

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

June 28, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-577-M
Petitioner	:	A. C. No. 02-02135-95017
	:	
v.	:	
	:	
ASPHALT PAVING SUPPLY INC.,	:	Prescott Valley Pit
Respondent	:	

**DECISION**

Appearances: Isabella Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California and Ronald D. Pennington, Conference and Litigation Representative, U.S. Department of Labor, Denver, Colorado, on behalf of the Petitioner;  
Jack Kolberg, Safety Director, Asphalt Paving & Supply, Inc., Prescott Valley, Arizona, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” charging (as amended) Asphalt Paving & Supply Inc. (Asphalt Paving) with one violation of the mandatory standard at 30 C.F.R. § 56.12008. The general issue before me is whether Asphalt Paving violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 6306160, as amended, charges as follows:

The 110 volt power cable feeding power to the pond pump condensation heater, located at the upper pond, was not insulated and/or did not have adequate protection for the power conductors. The conductors were exposed for approximately one-half inch where the outer protective jacket had been pulled from the bushing of the junction box. Employees were exposed to the possibility of injury from shock, flash or burn hazard if the conductors were to become damaged. No bare copper wire was observed. The operator was unaware of the electrical defect and the workplace exam was incomplete for this shift.

The Secretary alleges that the third sentence of the cited standard was violated. That sentence provides that “[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.”

The testimony of Bartholomew Wrobel, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA), is undisputed that June 14, 2006, the 110 volt power cable feeding the pond pump condensation heater did not have adequate protection for the power conductors. The undisputed evidence shows that the conductors were exposed about one-half inch where the outer protective jacket had been pulled from the bushing of the junction box. Inspector Wrobel issued the citation at around 7:00 a.m. on that date. He took photographs of the cited condition and those photographs were admitted into evidence (Gov’t. Exh. Nos.3 and 3-1). These photographs corroborate Wrobel’s testimony as they depict the power conductor pulled out of its bushing with the individual conductors exposed. Wrobel opined that injuries were unlikely because the conducting copper wires were not exposed. He also opined, however, that should an injury occur it would reasonably be expected to be fatal. He noted that with 110 volts alternating current, a person contacting the exposed wires would be unable to release their hold and fatal injuries would reasonably be expected.

Inspector Wrobel opined that the violation was caused by “moderate” operator negligence in light of his finding that the condition was obvious from 10 to 15 feet away. He conceded, however, that the mine operator was not aware of the condition and that it could have developed only minutes before it was discovered. Wrobel further acknowledged that the operator’s representative accompanying him on the inspection told him that they had not yet completed their workplace examination at the time the violation was discovered and argued that they would have discovered and corrected the condition if they only had been given more time. The representative also told Wrobel that “free-range” cattle water at the pond adjacent to the cited condition and that the condition may have resulted from cattle pulling the power cable from its bushing. In this regard Wrobel identified a cow hoof print in one of the operator’s photographic exhibits (Operator’s Exh. No. 3).

Chris Mathern, a safety assistant for Asphalt Paving, testified that another problem had been discovered during the operator’s pre-shift inspection that morning, before the violative condition was cited, and that other condition needed to be repaired. As a result, their inspection had not yet been conducted in the area where the violative condition was found.

Robert Smith, Asphalt Paving’s wash plant operator, testified that he performed the pre-shift inspection on the day before the citation was issued and, in particular, inspected the cited area and found nothing wrong with the wiring at that time. On the date the citation was issued he interrupted his inspection to repair some screens and by the time he arrived at the scene of the violative condition, it had already been repaired. Smith surmised that the damage to the wiring had occurred the night before the citation was issued based on his observation of cattle hoof tracks in close proximity to the condition. According to Mr. Mathern, the photograph depicting the cow hoof print was taken on the 15<sup>th</sup> of June, the day after the citation had been issued.

I find the testimony of Mathern and Smith to be credible and conclude that indeed the condition cited by the inspector on June 14<sup>th</sup> had occurred only the night before and prior to the completion of the mine operator's inspection that day. Under the circumstances, I do not find the operator chargeable with negligence.

While not denying that the violative condition existed, the Respondent has presented arguments that, in effect, it is unfair for the Secretary to issue a citation for a violative condition before the mine operator has the opportunity to complete its examination of the workplace and to correct conditions found during that examination. Section 104(a) of the Act mandates the issuance of a citation, however, when an inspector finds that a mine operator has violated any mandatory safety standard.<sup>1</sup>

### *Civil Penalties*

Under section 110(i) of the Act the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. It may be inferred from the record that Asphalt Paving is a small size mine. Its history of violations is not insignificant though most were assessed at the minimum level. Inspector Wrobel also testified that the mine had shown recent improvement in the number of violations. The gravity and negligence findings have previously been discussed. The record indicates that the violative condition was abated in a timely manner. There is no evidence that the penalty would affect the operator's ability to continue in business. Under the circumstances, and, in particular, considering the findings of low gravity and lack of negligence, I find that a civil penalty of \$25.00 for the violation charged herein is appropriate.

### **ORDER**

Citation No. 6306160 is affirmed and Asphalt Paving Supply Inc., is directed to pay a civil penalty of \$25.00 for the violation charged therein within 40 days of the date of this decision.

Judge Melick  
Administrative Law Judge

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<sup>1</sup> Section 104(a) provides in relevant part as follows:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness issue a citation to the operator.

Distribution: (Certified Mail)

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