

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2001-66
Petitioner	:	A.C. No. 46-05437-03621
v.	:	
	:	
DAY MINING INCORPORATED,	:	
Respondent	:	Day Mining Inc.

## DECISION

Appearances: M. Yusuf M. Mohamed, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;  
David J. Hardy, Esq., Heenan, Althen & Roles, LLP, Charleston, West Virginia, for the Respondent.

Before: Judge Schroeder

### Introduction

This case is before me on a Petition by the Secretary of Labor for the assessment of a Civil Penalty for the alleged violation of mine safety regulations. The Petition alleged two violations for which the Secretary proposed a total Civil Penalty of \$60,000.00. After prehearing development, a hearing was held in Charleston, West Virginia, on March 5 and 6, 2002. Following the hearing, both sides filed written arguments. The entire record has been carefully considered. Finding of fact and conclusions of law appear below.

The regulatory provisions at issue in this case are the following:

30 CFR § 77.501

#### **Electric distribution circuits and equipment; repair.**

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Opened and suitably tagged by such persons.

### **Required Protective Equipment**

(d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.

My task is to determine whether either or both of these regulations was violated and, if so, what the appropriate penalty should be under the circumstances.

There appear to be two critical issues which drive the major conclusions to be drawn; (1) was “electrical work” being performed at the time in question, and (2) were either of the persons involved in any “electrical work” required to wear hard hats. The factual findings below are directed primarily at those questions.

### **Factual Findings**

During January 2000, Day Mining experienced difficulties with one of its electric transformers. Tr. 361. The transformer was part of the Wet Branch substation. Tr. 28. Management decided to ship the transformer to a service facility for repairs. A trucking company was hired to haul the transformer; a crane operator was hired to lift the transformer out of the substation onto the truck; and an electrical company was hired to disconnect the transformer from the electric power network to allow the transformer to be hoisted. Power to the malfunctioning transformer was terminated but the remainder of the substation continued to be energized. Removal of the transformed was scheduled for February 21, 2000, a Monday.

Day Mining management took the form of Richard Busick, Project Manager, whose office was located a short drive from the Wet Branch substation. He made arrangements for the several contractors required for removal and repair of the transformer. Tr. 414. Of particular importance to this case, Mr. Busick decided to use Williams Electric for the disassembly of the transformer and assistance to the crane operator in the hoisting process. Steve Williams was the active employee for Williams Electric, in fact had been the owner of Williams Electric until a short time prior to the events of interest in this case. Williams Electric was chosen for this job by Mr. Busick because of Mr. Williams’ reputation in the area for quality electrical work. There is no suggestion in this case that Mr. Williams was anything other than a highly competent and knowledgeable electrical contractor. In fact, however, he had allowed his certification as a mine electrician lapse because of his failure to renew by taking continuing education. He had not been certified for almost 20 years prior to the accident which gave rise to this claim. Tr. 48. Sec. Ex. 20. Mr. Busick, likewise, had been certified as a mine electrician and had allowed his certification to lapse.

The weight of the testimony suggests that for the 20 years since his certification was

allowed to lapse, Mr. Williams had been employed in the construction and repair of electrical systems that were not energized and for which a certification under the regulations of the Mine Safety and Health Administration was not required. Work on or around an energized electrical system is a very different challenge from work on an electrical system that will be energized by someone else. The Wet Branch substation is surrounded by metal fencing topped by barbed wire and covered with signs warning of “High Voltage” in case anyone failed to notice the distinct hum associated with high voltage transformers. Tr. 92. Mr. Busick never asked Mr. Williams for evidence of mine electrical certification and Mr. Williams never offered a certification or asked if certification would be required. Mr. Busick testified he was shocked later to discover that Mr. Williams had allowed his certification to lapse so long before this work.

On the Friday morning before the scheduled removal of the Wet Branch transformer, Mr. Williams paid a visit to Mr. Busick at his office. They discussed a number of subjects, including the upcoming transformer removal, until Mr. Williams asked Mr. Busick to drive him up to the substation to take a look at the equipment. Mr. Williams had identified several potential work problems which might confront him on Monday and he wanted to satisfy himself as to the condition of the site. He expressed particular concern with the fastenings which connect the top of the transformer to the overhead wires. Tr. 235, 370.

Mr. Busick drove his truck out to the substation with Mr. Williams. Neither of them took any tools or plans concerning the work. Tr. 491. Neither of them wore a hard hat. They observed the substation from the outside for a few minutes and discussed the wooden cross-arms which carried wires to the various transformers. Some of the cross-arms were to be disassembled and removed to facilitate the crane lift of the transformer. Mr. Williams argued for a while that the transformer could be removed without removing the cross-arms but Mr. Busick was firm that the crane operator needed the cross-arms removed.

Mr. Williams then asked Mr. Busick to open the gate to the substation so he could enter and look more closely at the details of the equipment. Mr. Busick initially stayed out of the substation while Mr. Williams entered and walked around the equipment. Tr. 379. Mr. Williams continued to look up at the cross-arms and the wire connection points. Finally, Mr. Busick entered the substation to point out to Mr. Williams some small parts which earlier had been removed from the transformer by other workers. Mr. Williams by this time was out of sight further into the substation. Mr. Busick then heard “a sizzle, hard sound, and a grunt.” Tr. 382 He moved around the transformer in time to see Mr. Williams fall to the ground on the other side of the transformer. Tr. 432. Mr. Busick attempted first aid but without success. Subsequent examination showed that Mr. Williams died as a result of a high voltage contact to the back of his head. A photograph of his baseball cap showed a burn to the back of the head.

Neither Mr. Williams nor Mr. Busick were wearing hard hats when they entered the substation although both had such hats available without inconvenience. Use of a hard hat in the mine industry is typical and not considered burdensome.

The electrical line which more likely than not was the source of injury to Mr. Williams was located about 13 feet above ground. Mr. Williams was just over 6 feet tall. The only way he could have contacted the wire would have been to climb the transformer on cooling fins on the outside of the transformer. The first step in climbing the fins would have been over 30 inches from the ground. The wire was located in compliance with the applicable industry standard. Tr. 129, 263. The fins were not designed to serve as a ladder but would not be damaged by climbing and were accessible by a reasonably agile person. Tr. 33. The wire was not hidden or concealed. It would have been visible to Mr. Williams as he looked at the overhead cross-arms. Mr. Williams climbed the transformer without tools and without an intent to perform current physical work. His apparent intent was to take a closer look at the upper connections between the transformer and power wires.

An expert witness employed by the Mine Safety and Health Administration testified in his opinion if Mr. Williams had been wearing an ordinary hard hat when he contacted the wire, he would not have received a serious injury. I accept this opinion as reasonably supported by scientific evidence and analysis.

## **Analysis**

### Electrical Work in the Substation

The Secretary has the initial burden of showing evidence of each of the elements of the claims alleged. The jurisdictional facts are not in dispute. It is also undisputed that neither Mr. Williams nor Mr. Busick satisfied the requirements for a “qualified person” as that phrase is used in 30 C.F.R. §77.501 that requires annual recertification under 30 C.F.R. §77.103(g). The issue is whether the activities conducted by Mr. Williams and Mr. Busick within the Wet Branch substation on the morning of February 18, 2000, constituted “electrical work” within the meaning of the regulation. If “electrical work” was performed, the required qualified persons were not present and the regulation was violated.

The words used in 30 C.F.R. §77.501, and the context of the regulation in a subpart entitled Electrical Equipment, imply technical meanings which the Secretary is entitled to interpret. That interpretation must be given deference in this forum unless it is patently unrealistic. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123 (D.C. Cir. 2001). The Secretary has made only limited use of this authority to supply useful interpretations of this regulation. Exhibits 14 and 18 supplied by the Secretary contain almost the same words in describing the intention of the Secretary in applying this regulation. What can be gleaned from these interpretations is the intention to apply the regulation broadly to separate insufficiently trained persons from a substantial hazard. I find it particularly significant that the interpretation includes design work as part of electrical work. I interpret design work to include activities like measurement, inspection, comparison, simulation and similar activities with very limited use of tools other than the hands and the brain. Respondent’s argument that no work was contemplated by Mr. Williams and Mr. Busick because they did not bring tools with them is overly simplistic.

That Mr. Williams died without a tool in his hand is very hard evidence of the hazard involved even without tools.

I conclude that Mr. Williams went to the Wet Branch substation to perform electrical work within the meaning of 30 C.F.R. § 77.501 in the form of inspection, measuring, planning, simulation, and alternative analysis. The substation was energized at the time of his visit and constituted a work site subject to the regulation. In the course of performing this electrical work he climbed the transformer as he would have done many times in working on nonenergized facilities. During that climb his head contacted a hot wire and he died.

Mr. Busick argued in his testimony with some force that there was no way he could be expected to have anticipated that Mr. Williams would climb the transformer out of a safe area and into danger. But his argument misses the point of designating an area as requiring special qualifications to enter. The area is so hazardous there are only in two ways can it properly be entered; (1) by a qualified person or people performing under the direct supervision of the qualified person, or (2) by a person who has a specific, narrowly defined job to do in a safe zone and then withdraw. A person entering an electric substation must either know in detail what is safe or must act very specifically on the instructions of someone who does know what is safe. Mr. Williams, by definition under the regulation, did not know what was safe in an energized substation. He should not have been permitted to walk around the inside of the substation as though he did know.

#### Hard Hat Use

It is not seriously disputed that the Wet Branch substation was free of dangers from falling objects. There was some testimony as to the possibility that a cracked wooden overhead cross-arm might constitute a falling hazard, but no solid conclusions can be reached. There was also testimony speculating as to the hazards from an unanticipated electrical explosion, as in the event of a massive power surge. The issue as to hard hats is whether an energized substation constitutes an area of electrical hazard that would require the use of hard hats, without regard to overhead risks. That it is likely that Mr. Williams might be alive today if he had worn a hard hat on February 18, 2000, does not affect the legal question of whether a hard hat was required.

In applying a regulation to a particular set of facts, I am required to apply the plain meaning of the words used rather than to attempt to imply intended meanings imperfectly expressed. On the other hand, I am required to use all of the language of the regulation that can be reasonably applied rather than to pick and chose language to reach a particular result. I am required to give purpose and meaning to the entire regulation to the extent possible. The words should be given their natural meaning rather than a meaning known only to regulation writers. *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1<sup>st</sup> Cir. 1987)

In this context it is important to note the words used in the second sentence of the regulation; “If a hard hat or hard cap is painted, nonmetallic based paint shall be used.” The

conjunction of hat and nonmetallic paint cries out a concern with electrical hazards of some sort. The second sentence has no reasonable function in the regulation if it does not relate to electrical hazards. A falling rock does not care about the kind of paint used on the hard hat it hits. A reasonable person reading this regulation would be prompted to ask the question, “Does this also apply to solely electrical hazards?”

The answer to this question is readily found in the Mine Safety and Health Administration’s Policy and Procedure Manual (PPM) as it relates to 30 C.F.R. §77.17010(d). G. Exh. 15. The PPM very unequivocally says the purpose of the regulation includes “to protect miners against electrical shock or burn.” This clear interpretation of the inartful language of the regulation is entitled to deference from the Commission. The effect of this interpretation is not avoided by the rules requiring fair notice of prohibited conduct. Comparison of the hard hat regulation with the regulation at issue in *Morton International, Inc. v. Secretary of Labor*, 18 FMSHRC 533 (April 1996) illustrates the principal of fair notice. In *Morton*, supra, the Commission was dealing with a regulation on mine ventilation. The Secretary argued that the regulation limiting methane levels applied to abandoned areas of a mine. This interpretation was contrary to express language of the regulation as amended. The contrary interpretation of the regulation attempted by the Secretary depended on a reader understanding an error expressed by the Secretary in the preamble to the regulation that amended the original regulation. The Commission found this to not constitute fair notice of the prohibited conduct, i.e., the failure to ventilate the abandoned mine.

In *Morton* the Commission held only that “fair notice” cannot be implied from the possibility that a person might notice an error in a preamble which would infer an intent contrary to the expressed intent in a regulation. No such convoluted search for meaning is necessary here. The regulation, by its express terms, is concerned with electrical hazards and a publication generally available to the public (now accessible through the MSHA Internet Web Site) makes the required (or prohibited) conduct crystal clear.

I find that 30 C.F.R. §77.17010(d) applies to persons performing electrical work in an energized substation of a coal mine. The regulation requires the use of a hard hat. That regulation was violated at the time Mr. Williams and Mr. Busick stepped inside the Wet Branch substation.

#### Appropriate Penalty

My task now is to apply the statutory criteria for penalty amounts to the facts as I have found them above. It is undisputed that the mine was in an active but unproductive status. The Secretary made no effort to show a significant history of safety regulation violations. There was no evidence produced to suggest that a Civil Penalty in the amount proposed by the Secretary would compromise the ability of the Respondent to continue in business.

This leaves three factors to be considered; degree of negligence, gravity of the risks, and efforts to abate or mitigate the violations. The principles established by the Commission for consideration of these factors are well known. See, for example, Secretary of Labor v. Gunther-Nash Mining, 20 FMSHRC 1205 (Oct. 1998)

### Negligence

The key to analysis of negligence is the standard of care demanded of a coal mine operator. The mining business is considered hazardous. People engaged in the business of mining must be constantly alert for risks of injury. Actions which might be considered merely careless elsewhere are significant negligence in a mining context.

Day Mining made at least two mistakes in connection with the visit by Mr. Williams to the Wet Branch substation. First, there was a failure to verify the qualifications of Mr. Williams to be in the substation while it was energized. Because this failure began a cascade of consequences, what would otherwise seem mere careless in light of Mr. Williams long history of electrical work was really negligence. Since the circumstance of spur-of-the-moment planning by an assumed expert is a highly unusual event, I find the negligence is low rather than moderate.

### Gravity

A violation of a mine safety regulation is “significant and substantial” if the violation creates a situation in which there is a reasonable likelihood of an injury of a reasonably serious nature. In my judgement, an energized substation is a place where only serious injuries are experienced, i.e., the knowledge or luck of the person in the substation either results in no injury at all or in a serious injury with real risk of death. The injury suffered here, obviously, was quick and fatal.

### Abatement or Mitigation

Because electrical transformers do not need replacement on regular intervals, abatement or mitigation specific to the Wet Branch substation is difficult to identify. The record is empty of any suggestion that Day Mining has implemented any generic mitigation measures to give greater assurance that the qualifications of contractors will be more closely examined in the future. The record is likewise empty of any suggestion that hard hats will be required in electrical Day Mining substations. It is sufficient to say that the Respondent received no credit at all from this issue.

### Penalty Amounts

While the conduct of Day Mining certainly resulted in a violation of mine safety regulations, the combination of unique circumstances and benign motivation makes the amounts proposed by the Secretary seem excessive. The Secretary offered nothing but oratorical outrage

to support the amounts. The purpose of a Civil Penalty is to focus management attention on hazard prevention by economic coercion. The amount of the Civil Penalty should not be related in any way to the extent or character of the injury which resulted from the violation. In my judgement that purpose would be best served by a Civil Penalty of \$5,000.00 for each of the two violations.

### **ORDER**

For the reasons given above, it is ORDERED that the Respondent pay a Civil Penalty of \$10,000.00 within 60 days of the date of this Order. The parties are each to bear their own costs.

Irwin Schroeder  
Administrative Law Judge

Distribution:

Yusuf Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

David J. Hardy, Esq., Heenan, Althen & Roles, LLP, P.O. Box 2549, Charleston, WV 25329 (Certified Mail)