

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 13, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 96-222-M
Petitioner	:	A.C. No. 08-00768-05519
v.	:	
	:	Fort Green
IMC-AGRICO COMPANY,	:	
Respondent	:	

DECISION

Appearances: Sharon D. Calhoun, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Patrick S. Casey, Esq., Sidley & Austin, Chicago, Illinois, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against IMC-Agrico Company (IMC) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$8,000.00. For the reasons set forth below, I vacate one citation, affirm the other and assess a penalty of \$500.00.

A hearing was held on November 6, 1996, in Bartow, Florida. In addition, the parties have submitted post-hearing briefs in this matter.

Background

IMC is the owner and operator of the Fort Green phosphate mine in Polk County, Florida. Phosphate is mined by 26 draglines which dig it up and unload it into a pit where it is mixed with water. The resulting mixture, called slurry or Amatrix, is then pumped through pipes to the processing plant where it ultimately becomes fertilizer. The draglines, which have 60-yard buckets, and the pumps are electrically powered.

Because the phosphate rock is in veins of five or six feet in depth, the draglines have to be moved as the vein is followed. This in turn requires that the power lines, cables, pumps and power line poles be moved. The power lines and pumps are moved on a daily basis by electricians and linemen. The electricians are generally responsible for the power cables on the ground and the linemen take care of the power lines overhead.

On September 12, 1995, Jennings O. Gainer had been a lineman for 30 years and had worked as a first class lineman for IMC for 14 years. On that date, he was assigned to assist some electricians in attaching power cables from a pump to a disconnect switch on a power pole. To accomplish this, he placed a closed, six-foot, fiberglass, step ladder against the pole and climbed to the top of it. He then pulled himself up onto the cross arm of the pole, stood up, grabbed the ground wire with his right hand and the far left phase wire with his left hand. He was not using hot line tools. His actions resulted in his being electrocuted.

MSHA Inspector Donald Collier and his superior, Supervisory Inspector Harry L. Verdier, were assigned to investigate the fatal accident. They arrived at the mine on September 14, 1995. After interviewing witnesses and viewing the scene, four citations were issued, two of which are involved here.

Both citations state that:

A fatal accident occurred at this operation on September 12, 1995, at about 6:10 p.m. when an employee contacted an energized 4160 volt power conductor. The employee attempted to climb on the cross arm of the power pole at the No. 4 matrix lift pump, No. 8 dragline side in order to connect the switch gear conductors to the knife blade disconnects on the power pole cross arm.

The first citation, No. 4301373, alleges a violation of section 56.12017 of the Secretary's Regulations, 30 C.F.R. ' 56.12017, because A[t]he power circuit was not de-energized and locked out and hot line tools were not being used.@ (Govt. Ex. 1.) The second citation, No. 4301374, asserts a violation of section 56.1101, 30 C.F.R. ' 56.1101, since: ASafe access was not provided. A 6 foot fiberglass step ladder leaned against the power pole had been used. The lower cross arm was about 11 feet above the ground. A bucket truck was available at the site but was not used.@ (Govt. Ex. 2.)

Findings of Fact and Conclusions of Law

Citation No. 4301373

Section 56.12017 provides, as pertinent to this case, that A[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individuals working on them@ Everyone agrees that

the power line which caused Mr. Gainer's death was not de-energized and that he was not using hot-line tools. Thus, the parties argue that the issue is whether he was working on a power circuit. The company contends that he was not because attaching the cables from the lift pump to the knife blade switch¹ should only have required him to attach the cables to the de-energized, bottom part of the switch. On the other hand, it is the Secretary's position that on in the regulation means in close proximity to an energized circuit.

IMC's interpretation of the regulation is too constricted. I find that the facts in this case do comprise a violation of section 56.12017, but not for the reasons advanced by the Secretary.

If there is any doubt as to whether a regulation provides adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *BHP Minerals International Inc.*, 18 FMSHRC 1342, 1345 (August 1996). That test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). *Id.*

The regulations do not define the term power circuit. According to the *DMMRT*, the word power, in connection with electricity, is used to indicate the electric current in a wire *DMMRT* at 855. It defines the word circuit as: "A conducting part or a system of conducting parts through which an electric current is intended to flow." *Id.* at 210. Thus, a power circuit is a conducting part or a system of conducting parts through which electric current is flowing. This comports with the definition of power circuit offered by the Respondent's expert, Stanley S. Burns, at the hearing. He stated: "An electric circuit requires a conductor, some type of loads, pump. That's an electric circuit where the current flows." (Tr. 228.)

Where the company's argument fails, however, is in its attempt to limit application of the regulation to only those circuits through which current is flowing. Burns testified that a circuit with an open switch is no longer a power circuit because it would not have current flowing through it. In such a situation, the company maintains that the regulation does not apply because work on a circuit with an open switch would not be work on a power circuit. Such an interpretation nullifies the purpose of the regulation, which is to prevent miners from being electrocuted.

¹ A knife blade switch is one which opens or closes a circuit by the contact of one or more blades between two or more flat surfaces or contact blades. Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 614 (1968) (*DMMRT*).

Following IMC's argument to its logical conclusion would mean that anytime a power circuit had a switch in it, the regulation could be avoided by opening the switch. However, one of the ways that the regulation prevents electrocution is by requiring that a switch be locked out to *prevent the power circuits from being energized without the knowledge of the individuals working on them.* Merely opening a switch would not serve this function. Accordingly, I conclude that a reasonably prudent person familiar with the mining industry would recognize that the term *power circuit* in the regulation means an electrical circuit which is capable of having current flow through it and that to work on such a circuit, the circuit must be de-energized and locked out.

Therefore, I find that Gainer was assigned to work on a power circuit within the meaning of the regulation, even though it was not energized because the knife blade switch was open. If he had remained below the open switch to connect the cable, as the job was normally performed, he probably would not have been electrocuted.² However, the facts of this case are that Gainer did not remain below the open switch, but climbed above it. Even the company's expert witnesses agreed that to go where Gainer went the whole system should have been de-energized.³ Since it was not, I conclude that the company violated the regulation.

In reaching this conclusion, I am aware no one in authority had any idea that Gainer would climb up on the cross member to attach the cable and, indeed, could not reasonably have been expected to anticipate that he would do such a foolish thing. However, *the Mine Act* clearly contemplates that a violation may be found where the wrongful act is performed by someone other than the operator. *Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711, 716 (D.C. Cir. 1989). Thus, *the Act's* scheme of liability provides that an operator, although faultless itself, may be held liable for the violative acts of its employees . . . *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (September 1991). *Accord Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1115 (July 21, 1995). Consequently, IMC is liable for Gainer's failure to de-energize the system before climbing onto the cross member.

Significant and Substantial

The Inspector found this violation to be *significant and substantial.* A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other

² No evidence was presented as to whether the switch was locked out or not.

³ Lee Barnes, the electrical instrumentation supervisor at Fort Green, in response to a question as to whether the system would have to be de-energized if someone was going to climb up on the cross member of the pole, stated, *A[y]es, it would.* (Tr. 215.) Mr. Burns, in response to a question whether he would de-energize the line coming into the top of the switch if he were climbing up on the cross bar, said, *A[y]es, I would.* (Tr. 250.)

mine safety or health hazard." A violation is properly designated S&S "if, based upon 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 set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

There can be little doubt that this violation was S&S. Clearly, it was a significant contributing cause to the fatal accident. *Walker Stone Company, Inc.*, 16 FMSHRC 48, 53 (January 31, 1997). Accordingly, I conclude that the violation was significant and substantial.

Negligence

The inspectors concluded that this violation resulted from moderate negligence on the part of the operator. They concluded this because Barnes closed the circuit breaker which energized the circuit and he did not instruct Gainer to make sure he used the bucket truck because the circuit was energized. Supervisor Inspector Verdier testified:

Well, we felt after the statement that Mr. Barnes made that he wasn't sure, but felt he was the one who threw the breaker that really energized the line.

Also, we didn't feel that Mr. Barnes probably told Mr. Gainer to take the bucket truck and go down there and help them and make sure you use the bucket truck and use your hot line tools. We just didn't feel there was enough instructions given.

(Tr. 92.)

The evidence does not support the inspectors' feelings. The Secretary has not shown that the operator did anything that a reasonably prudent person would not have done, or failed to do anything that a reasonably prudent person would have done. Consequently, I conclude that the operator was not negligent in this case.

The evidence is clear that Gainer was negligent, indeed, that he acted with reckless disregard. However, since Gainer was not in a supervisory position, his negligence cannot be directly imputed to the operator. *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March

1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Further, the evidence is uncontroverted that IMC's supervising, training and disciplining of its employees was more than adequate. Finally, no supervisor was present when the violation was committed. *Cf. Midwest Material Co.*, 19 FMSHRC 30, 35 (January 21, 1997) (foreman watched the violation being committed by an employee).

There is no evidence to support the inspectors' apparent assumption that Gainer was not aware that the power line was energized. Their accident report states that at the No. 716 substation, Gainer:

removed his grounding jumpers and tag, then closed the disconnects above the circuit breaker.

Lee Barnes, electrical foreman, who was also at the substation, instructed Gainer to return to the No. 4 matrix lift pump location with the bucket truck to assist in connecting the conductors to the bottom of the disconnects, since all that was available at the pump was a six foot step ladder. Barnes then closed the circuit breaker for Circuit A, energizing the power line, and Gainer left the substation.

(Govt. Ex. 8, p. 2.)

If this were the only evidence available, it would be unreasonable to conclude that Gainer, a lineman with 30 years experience, the last 14 of which had been at Fort Green, did not know that when he removed his jumpers and tag and closed the disconnects that the line was going to be energized. Or that he did not see Barnes close the circuit breaker. Or that telling him to take the bucket truck to assist in connecting the conductors to the disconnects because *all that was available was a six foot step ladder*, did not put him on notice that the bucket truck should be used to make the connections.⁴ But this was not all of the evidence presented at the hearing.

Barnes testified that he told Gainer that he was going to close the circuit breaker and that Gainer acknowledged that he heard him. He further testified that when he closed the circuit breaker it made a loud, mechanical-type noise like the slamming together of contacts and that Gainer was present when that occurred. (Tr. 200.) Barnes related that he then asked him to take the bucket truck to assist in hooking up the rouser wires because my electricians could not reach the disconnects off of the step ladder. (Tr. 201.) He said he told Gainer to take the bucket truck because we couldn't reach them off the step ladder. That was the best way of getting the

⁴ Robert E. Myers, Electrical and Instrumentation Superintendent, stated that while electricians normally connected the leads to the disconnect switch from a six-foot step ladder, on the higher ones the line crew does. (Tr. 169-70.) In other words, the linemen were used when the connections could not be made from a ladder, but necessitated the use of a bucket truck.

height we needed to hook the wires up. (Id.) This testimony was corroborated by Myers, who was also present at the time.

Based on this evidence, I find it inconceivable that Gainer, an experienced lineman, did not know that the system had been energized or that he was supposed to use the bucket truck, which was insulated, to attach the cables to the disconnect. No one knows why he did not make the connections from the bucket truck the way he had hundreds of times in the past. Witnesses at the scene testified that there was no reason the truck could not have been used. Whatever reason Gainer decided to park the truck and climb up a ladder which he already knew was too short, and which he verified when he climbed up it, it was not the result of any negligence on the part of the operator.

I find that the operator, through Barnes, exercised diligence and could not have known what Gainer was going to do. Therefore, I conclude that there was no negligence on the part of IMC.

Citation No. 4301374

Section 56.1101 states that A[s]afe means of access shall be provided and maintained to all working places. Because this regulation is found under the general heading ATravelways, the Respondent argues that the citation should be vacated because the facts do not meet the regulations=definition of travelways. This argument is not persuasive. However, I conclude that the Secretary has not shown that the company failed to provide a safe means of access in this case.

Section 56.2 of the Regulation, 30 C.F.R. ' 56.2, defines Atravelway as Aa passage, walk or way regularly used and designated for persons to go from one place to another. The company maintains that a travelway is not involved here because the ladder, the pole and the cross member were not regularly used and designated for persons to go from one place to another. In the first place, not all of the regulations found in Subpart J, ATravelways, involve travelways. See e.g., 30 C.F.R. ' 56.11003 (Construction and maintenance of ladders), 30 C.F.R. ' 56.11007 (Wooden components of ladders), 30 C.F.R. ' 56.11027 (Scaffolds and working platforms). In the second place, it is undisputed that at the Fort Green mine a six foot step ladder is a way regularly used and designated for electricians to connect leads from the disconnect switch on an electrical pole. (Tr. 170.) Accordingly, I conclude that the regulation does apply to these facts.

That does not mean, however, that the company violated the regulation. The Commission, in construing identically worded regulations, has held that:

the standard requires that each Ameans of access to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a Ameans of access within

the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

Homestake Mining Company, 4 FMSHRC 146, 151 (February 1982); *The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981).

IMC provided two means of access to the electricians and linemen attaching leads to disconnect switches, a six foot step ladder and a bucket truck. In connection with the use of the ladder, the company's *Safety Manual* required that the step ladder be fully open and the spreader bars locked into place, that a safety belt be used when working at heights above eight feet and that the miner not climb higher than the second step from the top of the step ladder. (Tr. 160-61, Resp. Ex. A, pp. 7-8.)

Gainer was sent to assist the electricians with the expectation that he would use the bucket truck to make the connections. For reasons known only to him, he did not. Instead, he used a step ladder in its folded up position and resting against the pole. This violated the safety requirements set out above. Then he apparently attempted to pull himself up on the cross member.

The two means of access provided by the company, when properly used, were safe means of access. Gainer's method of access was highly improbable and against company rules. It was not a means of access within the standard, in fact the company's safety rules prohibited it as a means of access. Consequently, I conclude that the company did not violate section 56.11001.

Civil Penalty Assessment

The secretary has proposed a civil penalty of \$5,000.00 for the violation of section 56.17012. However, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that: the proposed penalty will not affect the operator's ability to continue in business; the operator demonstrated good faith abatement; the operator does not have an excessive history of prior violations; and, the size of the Fort Green mine is approximately 480,862 production tons or hours worked per year. (Jt. Ex. 1.) I further find that the company's history of prior violations is very good in that it had only received 11 non-S&S citations in the two years preceding the instant violation, (Govt. Ex. 10), and it had been awarded a *Certificate of Achievement in Safety* by MSHA under its *Sentinels of Safety Program* for its outstanding safety record in 1994[,] 334,457 employee-hours worked without a lost workday injury,@(Resp. Ex. C.). In addition, as discussed above, the violation was not caused by negligence on the part of the operator. On the debit side, the gravity of the violation was very serious in that it was not only Asignificant and substantial@but also resulted in the death of a miner.

The Secretary's proposed penalty apparently considered all of the above, except that the penalty assessment indicates that the violation resulted from the operator's moderate degree of negligence. (Govt. Ex. 9.) Taking the six criteria into consideration, including the finding of no negligence, I conclude that \$500.00 is an appropriate penalty.

ORDER

Accordingly, Citation No. 4301373 is **MODIFIED** by reducing the degree of negligence from **A moderate** to **A none**, and is **AFFIRMED** as modified. Citation No. 4301374 is **VACATED**. IMC-Agrico Company is **ORDERED TO PAY** a civil penalty of **\$500.00** within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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/t