FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-307
Petitioner	:	A. C. No. 36-08719-03511
	:	
v.	:	
ROSEBUD MINING COMPANY,	:	Josephine # 3 Mine
Respondent	:	

DECISION

Appearances: John M. Strawn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Joseph A. Yuhas, Esq., Northern Cambria, Pennsylvania, for Respondent.

Before: Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Rosebud Mining Company (Rosebud) for an alleged violation of 30 C.F.R. § 75.523-2(c), a mandatory safety standard for underground coal mines that pertains to deenergizing devices (frequently referred to as "panic bars") on self-propelled electric face equipment. The standard is a subpart of 30 C.F.R. § 75.523. Section 75.523 states that the Secretary "may require . . . that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency." The first subpart of section 75.523, 30 C.F.R. § 75.523-1, requires the time-sequenced installation of the devices on self-propelled electric face equipment. Section 75.523-2 specifies how the devices must perform and requires, among other things, that if panic bars are used, the "movement of not more than 2 inches of the . . . bar . . . resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the . . . bar shall cause deenergization of the tramming motors of the . . . equipment."

The Secretary alleges that on July 21, 1999, at Rosebud's Josephine No. 3 Mine, a MSHA inspector needed more than 15 pounds of force to cause a panic bar on a mobile bridge carrier (MBC) to deenergize a continuous mining machine. In addition, the Secretary charges that the condition was a significant and substantial contribution to a mine safety hazard (S&S), and she proposes the assessment of a civil penalty of $184 for the alleged violation. In response, the

company argues that section 75.523-2(c) does not apply to the MBC or, in the alternative, that the proposed penalty is not based upon proper legal and factual findings.

The case was tried in Indiana, Pennsylvania. Following the trial the parties submitted helpful briefs.

THE STIPULATIONS

The parties stipulated as follows:

> 1. [T]he Josephine Number Three [M]ine is owned and operated by . . . Rosebud.
>
> 2. [T]he mine is subject to the jurisdiction of the . . . Act . . . .
>
> 3. [T]he Administrative Law Judge has jurisdiction over [the] proceedings.
>
> 4. [C]itation [No. 3698571] [and its modification were] . . . properly assessed and served by a representative of the Secretary . . . upon an agent of . . . [Rosebud]. . . [on and at] the dates and times and places stated therein, and may be admitted into evidence for the [purpose] of establishing their issuance and not for the truthfulness or relevancy of any statement asserted therein.
>
> 5. [T]he assessment of a [c]ivil [p]enalty in this proceeding will not affect [Rosebud's] ability to continue in business.
>
> 6. [T]he appropriateness of the penalty, if any, to the size of . . . [Rosebud's] business should be based on the fact that [Rosebud's] annual production tonnage [of coal] in 1998 was 1,424,142 tons. The month[ly] annual production tonnage [of coal] in the last two quarters of 1998 was 56,148 and [was] 61,462 in the first quarter of 1999. The mine employs 200 employees.
>
> 7. [Rosebud] demonstrated ordinary good faith in obtaining [compliance] after the issuance of the citation.
>
> 8. [T]he mine was assessed a total of 16 citations based on 28 inspection days in the 24 months immediately proceeding the issuance of the citation.
>
> 9. The parties stipulate to the authenticity of their exhibits . . . . (Tr. 13-14; see also Joint Exh. 1)

In addition, and based upon Stipulations 6 and 8, counsel for the Secretary characterized the size of Rosebud as "medium" and the company's history of previous violations as "moderate"

(Tr. 16).

THE CONTINUOUS MINING AND HAULAGE SYSTEM AND THE INVESTIGATION

An MBC is a component of a continuous mining and haulage system that extracts and moves coal from a face to a main conveyor belt line. A continuous miner is the component in the system that is closest to the face. The continuous miner cuts the coal. The coal is then conveyed to a bridge or to a series of bridges and ultimately to a main conveyor belt. The coal is dumped onto the belt and is carried out of the mine (Tr. 37).

An MBC is a bridge conveyor that carries the coal. However, unlike a regular bridge conveyor, an MBC can articulate so as to bend around corners. An MBC can be connected to the other bridge conveyors and to the continuous miner by a sliding dolly (Tr. 38-39). Also, an MBC can be trammed (moved) forward and backward (Tr. 38). The continuous miner and the MBC each have motors for tramming. No other parts of the system have tramming motors (Tr. 131). Because the continuous miner and the MBC can move independently of one another, both require the presence of miners at their controls (Id.). Therefore, when the system is operating, one miner is at the controls of the continuous miner and another is at the controls of the MBC.

At the Josephine No. 3 Mine, two deenergizing devices were installed on the subject MBC, one deenergized the MBC and one deenergized the continuous miner. Both devices were activated by depressing a single panic bar on the MBC (Tr. 30, 32-34). In addition, one deenergizing device was installed on the continuous miner. The device on the miner also was activated by depressing a single panic bar on the miner. When the bar on the miner was depressed, only the continuous miner was deenergized.

David Sherry was employed by Rosebud as an underground laborer. One of his duties was to operate the MBC. On July 21, 1999, he was at the controls of the MBC when it became necessary for him to leave the operator's compartment in order to change a cable to the continuous mining machine (Tr. 26-29). Prior to leaving, Sherry depressed the panic bar on the MBC. The MBC deenergized. Sherry believed the continuous miner also deenergized (Tr. 30-31).

Sherry got out of the MBC, took a step or two, and knelt down within an arms length of the MBC. Sherry testified that he would not have left the MBC but for the fact that he believed the continuous miner was deenergized (Tr. 30, see also, Tr. 91).

As Sherry knelt, the continuous miner, which, in fact, was not deenergized, began to back up. The movement of the heavier continuous miner pushed the MBC backwards and sideways toward the rib. Sherry was caught between the MBC and the rib. He was crushed, suffering severe, traumatic injuries to his trunk and his abdomen (Tr. 29, 31). As a result, Sherry was out of work for three and one half months (Tr. 32).

The accident occurred around 10:30 a.m. MSHA was notified and MSHA Inspector Joseph O'Donnell was assigned to investigate the accident. O'Donnell went to the mine that afternoon. O'Donnell was accompanied by electrical inspector Bill Collinsworth. Once at the

mine, O'Donnell spoke both with management personnel and with miners. The miners had been withdrawn from the mine following the accident, so the interviews took place on the surface (Tr. 53-54). After the interviews, O'Donnell and Collinsworth went underground where they inspected the continuous mining and haulage system (Tr. 54-55). They payed special attention to the MBC and its panic bar.

O'Donnell described the panic bar as "a long lever" — about four feet in length — "that the operator [of the MBC] can contact anywhere . . . and deenergize the tramming motors of the [MBC and the continuous miner]" (Tr. 57). The bar was designed to activate two different "on and off" devices, one in the form of a button and one in the form of a "flipper switch" (Tr. 57-58). O'Donnell stated that "when the prong of the bar strikes the button and the . . . switch . . . [the bar is] supposed to deenergize the tramming motors of the system" (Tr. 58).

O'Donnell and Collinsworth depressed the MBC's panic bar to determine if the "on and off" devices were working. When they did this the MBC was deenergized, but the continuous miner was not (Tr. 55-56). They applied more pressure to the bar, and the continuous miner then was deenergized (Tr. 61).

The inspectors checked the pounds of force necessary to apply to the bar to deenergize both pieces of equipment. The inspectors used a gauge-type device that they had calibrated according to its manufacturer's specifications shortly before going underground (Tr. 81). O'Donnell described how the gauge was used. "[Y]ou place it on the panic bar, force it in, when it shuts off [the equipment], [you] read how many pounds of pressure it took to deactivate the tramming motors of the unit" (Tr. 60).

The inspectors found that to deenergize the MBC they had to apply eight pounds of force and move the bar no more than two inches. However, to deenergize the continuous miner they had to apply more than 20 pounds of force (Tr. 61-63).

The inspectors also checked the panic bar on the continuous miner. They found that it operated properly (Tr. 82).

The inspectors further determined that although they could not move the continuous miner by tramming the MBC, the opposite was not true. The continuous miner was heavier and more powerful than the MBC, and the movement of the continuous miner could cause the MBC also to move (Tr. 61-63).

The inspectors credited Sherry's belief that when he deenergized the MBC, he also deenergized the continuous miner. O'Donnell explained that Sherry was an experienced MBC operator and that he "had to believe that the tramming motors of the miner were also deenergized or he would have never ex[ited the MBC]" (Tr. 63).

Sherry told O'Donnell that after he depressed the panic bar he looked inby and saw no lights on the continuous miner, something that confirmed to him that he had deenergized the continuous miner (Tr. 64). As it turned out, however, the operator of the continuous miner was preparing to back out of the working face and to move the continuous miner to another area.

Therefore, the operator shut off the continuous miner's lights so that he would not be "blinded." He wanted to see the areas surrounding and in back of the continuous miner and any miners who might be in the areas (Tr. 64).

The continuous miner operator stated that when he looked in back of the miner he saw lights that he believed to be the lights of the MBC. Three other miners were working within five feet of Sherry's location. O'Donnell speculated that the operator of the continuous miner mistook the lights of the miners' cap lamps for the lights of the MBC. This lead the continuous miner operator to believe that the MBC was energized and that Sherry was in the MBC operator's compartment (Tr. 65-66).

The operator of the continuous miner began to back up the equipment. The movement of the miner "kicked the MBC against the rib" (Tr. 75, see also, Tr. 75-78). O'Donnell testified that had the panic bar on the MBC functioned as required, the continuous miner would not have been able to move and the accident would not have occurred (Tr. 67).

O'Donnell cited Rosebud for a violation of section 75.523-2. He based the violation on the fact that more than 15 pounds of pressure was required to deenergize the MBC (Tr. 67, see also, Tr. 81). O'Donnell noted that the standard applied to electric face equipment. He maintained that because the MBC and the continuous miner were physically and electrically connected they constituted one "single moving unit", and that the unit, which was headed by the continuous miner, was "electric face equipment" (Tr. 71). In O'Donnell's view, the continuous miner and the MBC were but "different component[s] of the system" (Tr. 80). He also noted that when the continuous miner was operated as a part of the continuous mining and haulage system, the miner could not act independently of the system (Tr. 80). In the inspector's mind, the "electric face equipment" referenced in the standard was "the entire mining system, the continuous haulage system," and the "equipment operator" referenced in the standard was both the operator of the continuous miner and the operator of the MBC (Tr. 94-95). O'Donnell put it, "there are two equipment operators in this system" (Tr. 94).

O'Donnell found that the violation resulted in lost work days and in restricted duty to Sherry. He further found that it was S&S, and was caused by Rosebud's moderate negligence. (In fact, Rosebud agreed that if there was a violation, it was moderately negligent (Tr. 68, 69-70)). To abate the alleged violation, Rosebud dismantled the switch that deenergized the continuous miner, corrected a problem with the switch, lubricated the switch, and put the MBC back into service (Tr. 71).

MSHA's INTERPRETATION OF SECTION 75.523-2

In addition to O'Donnell's testimony regarding his investigation of the accident, the Secretary presented testimony concerning MSHA's interpretation of the standard. MSHA's policy was described by Robert Phillips, the coordinator of MSHA's electrical program (Tr. 102-103). (Phillips also participated in MSHA's investigation of the accident by going to the mine, by observing the conditions that surrounded the accident, and by meeting with management officials and with miners (Tr. 107-108)).

Phillips explained that the requirements for the installation of deenergizing devices are contained in section 75.523-1 and the requirements for the performance of the devices are contained in section 75.523-2. Like O'Donnell, Phillips emphasized that the subject continuous miner and MBC were parts of a unitary system. In Phillips view, this brought the system within the mandate of section 75.523-2 (Tr. 112). As a result, Phillips agreed with O'Donnell that Rosebud violated section 75.523-2.

Phillips identified a MSHA policy letter, dated July 12, 1989, which warned of the "hazardous condition [that] can occur when machines are mechanically connected to each other, but trammed independently and the emergency stop switch of the attached machine fails to deenergize the physically larger more powerful machine in the event of an emergency" (Gov. Exh. P-5). Phillips explained that in 1987, a fatal accident occurred when a MBC operator was killed. MSHA investigated the accident and found that it involved a continuous mining and haulage system and that the continuous miner in the system was sufficient in size, weight, and power to move the smaller, less powerful MBC (Tr. 114-115). The MBC involved in the accident did not have a device that could deenergize the continuous miner (Tr. 116). According to Phillips, the 1989 policy letter was issued to warn operators of the hazard (Tr. 114). The letter did not specifically state that the failure to have a device on the MBC that could deenergize a continuous miner constituted a violation of section 75.523 or of its subsections, rather it stated that if the smaller MBC did not have a switch, the MBC had to be removed from service because the MBC was in violation of section 75.1725 (see Tr. 123-124). (Section 75.1725 requires in part that "machinery or equipment in unsafe condition shall be removed from service immediately.") The letter instructed operators that "[a] means to eliminate the hazard is to mount an emergency stop switch on the MBC to deenergize the continuous mining machine" (Exh. P-5). The letter also stated that the "[f]ailure of the mine operator to install an emergency stop switch on the attached machine [i.e., the MBC] that will meet the requirements of . . . section 75.523-2, and simultaneously deenergize both . . . [the continuous miner and the MBC] when activated will result in enforcement action" (Gov. Exh. 5 at 2). The letter did not identify which section of the regulations the Secretary would cite when he or she undertook the "enforcement action". The letter expired on March 31, 1991 (Gov. Exh. P-5).

MSHA's next policy statement on the problem took effect immediately after the expiration of the program policy letter (i.e., on April 1, 1991). Phillips identified this statement as a part of MSHA's Program Policy Manual (PPM) concerning the implementation of 30 C.F.R. § 75.1725 (Gov. Exh. P-6). The part identified by Phillips remains in effect and states:

> When machines are mechanically connected to each other but trammed independently, and are sufficiently different in size, weight, and power an emergency stop switch shall be installed on the smaller machine to deenergize the larger machine. Without an emergency stop switch the equipment is not considered to be in a safe operating condition and must be removed from service (Gov. Exh. P-6).

According to Phillips, this part of the PPM pertains to those situations where a panic bar is not installed on a MBC (Tr. 125). If the MBC that injured Sherry lacked a device to

deenergize the continuous miner it would have been cited under section 75.1725 rather than under section 75.523-2 (Tr. 125). However, because the MBC had a stop switch for the continuous miner and the switch did not perform as required by the performance standard for such a switch, the condition was cited under section 75.523-2(c) (Tr. 117-118).

Finally, although Phillips did not testify regarding the matter, in 1996 MSHA issued another policy statement on the hazards attending the operation of continuous mining and haulage systems (Public Information Bulletin No. P96-18, Operation of Continuous Haulage Systems (October 18, 1996)). As I will explain, the statement has a significant bearing on this case, and I have judicially noticed its contents.

THE VIOLATION

Citation No. 3698571 describes the alleged violation of section 75.523-2(c) as follows:

> More than 15 pounds of force was needed along the actuating bar or lever of the . . . MBC . . . to deenergize the . . . [continuous] miner from the MBC operator['s] compartment. A . . . gauge . . . was used to measure the force needed to deenergize the miner. The equipment was involved in a serious accident that occurred at the mine. The measured force exceeded 20 pounds of force (Gov. Exh. P-2).

The principal issue is whether section 75.523-2 applied to the MBC? If so, there is no question but that a performance criterion of the standard was violated. Evidence offered by the Secretary in this regard was clear and went essentially unrebutted. Sherry testified that on July 21, he activated the bar prior to leaving the MBC (Tr. 30). He further testified that although the MBC was deenergized as a result, the continuous miner was not (Tr. 32-33). The same day, and within a few hours of the accident, MSHA personnel inspected the MBC. O'Donnell described how he and Collinsworth tested the effectiveness of the bar with a recently calibrated, gauge-type device and found that more than 20 pounds of force was needed for the panic bar on the MBC to deenergize the continuous miner (Tr. 56, 60-61, 67, 81). There is nothing in the record to suggest that the panic bar functioned differently during the MSHA investigation than it did when Sherry depressed it prior to the investigation. Nor is there anything to suggest the gauge was improperly calibrated and unable to obtain an accurate measurement. Therefore, I find that when Sherry activated the bar, it did not deenergize the tramming motors on the continuous miner unless more than 20 pounds of pressure was applied and that the device failed to meet a performance requirement of section 75.523-2(c).

This leaves the question of the applicability of the standard. It is clear that the situation in which Sherry found himself was hazardous. As Sherry recognized, he was lucky he was not killed (Tr. 32). It is equally clear that MSHA has been cognizant of the hazard. MSHA publicly warned operators about such a hazard in its July 1989 policy letter (Gov. Exh. 5), and when the 1989 warning expired, MSHA renewed the warning in its PPM by stating that "an emergency stop switch shall be installed on the smaller" of mechanically connected machines that could be trammed independently (Gov. Exh. P-6). Further, and as I just stated, I take judicial notice that in

1996 it again alerted the mining community of the possible hazard (Public Information Bulletin No. P96-18 at 2), and in so doing described four fatal accidents, two of which appear to have been similar to the accident involving Sherry (Id.).

Given its clear recognition of the hazard, one would think that MSHA would be equally clear about what it required operators to do to avoid the danger and about the authority for the requirement. Unfortunately, such is not the case. Although not explicitly stated, the 1989 program policy letter could have been read to imply that compliance with section 75.523-2 was required ("A means to eliminate [the] hazard is to mount an emergency stop switch on the MBC to deenergize the continuous min[er] . . . [and f]ailure to install an emergency stop switch . . . that will meet the requirements of . . . [section] 75.523-2 . . . will result in enforcement action" (Gov. Exh. P-5 at 1-2)). However, MSHA let the letter expire and the agency has not since made any explicit, let alone implied, pronouncements on the applicability of the subsection.

The PPM, which took effect upon expiration of the letter, states "[w]ithout an emergency stop switch the equipment is not considered to be in safe operating condition and must be removed from service" (Gov. Exh. P-6). The statement is made with respect to the agency's interpretation of section 75.1725. The PPM's discussion of section 75.523-2 makes no reference to the requirements of the section being applicable to MBC's when they are used as component parts of continuous mining and haulage system.

The fact is that nowhere in MSHA's extant public statements is notice given of MSHA's intent to require through section 75.523 and its subparts that MBC's which are mechanically connected to self-propelled electric face equipment, i.e., to continuous miners, be equipped with panic bars to deenergize the continuous miners. On the contrary, although the agency's most recently published pronouncement on the subject advises that "MBC's should be equipped with panic bars or switches" and that "[t]he panic bar and/or emergency stop switch on the MBC should . . . be able to de-energize the continuous mining machine" (Public Information Bulletin No. P96-18 at 2), it describes the statement as a recommendation ("MSHA recommends . . . the following" (Id.)) rather than as a requirement. Moreover, it indicates the recommendation is made under the authority of section 75.1725(a) and the Act. It does not once reference section 75.523 or the section's subparts (Id. 3).

Given this lack of clarity and guidance by the agency, should Rosebud nonetheless have realized the MBC came within the requirements of section 75.523-2? I think not. The standard does not specifically refer to continuous mining and haulage systems and/or MBC's. Lacking a specific reference, the question, as with so many other standards, is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the requirements of the standard applied to the MBC (Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990)).

The standard states that it applies to "self-propelled electric face equipment", and the Secretary argues strenuously that the MBC and the continuous miner together constituted a single unit of "electric face equipment". However, while it is obvious the continuous miner was electric face equipment, in that it operated in the immediate vicinity of the face, it is not clear at all that the MBC, which was removed by distance from the face, also qualified as such equipment.

Indeed, the Secretary's theory, if carried to its logical conclusion, would make every MBC in a continuous haulage system (and there could be several) "electric face equipment", no matter how far removed from the face they might be. The very use of the term "face" in the standard, gives the standard a specific locational reference, one that the Secretary's interpretation would blur if not altogether eliminate (see Tr. 94 (O'Donnell's description of electric face equipment as "the entire mining system")).

Moreover, in its most recent public pronouncement on the need for deenergizing devices on MBC's, MSHA appears to take a position counter to that advocated in this case. The Program Information Bulletin treats MBC's and chain bridge conveyers as separate from the continuous miner that cuts the coal. It states, "Continuous haulage systems, known as mobile bridge conveyors, commonly consist of alternating series of piggyback mobile bridge carriers (MBC) and chain bridge conveyers" (Program Information Bulletin No. P96-18 at 1). There is no mention of continuous miners as part of the system. Rather, the agency strongly implies that it views the system and the continuous miner are separate entities in that the agency recommends "[a]ny panic bar and/or emergency stop switch in any MBC should de-energize the entire system" and it recommends that "[t]he panic bar and/or emergency stop switch on the MBC should also be able to de-energize the continuous min[er]" (Id., 1, 2).

Given the wording of the standard and the agency's lack of clear pronouncements, I do not believe that a reasonable operator familiar with the industry and the protective purposes of the standard should have known the cited MBC was required to have a panic bar that deenergized the continuous miner in accordance with the performance requirements of section 75.523-2. Accordingly, I conclude Rosebud did not violate the standard.

While it is readily apparent that MSHA has struggled with the issue of how best to confront the undoubted dangers posed by the operation of MBCs as parts of continuous mining and haulage systems, shoehorning situations like the one at issue into section 75.523-2 without first clearly advising operators of MSHA's regulatory interpretation does not meet the requirements of the law. The agency may want to rethink the issue and either make a straightforward statement of its policy or engage in rule making.

ORDER

For the foregoing reasons, Citation No. 3698571 is **VACATED** and this proceeding is **DISMISSED.**

David F. Barbour
Chief Administrative Law Judge

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I further find that the MBC and the continuous miner together constituted a single unit of electric face equipment that came within the standard and, therefore, that the failure of the panic bar on the MBC to perform as required by section 75.523-2 and to deenergize the continuous miner violated the standard. First, the components of the continuous haulage systems were physically connected by metal couplings and by electrical conductors. While it is true that two of the parts, the continuous miner and the MBC could be disconnected and could operate on their own, on July 21 they were functioning as a physically connected unit of electric face equipment. (While Rosebud objects that the Secretary has presented no evidence the MBC is "self propelled electric face equipment" within the meaning of the standard (Rosebud Br. 5), the continuous miner is such equipment, and its presence at the face makes the entire unit such equipment for purposes of the standard.) Treating the components of what is essentially a unitary piece of equipment separately makes not sense, especially when doing so defeats the purpose of the standard.

That purpose is to prevent miners from being endangered by the unexpected movement and/or electrification of electric face equipment. The position advocated by Rosebud — that the standard does not require the deenergizing of the continuous miner from the MBC — does not effectuate that purpose since it leaves open the possibility a continuous miner could suddenly and unexpectedly push the MBC into an unsuspecting MBC operator or other miner . . . exactly what happened to Sherry. While it is true that the standard does not specify the types of electric face equipment it covers but rather regulates through use of the general term "electric face equipment", I conclude that Since the lapse of Public Policy Letter No. P89-V-13 (Gov. Exh. 5), the Secretary has not published another explicit notice of its intent to apply section 75.523 to MBC's mechanically connected to self propelled electric face equipment. In fact, MSHA's most recently published public pronouncement — of which I take judicial notice — states that, "The panic bar and/or emergency stop switch on the MBC should . . . be able to de-energize the continuous mining machine" (Public Information Bulletin No. P96-18, Operation of Continuous Haulage Systems (October 18, 1996) 2). It describes the statement as a recommendation rather than as a requirement of the subject standard and indicates that the recommendation is made in part under the authority of section 75.1725(a). Indeed, that fact that Rosebud installed such a device on the MBC makes reasonable an inference that Rosebud interpreted the standard in this way. (If in fact Rosebud had another reason for installing the device, it did not explain why.)

Finding that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have interpreted the standard as advocated by MSHA does not mean that the agency's position on the issue has been a model of clarity. Since the lapse of Public Policy Letter No. P89-V-13 (Gov. Exh. 5), the Secretary has not published another explicit notice of its intent to apply section 75.523 to MBC's mechanically connected to self propelled electric face equipment. In fact, MSHA's most recently published public pronouncement — of which I take judicial notice — states that, "The panic bar and/or emergency stop switch on the MBC should . . . be able to de-energize the continuous mining machine" (Public Information Bulletin No. P96-18, Operation of Continuous Haulage Systems (October 18, 1996) 2). It describes the statement as a recommendation rather than as a requirement of the subject standard and indicates that the recommendation is made in part under the authority of section 75.1725(a). Indeed, I recognize that an argument can be made that when a panic bar on an MBC does not de-energize the continuous miner and the MBC is not withdrawn from service immediately, a violation of section 75.1725, not section 75.523-2 exists (see Rosebud Br. 11), but the

essence of a violation of section 75.1725 is an unsafe condition and a failure to remove from service immediately, not the failure to comply with the specific performance requirements of section 75.523-2.

S&S AND GRAVITY

A violation is S&S if based on 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 (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984) the Commission held that to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonably serious nature.

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

The Secretary has met her burden of proof with regard to all of the elements. There was a violation of the cited standard. The failure in the performance of the panic bar meant that there was a hazard that a miner, especially the operator of the MBC, would be subject to being hit by the unexpected movement of the MBC when the continuous miner backed away from the face. Moreover, because the continuous miner turned out its lights when it was tramming away from the face and because miners with cap lamps at times worked in the vicinity of the MBC, the operator of the MBC who activated the panic bar reasonably could believe the lack of lights inby meant that the continuous miner was deenergized and that the operator of the continuous miner who looked outby and saw lights reasonably could believe the MBC was energized and the operator of the MBC was in MBC's operator's compartment. The resulting sudden movement of the MBC reasonably could have been expected to lead to injury to the MBC operator or to other miners in the vicinity of the MBC. In other words, the there was a reasonably likelihood that the violation would result in exactly what happened.

In addition to being S&S the violation was serious. The hazard confronting the MBC operator and those others in the vicinity of the MBC were those that could result from being struck by the MBC. Sherry suffered sever crushing injuries, and he was fortunate that he was not killed.

NEGLIGENCE

Rosebud did not exhibit the care required. It failed to keep the switch mechanism for the continuous miner in a condition that allowed the mechanism to perform within the requirements of the standard. Testimony offered by the Secretary unequivocally established that the mine had experienced a fatal accident in 1987 when an MBC, which did not have a device to deenergize the continuous miner, was moved by the continuous miner and the MBC stuck a miner (Tr. 123-124). With this event in its past, the company should have been mindful of the hazard created when the continuous miner could not be deenergized from the MBC and should have ensured the panic bar performed as required. The company's failure to meet that level of care demonstrates its negligence.

OTHER CIVIL PENALTY CRITERIA

The parties agreed that the company has a moderate history of pervious violations and that Rosebud is of a medium size (Tr. 16). They further stipulated that the assessment of a civil penalty will not affect Rosebud's ability to continue in business (Stip. 5) and that the company exhibited good faith in attempting rapidly to abate the violation (Stip. 7).

CIVIL PENALTY DETERMINATION

Although the serious nature of the violation and the negligence of Rosebud in allowing the violation to exist would warrant the assessment of a penalty in excess of that proposed by the Secretary, the other penalty criteria act somewhat to moderate that amount. Therefore, I conclude that a civil penalty of $250 is appropriate.

ORDER

Within 30 days of the date of this decision Rosebud **IS ORDERED** to pay a civil penalty of $250, and upon payment of the penalty this proceeding is **DISMISSED**.

THE PARTIES' POSITIONS

The case involves a mobile bridge carrier that was attached to a continuous mining machine (continuous miner). Both units were part of a continuous mining and haulage system that extracted and moved coal from the face to the main conveyor belt.. Two deenergizing devices were installed on the MBC, one deenergized the MBC and one deenergized the continuous miner. Both devices were activated by depressing the panic bar on the MBC. The Secretary asserts that more than 15 pounds of pressure had to be applied to the panic bar the button used to deenergize the continuous miner required more than 15 pounds of force upon contact to cause the miner to deenergize. The Secretary maintains that because the MBC and the continuous miner were connected both physically and electrically, they were for all effects and purposes a single unit and that the MBC therefore constituted self-propelled electric face equipment that had to meet the requirements of section 75.523-2 (Tr. 19-20). As counsel for the Secretary stated, "For the regulation to make any sense it must be read to require a . . . [deenergizing device] in the MBC

compartment which would de-energize both the MBC and the connected [continuous] miner (Tr. 20-21).

On the other hand, Rosebud argues the standard only requires a deenergizing device on the MBC, that the MBC is not required to have a device to deenergize the continuous miner (Tr. 23).

Asked whether he saw any lights on the continuous miner to indicate the continuous miner had not deenergized, Sherry replied that he "really didn't pay attention" (Tr. 31). Sherry thought that the hazard of leaving the MBC if the continuous miner wasn't deenergized was being crushed between the continuous miner and the MBC; or, as Sherry stated, was "[w]hat happened to me" (Tr. 31).

Sherry explained that there are two buttons that control electrical switches on the MBC, and that the buttons are engaged and the switches are opened by depressing a bar (the panic bar) (Tr. 32-34). One of the buttons deenergized the MBC and one of the buttons deenergized the continuous mining machine (Tr. 30). When Sherry pushed the bar, the button for the MBC was engaged and the MBC was deenergized. However, the button for the continuous miner was not sufficiently depressed by the bar and power continued to flow to the continuous miner (Tr. 32-33). When he got out of the MBC, Sherry believed the continuous miner had been deenergized (Tr. 31).

If they had been able to move the continuous miner they would have required the continuous miner to have safety device to deenergize the MBC in order to protect the operator of the continuous miner from the unexpected movement of the continuous miner caused by the movement of the MBC (Tr. 61-62, see also Tr. 96).

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