FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 13, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 96-81 A.C. No. 32-00491-03514
v.	:	Falkirk Mine
FALKIRK MINING COMPANY, Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew S. Good, Esq., North American Coal Corporation, Dallas, Texas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Falkirk Mining Company ("Falkirk"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.'' 815 and 820. The petition alleges one violation of the Secretary's safety regulations.

A hearing was held in Washburn, North Dakota. The parties presented testimony and documentary evidence, but waived post-hearing briefs. For the reasons set forth below, I affirm the citation and assess a civil penalty of $50.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Falkirk operates the Falkirk Mine, a surface coal mine, in McLean County, North Dakota. On September 13, 1995, MSHA inspector Calvert Browning issued Citation No. 4058725 to Falkirk alleging a violation of 30 C.F.R. ' 77.502. The citation states:

> The electrical power connections were unguarded and exposed where the welding leads connected to the generator mounted on the 369 belt maintenance truck. Adequate examinations were not made to disclose a potentially dangerous condition.

On November 5, 1995, MSHA issued a subsequent action notice for the citation, which states as follows:

> Citation No. 4058725, issued on 09-13-95, for a violation of 77.502, was modified during a Health and Safety Conference held 10-27-95. Mitigating information provided by the operator and the results of the conference were as follows:
>
> > The Part and Section of Title 30 CFR was modified to indicate the proper standard. The electrical connections were not insulated to the same degree of protection as the remainder of the wire.
>
> Section I, item 9c is modified to indicate 77.504.

Section 77.504, entitled "Electrical Connections or Splices; Suitability," provides:

> Electrical connections or splices in electric conductors shall be mechanically and electrically efficient, and suitable connectors shall be used. All electrical connections or splices shall be reinsulated at least to the same degree of protection as the remainder of the wire.

Inspector Browning determined that the alleged violation was neither serious nor of a significant and substantial nature ("S&S"). He also determined that Falkirk's negligence was moderate. The Secretary proposed a penalty of $50 for the citation.

The basic facts in this case are not in dispute. The cited equipment is a welding machine that generates DC current for

welding operations. Two posts are on the front of the welding machine (the "welder"), one marked positive and the other marked negative. These posts are recessed from the vertical plane of the front of the welder. Welding leads are attached to each of the posts with lugs. The lugs are placed around the posts and tightened. A nut is also attached to the top of each post. An insulated wire is attached to each lug. These wires are welding leads that are used in welding operations.

On the day of the inspection, the positive lead was insulated with insulating material. The positive post and lug were insulated by their recessed position. An insulating sleeve was present where the wire entered the lug. The area where the negative lead attached to the welder was not fully insulated. A bare conductor was present where the welding lead entered the lug because an insulating sleeve was not present. Part of this bare conductor was outside the vertical plane of the front of the welder. The conditions at the welder are depicted in Ex. G-7.

B. Arguments of the Parties

The Secretary contends that he established a violation because the electrical connection on the negative side was not reinsulated to the same degree of protection as the remainder of the wire as required by section 77.504. The Secretary relies on the plain language of the standard and the deference that is owed his reasonable interpretations of safety standards.

Falkirk argues that the Secretary's interpretation of the safety standard is not reasonable. First, it contends that the application of the standard is limited to splices and similar electrical connections. It argues that the cited area was neither a splice nor an electrical connection. Second, it contends that because the cited area was never insulated, the standard does not apply. Section 77.504 requires wires to be "reinsulated" where they have been stripped of insulation to make a splice or similar connection. Third, Falkirk argues that the Secretary did not require it to insulate the alleged electrical connection to abate the citation.

Finally, Falkirk argues that the Secretary failed to provide the mining community with notice of his interpretation of the safety standard. It states that the Secretary's witness could not think of a single MSHA document that supports the Secretary's interpretation of the standard. Falkirk also maintains that MSHA did not make any other attempt to provide notice of his interpretation. In addition, it notes that the Secretary's witness was unaware of any other citations issued by MSHA under similar con-

ditions prior to September 1995.[1]

C. Analysis of the Issues

I find that the Secretary's interpretation of section 77.504 is reasonable and is supported by the plain language of the standard. Thus, I do not consider issues of deference. Mr. Terrance D. Dinkel, an electrical engineer with MSHA's Denver Safety and Health Technology Center, testified that the cited area is an electrical connection as that term is used in the standard. He defined an electrical connection as a connection of an insulated wire to another insulated wire or to a piece of electric equipment to allow electric current to flow through the connection. (Tr. 14-16, 22, 37-38). Examples of electrical connections include a splice, a junction box, a plug in an electric outlet, and an insulated wire attached to a terminal of a light switch.

The safety standard states on its face that it applies to "all electrical connections." The term "electrical connection" is not so complicated that it necessarily requires the Secretary to provide written policy guidance to mine operators. An electrical connection, as applicable here, is simply a connection between an insulated wire and a piece of electric equipment which allows current to flow either from the wire to the equipment or from the equipment to the wire. An electrical connection need not be a splice between two wires. The connection must include at least one insulated wire to be covered by the standard, however. Connections between uninsulated wires or between an uninsulated wire and a piece of electric equipment are not required to be "reinsulated" at the point where they are connected. (Tr. 15).

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[1] Falkirk raised other issues in a motion for summary decision. I ruled on these issues in an order denying Falkirk's motion. *Falkirk Mining Co.*, 18 FMSHRC 1521 (August 1996). At the time I issued that order, genuine issues of material fact had not been resolved. Accordingly, any findings and conclusions contained in that order that are inconsistent with this decision are hereby superseded.

The connection between the welder and a welding lead is clearly an electrical connection. (Tr. 62-63). The welder generates DC current. This current passes through the electrical connection to the end of the welding lead. As explained above, the connection is very similar to the connection on an automobile or truck battery. The lead is attached to a post on the welder by means of a lug that is tightened to the post. The electricity passes through the post, through the lug, and into the lead. The lead is an insulated wire. Thus, I find that the cited connection is an electrical connection in insulated wire as that phrase is used in the standard.

The cited standard requires wires to be reinsulated at electrical connections. Falkirk maintains that because the area where the leads connect to the welder (the "terminals") had never been insulated, the standard cannot apply. How can you reinsulate something that was never insulated in the first place? It is clear that the posts and the lugs on the welder were never insulated in the sense of an insulating material being applied to them. It is not clear whether the bare conductor at the negative post was ever insulated. Mr. Dinkel testified that there are two basic ways to insulate connections under section 77.504. First, insulating material can be placed around the connection. (Tr. 23-25, 52-54). Second, the connection can be insulated by isolation. *Id.* For example, the connection can be placed in a junction box or an air gap can be created by recessing the connection. *Id.*

Mr. Dinkel testified that, at the time the citation was issued, the posts and part of the lugs were insulated by isolation. (Tr. 27-31). These parts of the connection were recessed from the vertical plane of the front of the welder. He testified that although someone could deliberately come in contact with the posts, they were protected by location and were therefore insulated. That part of the lug on the positive side that protruded outside of the vertical plane of the welder was protected by an insulating sleeve. Part of the lug on the negative side also protruded outside the vertical plane of the welder, but this area had not been reinsulated with an insulating sleeve. *Id.* The sleeve was either missing from the negative welder lead or a lead without such a sleeve had been installed. Dinkel testified that it was this lug and the bare wire entering the lug that was not reinsulated as required by the standard.

Thus, according to Mr, Dinkel, Falkirk was not required to "reinsulate" those areas of the terminals that were recessed because they were already insulated by location. (Tr. 58). Or, to put it another way, Falkirk actually reinsulated these areas

of the terminals because they were recessed behind the vertical plane of the welder. Dinkel testified that Falkirk was only required to reinsulate the lug on the negative side where the insulating sleeve was not present. I credit Mr. Dinkel's testimony in this regard. *Id.*

Falkirk also argues that the Secretary did not require it to insulate the terminals to abate the citation. Falkirk abated the citation by installing a rubber flap in front of the terminals. I find that Falkirk reinsulated the terminals when it abated the citation. Mr. Dinkel's broad definition of insulation would include the rubber guard that Falkirk installed. The guard provided physical separation and the guard was made of an insulating material.

Finally, Falkirk contends that the Secretary failed to provide any notice to the mining community of its requirement that terminals on welders are electrical connections that must be reinsulated. As stated above, I have determined that the Secretary's interpretation of section 77.504 is supported by the plain language of the standard. Ordinarily, when the plain language of safety standard supports a violation, the Secretary is not required to show that he provided additional notice of the requirements of the standard. Nevertheless, the language of the standard is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1982). Such broad standards must afford reasonable notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be `so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, Inc., 13 FMSHRC 1341, 1343 (September 1991)(citation omitted). In this context, the Commission further explained:

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person

> familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted).

I find that a reasonably prudent person would have recognized that the terminals on a welder that generates electricity are electrical connections in insulated wire and that section 77.504 requires that these terminals be insulated to prevent inadvertent contact with the terminals by persons working in the area. As stated above, the plain language of the standard states that "[a]ll electrical connections ... in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire." Given the Secretary's broad, common-sense definition of the term insulation set forth by Mr. Dinkel, a reasonable prudent person would have recognized that the missing sleeve on the lug attached to the negative post needed to be replaced to comply with the safety standard. Additional explanation or interpretation of the standard by the Secretary was not necessary in this instance.

In addition, a safety booklet published by the American Welding Society entitled "Safety in Welding and Cutting," makes clear that the accepted industrial safety practice is to protect terminals for welding leads from "accidental electrical contact." (Tr. 19-20, 48-49, 61-62; Ex. G-5). This document is consistent with the testimony of Mr. Dinkel.

D. Civil Penalty Assessment

Section 110(i) of the Mine Act sets forth six criteria I must consider in determining the appropriate civil penalty. Based on this criteria, I assess a civil penalty of $50 for the violation. Falkirk was issued 9 citations in the 20 months preceding the inspection in this case. (Ex. G-1). None of the citations were S&S. It appears that the mine produced 26,000 tons of coal and employed 251 individuals. *Id.* I find that the Falkirk Mine is a small to medium sized operation. The violation was promptly abated in good faith.

I find that the violation was not serious or S&S. Only a small area of the electrical connection was exposed. In addition, the area that was exposed would generally be the ground for the welder and would not pose a safety hazard. (Tr. 59). A hazard would be presented only if negative welding was being performed with the welder. In such an instance, the voltage

between the negative terminal and the earth would be approximately 75 volts. (Tr. 55). There is no evidence that negative welding ever occurs at the mine. (Tr. 64).

I find that Falkirk's negligence was low. There is no evidence that the mine's employees were inattentive to safety in general or believed that the condition of the welder presented a safety hazard. As stated above, there is no showing that the cited condition presented a serious hazard to employees.

II. ORDER

Accordingly, Citation No. 4058725 is **AFFIRMED** and Falkirk Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $50.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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To establish a violation of a safety standard, the Secretary is not required to prove that the violation contributed to a safety hazard. *Asarco Inc. v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989); *Allied Products Co.*, 666 F.2d 890, 892-93 (5th Cir. 1982). The degree of the hazard is taken into consideration when assessing a civil penalty.