**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 3, 2008

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2007-63 |
| Petitioner | : | A.C. No. 15-18505-99179 |
| v. | : | |
| | : | |
| CONSOL OF KENTUCKY, INC. | : | Beaver Gap E-3 Mine |
| Respondent | : | |

## DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
David Hardy, Esq., Allen Guthrie McHugh & Thomas, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Consol of Kentucky, Inc. (Consol) with two violations of mandatory standards and seeking civil penalties of $78,000.00 for those violations. The general issue before me is whether Consol violated the cited standards as alleged, and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

There is no dispute that on December 31, 2005, at about 6:30 a.m., Dustin Wright, a third shift electrician at Consol's Beaver Gap E-3 mine, received a severe electrical shock while working in the high-voltage compartment of the underground 001 Section power center. It appears that on the shift before the accident, the maintenance crew had removed a conveyor belt head drive, a power center and a section of the 13,200-volt cable supplying the section. The section power center was moved six crosscuts outby and power was restored at about 4:30 a.m.

The day-shift production crew arrived on the section at about 6:00 a.m. to begin their normal shift. Several members of the maintenance crew, including Dustin Wright and another electrician, Brian Lucas, were still on the section when the production crew arrived. At this time Wright became aware that the phase rotation on the 13,200-volt line supplying power to the 001 Section was incorrect. Wright then told Lucas to go to the vacuum switch (located near the No. 4

Head Drive) and deenergize and lock out the circuit supplying power to the section. Wright stated that he would go to the section power center and switch the phase leads to remedy the problem. Wright and Lucas then proceeded to their respective destinations. Lucas maintained in an out-of-court statement that the accident occurred before he was able to deenergize the vacuum switch.

According to Wright's out-of-court statement, when he arrived at the power center, he pushed the emergency stop switch located on the high-voltage end of the power center. This deenergized the incoming power. He then removed the lid covering the disconnect switch and tested for voltage. The voltage detector indicated that the power was deenergized. In that same statement Wright claimed that he tossed a chain across the phase leads to bleed the charge off the cable before touching the leads.

According to his statement, Wright removed the right phase lead from the termination point (as viewed from the high-voltage end of the power center facing the inby direction). He then realized that the middle phase lead was not long enough to reach the right termination point, so he reconnected the phase lead in its original position. He removed the left and middle phase leads and then connected the middle phase lead to the left termination point. He picked up the left phase lead and started bending it so it could be easily attached to the middle termination point. At this point Winford Taylor, section foreman, and Tony Thomas, another electrician, arrived at the power center.

As Taylor and Thomas approached the power center, the phase lead in Wright's hand became energized and Wright collapsed against the frame of the power center. Thomas picked up a rubber mat lying next to the power center and, apparently while standing on the mat, pulled Wright away from the power source. As a result of the accident Wright suffered, and was hospitalized for treatment of, burns on his right arm.

*Citation No. 7558347*

Citation No. 7558347 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.511 and charges as follows:

> On December 31, 2005, a mine electrician performed electrical work in the high voltage compartment of the 001 Section power center without first personally de-energizing, locking out, and tagging the appropriate disconnect device. While attempting to change the configuration of the high voltage input leads, the electrician received a severe electrical shock.
>
> The cited standard provides as follows:
>
> No electrical work shall be performed on low-, medium-, or high-voltage 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. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by person authorized by the operator or his agent.

Consol does not dispute that the violation occurred and that it was "significant and substantial". There is therefore no dispute that the violation was also of high gravity. The evidence of record also clearly establishes that the violation was reasonably likely to cause death by electrocution. Consol argues in this case only that the violation was not the result of its high negligence and that no civil penalty should be assessed.

In her brief, the Secretary observes that the cited standard requires that disconnecting devices must be "locked out and suitably tagged by the persons who perform [electrical] work" on high voltage circuits or equipment. The Secretary also notes that there is no dispute that Wright was performing electrical work when he was injured and that he did not lock out and tag the circuit or equipment he was working on. The Secretary further observes, and it is undisputed, that Consol had a practice and policy that permitted Wright to perform his electrical work without first personally locking out and tagging the disconnect device. Indeed, it may also reasonably be inferred that Wimp Taylor, one of Consol's foreman, also knew that Wright would perform the electrical work at issue without first locking out and tagging the disconnect device because Taylor gave Wright a ride to the power center to perform the work while co-worker Lucas traveled to the splitter to lock out the disconnect device. The Secretary accordingly argues that Consol, through its agents, not only knew that Wright would violate the cited standard, but that it affirmatively encouraged electricians to violate the standard as a matter of company policy.

While admitting that it had a long-term policy of allowing two certified electricians to work together, with direct telephone or radio communication, in deenergizing lines, locking and tagging the power source and performing repairs, Consol maintains that it reasonably believed this policy to be in full compliance with applicable federal law and equally safe. More specifically, the policy required that phone or radio instruction be direct between the person who removes the power, locks and tags, and the person performing the repairs. The policy further required that when the repair was completed, the order to unground and restore power again be a direct communication repeated at least three times between the two electricians.

As noted, Consol argues that it should not be found negligent because it maintains that it reasonably and in good faith believed its policy to be safe and compliant with applicable law. In this regard Consol presented testimony of witnesses experienced in the mining industry who had "always seen the procedures described in the Consol policy followed in circumstances such as those presented in this case", had never seen such procedures questioned by anyone including MSHA inspectors, were unaware that citations had ever been issued as a result of the subject policy, and who believed the procedures were as safe as those required by the cited standard.

I do not however find Consol's claims - - that it reasonably believed that its two-person lock and tag policy was consistent with the cited standard - - to be credible. The plain language of the standard requires disconnecting devices to be locked out and tagged "by the persons who perform" the electrical work on high voltage, distribution circuits or equipment. The standard does not in any way suggest that the person performing the electrical work may have someone else lock out and tag the disconnecting device, or that the disconnecting device may be locked out and tagged by only one of the persons performing that work if there is more than one.

Consol's policy is also inconsistent with the purpose of the standard. As the Secretary notes, the standard implements the statutory provision 30 U.S.C. § 865(f), and Congress, in explaining the comparable provision in the Federal Coal Mine Health and Safety Act of 1969, described the purpose of requiring switches to be locked in an open position where the power is disconnected is to prevent accidental reclosing and that the person performing the work must retain possession of the key to guard against such reclosing. H.R.Rep.No.91-563, at 1078(1969). Congress intended that the person who locks out the equipment be the person who is going to perform the work. See *Badger Coal Company* 6 FMSHRC 874, 902(April 1984)(ALJ). It does not take a rocket scientist to recognize that the only way for a person to assure against the accidental reclosing of the circuit is to place their own lock on the disconnect device and retain possession of the key. By retaining the key to the lock, that person is thereby assured that power will not accidently be engaged. Allowing an electrician to rely on someone else to lock the disconnect device adds an unnecessary human element that increases the likelihood of mistake and mis-communication. Under the circumstances, I find that the violation herein was the result of Consol's high negligence.

In reaching these conclusions I have not disregarded Consol's claim that it reasonably and in good faith believed its policy to be in compliance with the cited standard, because of its reliance on an interpretive policy issued by a former Consol employee then employed by the West Virginia Office of Miners Health Safety and Training(Respondent's Exhibit No.2). However, since the policy was not adopted by this state agency until almost two years after the violation charged in this case, it could not have been relied upon by Consol for a good faith belief that it was in compliance two years earlier with the West Virginia policy. In any event, an interpretation by a state agency of its own regulation when that interpretation is contrary to the plain meaning of the Federal standard provides but little support for Consol's position herein. The potential for conflicting interests of a former Consol official rendering assistance to Consol also certainly raises issues of credibility.

*Citation No. 7558348*

Citation No. 7558348 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.705 and charges as follows:

> On December 31, 2005, a mine electrician performed electrical work in the high voltage compartment of the 001 Section power center without first personally ensuring that the

power source was de-energized and grounded. While attempting to change the configuration of the high voltage input leads, the electrician received a severe electrical shock.

The cited standard provides as follows:

> High-voltage lines, both on the surface and underground, shall be deenergized and grounded before work is performed on them, except that repairs may be permitted, in the case of energized surface high-voltage lines, if such repairs are made by a qualified person in accordance with procedures and safeguards, including, but not limited to, a requirement that the operator of such mine provide, test, and maintain protective devices in making such repairs, to be prescribed by the Secretary prior to March 30, 1970.

30 C.F.R. § 75.705-1 explains what is meant by the phrase "deenergized and grounded":

> No high-voltage line, either on the surface or underground, shall be regarded as deenergized for the purpose of performing work on it, until it has been determined by a qualified person (as provided in § 75.153) that such high-voltage line has been deenergized and grounded. Such qualified person shall by visual observation (1) determine that the disconnecting devices on the high-voltage circuit are in open position and (2) ensure that each ungrounded conductor of the high-voltage circuit upon which work is to be done is properly connected to the system-grounding medium.

It is undisputed that Mr. Wright was performing work on a high-voltage line in the power center and that the high-voltage circuit could not be deenergized and grounded at the power center. It is also clear that in order to deenergize and ground the high-voltage circuit, one would have had to travel to the splitter. The splitter was about 1,500 feet away from the power center. Wright sent Lucas to the splitter to deenergize and ground the circuit. However Lucas stated that he had just arrived at the splitter when he heard about the accident, and had not yet made any changes at the splitter. Power was obviously reaching the high voltage lines Wright was working on when he suffered his electrical burns. In addition, when MSHA inspector Cook observed the splitter after the accident the visual disconnect was closed, indicating that it would not have prevented power from going to the power center. On the basis of these undisputed facts it is clear that Wright performed work on a high-voltage line that had not been deenergized and grounded. The Secretary has therefore met her burden of proving a violation of the cited standard.

In reaching this conclusion I have not disregarded Consol's contention that the two citations herein are duplicative. Citations are not duplicative, however, if the standards cited impose separate and distinct duties and the alleged violations are based upon two separate and specific omissions. See *Secretary v. Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Within this framework of law, I find that the violations of 30 C.F.R. § 75.511 and 30 C.F.R. § 75.705 charged herein are in fact not duplicative because the standards impose

separate and distinct duties and the distinct duties and the violations are based on two separate and specific omissions. Section 75.705 requires high-voltage lines to be deenergized and grounded before work is performed on them, while section 75.511 requires the disconnect device for the circuit or equipment to be locked out and suitably tagged. It is possible to comply with the former requirement and fail to comply with the latter. See also *Blue Diamond Coal Co. v. Secretary*, 26 FMSHRC 570, 583 (July 2004) (ALJ) in which Judge Zielinski found that the requirement to deenergize and the requirement to lock and tag are, indeed, separate and distinct duties and that charges that the operator failed to meet each requirement are not duplicative.

The violation was also "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary 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 injury in question will be of a reasonably serious nature.

*See also Austin Power Co. v. Secretary,* 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Clearly, having a person work on high-voltage lines that have not been deenergized and grounded exposes that person to the hazard of contact with high voltage, and the likelihood of suffering burns, electric shock and electrocution. Indeed the hazard contributed to by the violation herein actually resulted in a serious permanently disabling injury. The violation was accordingly "significant and substantial" and of high gravity.

The Secretary argues that the violation was also the result of Consol's moderate negligence. She argues that while Consol's two-person lock-out policy may not have been violative of section 75.705 it nevertheless invited violations of section 75.705 by encouraging persons who perform electrical work on high-voltage lines to rely on others to deenergize and ground the circuit. She argues that Consol's policy increases the likelihood for mis-communication and for mistakes due to inattention or carelessness and, thus, the likelihood of

injury. I find, however, that the Secretary's argument is so highly speculative as to be without probative value. Accordingly, I must reject her findings of moderate negligence based on that argument. In the absence of other evidence of negligence I must conclude that the violation was the result of but little negligence.

*Civil Penalties*

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would effect the operator's ability to continue in business. The record shows that Consol is a large operator and it has been stipulated that the proposed penalty would have no effect on its ability to continue in business. It has a significant violation history (Government Exhibit No.15). The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of $50,000.00 for the violation charged in Citation Number 7558347 and $1,000.00 for the violation charged in Citation Number 7558348 are appropriate.

## ORDER

Citation Numbers 7558347 and 7558348 are affirmed with "significant and substantial" findings. Consol of Kentucky, Inc., is hereby directed to pay civil penalties of $50,000.00 and $1,000.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
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