FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 14, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2000-133 A.C. No. 15-18030-03507
v.	:	
COUGAR COAL COMPANY, INC., Respondent	: :	Mine No. 8
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2000-277 A.C. No. 15-18030-03508A
v.	:	
LESLIE B. COMBS, employed by COUGAR COAL COMPANY, INC., Respondent	: : :	 Mine No. 8

DECISION

Appearances: Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary;
Michael J. Schmidt, Esq., Wells, Porter, Schmidt & Jones, Paintsville, Kentucky, for the Respondents.

Before: Judge Weisberger

INTRODUCTION

In June 1999, the Cougar Mine No. 8 site at issue was no longer producing coal, as it's coal had been depleted, and the site was in the process of having it's equipment dismantled and moved to another location. Among the pieces of equipment to be moved was a power center. A high line cable that extended from a utility pole ("A-1 pole") provided the source of electricity to the power center, which in turn supplied electricity to various underground equipment. Each of

the three phases located inside the high line cable that ran from the A-1 pole to the power center was connected, respectively, to one of the three disconnect switches located 22 feet above the ground on the middle cross-arm of the A-1 pole. The top of each of these three disconnects was connected to a phase that extended 1.2 miles to the main line located at the mouth of Butcher Hollow. When the disconnect switches were closed, electric current was then allowed to flow from the main line to the power center. When the disconnects at the A-1 pole were open, electric current could not flow from the main-line to the high line cable located at the bottom of the disconnect and then to the power center.

On June 16, 1999, Paul Preece, who was not a qualified electrician, was at the site to assist in the removal of equipment owned by the Cougar Coal Company ("Cougar"). He opened a series of disconnect switches, and disconnected a series of capacitors that were mounted on the B-1 utility pole located midway between the A-1 pole and the main line at Butcher Hollow. Preece then used the boom of a boom truck to ascend the A-1 pole. Preece, who was not wearing a hat or any kind of restraining device that would have kept him from falling, climbed onto one of the cross-arms of the pole, and began to undo the terminals connecting the phases from the high line cable to the bottom of the disconnect switches. He inadvertently came in connect with one of phases, and was subjected to 7,200 volts of electricity. Preece then fell 22 feet from the cross-arm. Before he landed on the ground, his head had struck the edge of the power center. He was found unconscious and without any pulse. Preece was revived, but as a result of the shock and fall, suffered lacerations to his head, serious burns, a fractured vertebra in his neck, and had to be hospitalized for several weeks. As of July 17, 2001, he had not returned to work.

After the accident, Cougar moved the boom truck from the accident site without first obtaining permission from MSHA, and failed to notify MSHA of the accident.

Subsequent to an investigation, MSHA Inspector Mark V. Bartley, issued, to Cougar, three Section 104(d) orders alleging violations of 30 C.F.R. §§ 77.807-2, (Order No. 7352787), 77.1710(g), (Order No. 7352788), and 77.501, (Order No. 7352789), respectively. He also issued a Section 104(d) citation alleging a violation of 30 C.F.R. § 77.704-1(b), (Citation No. 7352786), and two Section 104(a) citations alleging violations of 30 C.F.R. §§ 50.12, (Citation No. 7352790) and 50.10, (Citation No. 7352791), respectively. The Secretary in the proceeding seeks civil penalties to be imposed as a result of these violations. Additionally, the Secretary seeks the imposition of a civil penalty under Section 110(c) of the Act against Leslie B. Combs[1] in connection with the alleged violation by Cougar of Section 77.501, supra.

A hearing was held regarding these proceedings in Louisa, Kentucky.

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[1]Combs was the general manager of Eagle Rock, and was authorized to be responsible for the removal of the mine equipment at the site at issue.

DISCUSSION

I. Citation No. 7352786, and Order Nos. 7352787, 7352788, 7352789 and Combs' Liability Under Section 110(c) of the Act.

A. Violation of Section 77.501, supra (Order No. 7352789)

Order No. 7352789 alleges a violation of 30 C.F.R. Section 77.501 which, as pertinent, provides as follows: "[n]o electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person." Cougar, in its brief, indicates that it does not dispute that the actions of Preece were a violation of Section 77.501, supra. Since Cougar does not dispute the Secretary's assertion and proof in this regard, I find that Cougar did violate Section 77.501, supra.

1. Combs' Liability Under Section 110(c) of the Act Regarding the Violation of Section 77.501, supra, and Cougar's Unwarrantable Failure in Connection With This Violation

a. Combs' Actions and His Liability Under Section 110(c) of the Act

In order for the Secretary to establish Combs' liability under Section 110(c) of the Act in connection with the violation of Section 77.501, supra, it must be proven by the Secretary that Combs "knowingly authorized, ordered or carried out such violation" (Section 110(c) supra). There is no evidence that Combs ordered or carried out the violation. Thus, to prevail, the Secretary must establish that Combs "knowing authorized" the violation. In Freeman United Coal Mining Co. v. FMSHRC 108 F. 3rd 358, 363 (D.C. Cir 1997), the D.C. Civil Court of Appeals found reasonable the Commission's definition of "knowingly" set forth in Secretary of Labor v. Richardson 3 FMSHRC 8, 16 (1981), aff'd 689 F. 2nd 632 (6th Cir. 1981) as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means *knowing or having reason to know.* A person has reason to know when he has such information as would lead a person exercising reasonable case to acquire knowledge of the fact in question or to infer its existence. (Internal quotations omitted.)

The only evidence[2] relied on by the Secretary in support of her position that Combs

[2]The Secretary argues that her finding of unwarrantable failure regarding Cougar's violation of Section 77.501, supra, (Order No. 7352789), and the 110(c) action against Combs, is based "at least [in]

authorized Preece to climb the A-1 pole and remove the high line from the disconnects, consists of two hearsay statements made by Preece.

On July 15, 1999, in his hospital room, Preece told MSHA Inspector Mark Bartley, and Kentucky Department of Mines and Minerals, Inspector Wes Gerhard, that when he suggested to Combs that the high line could be saved by taking it down from the utility pole, Combs instructed Preece to take a hot stick and pull the fused disconnects located at the mouth of the hollow. (Gx. 6).

MSHA Special Investigator, Douglas Fleming, testified that on October 17, 1999, he interviewed Preece at his home. According to Fleming, Preece told him that when Combs told him (Preece) to cut the high line at the power center, he (Preece) told Combs that the high line could be saved by disconnecting it from the utility pole, and that Combs responded by telling him (Preece), that, in essence, if he (Preece) took this action, to make sure that the disconnects were pulled. Although Preece's hearsay statements to the inspectors were recorded, I find them unreliable, inasmuch as they were not corroborated by any other witness. Also, significantly, they were essentially recanted by Preece in his sworn testimony at the hearing.

In contrast to Preece's hearsay statements relied on by the Secretary, Combs, who was Preece's supervisor, testified that on June 15, 1999, in the evening, he told Preece that the power center on the subject site was to be removed, and that all electric power to the power center had been disconnected. Combs told Preece to disconnect the high line from the power center by cutting it with a hacksaw at a point about six to eight inches from the place where the high line entered the power center, or to loosen a wire from inside the power center. According to Combs, Preece said, in response, that he would probably take the wire down from the A-1 pole disconnect, as that was an easier task to perform. Combs testified that he then told Preece that should McCoy Contractors be present at the site, to let them disconnect the wire from the pole. According to Combs he told Preece that should McCoy Contractors not be at the site, then Preece should disconnect the high line at the power center. Combs denied telling Preece that if Preece were to disconnect the high line at the pole, he was to make sure that the disconnects were pulled at the main line located in the hollow. Combs stated that the following day, in the shop, he again informed Preece, to cut the high line at the entrance to the power center. Since Preece, in his testimony did not contradict Combs' version of the conversations at issue, I accept Combs' version.

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part", on the instructions that Combs, who was the general mine manager and was responsible for the removal of the equipment at the subject site, gave to Preece, to cut the high line cable near the power station even though he knew that Preece was not a qualified electrician. This argument is without merit, inasmuch as Preece never did cut the high line cable near the power station, and the 77.501 supra violation was based only on Preece's action, not on action not taken by him. Hence, Combs' instructions can not form the basis of a 110(c) violation in connection with the violation of Section 77.501 supra at issue.

For the reasons set forth above, and placing most weight upon the testimony of Combs, whom I found credible, I find that the Secretary has not established that Combs authorized Preece's actions that constituted violations of Section 77.501, supra. Further, I find that there is no evidence that Combs had actual knowledge of these actions.

The Secretary further asserts, in essence, that an additional basis for a finding of Section 110(c) liability on Combs' part is his failure to have been on the site on June 16 to carefully supervise Preece . In this connection, the Secretary argues that since Preece had expressed to Combs, on June 15, and again on June 16, his interest in ascending the A-1 pole to remove the high line at the disconnect in order to save the line, it should be inferred that Preece might disregard his (Combs') order not to take this action. The Secretary argues that, accordingly, Combs should have been on the site on June 16 to carefully observe Preece. There is no evidence to suggest that Preece had on any occasion, disregarded an order of a supervisor or had proceeded to act contrary to such an order. Thus, I find the Secretary's argument too speculative to support a finding that Combs demonstrated "aggravated conduct" as opposed to "ordinary negligence".

For all the above reasons I conclude that it has not been established that Combs violated Section 110(c), supra, See, Beth Energy Mines, 14 FMSHRC 1232, at 1245 (1992)).

2. Cougar's Unwarrantable Failure

a. Jarvis' Actions

In essence, the Secretary argues that a finding of unwarrantable failure may be based on the following assertions regarding Rick Jarvis, the mine foreman supervising the dismantling of the equipment at the site: (1) that Jarvis gave Preece a hot stick for the purpose of de-energizing the main circuit; (2) that Jarvis instructed Preece what to do with the hot stick; (3) that accordingly, Jarvis knew that Preece was intending to climb the A-1 pole to disconnect the high line from the disconnect terminals and; (4) that Jarvis knew that Preece was not a qualified electrician.

The Secretary adduced a statement signed by Rick Jarvis, that on June 16, "Paul said he would pull the disconnects." (Gx. 17, p. 2) In addition, Preece, in his testimony as part of the Secretary's case, and in a recorded statement, indicated that prior to his ascending the A-1 pole, he had obtained a hot stick from Jarvis, and the latter told him "[t]o make sure I push the button to ground the capacitors." (Tr. Vol III, 37) Further, the Secretary's witnesses testified that the only use for a hot stick is to open or close fuse disconnects. Since none of these facts were impeached, contradicted or rebutted by Cougar, an inference may be drawn that Jarvis, being the supervisor on the site, should reasonably have taken steps to ensure that the hot stick would be used only by a qualified electrician. The Secretary argues that Jarvis' conduct, in this regard, rose to the level of aggravated conduct inasmuch as he knew that Preece was not a qualified electrician. However, Jarvis was not called to testify by the Secretary or by Cougar, to establish that he had personal knowledge of this fact. Nor did any person testify that Jarvis was either informed that Preece was not a qualified electrician, or was provided with written documentation

of that fact. Hence, there is insufficient evidence in the record to predicate a finding that Jarvis knew or reasonably should have known that Preece was not a qualified electrician.

The Secretary argues, in essence, that since, according to Preece, Jarvis told the latter to make sure to push the buttons on the capacitors when he gave him the hot stick, it is to be inferred that Jarvis opined that Preece did not have expertise in de-energizing electrical lines, and had to be instructed how to perform such a procedure. Hence, according to the Secretary, it is to be concluded that Jarvis did not believe the Preece was a qualified electrician. I find that this inference, going to Jarvis' state of mind, to be too speculative to predicate a finding that Jarvis knew or should have known that Preece was not a qualified electrician. I thus conclude the Secretary has failed to establish that a finding of unwarrantable failure can be based on Jarvis' actions.

b. Combs' Actions

For the same reasons set forth above, regarding the analysis of the analysis of the level of Combs conduct pertaining to Section 110(c) liability, I(A)(1)(a), infra, I conclude that the Secretary failed to establish that Combs' actions rose to the level of aggravated conduct relating to the violation of Section 501, supra.

Accordingly, after evaluating the actions of Jarvis and Combs, I find that the Secretary has not established that Cougar's violation of Section 77.501, supra, was as the result of its unwarrantable failure.

3. Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> 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.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that 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 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the

cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The evidence clearly establishes that the violation herein, Pierce's pulling disconnects, contributed to the risk of the hazard of contact with high voltage electric lines or equipment. Also, inasmuch as this resulted in an injury of a reasonably serious nature to Preece, I conclude that all the elements set forth in Mathies, supra, have been met and therefore it has been established that the violation was significant and substantial.

4. Penalty

I find that the level of gravity of the violation to have been extremely high inasmuch as it did in fact result in contact with equipment energized at 7,200 volts, which could have caused a fatal injury. I find this a significant element in analyzing the matrix of the factors set forth in Section 110(c) of the Act. I have considered Cougar's violation history, the fact that there is not any evidence that the imposition of the penalty would adversely affect its ability to continue in business, the lack of any evidence of non-good faith abatement, and the fact that Cougar is a small mine. I note, however, that the Secretary has asserted that Cougar's negligence rose to the level of unwarrantable failure, which, in essence, is equated with aggravated conduct. For reasons discussed above, (I)(A)(1), infra, I find that Cougar's negligence did not reach this level and was not more than moderate. Accordingly, the high penalty sought by the Secretary is to be reduced significantly, as the record establishes that the level of Cougar's negligence to be considerably less than that asserted by the Secretary, which had formed one of the bases for the penalty it was seeking. I conclude that a penalty of $30,000 is appropriate for the violation of Section 77.501, supra, (Order No. 7352789).

B. Citation No. 7352786

1. Violation of Section 77.704-1(b), supra

The parties stipulated that the Cougar did violate Section 77.704-1(b), supra, and I accept this stipulation and so find.

2. Unwarrantable Failure

The specific violative acts of Preece, attributed to Cougar that have been stipulated to as constituting the violation of Section 77.704-1(b), are as follows: (1) attempting the de-energize the three phase power line supplying power to the mine, and (2) ascending the A-1 utility pole and trying to undo the terminals connecting the high line to the disconnect switches. The record is devoid of any evidence tending to establish that on June 16 Jarvis could reasonably have anticipated that any of Cougar's employees were going to disconnect a high line from the fused

disconnect on the A-1 pole.[3] Accordingly, there is no basis to predicate a finding that Jarvis, in his capacity as supervisor on the site, could reasonably have anticipated Preece's unauthorized action removing the high line at the disconnect on the A-1 pole. Further, as discussed above, the record does not support a finding that Combs either authorized or approved Preece's action in this regard and had, indeed, indicated his opposition to it. I find that the Secretary has not established that Cougar's violation of Section 77.704-1(b) was the result of its aggravated conduct, and thus can not be determined to be an unwarrantable failure (see Emery, supra,).

2. Significant and Substantial

For the reasons set forth above regarding the violation of Section 77.501, supra, ((I)(A)(2), infra), inasmuch as the underlying act and location of both these violations were the same, I find that the violation of Section 77.704-1(b), supra, was significant and substantial (see Mathies, supra.).

3. Penalty

I note that the Secretary seeks a penalty of $55,000 for the violation of Section 77.704-1(b), supra. Since the acts and conditions surrounding the violation were the same, essentially as that which gave rise to the violation of Section 77.501, supra, I find that for the reasons discussed therein that the violation herein, which could have led to a fatality was of a very high level of gravity. I note, however, that the Secretary has asserted that Cougar's negligence rose to the level of unwarrantable failure, which, in essence, is equated with aggravated conduct. For reasons discussed above, (I)(B)(2), infra, I find that Cougar's negligence did not reach this level and was not more than moderate. Accordingly, the high penalty sought by the Secretary is to be reduced significantly, as the record establishes that the level of Cougar's negligence to be considerably less than that asserted by the Secretary, which had formed one of the bases for the penalty it was seeking. The additional factors set forth in 110(i) of the Act were discussed regarding the violation of Section 501, supra, (I)(A)(4), infra, and are common to all the matters at issue herein, and I reiterate those findings. Thus, taking into account all the above factors, placing considerable weight on the act that Cougar's negligence was significantly less than that asserted by the Secretary, I find that a penalty of $30,000 is appropriate for this violation.

C. Order Nos. 7352787 and 7352788

1. Violation of Sections 77.807-2, supra, and 77.1710(g), supra.

[3]Indeed, the unimpeached and uncontradicted testimony of Dennis Jewel, one of Cougar's electricians, Johnny McCoy, one of the principals of McCoy Contractors, Inc., and Billy R. Cantrell, the president of Azar Coal Corporation, who oversees the installation and removal of electric lines at various companies including Cougar, established that it is standard procedure for McCoy Contractors to dismantle and remove Cougar's high line wires, and this activity is not done by any of Cougar's electricians.

Cougar was cited with violations of 30 C.F.R. Section 77.807-2 and 77.1710(g), supra. It was stipulated by the parties that in using the boom of a truck to ascend the A-1 pole, Preece was operating the boom of the truck within 10 feet of energized power lines in violation of Section 77.807-a, supra. It was further stipulated that while ascending the A-1 pole, and climbing onto the cross-arm, Preece was not using any kind of safety or harness device which would have prevented him from falling, which was a violation of Section 77.1710(g), supra. In light of these stipulations, I find that Cougar did violate Section 77.807-2, supra, and Section 77.1710(g), supra

2. Significant and Substantial

Since Preece's actions in violating Section 77.807-2 and Section 77.1710(g), supra, were all, essentially, a part of the same action and activity as the actions constituting violations of Sections 501 and 1704-1(b), supra, and since the former two violations were found to be significant and substantial, for the same reasons set forth above, I find that the violations of Section 77.807-2, supra, and Section 77.1710(g), supra, similarly to be significant and substantial.

3. Unwarrantable failure

The Secretary argues that a finding of unwarrantable failure should be predicated on Combs' action in authorizing Preece to climb the pole at issue, which led to the violations cited, and which evidenced Combs' inadequate supervision. This argument had been advanced by the Secretary and rejected above in the analysis of Combs' liability under Section 110(c) of the Act. (I)(A)(1)(a), infra.

The Secretary also argues that since Jarvis gave Preece a hot stick and told him what to do with it, he therefore knew Preece intended to climb the pole. The Secretary asserts that Jarvis was within clear sight of Preece during the entire time that Preece moved the boom within 10 feet of the energized lines, raised himself up to the cross-arms at the A-1 pole without a harness or restraining device, and began to loosen the high line from the A-1 disconnects.

In addition, the Secretary argues that these violations were the direct result of Jarvis' inadequate supervision. In this connection, Combs, in a signed statement, indicated that he had told Jarvis, on June 16, that "we would be moving that day", and that Preece and another worker would be bringing the boom truck. This hearsay statement was not impeached when Combs testified, nor was Jarvis called to testify to contradict this statement. Accordingly, I find that Jarvis, was aware that a boom truck was going to be brought on the site, and should reasonably have assumed some responsibility in supervising that the boom truck would be used properly.

According to the uncontradicted testimony of Preece, Jarvis gave him a hot stick. Thus, Jarvis should have ensured that it would be used by a qualified electrician to open the disconnects. However, there is no evidence that Preece used the hot stick in any actions that led

to the two specific violations at issue herein. There is not any evidence that Jarvis knew or reasonably should have been expected to know that Preece would initiate the action of climbing the A-1 pole to work on the middle arm, which directly led to these violations. In this connection, the Secretary relied upon inspector Bartley's testimony that Jarvis, on June 16, most certainly would have to have seen the boom extended from the surface of the property, and thus was, in essence, guilty of aggravated conduct in not making sure that the boom truck was not within 10 feet of the high line. Bartley's testimony is at best speculative since he was not on the site at the time, and did not have personal knowledge of Jarvis' location, vis a vis the A-1 pole during the events at issue. Nor is there any testimony by any other witness placing Jarvis, during the time of the events at issue, in a location which would have given him a direct unobstructed line of sight to the portion of the pole at issue. The only evidence relating to Jarvis' location at that time, consists of a written statement signed by him to the effect that at the time of the accident he was loading the belts structure on the scoop. There is no evidence in the record, relating the location of the belt structure on the scoop to the A-1 pole, either in terms of horizontal or vertical distance. Nor is there any evidence relating to the contour of the site, or the presence or absence of obstructions between these two locations.

Accordingly, for all the above reasons, I find that although Jarvis was negligent in his supervision it has not been established that the level of this negligence reached aggravated conduct. Accordingly, I find that it has not been established that these violations resulted from Cougar's unwarrantable failure. (See Emery, supra)

4. Penalty

a. Violation of Section 77.1710(g), supra.

The evidence clearly establishes that the violation herein of not using a safety belt or a harness device while climbing onto the cross-arm of the A-1 pole, in close proximity to a energized high voltage electrical equipment, was a violation of a very high level gravity, as it could have resulted in a serious injury. However, the penalty sought by the Secretary, appears to be predicated upon a level of negligence equal to aggravated conduct. For the reasons set forth above, (I (C)(3)), infra, I find that although Cougar was negligent, the level of its negligence was not as high as aggravated conduct. Hence, the penalty sought by the Secretary is to be mitigated to a significant degree. Taking into account the additional factors set forth in Section 110(i) of the Act, as discussed above, (I(A)(3)), infra, which are the same for this violation, I find that a penalty of $30,000 is appropriate for the violation of Section 77.1710(g), supra.

b. Violation of Section 77.807-2, supra

I find that the level of gravity of this violation was high, inasmuch as it provided access to the pole for Preece, and thus facilitated contact with high voltage energized equipment which could have led to a fatality. However, I find that the penalty sought by the Secretary, is predicated to some degree upon the level of Cougar's negligence, which is asserted to have been high enough to have constituted aggravated conduct. For the reasons set forth above, (I(C)(3)),

infra, I find that although Cougar was negligent, the degree of its negligence did not reach aggravated conduct. Accordingly, the penalty sought by the Secretary is to be reduced to a significant amount. Taking into account the additional factors set forth in Section 110(i) of the Act which are the same as discussed above, (I(A)(3)), infra, I find that a penalty of $16,350 is appropriate for this violation.

II Citation Nos. 7352790 (Violation of 30 C.F.R. § 50.12) and 7352791 (Violation of 30 C.F.R. § 50.10)

A. The Violation of 30 C.F.R. §§ 50.12 and 50.10

30 C.F.R.§ 50.10 provides, as pertinent, that "[i]f an accident occurs, an operator shall immediately contact ... MSHA. ... ." (Emphasis added.) 30 C.F.R. § 50.12 provides, in essence, as pertinent, that "[u]nless granted permission by ... MSHA ..., no operator may alter an accident site or an accident related area until completion of all investigations". (Emphasis added.)

The facts relating to both these Citations are not at issue. Relating to Section 50.10, supra, the parties stipulated that after the accident, Cougar failed to notify MSHA of the accident. Relating to Section 50.12, supra, the parties stipulated that after the accident, Cougar moved a boom truck and high voltage power center from the accident site without first obtaining permission from MSHA.

In order for the Secretary to establish that these acts of the operator violated Sections 50.10, supra, and 50.12, supra, respectively, it must be established that there was an "accident" as that term is defined in the regulations. 30 C.F.R. § 50.2 sets forth definitions of terms used in part 50 of the Code of Federal Regulations. 30 C.F.R. § 50.2(h)(2) provides, as pertinent, that an accident means "an injury to an individual at a mine which has a reasonable potential to cause death;". (Emphasis added.) The common meaning of the word injury means either an act that harms, or the damages suffered as a result of an act. However, inasmuch as in the regulatory scheme at issue an accident is defined, inter alia, as pertinent, as an injury having a reasonable potential to cause death, it is clear that the word injury as used in Section 50.(h)(2), supra, defining an accident, means not the act itself, but rather the harm resulting from the act. In this context, an operator's responsibilities under Sections 50.10 and 50.12, supra, must be evaluated not in terms of an analysis of the act at issue i.e., coming in contact with 7,200 volts of electricity and falling at least 18 feet. Rather, the nature and extent of Preece's injuries must be evaluated as to whether they had a reasonable potential to cause death.

The parties stipulated that Preece received an electric shock of exposure to 7,200 volts and as a result fell 18 feet to the ground, and hit his head on the edge of the power center before hitting the ground; that he was found on the ground with no pulse; that C.P.R. was administered to him and he revived; and that as a result of the electric shock and fall, he suffered lacerations to his head, serious burns, and a fractured vertebrae in his neck, and he had to be hospitalized for several weeks. In the Secretary's brief, the Secretary asserts that "it is within the realm of common knowledge that these injuries entail a reasonable potential to cause death. " However,

the Secretary did not adduce any medical evidence or cite any recognized medical authorities to support this conclusion. In support of her conclusion, the Secretary refers to the testimony of Inspector Bartley, who was trained as an accident investigator. However, there is no evidence that Inspector Bartley has any medical degree or received any medical education.

Further, Bartley's testimony related soley to the nature of the accident. He testified that based upon his investigations, most people die after coming in contact with 7,200 volts of electricity. He also testified that persons fall from heights lower than18 feet, and suffer fatal injuries. This testimony, which relates to analysis of the act of the accident, is not relevant to an analysis of whether Preece's injuries had a reasonable potential to cause death.

The Secretary also asserts, referring to Preece's having broken his neck, that it is common knowledge that a broken neck can cause death. The Secretary, additionally, refers to Preece's testimony that his treating physicians told him that he was lucky that he didn't die as a result of having broken his neck. There is not any medical evidence cited by the Secretary, nor is any found in the record that supports the Secretary's assertion that it is common knowledge that a broken neck "can" cause death. Preece's hearsay testimony that his physician told him that he was lucky that he didn't die as a result of breaking his neck, is not accorded much weight as there is no medical evidence in the record to support a conclusion that Preece's injuries had a reasonable potential to cause death.

The record does not contain any evidence from any of the ambulance medical personnel who observed Preece at the site of the accident, regarding their observations and opinions relating to Preece's prognosis. Preece was taken from the accident site to the Emergency Department at the Paul B. Hall Regional Medical Center in Paintsville, Kentucky. The records from this department list the various signs of injury noted upon examination of Preece, as well as interpretation of tests taken, and diagnoses. However, no opinion was set forth regarding whether these injuries had a reasonable potential to cause death. Later on that day, Preece was transferred, by helicopter, to Cabell Huntington Hospital in Huntington, West Virginia. It is significant to note that when transferred Preece's condition was described in the emergency record as "serious". Thus, this medical evidence fails to establish that Preece's injuries were deemed either critical, or very serious by the emergency department.

The hospital records from Cabell Huntington Hospital indicate that the admitting physician noted various signs on examination, also, laboratory and x-ray findings were described. The assessment, upon admission was electrical injury, third degree burns, trauma patient, and multiple contusions. However, the physician did not set forth any opinion that the injuries were such that there was reasonable potential to cause death. It is significant that the admitting physician noted that he had monitored Preece "constantly" during his emergency room stay, and Preece did not have any arrhythmia.

A consultation prepared on the same date noted that the extent of burns and findings were suggestive that an electric current may have followed a neurovascular tract down the right leg. However, the consulting physician set forth in his ASSESSMENT AND PLAN, a plan to

treat Preece's burns. There is no indication that the assessment found there was any potential of these injuries to cause death.

Accordingly, I find that the Secretary has not adduced sufficient evidence to establish that Preece's injuries sustained on June 16 were such as to have had a reasonable potential to cause death. Nor does the record establish that Cougar's agents should reasonably have concluded that Preece's injuries had such a potential. Cougar's witnesses testified that when they observed Preece they were unable to observe the extent of his injuries, but that he was conscious, alert, responsive and coherent. Their testimony was not impeached or contradicted.

For these reasons, I find that it has not been established that on June 16 there was an "accident" at the site, as defined in Section 50.2(g)(2), supra. Thus, Cougar was not under any responsibility to fulfill the requirements of Sections 50.10 and 50.12, supra, which must be followed only in the event of any "accident". Accordingly, I find that Cougar did not violate Sections 50.10, supra, and did not violate Section 50.12, supra.

ORDER

It is **ORDERED** that (1) the following Citation and Orders be modified to indicate that they are not the result of Cougar's unwarrantable failure: Citation No. 7352786, and Order Nos. 7352787, 7352788 and 7352789; (2) Citation Nos. 7352790 and 7352791 be dismissed; (3) Docket No. KENT 2000-277 be dismissed; and (4) within 30 days of this Decision, Cougar shall pay a total civil penalty of $106,350.

Avram Weisberger
Administrative Law Judge

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