

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

February 7, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 96-327  
Petitioner : A.C. No. 15-16482-03526  
v. :  
: Browns Valley Mine  
WINN CONSTRUCTION CO., INC., :  
Respondent :

**DECISION**

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the Peitioner;  
J. R. Winn, Safety Director, Winn Construction  
Company, Inc., Owensboro, Kentucky, for the  
Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act," to challenge two citations issued by the Secretary of labor to Winn Construction Company, Inc. (Winn Construction) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Winn Construction violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The two citations at issue arose from an accident at the Browns Valley Mine on March 7, 1996. A 10-foot by 10-foot steel pump house, built on four 12-foot pontoons and weighing approximately one ton, was to be moved to another work site utilizing a "cherry picker". Foreman Max Fendell was operating the cherry picker and mechanic George Townsell and miner Dewayne Pharris walked alongside prepared to steady the load as it was being moved. It was suspended by chains attached to a hook on the cherry picker boom. The load was not otherwise secured.

As the cherry picker moved across some water diversion ditches, the load began to move. Townsell and Pharris steadied the pump house with their hands. The boom of the cherry picker then contacted the overhead high-voltage power lines, breaking one of the power lines and the ground line. Since Townsell was in contact with the metal pump house with his right hand the electrical current entered this hand and exited his right foot. He suffered burns to his fourth, middle and index fingers, two small burn holes on the ball of his right hand and a dime-sized burn on the bottom of his right foot. He received first-aid and was later transported to the intensive care unit of the Owensboro Mercy Health System for observation. He was released on the third day after the accident and returned to work on March 11, 1996.

It is undisputed that Pharris and Townsell were not watching the power lines as they walked alongside the pump house. It has also been stipulated that Foreman Fendell knew the high-voltage lines were energized, that he examined the work area before moving the pump house, that he did not consider energized lines to be a hazard, and that he thought he had lowered the boom sufficiently to clear the power lines.

Citation No. 4276841 alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 77.1607(s) and charges as follows:

The Galion model 125 company ID 301 cherry picker located at the preparation plant area was transporting an approx 12 times 12 metal pump house pontoon and the equipment was not secured. The equipment was involved in an accident March 7, 1996.

The cited standard, 30 C.F.R. ' 77.1607(s) provides that "[w]hen moving between work areas, the equipment shall be secured in the travel position."

Citation No. 4276919 alleges a "significant and substantial" violation of the standard at 30 C.F.R. ' 77.807-3 and charges as follows:

The Galion model 125 Co. ID 301 cherry picker located at the preparation plant area was being operated within 10 feet of an energized overhead line and the power lines were not deenergized or other precautions taken. The cherry picker was transporting an approx. 12 x 12 foot metal pump house pontoon when the boom made contact with the energized overhead power line. One person was contacting

the metal structure and received an electric shock from the 7200 volt overhead power line. The accident occurred March 7, 1996.

The cited standard, 30 C.F.R. ' 77.807-3, provides that "when any part of any equipment operated on the surface of any coal mine is required to pass under or by any energized high-voltage power line and the clearance between such equipment and power line is less than that specified in Section 77.807-2 for boom and masts, such power lines shall be deenergized or other precautions shall be taken."

The standard at Section 77.807-2 provides in part that "the booms and masts of equipment operated on the surface of any coal mine shall not be operated within 10 feet of an energized overhead power line."

There is no dispute in this case that the violations occurred as charged, and that they were "significant and substantial" and of high gravity. Winn Construction takes issue, however, with the amount of penalty proposed by the Secretary for the violations. In determining the amount of penalty to be assessed in these cases, the degree of operator negligence is of particular importance. In this regard Inspector Michael Van Moore of the Mine Safety and Health Administration (MSHA) noted that, when issuing these citations there were mitigating circumstances which warranted his findings of moderate negligence. In particular, Moore relied upon statements to him by Foreman Fendell that although he knew the power lines were energized he tried to avoid them by suspending the pump house in a low position and that he had the other miners watch the overhead lines.

Jerry Winn, Jr., on behalf of the Respondent testified that he too had talked to Fendell and that Fendell told him that he did not specifically tell his workers to watch out for the power lines. In addition, Winn testified that Pharris reported to him that he was not told "anything in particular" regarding the power lines. Under the circumstances it would appear that Inspector Moore's conclusions that Respondent was chargeable with but moderate negligence may have been based upon less than credible and self serving statements. I do note however that Fendell was disciplined by Respondent for his negligence and received a letter of reprimand.

In any event, under all the circumstances and considering the criteria under Section 110(i) of the Act, I conclude that

civil penalties of \$500 for each of the violations is appropriate.

**ORDER**

Citation Nos. 4276841 and 4276919 are affirmed and Winn Construction Company, Inc. is hereby directed to pay civil penalties of \$500 for each of the violations in the above citations within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

Distribution:

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