

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 14, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 96-125
Petitioner : A.C. No. 36-04629-03543
v. :
PRIMROSE COAL COMPANY, : Docket No. PENN 96-148
Respondent : A.C. No. 36-04629-03544
: Docket No. PENN 96-158
: A.C. No. 36-04629-03542
:
: Mine: Primrose Slope

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
David S. Himmelberger, Partner, Primrose Coal
Company, Tremont, Pennsylvania, pro se.

Before: Judge Melick

These consolidated civil penalty proceedings are 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 citations issued by the Secretary of Labor to the Primrose Coal Company (Primrose) and to contest the civil penalties proposed for the violations charged therein. The general issue before me is whether Primrose 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.

Settlement motions were considered at hearing as to all violations except those charged in Citation Nos. 4149821 and 4152240. In connection with the settlement motion, a reduction in penalties from \$460 to \$443 was proposed. I have considered the representations and documentation submitted in connection with the motion, including documents submitted at trial, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed amount will accordingly be incorporated in this decision.

The two citations remaining at issue arose from an investigation by the Mine Safety and Health Administration (MSHA) of a fatal electrical accident at the Primrose Coal Slope on March 30, 1995. The victim, Charles J. Frederick, an employee of Primrose, came in contact with an energized slope car and the frame of a 480 volt slurry pump. According to the investigation, the slope car and pump frame became energized when faults occurred in the electrical system.

Citation No. 4149821 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.518 and charges as follows:

The 3 phase 480 volt 3.7 horsepower motor on the Flyght pump (model 3060 SS) used to wash coal from the No. 1 Breast, was not provided with an automatic circuit breaking device to protect against overload, or that would deenergize all three phases in the event any phase was overloaded. Three 30 amp fuses were improperly used to provide this protection. This condition was observed during a fatal electrical accident investigation.

The cited standard, 30 C.F.R. § 75.518, provides in relevant part that "3-phase motors on all electrical equipment shall be provided with overload protection that will de-energize all three phases in the event that any phase is overloaded."

Citation No. 4152240 charges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.701 and charges as follows:

The metallic frames and enclosures of all 3 phase 480 volt equipment in use at the mine were not grounded by methods approved by an authorized representative of the Secretary. Failure to connect the surface equipment frames to a low resistance ground field resulted in, and increased the probability of, a difference of potential existing between the surface and underground equipment frames.

The cited standard, 30 C.F.R. § 75.701, provides that "metallic frames, casings, and other enclosures of electrical equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary." It is noted that the standard at 30 C.F.R. § 77.701-1 sets forth several of the approved methods of grounding equipment receiving power from ungrounded alternating current power systems.

There is no dispute in this case that the violations existed as charged, were "significant and substantial" and were of high gravity. It is further undisputed that these violative conditions were causative factors in the death of Charles Frederick. Under the circumstances the parties agreed at hearing that the only issues to be litigated were the operator's negligence, if any, and the amount of civil penalty to be assessed giving particular consideration to "the effect on the operator's ability to continue in business".

It is undisputed that David Himmelberger, one of two Primrose partners, was the MSHA certified electrical examiner at the subject mine during relevant times and was responsible for the required weekly and monthly electrical examinations. According to the expert testimony of MSHA electrical inspector Bill Hughes, both of the violations should have been obvious to a certified electrician and should therefore have been known to Himmelberger. In addition, Hughes testified that neither of the violative conditions were reported in the appropriate examination books. In regard to the violation charged in Citation No. 4152240, it is particularly noted that the unconnected ground wire was hanging in plain view. (See photograph Exhibit G-12).

In his answer filed in this case and as purported grounds for reduced negligence, Primrose alleges as follows:

The mine was inspected one month before and there was no problem. The circuit breakers that we were fined for was not enforced [sic] by MSHA for years. The mine was not inspected for years by an MSHA electrical inspector.

At hearing Himmelberger testified that he had been operating the subject mine since October 1991, and had then received an MSHA "courtesy" inspection. He has subsequently been inspected by MSHA each quarter but has never had an MSHA electrical inspection. Indeed, it is undisputed that only one month before the instant citations were issued, MSHA had inspected this mine and the violations at issue were not then cited. Himmelberger also claims, and it has not been disputed, that the conditions cited herein were the same as when he began operating this mine in 1991. He also maintains that he did not understand at the time these conditions were cited that they were violations.

I agree with the Secretary that a certified electrical inspector such as Mr. Himmelberger should have the qualifications to know that the cited conditions were violative. Under the circumstances I give but little weight to Himmelberger's claims of ignorance. I have also considered Respondent's claims that

MSHA should have previously discovered and cited these apparent obvious violative conditions either at the time of its courtesy inspection when the mine began operations under Himmelberger's control in October 1991 or thereafter during what must have been 12 to 14 regular quarterly inspections. The absence of any MSHA electrical examination during this period also raises some concern. However whether or not MSHA was itself negligent in failing to conduct an electrical inspection at this mine for more than three years and in failing to detect these violations during a courtesy inspection or during as many as 14 regular quarterly inspections, under the circumstances of this case would not in any event mitigate Respondent's own negligence herein. As the mine's certified electrical inspector, Himmelberger should clearly have known of those violative conditions. Under the circumstances and considering all of the criteria under Section 110(i) of the Act I find that civil penalties of \$1,800 and \$1,700, respectively, for Citation Nos. 4149821 and 4152240 are appropriate.

In reaching this conclusion I have not disregarded Respondent's claims of financial problems, however, the evidence is insufficient to warrant any further reduction. It is noted that he is no longer operating the subject mine and the operating partnership no longer exists. Furthermore, Himmelberger reported \$40,000 in taxable income for 1995.

ORDER

The citations at issue are hereby affirmed and Primrose Coal Company is hereby directed to pay civil penalties of \$3,943 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

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