

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 15, 1995

WESTERN FUELS-UTAH, INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 94-391-R
: Citation 4059968; 4/21/94
SECRETARY OF LABOR, : Deserado Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Mine I.D. 05-03505
Respondent :

DECISION

Appearances: Karl F. Anuta, Esq., Boulder, Colorado,
for Contestant;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent.

Before: Judge Manning

This case is before me on a notice of contest filed by Western Fuels-Utah, Inc. ("Western Fuels") against the Secretary of Labor and his Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. Western Fuels contests the issuance of Citation No. 4059968 to it at its Deserado Mine on April 21, 1994. For the reasons set forth below, I affirm the citation.

A hearing was held in this case on January 5, 1995, in Grand Junction, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. FINDINGS OF FACT

The Deserado Mine is an underground coal mine in Rio Blanco County, Colorado. It mines coal using the longwall method and transports coal out of the longwall section on a conveyor belt. On April 21, 1994, MSHA Inspector Phillip Gibson issued a section 104(a) citation to Western Fuels because "additional insulation was not provided for the communication circuit in the belt conveyor entry of the 9th East longwall section at the point where the circuit passed over the 995 V AC power conductor." (Ex. M-1). He alleged a violation of 30 C.F.R. ' 75.516-2(c). In the

citation, Inspector Gibson stated that an injury was unlikely, that if an injury did occur it would not result in any lost work days, and that the violation was not of a significant and substantial nature. He determined that the mine operator's negligence was moderate. The citation was abated by moving the communication cable and a nearby telephone.

Section 75.516-2 provides, in pertinent part:

Communication wires and cables; installation; insulation; support.

(a) All communication wires shall be supported on insulated hangers or insulated J-hooks.

(b) All communication cables shall be insulated ..., and shall either be supported on insulated or uninsulated hangers or J-hooks, ... or buried, or otherwise protected against mechanical damage....

(c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.

(d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.

Western Fuels does not deny that the phone cable passed over the power cable and that additional insulation was not provided at that location. It contends, however, that this condition did not violate the safety standard.

Tracks and trolley wires are not used in the Deserado Mine. Between 70 and 80 permissible telephones are present underground, which are used as the primary means of communication in the mine. (Tr. 112-13; Ex. W-2). These phones are connected through and powered by 24-volt DC audio communication cables, which contain four shielded conductors and are protected by an outer jacket. (Tr. 109-10; Ex. W-7). The phone cables are installed on J hooks attached to the roof in the belt entry of the longwall section. Western Fuels does not dispute that its phone cables are a "communication circuit," as that term is used in the standard. Electricity for the longwall section is

supplied through power cables, which carry about 995 volts AC. (Tr. 106-09; Ex. W-6). The power cables contain three power conductors, two ground conductors and a conductor for the ground fault monitor. (Tr. 108). The cable has a dielectric rating of 2,000 volts and is protected by an outer jacket. (Tr. 106-08; Ex. W-6). The power cables are installed in the belt entry on a monorail. The mono-rail consists of a long I-shaped bar suspended from the mine roof. (Ex. W-4). The power cables are suspended from cable carriers that are located along this bar. (Ex. W-5). The cable carriers are on wheels so that they may be moved along the mono-rail, as necessary. Two power cables and several compressed air lines are supported by the cable carriers.

Inspector Gibson testified that the communication cable touched the power cable where they crossed. (Tr. 18). Robert Daniels, a safety inspector and trainer with Western Fuels, testified that the cables were about three inches apart. (Tr. 100). Neither party, however, contends that this conflict is significant in the resolution of this case. Both cables were well insulated and were protected against mechanical damage by outer jackets. Neither cable was damaged or worn at the cited location. The fuses and circuit breakers protecting the communication and power circuits were adequate. Mobile equipment was not used in the entry where the citation was written. Finally, MSHA would have permitted Western Fuels to abate the citation by covering either cable with a single wrap of electrical tape at the crossover point.

It is not uncommon for cables to become cracked or broken in underground coal mines. (Tr. 126-27). MSHA believes that additional insulation is necessary where communication circuits pass over or under power cables because communication circuits lead directly to telephones used by miners on a regular basis. These telephones are an important safety tool for miners. If the communication circuit becomes energized by a power cable, anyone using the phone could be injured, a methane explosion could occur, and the phone system could be knocked out. The Secre-

Exhibit W-6 is portable mining cable. The cable installed to supply power to the longwall is similar, but is a larger 350 MCM cable. (Tr. 107).

Western Fuels has a backup wireless communications system for use in the event the communication circuit is not functioning.

tary's witnesses acknowledged that, given the condition of the cables at the cited location, the chance of the communication circuit becoming energized by the power cable was remote. (Tr. 31-32, 34, 62-64; Ex. W-1 p.7). They stated that the requirement for additional insulation is to provide an extra measure of safety for an abnormal situation, in case "something out of the ordinary were to occur." (Tr. 62-64).

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Western Fuels

Western Fuels makes several arguments in support of its contention that it did not violate the safety standard. First, it argues that the provisions of section 75.516.2(c) are only applicable to track entries. Western Fuels contends that the two sentences in 75.516-2(c) must be read together and that the phrase "communication wires and cables installed in track entries" in the first sentence of subsection 2(c) is also applicable to the second sentence. It reasons that the language of the first sentence of the subsection limits the application of the entire subsection to track entries, because such entries contain bare trolley wires. Western Fuels further contends that the language of the subsection is clear, not ambiguous, and is not subject to a contrary interpretation by MSHA. Since the communication cable observed by the inspector was not in a track entry, the safety standard was inapplicable and, consequently, there was no violation.

Second, Western Fuels argues that Commission precedent requires that the MSHA inspector make an objective evaluation of the conditions observed to determine whether a hazard was present. In this case, it argues that the inspector failed to take into consideration the condition of the power and communication cables, the degree of insulation and physical protection provided by the cables themselves, the method the mine used to support the cables, the fact that no vehicles travel through the area, and other environmental factors. Western Fuels contends that the citation should be vacated because the inspector failed to make the requisite objective evaluation of these conditions.

Finally, Western Fuels contends that MSHA's interpretation of the standard is nonsensical and defeats its purpose. It maintains that the purpose of the safety standard is to protect miners from the potential hazards of electrical shock or fire in the event communication wires or cables contact bare trolley wires. It makes sense to require additional insulation where communication cables cross bare trolley wires because a trolley wire is not insulated. Applying the standard to communication cables that are not in track entries is illogical because power cables and communication cables are adequately protected by the insulation and outer jackets provided by the manufacturer.

B. Secretary

The Secretary contends that the second sentence of section 75.516-2(c) was promulgated to deal with communication wires, wherever they may be located. He maintains that the second

sentence is concerned with communication circuits crossing "any power conductor," not just trolley wires. The Secretary points to the fact that the safety standard deals with the hazards of communication circuits, not with the hazards of trolley wires or track entries. Thus, the standard is titled "Communication wires and cables; installation; insulation; support." The Secretary maintains that the second sentence of subsection 2(c) is applicable to the conditions cited by the inspector.

The Secretary also contends that the word "additional" in the standard means what it says: additional insulation must be provided by the mine operator at the applicable locations. He argues that the degree of protection provided by the cable manufacturer and the environmental conditions at the mine are irrelevant in determining whether there is a violation of the standard. Thus, the inspector is not required to make an objective evaluation of the these conditions.

Finally, the Secretary contends that, to the extent the standard is deemed to be ambiguous or silent as to the issues raised by Western Fuels, the Commission should give the Secretary's interpretation deference. The Secretary maintains that his interpretation is entitled to deference because it is clearly consistent with the purposes of the Mine Act.

III. DISCUSSION WITH FURTHER FINDINGS
AND
CONCLUSIONS OF LAW

I find that the language of the safety standard is clear on its face and that the second sentence is applicable to the condition cited by Inspector Gibson. Accordingly, I have not reached the Secretary's deference argument. The safety standard, 30 C.F.R. ' 75.516-2, is directed to hazards associated with communication wires and cables. One sentence in the standard specifically directs that communication wires and cables be installed on the side of the entry opposite trolley wires. No other sentence in the standard speaks of track entries or trolley wires. The sentence in dispute specifically states that its requirements are applicable where communication circuits "pass over or under any power conductor." Thus, by its own terms, the requirements of that sentence are not limited to areas where communication circuits cross over bare trolley wires.

Although the placement of the disputed sentence immediately after the sentence concerning trolley wires is unfortunate, such placement does not alter the meaning of specific language of the sentence. I believe that such placement should not cause undue confusion because of the clarity of the language. It is not

logical to assume that, because the first sentence in subsection 2(c) addresses the hazards of communication wires in track entries, the second sentence is also applicable only to track entries. The title of the standard is broadly worded and the language in the sentence in question specifically addresses all power cables, not just trolley wires. Because the sentence is applicable to all power cables, it is not logical to limit its scope to track entries. If a communication circuit passing over an insulated power cable poses a hazard in a track entry, then it would also pose a hazard in other entries. Thus, I find that the second sentence of section 75.516-2(c) is not limited to communication circuits in track entries.

Western Fuels maintains that Inspector Gibson was required to consider the conditions present in the mine and determine objectively whether additional insulation was required where the communication cable passed over the power cable. In making this argument, Western Fuels relies on the Commission's decisions in Homestake Mining Co., 4 FMSHRC 146 (February 1982) and Climax Molybdenum Co., 4 FMSHRC 159 (February 1982). For the reasons discussed below, I believe that those cases are distinguishable.

In Homestake and Climax, insulated power cables were in contact with waterlines, telephone lines, and air lines. The safety standard at issue provided that "powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines." MSHA inspectors issued citations without determining whether the powerlines were "well separated or insulated" from the waterlines, telephone lines, and air lines. The inspectors believed that the standard required operators to provide additional insulation around the power cables, above that supplied by the manufacturer, at such contact points. In vacating the citations involved, the Commission emphasized that the standard at issue "does not state that 'additional insulation' must be placed between 'powerlines' and pipelines; it merely requires separation or insulation." 4 FMSHRC at 149. Thus, the Commission held that the Secretary was required to show, through objective evidence, that the insulation provided in the power cable was insufficient at the specified contact points, given the specific conditions found in the mine.

The safety standard at issue in this proceeding specifically states that "additional insulation" must be provided at specified points. Thus, even if the cables are "well separated or insulated," additional insulation is required.

This safety standard is currently at 30 C.F.R.
' 57.12082.

Western Fuels also cites the decision of Judge George A. Koutras in Cyprus Emerald Resources Corp., 11 FMSHRC 2329 (November 1989). In that case, a citation was issued because a "light switch power cable was not adequately protected where [it] passed over [an] energized trolley wire." 11 FMSHRC at 2337. The safety standard cited, 30 C.F.R. ' 75.517, provides that "power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." Judge Koutras used the Homestake approach and determined that, in order to establish that a power cable is not fully protected, the inspector "must, on a case-by-case basis, make an objective evaluation of all the circumstances presented ... [to] support a reasonable conclusion that the cable is located and utilized in such a manner as to expose it to physical damage." 11 FMSHRC at 2345. While I am in agreement with the judge's approach in that case, it is not applicable here. Section 75.516-2(c) does not provide that cables be adequately protected and insulated, it requires that "additional insulation" be provided at specified locations.

Finally, Western Fuels points to the decision of Judge John J. Morris in Western Fuels-Utah, Inc., 16 FMSHRC 295 (February 1994). In that case, a communication cable crossed over a power cable and an MSHA inspector issued a citation for a violation of section 75.516-2(c). Judge Morris affirmed the citation. Western Fuels argues that Judge Morris held that an objective evaluation of the particular conditions observed by the MSHA inspector was required. Although Judge Morris cited Homestake and Cyprus Emerald in his decision, it is not clear to me that he applied them in his analysis. 16 FMSHRC at 305-06. In any event, he did not hold that the Secretary must show that the existing insulation is inadequate in order to sustain a violation of subsection 2(c).

I conclude that the Secretary was not required to show that the insulation and outer jacket on the communication and power cables was insufficient in order to sustain a violation of 30 C.F.R. ' 75.516-2(c) in this case. The fact that the cables were in good condition, were well insulated and protected by outer jackets, and were unlikely to be struck by mobile equipment does not invalidate the citation. These facts and other environmental factors relate to the gravity of the violation, not to the fact of violation.

In large measure, Western Fuels is arguing that the hazard is so remote in this case that enforcement of the standard in the manner advocated by MSHA does not advance the safety of its miners. It maintains that an objective evaluation of the surrounding conditions is necessary to determine if there is a sufficient hazard to create a violation. There is no dispute that

there was only a remote possibility that the communication circuit could become energized by the power cable as a result of this violation. The safety resources of MSHA and mine operators are finite. To the extent that MSHA is enforcing this standard in the manner described above, and mine operators are employing its resources to comply with the standard, those resources cannot be applied to other more serious hazards. Thus, Western Fuels is questioning the opportunity cost of enforcing this safety standard without regard to the hazard created. This issue, however, is beyond my authority and is more properly addressed to the Assistant Secretary for Mine Safety and Health.

IV. ORDER

Accordingly, Citation No. 4059968 is **AFFIRMED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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