

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2014

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

US SILICA COMPANY,
Respondent,

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-425
A.C. No. 46-02805-309429

Mine: Berkeley Plant

**ORDER GRANTING U S SILICA COMPANY’S MOTION
FOR
SUMMARY DECISION**

In this civil penalty proceeding arising under sections 104 and 110(i) of the Federal Mine Safety and Health Act of 1977, as amended (30 U.S.C. §§814, 820(I)), the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) petitions for the assessment of a civil penalty of \$100 for an alleged violation of 30 C.F.R. §56.12018, a mandatory safety standard for the nation’s metal and nonmetal mines that requires the identification of certain power switches.¹ The Secretary alleges that on October 11, 2012, at the Berkley Plant of US Silica Company² (“US Silica” or “the company”), a breaker box in the plant’s paint trailer “was not labeled to show what circuits they controlled.”³ Citation No. 8705547. The inspector found that the cited condition was unlikely to result in injuries that could reasonably be expected to cause lost workdays or restricted duty and that the alleged violation was due to the company’s moderate negligence. *Id.* US Silica answered by denying it violated the standard and asserting that Citation No. 8705547 should be vacated.

¹ The standard states:

Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

30 C.F.R. § 56.12018.

² At the plant the company mines high quality sand that is used in manufacturing glass. The sand also is used in the production of natural gas through hydraulic fracturing. US Silica, *Locations*, <http://www.ussilica.com/locations/berkeley-springs-wv> (last visited Feb. 24, 2014).

³ Although the citation is awkwardly worded, it is clear from the pleadings that the inspector who cited US Silica used “they” to refer to the box’s two unlabeled circuit breakers.

The Commission's Chief Administrative Law Judge assigned the matter to the Court, and the Court ordered the parties to confer regarding possible settlement. When it became clear that a settlement could not be reached, the Secretary's counsel, with the agreement of the company's counsel, suggested to the Court that the matter be resolved through cross motions for summary decision.⁴ The Court agreed. Counsels submitted their motions and, at the Court's request, provided the Court with additional information. Based on the motions and the additional information, the Court enters the following decision granting US Silica's motion and denying the Secretary's motion.

SUMMARY DECISION IN GENERAL

Pursuant to the Commission's rule, a party moving for summary decision is entitled to judgement in its favor if, based upon the record before the court, (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to a summary decision as a matter of law. 29 C.F.R. § 2700.67.

MATERIAL FACTS

Citation No. 8705547 states in part:

The Square D breaker box was not labeled to show what circuits they controlled. This was located in the paint trailer and created [a] shock hazard to employees in the event of an emergency and [the] circuit[s] could not be identified.

⁴ E-mail from Courtney Przybylski, counsel for the Secretary, to Dhruba Mukherjee, law clerk to the Court (Aug. 28, 2013, 3:45 EST) (in official case file).

The material facts are contained in the parties' stipulations, the attachments to the parties' briefs and the additional information the parties supplied the Court. According to the stipulations, the cited Square D breaker box was located in an 8 feet wide by 36 feet long by 8 feet high paint trailer at the plant.⁵ Stip. 4. The breaker box controlled: (1) the overhead lighting for the main trailer; (2) an electrical power receptacle located below the breaker box; and (3) the overhead lighting for the paint storage area. *Id.* 5, Addit'l Stip. 2. The main electrical disconnect controlling the breaker box was located directly below the box.⁶ Stip. 6. The main electrical disconnect was clearly labeled in compliance with 30 C.F.R. §56.12018. *Id.* 7. Exhibit A, attached to the stipulations, is an "accurate photograph showing the breaker box and the disconnects as they appeared at the time of the alleged violation." *Id.* 8. The switch on the left side of the breaker box controlled the main trailer overhead lighting. Addit'l Stip. 1. The lights were connected to the breaker box by wiring entering the box toward the left side of the top of the box. *Id.*) The switch on the right side of the breaker box controlled the electrical receptacle and the paint storage room lighting.⁷ *Id.* 2. The electrical receptacle was connected to the breaker box by electrical wiring entering the box toward the right side of the bottom of the box. *Id.* The paint storage room lighting was connected to the breaker box by a conduit entering the box toward the right side of the box. *Id.* 2. Finally, the parties agreed as to the words that were written on the breaker box to abate the alleged violation. *Id.* 3-6.

THE PARTIES' ARGUMENTS

⁵ The parties agreed that the plant is a "mine" as defined by section 3(h) of the Mine Act, 30 USC. § 802(h), and that the products of the plant affect commerce. They further agreed that mine is subject to the Act. Stips. 1, 2.

⁶ Although not defined by the parties, the Court assumes that the main electrical disconnect is, as its name implies, the electrical device used to connect and disconnect all electrical circuits in the trailer.

⁷ The switches are best viewed in Exhibits A, B and C.

The parties maintain that primarily the question before the Court is whether the Square D breaker box was a “principal power switch” within the meaning of section 56.12018. Counsel for US Silica argues for a “plain meaning” interpretation of the phrase “principal power switch” that excludes the box. Resp.’s Mot. For Sum Dec. 3-12. Counsel for the Secretary argues for a broader definition that includes the box. Sec’s Op. to Resp’s Mot. For Sum Dec. And Cross Mot. For Sum Dec. 2-12. As the parties are aware, questions regarding the meaning of the phrase “principal power switch” and whether particular cited equipment comes within the meaning have repeatedly been brought to the Commission’s judges. While the judges have decided whether certain equipment is covered by the standard based on the facts of the cases before them, a definitive meaning of the phrase “principal power switch” has yet to emerge. *See, e.g., Beverly Materials, LLC*, 35 FMSHRC 88, 95-97 (Jan. 2013) (Judge Moran); *Cemex Construction Materials of Florida, LLC*, 34 FMSHRC 170, 174 (Jan. 2012) (Judge Zielinski); *Omya Arizona, A Division of Omya Inc.*, 33 FMSHRC 2738, 2739-40 (Nov. 2011) (Judge Miller); *Blue Mountain Production Co.*, 32 FMSHRC 1464, 1473-74 (Oct. 2010) (Judge Miller); *Tide Creek Rock, Inc.* 19 FMSHRC 390, 399 (March 1996) (Judge Manning); *Walker Stone Co., Inc.*, 12 FMSHRC 256,264 (Feb. 1990) (Judge Fauver); *FMC Corp.*, 6 FMSHRC 1294, 1299 (May 1984) (Judge Vail) (decided under identically worded standard, 30 C.F.R. §57.12-18)⁸. This unbroken string of decisions without an agreed upon definition of the phrase will continue here, because the Court concludes that based on the stipulations and the information provided, the cited switches can be “readily identified by location”(30 C.F.R. §56.12018) and therefore come within the exception to the labeling requirement.

ANALYSIS

As previously noted, section 56.12018 provides, “Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.” The citation states, and US Silica agrees, that the subject breaker box was not labeled to show what the box’s switches controlled. *See* Resp.’s Mot. 2 (describing attached Exh. B). While the parties argue at length about the applicability of the standard to the breaker box, the Court concludes it need not resolve the arguments because assuming the box is a “principal power switch,” the box’s switches can be “identified readily by location” and therefore the box is exempt from the standard’s requirements.

The breaker box was located in the paint trailer as described in the stipulations. Jnt. Stip. 4. The box controlled the power supply to only three things: an overhead light for the trailer, an immediately adjacent electrical power receptacle and an overhead light for the paint storage area . Stip. 5, Addit’l Stips. 1, 2. It is clear from looking at the photographic exhibits submitted by the

⁸ 30 C.F.R. Part 57 contains mandatory health and safety standards for the nation’s underground metal and nonmetal mines. 30 C.F.R. 56 contains mandatory health and safety standards for surface metal and nonmetal mines. 30 C.F.R. §57.12-18 and 30 C.F.R. §56.12-18 were worded the same as current standard 30 C.F.R. § 56.12018. When section 57.12-18 and section 56.12-18 were renumbered in 1985, section 57.12-18 became section 57.12018, and section 56-12-18 became section 56.12018.

parties that the breaker box was mounted on a board that was attached to a wall of the trailer. The two switches in the box are aligned parallel to one another, slightly below the center of the box. Exhs. A, C, D. Visibly running from the box above the location of the left switch (when facing the box) is the wiring going to the overhead light for the trailer. *Id.*; Addit'l Stps. 1 Visibly running from the box below and slightly to the right of the right switch is the wiring going to the electrical receptacle that is in turn affixed to the board a short way below the breaker box. Exhs. A, C, D; Addit'l Stps. 2. Visibly running from the box to the upper right and above the right switch is a conduit going to the overhead light for the trailer's paint storage area. *Id.* There is nothing "tricky" about the location of the wiring and the conduit. A person attempting to turn off the circuits to the lights or the receptacle or both would need to face the box and the board on which it is mounted. The alignment of each switch with its corresponding wiring and, in the case of the right switch, also with its corresponding conduit, would logically signaled to the most elementary observer, let alone to a knowledgeable miner, that the left switch controlled the overhead trailer light and the right switch controlled the receptacle and the paint storage area lighting. Only a blind person might be confused. The Court therefore finds that identification of the switches "can be made readily by location" (30 C.F.R. §56.12018) and that the standard does not apply to the box and the switches.⁹

⁹ The Court notes that its approach to resolving the case is similar to that adopted by Commission Administrative Law Judge August Cetti in *Pittsburg & Midway Coal Co.*, 14 FMSHRC 346, 351-352 (Feb. 1992). The *Pittsburg & Midway* case concerned an alleged violation of 30 C.F.R. 77.904, a standard requiring that at surface coal mines and surface areas of underground coal mines, circuit breakers "be labeled to show which circuits they control, unless identification can be made readily by location." Judge Cetti, based on the factual record before him, found that the subject circuit "could be readily identified" by looking at the cited switch and therefore that "no violation [was] shown by the evidence." 14 FMSHRC at 352.

This is a simple way to decide the case, but it is all that is necessary, and it is in line with the fact-based manner in which virtually all cases involving section 56.12018 have been resolved. It also is in accord with the Court's belief that, tempting as it is to display the Court's undoubted legal acumen, the Court should decide only issues that are absolutely necessary to reach a final outcome.

For the foregoing reasons, US Silica's motion for summary decision is **GRANTED** and the Secretary's cross motion for summary decision is **DENIED**. Citation No. 8705547 **IS VACATED**.

/s/ David Barbour
David Barbour
Administrative Law Judge

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