA panel box. First of all, it was rare that anyone used the trailer (Tr. 150, 153-4). Secondly, rarely would anyone need to open the panel box, which is no different than a circuit breaker box in a person's home (Tr. 142, 148). Finally, even if a person opened the panel box to manipulate the circuit breakers, it is not reasonably likely that they would stick their fingers or another object beyond the circuit breakers and contact the exposed buss bars (Tr. 151-153). Therefore, I find this violation to be non-significant and substantial at step 3 of the Mathies test.

Assessed Civil Penalty

The Secretary proposed a \$903 civil penalty for this violation. I conclude that under the statutory criteria in section 110(i), a \$50 civil penalty is appropriate. Of the six criteria, the two that are most important in determining the appropriate penalty for this violation are the gravity and the Respondent's negligence. Given the fact that the trailer in question was often padlocked and rarely used, I conclude that Respondent's negligence was fairly low.

Similarly, since employees were rarely exposed to the uninspected circuit breaker box and it is not reasonably likely that they would have been injured due to Respondent's failure to inspect the box, even if they did open it, I believe that the gravity of this violation is also low. After also considering the other four statutory criteria, I assess a \$50 civil penalty.

The clearance below the electrical panel boxes

Three of the citations in this case, numbers 4061289, 3588749, and 3588744 allege violations of 30 C. F. R. 77.516,

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which requires that all electrical equipment and wiring installed after June 30, 1971, meet the requirements of the National Electrical Code (NEC) in effect at the time of installation.

More specifically, these three citations allege that Respondent violated section 110-16(a) of the NEC which requires a working space of 30 inches in the direction of access to live parts, operating at not more than 600 volts, which are likely to require examination, adjustment, servicing or maintenance while alive. The three citations involve 3 different circuit breaker boxes.

Citation 4061289 involved a breaker box in Respondent's safety trailer, which had a metal file cabinet directly below it. The top of the file cabinet was 30" long x 19" wide, and 12 - 18 inches below the breaker box (Tr. 156-159).

Citation 3588749 involved a circuit breaker box in the BHP lube area complex which had 6 5-gallon buckets directly underneath it (Tr. 164-165). Finally, citation 3588744 involved a box in the main shop complex which had a metal desk directly below it (Tr. 167-168).

Respondent contends that while NEC section 110-16 is applicable to the boxes, 110-16(a) is not because the breaker boxes do not contain live parts which are likely to require examination, adjustment, servicing, or maintenance while alive.

In all three cases there was nothing directly in front of the electrical panel box, but there were objects directly below the box. Section 110-16 of 1968 NEC requires that "sufficient access and working space be provided and maintained about all electrical equipment to permit ready and safe operation and maintenance of such equipment (Exhibit P-2)."

I conclude that Respondent complied with section 110-16 and that 110-16(a) does not apply to the conditions cited. I credit the opinion of BHP's Lynn Byers, a master electrician, that circuit breaker boxes do not normally have exposed live parts (Tr. 190) and that there is no reason to work inside of such a box when the box is energized (Tr. 181-3, 187-190). I therefore vacate all three citations.

ORDER

Citation 3588747 is affirmed as a non-significant and substantial violation and a \$50 civil penalty is assessed. This penalty shall be paid within 30 days of this decision.

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Citations 4060870, 3588744, 3588749, 4061289, and 4061294
are vacated.

Arthur J. Amchan
Administrative Law Judge
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