FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
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June 28, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-237
Petitioner	:	A.C. No. 15-18647-82666
v.	:	
	:	Docket No. KENT 2006-238
LONE MOUNTAIN PROCESSING, INC.,	:	A.C. No. 15-17234-82541
Respondent	:	
	:	Huff Creek No. 1

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Alex R. Sorke, Jr., Conference and Litigation Representative, Office of Mine Safety and Health Administration, Barbourville, Kentucky, for the Petitioner;
Marco M. Rajkovich, Esq., Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based on Petition for Assessment of Civil Penalty filed by the Secretary of Labor, alleging that Lone Mountain Processing, Inc., ("Lone Mountain") violated various mandatory safety standards set forth in Title 30 of the *Code of Federal Regulations* (C.F.R.). Pursuant to notice, these cases were scheduled to be heard on May 30, 2007, in Johnson City, Tennessee.

I. Docket No. KENT 2006-238

At the hearing, the Secretary made a motion to approve a settlement agreement. It was asserted that the operator agreed to pay the full proposed penalty of **$228**. The operator did not object to the motion. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

ACCORDINGLY, the motion for approval of settlement is **GRANTED**.

II. Docket No. KENT 2006-237

a. Citation No's 7552560, 7552564, and 7552565

At the hearing, the Secretary made a motion to approve a settlement regarding these citations. A reduction in total penalties from **$1,175** to **$554** was proposed. Also, the Secretary asserted it agreed to vacate Citation No. 7552565. The operator did not object to the motion. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ACCORDINGLY, the motion for approval of settlement is **GRANTED**.

b. Citation No. 7552563

At the conclusion of the evidentiary hearing in this matter, a bench decision was rendered which, with the exception of corrections of non-substantive matters, is set forth as follows:

> Lone Mountain operates the Clover Fork No. 1 Mine. On November 30, 2005, MSHA inspector Stanley Dale Sturgill, inspected the subject site. He picked up the cable supplying power to a Fletcher bolter on the 002-MMU Section. Sturgill observed a one-quarter inch vertical gap between the splice on the cable and the inner leads. In addition, the insulated leads within the cable were exposed for approximately four inches on either side of the splice. Normally these wires are covered by insulating tape between the end of the splice and the intact portion of the cable.
>
> According to Sturgill, the area where the cable was located was wet, and the cable was lying in mud. He issued a citation alleging a violation of 30 CFR § 75.604(b), which provides that when permanent splices in trailing cables are made, they shall be "[e]ffectively insulated and sealed so as to exclude moisture[.]"
>
> The operator has conceded that a violation has been established. Based on the uncontradicted testimony of the inspector relating to the existence of exposed leads, I find that the Secretary has established a violation of Section 75.604(b), *supra*.
>
> The Secretary also alleges that the violation was significant and substantial. In *Mathies Coal Company*, 6 FMSHRC 1, 3-4 (January 1984) the Commission set forth four elements that the Secretary must prove to establish a violation as being significant and substantial. These are the underlying violation

of a mandatory safety standard, a discreet safety hazard contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Secretary has established the existence of a violation. Also the record indicates that the violation contributed to the hazard of an electrical shock should a miner touch an exposed portion of the cable which contains energized wires.

The issue presented herein is the third element in the *Mathies* case, i.e., the existence of a reasonable likelihood that the hazard contributed to will result in an injury.

Subsequent to *Mathies*, *supra*, the Commission explained this element by articulating, in essence, that it requires the existence of a reasonable likelihood of an injury-producing event. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (1984).

Sturgill indicated that two of the leads within the cable were energized with 480 volts, and he had to wipe the damaged cable with a rag, as it was wet and muddy. Further, according to Sturgill, the ends of the splice were open, which allows water to seep in; the cable was in water; the area was wet; and he could see moisture on the exposed leads for about one-quarter of an inch inside the splice.

However, the key issue is whether there was a reasonable likelihood of an injury-producing event. (*See, U.S. Steel*, *supra.*) The inspector indicated that in his experience he has observed pinholes in cables, wires sticking out of cable, and leads within a splice that have been pulled apart. He opined that a person coming in contact with a pinhole, exposed wires, or wires sticking out of a cable, would be exposed to at least 240 volts, resulting in a serious burn or electric shock.

However, it is significant that Sturgill did not observe any of these defects, nor was he able to see inside the splice to establish the existence of these defects.

Sturgill opined that these defects could occur, but he did not indicate the presence of any condition that would lead to an inference of the existence of any of these defects. Nor did he indicate any condition or practice that would have resulted in a reasonable likelihood of the creation of these defects, as a result of the continuation of normal mining operations. Sturgill indicated that the cable is regularly moved and hung up, but he did not indicate that these activities would increase the likelihood of a defect occurring.

Moreover, the exposed wires were fully insulated, Sturgill conceded on cross-examination that, in essence, insulation keeps water from contacting the leads in the cable. Also he indicated on cross-examination that if the leads are insulated, there is not any hazard of shock in the absence of a pinhole in the cable or a wire protruding from the cable, and that there is not any hazard of arcing unless the wires within a splice or a cable have been separated or have lost their insulation. There is not any evidence in the record of any of these conditions.

I conclude that there is not sufficient evidence to support the inspector's assumption of the presence of a pinhole, protruding wires, or damage to leads within the cable or splice. For all these reasons, I conclude that it has not been established that there was a reasonable likelihood of an injury-producing event, i.e., contact with a damaged wire or arcing.

I thus find that the third element set forth in *Mathies* has not been established, and, therefore, I find that the violation was not significant and substantial.

The parties stipulated that a reasonable penalty would not affect the operator's ability to remain in business; that the violation was timely abated in good faith; that Lone Mountain has an average violation history for an operator of that size, and that it is a large operator.

Because water was present in the area, and the cited cable might be moved in water, a serious injury could have resulted should a pinhole appear or a wire protrude in the exposed area of the cable, or if the leads would separate within the cable or water and enter the splice through a gap. I find the gravity of the violation to be relatively serious.

Sturgill indicated that before he picked up the cable, he observed that it had a splice, and that some portion of the wires were exposed. Also, he opined that, based on his observation of the cable's condition, it had not been examined weekly. However, he indicated that he checked the relevant company books, which indicated that a weekly examination had been done. Lone Mountain did not adduce any evidence of any significant mitigating factors. Within the context of all the above, I find that Lone Mountain's negligence was to moderate.

Considering and weighing all the above factors set forth in Section 110(i) of the Act, I find that a penalty of **$100** is appropriate for this violation. Tr. 103-109.

ORDER

It is **Ordered** that, within 30 days of this decision, Lone Mountain pay a total civil penalty of **$882**.

Avram Weisberger
Administrative Law Judge

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