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

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 93-540
	:	A.C. No. 15-12941-03655
v.	:	
	:	No. 60 Mine
LEECO INCORPORATED, Respondent	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Edward H. Adair, Esq., Leona A. Power, Esq. (on the Brief), Reece and Lang, P.S.C., London, Kentucky, for the Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging Leeco, Incorporated (Leeco) with five violations of mandatory standards and seeking civil penalties of $18,250 for those violations. The general issue is whether Leeco violated the cited standards and, if so, what is the appropriate civil penalty to be assessed. Additional specific issues are addressed as noted.

At hearing the Secretary filed a motion for approval of settlement of Citation Nos. 3212149 and 3214717 proposing a reduction in penalties from $1,250 to $610. I have considered the representations and documentation submitted in support of the proposed settlement and conclude that the settlement is acceptable under the criteria set forth in Section 110(i) of the Act. The order accompanying this decision will accordingly incorporate this approved settlement.

The remaining citation and orders arose out of a fatal electrical accident on November 27, 1991, in an underground working section at the Leeco No. 60 Mine. It appears that the victim, Electrician Wayne Howard, was working on a continuous miner near its left side scrubber blower motor when he was

electrocuted. Citation No. 3215664, issued pursuant to Section 104(d)(1) of the Act, alleges a violation of the mandatory standard at 30 C.F.R. 75.514 and charges as follows:(Footnote 1)

> The splice in the green lead for the left side blower motor on the Joy 14CM9 continuous miner located on the 004 working section was not reinsulated at least to the same degree of protection as the remainder. About 2 laps of glass tape and about 3 laps of plastic tape was used.

The cited standard provides, in relevant part, that "[a]ll electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."

There appears to be no dispute that a section of draw rock fell onto the subject Joy continuous miner at approximately 2:30 p.m. on November 27, severing one of the left side blower motor conductors. Electrician Wayne Howard was called to repair the miner. It is essentially undisputed that Howard spliced the green conductor by joining the severed parts (Joint Exhibit No. 1) with a split bolt (Joint Exhibit No. 2) and by covering the splice with 2 or 3 laps of glass tape and 2 or 3 laps of plastic tape (Respondent's Exhibit Nos. 15 and 16, respectively).

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1 Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially con tribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

The original and unaffected areas of the wire were insulated by approximately 1/16 inch thick insulation plus 5/32 inch thick outer jacket and a 5/32 inch thick conduit (Joint Exhibit No. 1). As is readily apparent from observation of the severed conductor and split bolt (Joint Exhibit Nos. 1 and 2, respectively), the tape-covered split bolt would necessarily have protruded significantly beyond the original insulation. I find that this splice was not reinsulated to afford the same degree of protection as the remainder of the wire and, indeed, seriously compromised the insulating ability of the tape.

In this case there is general agreement that the electrocution of Howard was the direct result of the metal lid to the blower motor coming down upon the protruding bolt thereby creating a hole in the insulating tape and allowing electrical current to pass through the power conductor to the mining machine and through Howard as Howard's elbow touched the mining machine. Within this framework of evidence I have no difficulty finding that the cited splice in the green conductor did not afford the same degree of protection as the remainder of the wire and, accordingly, the violation is proven as charged. In reaching this conclusion I have not disregarded Respondent's argument that the term "insulation" refers only to the dielectric capacity of the material and not to any physical separation and protection it provides. However, even the definition of the term "insulation" cited by Respondent requires a "separation ... by means of a nonconducting barrier." See A Dictionary of Mining, Mineral, and Related Terms, U.S. Dept. of the Interior, 1968. If the "barrier" is inadequate to prevent penetration and compromise of its insulating qualities, as the tapes were in this case, it is clear that regardless of the dielectric capacity it did not provide the same degree of protection as the remainder of the original insulation.

The violation was also "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that 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 (1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.
>
> See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (1987) (approving Mathies criteria).

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 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations, U.S. Steel Mining Co., Inc., 6 FMSHRC 1473, 1574 (1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (1986) and Southern Oil Coal Co., 13 FMSHRC 912, 916-17 (1991).

In this case there is no dispute that the subject splice was a direct cause of Howard's electrocution. I find that it was reasonably likely for such a fatality to have occurred under the circumstances and that the violation was therefore "significant and substantial" and of high gravity.

The Secretary further charges that the violation was the result of Leeco's high negligence and "unwarrantable failure." "Unwarrantable failure" has been defined as conduct that is not "justifiable" or is "inexcusable." It is aggravated conduct by a mine operator constituting more than ordinary negligence. Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (1987); Emery Mining Corp., 9 FMSHRC 1997 (1987). The Secretary suggests through the testimony of his inspector that such findings are justified on the grounds that the victim, Mr. Howard, was a certified and trained electrician and, accordingly, "should have known" that the manner in which he spliced the green conductor at issue did not meet the requirements of the cited standard. The Secretary also apparently relies upon this evidence for his findings of high negligence for purposes of evaluating the amount of civil penalty.

On the facts of this case, I agree with the Secretary that Howard, as an experienced certified electrician, should have known that the use of the subject tape over the splicing bolt was not adequate under the circumstances and that he was, therefore, negligent. However, the "should have known" standard is not sufficient to establish that the violation was the result of Howard's "unwarrantable failure". It is not, in itself evidence of gross negligence or aggravated conduct sufficient to meet the "unwarrantable failure" standard. In Secretary v. Virginia Crews Coal Co., 15 FMSHRC 2103 (1993), the Commission specifically rejected the use of a "knew or should have known" test by itself in determining whether a violation was the

result of unwarrantable failure for the reason that it would be indistinguishable from ordinary negligence. Under the circumstances, Citation No. 3215664 must be modified to a citation under Section 104(a) of the Act.

It must next be determined whether the section electrician was an "agent" for purposes of imputing his negligence to the operator for civil penalty purposes. In Secretary v. Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), the Commission held that the negligence of an operator's agent may be imputed to the operator for civil penalty and unwarrantable failure purposes. In Secretary v. Rochester and Pittsburgh Coal Co., 13 FMSHRC 189 (1991), the Commission found that a rank-and-file miner who was charged by the mine operator with the responsibility of performing weekly examinations required under the Act was an "agent" within the meaning of the Act and his negligence was imputable to the operator. In reaching this conclusion the Commission observed that an agent is one who is authorized by another, the principal, to act on the other's behalf. I conclude herein that when Leeco assigned certified electrician Wayne Howard its responsibility to conduct and perform electrical inspections and repairs within the framework of the Act and related regulations, Howard became an agent of Leeco for those purposes. In Secretary v. Mettiki Coal Corp., 13 FMSHRC 760 (1991), the Commission, applying the Rochester and Pittsburgh case, similarly found the negligence of an electrical examiner imputable to the operator.

Imputing the electrician's negligence is particularly warranted on the facts of this case because the electrician herein was given complete discretion to act on the operator's behalf as to how, when and where to perform his work subject only to a management veto of his priorities. The electrician's managerial-like authority in this mine is well illustrated by his directing the mine foreman to remain at the power center and by directing him to plug and unplug the cathead at his command.

Order No. 3215663, also issued pursuant to Section 104(d)(1) of the Act, fn. 1, supra, alleges a violation of the mandatory standard at 30 C.F.R. 75.511 and charges that "the disconnecting device for the Joy 14CM9 continuous miner located on the 004 working section was not locked out and suitably tagged by the persons splicing a lead to the left side blower motor."

The cited standard provides, in relevant part, as follows:

> Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except 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.

Leeco does not dispute this violation and takes issue only with the Secretary's "significant and substantial" and "unwarrantable failure" findings in the order. Thus, it is established that while Howard was splicing the green conductor to the blower motor of the cited continuous miner he was doing so at a time when the disconnect device for the continuous miner cable was neither locked out nor suitably tagged.

According to Leeco witness Donny Collins, who was then Leeco's general mine foreman, as he approached the power center, the "lolo" man (miner helper) told him to watch the cathead, which was then "out" (disconnected). Collins testified that Howard subsequently told him (Collins) that he would tell him when to put the power back on. Howard then proceeded about 150 to 180 feet to the damaged mining machine. According to Collins, 10 to 15 minutes later, Howard called to "put the power on." Thereafter Collins connected and disconnected the cathead several times based upon various communications from Howard. Collins acknowledged that several times he had difficulty hearing Howard's commands because of the nearby operation of a roof bolter and it was necessary to then relay the messages from Howard through another miner, James Lowe. On at least one occasion, in deciding whether to connect or disconnect the cathead Collins relied upon what he construed to be an affirmative nod from Howard detected by observing his cap light in motion some 150 to 180 feet away.

I find that the admitted violation was "significant and substantial." The cited regulation requires that persons performing electrical work must lock out and suitably tag the disconnect. By retaining the key to the lock, an electrician is thereby assured that power will not accidentally be engaged. There is no dispute that the voltage to the subject mining machine was sufficient to cause electrocution and that Howard was performing such electrical work, i.e., splicing a power conductor that exposed him to imminent electrocution should power have been engaged. Under the circumstances and based upon the makeshift and flawed communication method used by Howard and Collins, I conclude that there was a reasonable likelihood for miscommunication and therefore, for death by electrocution.

In determining whether this violation was the result of Leeco's "unwarrantable failure," the Secretary again apparently relies on the inspector's testimony that Howard, as Leeco's certified and trained electrician, was negligent because, in essence, he "should have known" that his failure to follow lock-out procedures was violative of the regulations. As previously noted, the Commission has rejected the ordinary negligence standard expressed by the "should have known" test

as the sole basis for determining "unwarrantable failure." Virginia Crews, supra. Under the Secretary's theory, Howard's negligence was therefore at worst ordinary negligence.

I find, however, that General Mine Foreman Collins is chargeable with an aggravated omission constituting "unwarrantable failure." Although Collins testified that he did not know that Howard was performing electrical work, I do not find under the circumstances that this testimony is credible. In any event, I find that Collins, in his capacity as general mine foreman and under the circumstances of this case, had a duty to know what his electrician was doing. See Secretary v. Roy Glenn, 6 FMSHRC 1583 (1984). In the Glenn case, the Commission stated that supervisors "could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance." This is particularly true under the circumstances of this case where Collins himself was asked by his electrician to connect and disconnect the power cable while Collins knew Howard was working on electrical equipment. Even assuming, arguendo, therefore that Collins may not have had actual knowledge that Howard was performing electrical work, the circumstances were such that Collins, in essence, closed his eyes to the violation and then asserts lack of responsibility because of self-induced ignorance. Under the circumstances, I conclude that Collins' inaction constituted an aggravated omission and "unwarrantable failure." Moreover, Collins' aggravated omission is imputable to the operator since he was then the general mine foreman. Southern Ohio Coal Co., supra.

Since the precedential citation, No. 3215664, has been modified to a citation under Section 104(a) of the Act, the instant order must be modified to a citation under Section 104(d)(1) of the Act.

Order No. 3215665, also issued pursuant to Section 104(d)(1) of the Act, fn. 1, supra, alleges a violation of the standard at 30 C.F.R. 75.509 and charges as follows:

> The Joy 14CM9 continuous miner located on the 004 working section was not deenergized while troubleshooting or testing the left side blower motor. It was not necessary to have the miner energized.

The cited standard provides that, "[a]ll power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing."

It is undisputed that at the time Howard was electrocuted, he was performing work on the mining machine described by Government witness Oscar Farley as "digging" or "wiggling something" and "picking" on the blower motor compartment with

a crescent wrench. Farley was then on the opposite side of the mining machine across from Howard.

Experienced electrician and mechanic for Joy Technologies, George Lowe, is familiar with the type of Joy mining machine at issue. Based on Farley's description of Howard's activities at the time of his electrocution, Lowe concluded that Howard was "trouble shooting." According to Lowe, this activity would also commonly be known in the mining industry to be "trouble shooting." I accept this credible testimony and find that indeed Howard was "trouble shooting" within the meaning of the cited standard. Lowe also testified and agreed with the testimony of MSHA Inspector and former electrician Howard Williams that it was not necessary for the miner to have been energized while performing this "trouble shooting." Particularly considering Lowe's expertise in the mining industry and familiarity with Joy mining equipment, I give this testimony particular and decisive weight. Under the circumstances, the violation is proven as charged.

The violation was also "significant and substantial." The cited activity was a direct cause of the fatality in this case. I conclude that it is also reasonably likely for such activities to cause fatalities.

In support of his finding of high negligence and "unwarrantable failure," the Secretary again apparently relies upon a presumption that Howard, as a certified and trained electrician, "should have known" that he was violating the cited standard. Again, while such evidence may be sufficient to support a finding of ordinary negligence, it is not sufficient alone to establish the aggravating circumstances necessary for an "unwarrantable failure" finding. Virginia Crews, supra. Based on prior reasoning, I do, however, impute Howard's negligence to the mine operator for the purposes of civil penalty assessment. Under the circumstances, however, Order No. 3215665 must be modified to a "significant and substantial" citation under Section 104(a) of the Act.

ORDER

Citation No. 3215664 and Order No. 3215615 are hereby modified to citations under Section 104(a) of the Act. Order No. 3215663 is hereby modified to a citation under section 104(d)(1) of the Act.

Considering the criteria under Section 110(i) of the Act, the following civil penalties are deemed appropriate and Leeco, Incorporated is directed to pay such civil penalties within 30 days of the date of this decision.

Citation No. 3212149	$ 210
Citation No. 3214717	$ 400
Citation No. 3215663	$5,000
Citation No. 3215664	$4,000
Citation No. 3215665	$2,000

Gary Melick
Administrative Law Judge

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