

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9964 / FAX: 202-434-9949

April 2, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-122
Petitioner	:	A.C. No. 15-18839-128465
v.	:	
	:	
EXCEL MINING, LLC,	:	
Respondent	:	Van Lear Mine

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for a Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (“The Act”), alleging that Excel Mining, LLC (“Excel”), violated 30 C.F.R. § 75.517, and seeking the imposition of a civil penalty for this violation.

On August 2, 2007, Mine Safety and Health Administration (MSHA), inspector David Stepp, inspected Excel’s Van Lear Mine, an underground coal mine. In the course of his examination of a trailing cable of a roof bolter, he observed a damaged portion of the outer insulation that was approximately three inches long, and a half to one inch wide. Three inner insulated wires carrying 575 volts could be seen, but there was not any visible damage. Stepp issued a citation alleging a violation of Section 75.517, *supra*, which, as pertinent, provides as follows: “power wires and cables ... shall be insulated adequately and fully protected.”

A hearing was held in the this matter on November 13, 2008. On February 23, 2009, the Secretary filed Proposed Findings of Fact, Brief and Argument, and Excel filed a Post Hearing Brief. On March 3, 2009 Excel filed a Reply Brief.

Findings of Fact and Discussion

At the hearing, the parties filed a set of ten stipulations. Respondent, *inter alia*, stipulated to a violation of Section 517, *supra*. Thus, considering this stipulation and the record in this case, I find that Excel did violate Section 517, *supra*.

The citation at bar was issued as being significant and substantial. In general, Commission law regarding significant and substantial is well established and is as follows:

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the 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 825 (April 1981).

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 record clearly establishes, as set forth above, that the violative condition of the

damaged outer insulation of the cable exposed three inner insulated wires carrying 575 volts, which contributed to the hazard of electrical shock or injury. Accordingly, I find that the first and second factors set forth in *Mathies, supra*, have been met. The critical issue for resolution is whether the third element of *Mathies, supra*, has been established i.e., the reasonable likelihood of an injury producing event.

Excel argues, *inter alia*, that, as conceded by Stepp, a person would not receive any electrical shock when all the inner conductors are still insulated. In this connection, Excel cites Stepp's testimony that he did not observe any damage to the inner conductors. Excel also cites the testimony of Michael Hurley, Excel's shift foreman, that with continued normal mining operations in the entry at issue, the damaged portion of the cable would not have been handled.

In *U.S. Steel*, 6 FMSHRC 1573 (July 1984), the operator challenged the decision of the judge that a gash in the outer insulating jacket of a trailing cable in addition to being a violation of Section 517, *supra*, was also significant and substantial. The Commission, in affirming the decision of the judge with regard to significant and substantial held as follows:

The administrative law judge considered those mining conditions to which the damaged cable predictably would be exposed. He found that both the outer and inner layers of insulation provided important protection against electrical shock. These findings are fully supported by the testimony of the MSHA inspector and the operator's witness, each of whom stated that the mining environment is harsh and that damage to the outer layer of insulation weakened the protection afforded by the inner layer.

U.S. Steel, supra, at 1575.

In *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284-1286 (December 10, 1998), an issue presented to the Commission was whether a violation of 30 C.F.R. § 75.604(b)¹ i.e., that splices on a cable were not "effectively insulated" to exclude moisture, was significant and substantial. The operator therein argued that the third element of *Mathies, supra*, was not established by the Secretary, since there were not any exposed leads, and that the Secretary failed to prove "that anyone was or would be exposed to electrical current by handling the cable." 20 FMSHRC, *supra*, at 1285. It is significant that in rejecting this argument, the Commission relied on *U.S. Steel, supra*, and analyzed the holding in *U.S. Steel, supra*, as follows: "... In *U.S. Steel Mining Co.*, [citations omitted] we held that four inches of exposed wire constituted an S&S violation, despite lack of direct evidence that exposed wires were not insulated." 20 FMSHRC, *supra*, at 1286. The Commission also cited *U.S. Steel supra*, as "recognizing that a tear in the outer jacket of a cable significantly compromises the cable's protective function." (Id.) (emphasis added)

The Commission, in applying *U.S. Steel, supra*, to the evidence of record, cited the

¹Section 75.604(b) requires that permanent splices in trailing the cables must be "[E]ffectively insulated and sealed so as to exclude moisture;"

testimony of the inspector who “emphasized the danger of these situations [his inability to see bare conductors inside the open splice of the cable], stating that ‘there’s no way of knowing [whether there are holes in the insulation surrounding the wire within the cable].’”(Id). The Commission also noted the inspector’s testimony that “even if no copper wires are exposed, there is a danger of electrocution, because ‘[m]uch like an extension cord with a naked place you may not be able to see the naked place, but you grab a hold of it and you’ll know it.’”(Id.).

The Commission concluded that the record supported the judge’s finding that the violation was S&S, as it was reasonably likely to contribute to a serious electrical injury.²

In *Harlan, supra*, the Commission was also presented with the specific issue of whether the third *Mathies*, element was established regarding a violation of Section 517, supra. i.e., a visible rupture in the outer jacket of the training cable of a bolter which exposed the inner insulated conductors. The Commission held that the operator’s argument that reasonable likelihood of injury cannot be established if there is not direct evidence of damaged interior conductors or proof of the existence of exposed uninsulated wire “... is inconsistent with Commission precedent.” *Harlan, supra*, at 1287. (Emphasis added) In this connection, the Commission noted that in *U.S. Steel, supra*, where the parties agreed that the outer jacket had ruptured, but that there was not any evidence that the inner insulation was compromised, “we held that the gash in the outer jacket of the trailing cable constituted an S&S violation of section 517, in part because in the ‘harsh environment of a coal mine’ a tear in the outer jacket weakens the protection afforded by the inner insulation, ‘contribut[ing] significantly and substantially[] to the cause and effect of a safety hazard’ *Id.* at 1574-75.” (Id)

In *Harlan, supra*, the Commission noted that the condition of the cable at issue i.e., the outer jacket was torn but there was not any direct evidence that the inner insulation was damaged, was similar to the condition of the cable at issue in *U.S. Steel, supra*. The Commission found *U.S. Steel, supra*, persuasive in the matter before it, and affirmed the judge’s determination of S&S.

In the case at bar, as in *Harlan, supra*, there is not any dispute that the outer jacket of the cable, which constituted a layer of insulation between the miners and a potentially fatal 550 volt

²Excel argues that the case at bar is to be distinguished from *Harlan, supra*, inasmuch as there was not any evidence presented herein that the cable at issue was lying in water. This difference by itself, is not sufficient to distinguish facts in the instant proceeding from *Harlan, supra*. In *Harlan, supra*, the Commission initially cited other facts of record supporting the Judge’s decision of significant and substantial which appear to be the main bases for the Commission’s holding, and are equally applicable to the case at bar (The inspector’s testimony that although he could not see into the open splice there was no way of knowing whether there were any holes in the insulation surrounding the wire within the cable. Also, the inspector’s testimony that even if no inner wires are exposed there is a danger of electrocution).

current, was torn.³ I find that the physical condition of the cited cable was similar to that of the cables at issue in *Harlan*, *supra*, and *U.S. Steel*, *supra*, which were found to be S&S, in light of, *inter alia*, the harsh environment of a coal mine. Since I am bound to follow established Commission case law, I find, based on *U.S. Steel*, *supra*, and *Harlan Cumberland*, *supra*, that the violation herein was significant and substantial.⁴

Penalty

The record does not contain any evidence that Excel's history of violations is such as to have either a positive or negative effect on the level of penalty to be imposed. The parties stipulated that the penalty proposed by the Secretary is appropriate to the size of Excel's business, and will not affect its ability to continue in business.

The Secretary argues that the level of Excel's negligence was moderate given the fact that the damage to the cable was obvious and that the history of violations of Sections 75.517, *supra*, and 75.604, *supra*, was "very" significant.⁵ Excel did not impeach or contradict Stepp's testimony that the damage was obvious. However, it is significant that Stepp indicated that he noted the damage as he was running his hand over the cable. There is not any evidence as to when the cable had last been touched by Excel's employees or agents. Nor is there any evidence

³In addition, as set forth in the citation at issue, which was admitted in evidence, the bottom of the section was damp. Excel did not rebut or contradict this statement. In this connection, I note the following testimony by Stepp regarding the significance of this condition as follows: "it would be more easily to conduct electricity through the body into the ground." (Tr. 42).

I also note the inspector's testimony that the cable would be handled by the scoop operator in order for the scoop to travel under it. In addition, according to Stepp, one of the bolters would have to handle the cable at issue to move it to one side to allow the roof bolting machine to be moved. Thus, in normal operations miners would be in physical contact with the cable.

⁴Excel, in arguing that it has not been established that the violation was significant and substantial, relies on *Lone Mountain Processing, Inc.*, 29 FMSHRC 557 (June 2007) and *Oak Grove Resources, LLC*, 29 FMSHRC 1089 (November 2007). I note, that *Lone Mountain*, *supra*, a decision I issued, held that a violation under 30 C.F.R. § 75.604(b) was not significant and substantial, and *Oak Grove Resources*, *supra*, a decision by a fellow commission judge, also found a violation therein of Section 75.360(b), to be non-significant and substantial. However, both these cases are distinguishable from the instant case on their facts. Further, to the extent that they reach a different conclusion from the case at bar. I choose not to follow them for the reasons set forth above.

⁵I note that the Assessed Violation History Report for Excel indicates that from August 2, 2005, through August 1, 2007, Excel received 15 citations for violations of section 75.517, *supra*, and 13 citations for violations of Section 75.604(b), *supra*. (Government Exhibit 1).

in the record that prior to its being cited, the damage to the cable was obvious to visual observation. Further, there is not any evidence in the record as to when the cable was damaged, especially in relation in time to the inspection by Stepp. Thus, it cannot be concluded that Excel had knowledge or notice of the cited condition prior to the inspection.

The parties stipulated that Excel demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

For the reasons set forth above, I find that the gravity of the violation was high as it could have resulted in a fatality.

Considering all of the above factors set forth in Section 110(i) of the Act, and placing emphasis on the high level of gravity, I find that a penalty of \$1,657 is appropriate.

ORDER

It is **Ordered** that, within thirty days of this decision, Excel pay a penalty of \$1,657 for the violation of 75.517, *supra*.

Avram Weisberger
Administrative Law Judge
202-434-9940

Distribution:

Tom Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/lp