

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
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June 4, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-82
Petitioner	:	A.C. No. 46-08402-49118
v.	:	
	:	
ELK RUN COAL COMPANY, INC.,	:	
	:	
Respondent.	:	Black Knight II

DECISION

Appearances: Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Washington, D.C.,
Counsel for Respondent;
J. Matthew McCracken, Esq., U.S. Department of Labor, Office of the Solicitor,
West, Arlington, Virginia, Counsel for the Petitioner

Before: Judge Weisberger

I. Statement of the Case

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary) alleging violations by Elk Run Coal Company (“Elk Run”) of 30 C.F.R. §§ 77.501, 77.704-1(a), and 77.1710(c) respectively. Subsequent to notice, the case was heard in Charleston, West Virginia on December 12, 2006.

II. Introduction

Elk Run operates the Black Knight II Coal Mine. A belt line transports coal from underground to a silo on the surface. A high voltage line attached to various poles supplies electricity to operate the belt motors. Two sets of transformers on the poles convert the electricity down to 480 volts. Three disconnects are located under the transformers. In normal operations, the disconnects are closed creating a circuit and allowing electricity to flow in a three phase lead that runs from the transformers to four cabinets or compartments. (“Motor Control Center”) Three phases enter Compartment No. 1 (Gx. 22) at the top of the cabinet.

Each compartment contains a set of three fuses and disconnects. The cabinets are covered by an outer door and a metal grate. When the outer door is removed, it is possible to access a handle to open a disconnect switch, breaking contact to the fuses inside the box, and removing power to wires and components downstream from that point. Three phases leave the compartments and lead to various motors including the belt motors.

On the midnight shift of May 19, 2004, Ricky Bryson noticed a spillage in the area of the silo where it dumped coal on the belt, and heard a sound in one of the motors which indicated to him that only one phase was in operation. The belt stopped and Bryson made various attempts to restart it, but was unable to do so. At approximately 5:30 a.m., Bryson informed the mine foreman, Charles Roach that he was unable to get the belt system to run. Roach, in turn contacted two electricians on the next shift, Michael Wayne Clay and Darrell Shivley.¹ Shivley and Clay inspected the belt motor, and concluded that either the motor was defective, or there was a problem with a fuse. They were unable to further test the grounding at the motor because of excessive tape. Shivley traced the leads coming into Compartment No. 1, and since they looked like the same size as wiring to the motor junction box, he concluded that these were the motor leads. They then went to the Motor Control Center, removed the outer door to the cabinet compartment at issue, turned the disconnect switch to open, and visually confirmed it was open. Shivley and Clay next took off the grating, and removed two fuses.² Shivley tested the fuses, and one of the fuses indicated that "... it was blown." (Tr. 148). Shivley brought the fuse to Roach and suggested that the latter contact Ron Plumley, maintenance chief or Nicholas Thompson, line-crew foreman to locate another fuse. Roach was able to contact the latter but not the former. When Thompson arrived, Roach showed him the fuse, and Thompson indicated that he did not have a replacement.

Shivley and Clay went back to the cabinet, and attempted to test the grounding in the lower portion of the cabinet. Shivley placed one end of a lead- meter on a copper bar, to which one of the phases was attached, (Gx. 16, 17), and attempted to attach the other lead to a grounding bar at the bottom of the cabinet. Neither Shivley nor Clay wore any protective gloves when they performed this task. A loud explosion was heard and the meter exploded. Shivley was observed being knocked down, and he suffered a loss of hearing.

Later that day, Marcus Smith, an MSHA electrical engineer for 18 years, and a specialist accident investigator for the last two years, arrived on the site to investigate the accident. He interviewed Thompson, Clay, and Roach, and spoke with Shivley over the telephone. Based on his investigation, Smith issued Elk Run a Section 104(d)(1) Citation (No. 7224658) alleging a violation of Section 77.704-1(a), and two Section 104(d)(1) orders, (No.'s 7224659 and 7224660) alleging, respectively, violations of 30 CFR §§ 77.501, *supra*, and 77.1710(c), *supra*.

¹ The parties stipulated that Clay and Shivley were non-supervisory employees of Elk Run, and were not the latter's agents.

²The third fuse normally located in that area had been removed, and was by-passed by a wire.

III. Violations

A. Citation No. 7224658 (Section 77.704-1(a)), *supra*.

Section 77.704-1(a), *supra*, provides as pertinent as follows:

No high-voltage line shall be regarded as deenergized for the purpose of performing work on it, until it has been determined by a qualified person (as provided in § 77.103) that such high-voltage line has been deenergized and grounded. Such qualified person shall by visual observation (1) determine that the disconnecting devices on the high-voltage circuit are in open position, and (2) insure that each ungrounded conductor of the high-voltage circuit upon which work is to be done is properly connected to the system grounding medium. ...

Thus, according to Section 77.704-1 (a), *supra*, in order for work to be performed on high voltage lines, a qualified person must determine by visual observation that the disconnecting devices on the circuit are in the open position.

It was stipulated by the parties that both Shivley and Clay were qualified persons as provided in Sections 30 CFR § 77.103. They visually observed that the disconnecting devices inside the cabinet box were open, which would have broken the circuit downstream from that point. However, the cabinet was not deenergized inasmuch as the disconnect at the transformer on the power pole was still closed, allowing power to flow from the transformer to a point upstream from the disconnect device inside the cabinet. Accordingly, I find that it has been established that Elk Run was not in compliance with Section 77.704-1(a), *supra*.

B. Order No. 7224659 (Section 77.501, *supra*)

1. Order No. 7224659 as duplicative of Order No. 7224658

Elk Run argues that Order Nos. 7224659 (Section 77.501), and 7224658 (Section 77.704-1(a), *supra*), are duplicative, as the standards cited in the orders impose the same obligation. Section 77.704-1(a), *supra*, in essence, requires that a qualified person determine that high-voltage lines be deenergized and grounded before work is performed on them. Section 501, *supra*, provides that “disconnecting devices [shall] be locked out and [suitably] tagged out by the [persons who perform] such work” Elk Run asserts that “...locking out implies and necessarily requires a deenergization of a circuit.” (Elk Run’s Proposed Finding of Fact and Conclusions of Law, p. 33). (“Findings of Fact”) Elk Run argues that an operator who fails to deenergize as required by Section 77.704-1(a), *supra*, will thus be in violation of both standards, since their duties are not separate and distinct.

However, a reading of the plain, unambiguous language of both sections reveals that separate and distinct duties are required. 30 CFR § 77.704, *supra*, requires that all high-voltage lines shall be deenergized before work is performed on them. Section 77.704-1(a), *supra*, provides that a high-voltage line shall not be regarded as deenergized until a qualified person makes this determination based on visual observation “... that the disconnecting devices on the high-voltage circuit are in the open position...”

Thus, Section 77.704, *supra*, imposes a duty to deenergize. Section 77.704-1(a), *supra*, provides that in order for a line to be deenergized a duty is imposed on a qualified person (1) to determine (2) by observation that (3) the disconnecting devices on the high-voltage line “are in the open position...”, thus imposing a duty to open these devices prior to the performance of work. In contrast, Section 77.501, *supra*, requires that disconnecting devices be (1) locked out, and (2) suitably tagged by a qualified person. Thus, the two standards impose separate duty requirements and are not duplicative (*See, Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (1993). *See also, Blue Diamond Coal Co.*, 25 FMSHRC 570, 583 (2004) (ALJ).

2. Violation of Section 77.501, *supra*

There is not any evidence that, prior to their commencement of the work in the cabinet at issue, Shivley or Clay locked and tagged the relevant disconnecting device that was located below a set of transformers on the power pole. Accordingly, I find that Elk Run was not in compliance with Section 77.501, *supra*.

C. Order No. 7224660 (Violation of 30 CFR § 77.1710(c))

Section 77.1710, *supra*, provides as follows:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear ...:

(c) “[p]rotective gloves when handling materials or performing work which might cause injury to the hands; however, gloves shall not be worn where they would create a greater hazard by becoming entangled in the moving parts of equipment.

Since Clay and Shivley were working on equipment that had not been deenergized, they should have been wearing protective gloves to insulate them from contact with energized parts.³

³The record does not contain any evidence that the wearing of gloves in the situation at bar would have “... create[d] a greater hazard by becoming entangled in the moving parts of

Accordingly, since they were not wearing gloves, I find that Elk Run did violate Section 77.1710(c), *supra*.

Therefore, based on all the above, I find that the Secretary has established that Elk Run violated Section 77.1010(c), *supra*.

IV. Significant and Substantial

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon 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." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The record clearly establishes the first two elements set forth above, i.e., that Elk Run did violate mandatory standards (Sections 77.501, *supra*, 77.704-1(a), *supra*, and 77.1710(c), *supra*,

equipment." (Section 77.1710(c), *supra*).

and that the violations contributed to the risk of a hazardous condition, i.e. a person being subject to electrical shock and injuries. Further, Shivley and Clay were working around exposed metal parts in a relatively confined area that was energized with at least 480 volts, and they were not wearing protective gloves. I also note that when Shivley was testing in Compartment No. 1. when the accident at issue occurred, his meter exploded. Thus, I find, given the continuation of the normal operations of their work, that it was reasonably likely that the violations herein would have led to serious injury or electrical shock. Hence, the fourth element of *Mathies, supra*, has been met. I conclude that Citation No. 7224658 and Order No's 7224659 and 7224660 were significant and substantial.

V. Unwarrantable Failure

A. Smith's testimony

Smith found each of the violations alleged in Order Numbers 7224659 and 7224660 to constitute an unwarrantable failure. Smith based his opinion on Thompson's negligence, referring to the latter's extensive experience at Elk Run as an electrician, and his position as a line-crew foreman. According to Smith, "[h]e's the one that installed the transformers on the pole." (Tr. 92). Smith further testified that Thompson "... was also aware that electrical work was going to be performed in this specific compartment⁴ and he was aware that the disconnecting and deenergization device was closed on the pole. ... he was also aware that opening a disconnecting device on the equipment to be worked on is not sufficient." (Tr. 57).

Based on his interviews with Roach, Thompson, Clay and Shivley, Smith concluded that when Thompson exited his vehicle and left the area used for parking adjacent to the cited area, he would have seen that the pole disconnects were in the closed position. According to Smith, the pole disconnects were between a foot to 18 inches long, 3/4 to one inch in diameter, and were in a "conspicuous location" (Tr. 50), approximately ten to 15 feet above the ground.

Additionally, Smith indicated that Thompson met with Clay and Shivley prior to their commencement of testing at the cabinet at issue; that Thompson "... stands ... in front of the motor control center[;]... [and that] he sees in the open compartment the open upper area and lower area, and, most importantly, the incoming high-voltage termination area, and he also ... still has a plain sight view of these disconnects on the pole in the closed, energized position." (Tr. 51). Smith opined that Thompson, as a foreman, was required to be on the alert for hazards whether or not the miners exposed to the hazards reported directly to him. Smith asserted that

⁴According to Smith, in discussions Clay and Shivley had with Thompson regarding the situation of the broken fuse, the former indicated that they would check for a grounded phase in the motor. Smith indicated that Clay and Shivley "discussed" with Thompson that they were going to check "grounds on the motor ... in the Compartment 1 lower level incoming high-voltage termination compartment. (Compartment 1, Gx. 22) (Tr. 85, 86).

Thompson should have been aware that the disconnects on the pole were closed, and therefore should have required the work site to be safe, prior to the commencement of work on the cabinet at issue by Clay and Shivley.

B. Shivley's Testimony

Shivley testified when he examined Compartment No. 1, he went behind it to see where the power lines entered the cabinet, and “[i]t looked like the incoming power was rather high in through the box or the compartment.” (Tr. 137). Shivley indicated, based on his approximately 30 years experience as an electrician, that leads supplying power to a starter box or compartment usually enter it at the top. According to Shivley, the wires going to the bottom of the compartment appeared to be the same size as the motor junction box located on the motors.

Shivley indicated that once it was determined that there was a bad fuse in the compartment at issue, he told the mine foreman, Charles Roach that he needed to get in touch with either Ron Plumley, the maintenance superintendent, or Nick Thompson, who he referred to as “the high line installer”, to obtain a fuse. (Tr. 150).

When Thompson arrived he (Shivley) told the latter that a fuse had blown on the belt motor. According to Shivley, Thompson, who was not directing the repairs or supervising him, asked if he had a device to check the insulation on the motor, as he (Thompson) did not have one with him. Shivley indicated that he had his own meter, and told Thompson that he was going to check if the belt motor was grounded. After completing this task, Shivley returned to the starter box cabinet. He indicated that Thompson was no longer there.

C. Clay's testimony

According to Clay, when he and Shivley discussed the bad fuse with Thompson he (Clay) said that there must be a short in the belt motor. Thompson did not tell them to open the disconnects on the power pole, nor did he suggest that gloves be worn before working on “... that compartment[.]” (Tr. 179-180). According to Clay, there were not any insulated gloves in the area.

Clay and Shivley went to the belt motor, and observed a lot of tape on various leads. Clay thought it was best to test for grounding at the starter belt cabinet, rather than at the motor. Clay indicated that Thompson did not direct them to do any testing at the cabinet.

D. Thompson's testimony

Thompson testified that on the date in issue he was not in charge of any repairs that Clay and Shivley were making, nor did he direct their work. He said he received a telephone call from Tommy Green, who told him that he thought there was an overload problem at No. 1 silo, and

asked him (Thompson) to go there “... to see if I could assist them.”⁵ (Tr. 195) When Thompson arrived at the area in question, Shivley and Clay had already removed fuses from the compartment at issue, and determined that one had blown. The fuses were tested in his presence along with Roach, Shivley and Clay. Thompson observed that the compartment at issue had been opened, and he saw that the disconnect had been pulled, which normally would offer protection. He indicated that he did not ensure that power was not coming into the cabinet, nor did he ask Clay or Shivley if they had pulled the disconnects at the power pole. Thompson had a discussion with Clay and Shivley relating to testing the power lines leading to the belt motors.

After Clay returned from testing the belt motors, he told Thompson that the leads on the motor were taped. Thompson told Clay that he could test at the motor starter and get the same reading as testing the motors. According to Thompson, he did not tell Clay where to go to perform the testing. Thompson indicated that as he was leaving the area to return to his duties, he heard a “bang”. (Tr. 186).

E. The Secretary’s Position

Essentially, it is the Secretary’s position that Thompson, an experienced electrician, who is a high-line crew supervisor, and in general is responsible for safety, should have noticed, upon his arrival at the area in question, that the “conspicuous” disconnects on the power poles were in the closed position, and that he should have ensured that power would not flow to the power center where men were working. (Secretary’s Post Hearing Brief, p. 15). Also, it is argued that Thompson knew that Clay and Shivley were working in a cabinet that was connected to a high-voltage lead,⁶ but did not ensure the cabinet was deenergized, nor did he instruct them to wear gloves.

It is further argued that Thompson should have ensured that power was not flowing into the compartment before he inspected the fuses and suggested that the motor control center be tested.

The Secretary argues that Thompson, as a “foreman”, is an agent of Elk Run (Secretary’s Post-hearing Brief, p. 15), and is held to a high standard of care. Accordingly, his nonfeasance constituted high negligence which is imputed to the company. As a result, it is asserted that the

⁵Earlier, Shivley had told Roach that he had a bad fuse and suggested that Ron Plumley, the head of maintenance, or Thompson, be contacted to see if they had a fuse. Roach testified that he then called the mine office, and asked Green, the belt-man, to contact Plumley or Thompson.

⁶The Secretary in her reply to Elk Run’s proposed findings of fact, refers to (1) Thompson’s testimony on cross-examination, that he knew that Clay and Shivley “had” worked inside the cabinet at issue, (Tr. 201) and (2) Smith’s testimony, in essence, that Thompson was fully aware that electrical measurements were going to be taken in the compartment at issue.

violations resulted from Elk Run's unwarrantable failure.

The Secretary relies on *Capitol Cement Corporation*, 21 FMSHRC 883, (1999), *Midwest Material Company*, 19 FMSHRC 30 (1997) and *Lion Mining Company*, 19 FMSHRC 1774, (1997), as supporting a finding of unwarrantable failure, arguing that Thompson's failure to ensure power would not flow to the power center where Clay and Shivley were working is similar to the circumstances found to constitute unwarrantable failure in these cases.

F. Discussion

1. Case law

 In *Virginia Slate Co.*, 23 FMSHRC 482 (2001) the Commission summarized case law pertaining to unwarrantable failure as follows:

Regarding unwarrantable failure, that terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard, "intentional misconduct", "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also* *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the contest of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See* *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("Consol"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d. 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*,

14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Virginia Slate Co., *supra*, at 486.

The negligence of a rank-and-file miner is not imputable to the operator for purposes of penalty assessment or unwarrantable failure. *Wayne Supply Company*, 19 FMSHRC 447, 451-453, (1997), *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686. However, the negligence of an operator's agent is imputable (See, *Wayne*, *supra* at 451, *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194-197 (1991)) *U.S. Coal*, *supra*, at 1686.

2. Thompson as an Agent of Elk Run

The parties stipulated that Clay and Shivley were rank-and-file employees of Elk Run. Therefore, their negligence may not be imputed to Elk Run. (*Wayne*, *supra*).

Section 3(e) of the Federal Mine Safety and Health Act of 1977 defines an "agent" as "any person charged with responsibility for the operation of all or part of a ... mine or the supervision of the miners in a ... mine ..." (30 USC § 802(e)). In this connection, in considering whether an employee is an operator's agent, the Commission has relied upon "... his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel." (*U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995); See also, *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1560 (1996) (holding that an employee of the operator was an agent because "... the functions performed by [the employee] were crucial to the mine's operation and demonstrated an exercise a responsibility normally delegated to management personnel.") *Ambrosia*, *supra*, at 1561 (emphasis added)).

There is not any evidence regarding Thompson's specific duties as line crew foreman.⁷ However, Thompson had been an electrician working on a line crew until he assumed his position as foreman approximately three months prior to the incident at issue. Since Clay and Shivley, both electricians, were rank-and-file employees, it would appear that, as a foreman, Thompson was no longer a rank-and-file employee. Of more significance, is the testimony of Roach, the mine foreman, who agreed that it would be a duty of a foreman to have safety hazards eliminated. Thus, it would appear that the scope of Thompson's duties as foreman are those normally performed by operators. (See, *Ambrosia*, *supra* at 1561; See also, Section 2(e)(f) of the

⁷Thompson indicated that he is often called upon to address problems with high-voltage relating to power lines or transformers.

Mine Act (Congressional declaration that mine operators “have the primary responsibility to prevent unsafe conditions”). Therefore, it appears that Thompson, in general, is to be considered an agent of Elk Run.

3. Thompson’s Feasance or Nonfeasance as a Basis for Unwarrantable Failure

It is clear that the violations at bar constituted a high degree of danger, and it was obvious that the pole disconnects had not been pulled, and that Clay and Shivley were not wearing gloves. The key issue is whether Thompson, as Elk Run’s agent, knew of the existence of the violations.

The record establishes that Thompson knew that Clay and Shivley had worked inside the cabinet at issue; that they had opened the cabinet door; and that the disconnect inside the cabinet was in the open position. Also, he knew that opening the disconnect inside the cabinet would not disconnect power coming into the cabinet, but he did not ensure that the disconnects on the power pole had been pulled, and that the visible disconnects were tagged and locked.⁸ Nor did he require Clay and Shivley to wear protective gloves.

Smith opined, that Thompson was aware that electrical measurements were going to be taken in the compartment at issue. His testimony indicates that this opinion was based upon his investigation which revealed that Clay and Shivley discussed in Thompson’s presence that they were going to check for a grounded phase in the motors which, according to Smith, would require that electrical measurements be taken. (Tr. 52-53). However, not much weight was accorded this hearsay testimony as it was not corroborated by any of the declarants. Moreover, it is unclear how knowledge that Clay and Shivley intended to check motors for grounding, leads to an inference of Thompson’s knowledge of testing to be done in the compartment at issue.

Further, even if Thompson knew that Clay and Shivley were intending to work at this cabinet there was not any evidence in the record that he was aware of a violative condition i.e., that the disconnecting device had not be pulled open at the power pole. Although he may have passed the pole on his path to the area at issue, he did not have knowledge or notice then of any condition or practice that would have alerted him to check this disconnect.

In general, Thompson, as a supervisor, had a high duty to ensure safe conditions. However, in the context of unwarrantable failure, the scope of the inquiry is not the degree of care required of Thompson based on his position of foreman per se, but rather, as applied to his supervisory responsibility for the specific violative acts, his actions relative to the violative conditions, and his observations and knowledge of them. (c.f., *Capital Cement Corp.*, supra,

⁸Thompson indicated that when addressing a high-voltage problem, the first step is to ensure the disconnects are pulled and work will be performed on the deenergized side of the disconnects.

Midwest Material Co., supra and *Lion Mining Co., supra*).

There is not any evidence that he was responsible for repair or maintenance of the compartment at issue.⁹ He was a line-crew foreman, and did not direct or supervise electricians Clay and Shivley. Nor did Thompson direct any of the work at issue performed by Clay and Shivley. Further, he did not receive any directive to perform or supervise any of the work at issue. He was at the site only because Roach, having been informed by Shivley that a fuse was bad, asked Green, a belt-man who was in the mine office, to contact either Plumley the maintenance chief, or Thompson. Green informed Thompson that there was an overload problem at silo No. 1 and asked him to go there "... to see if [he] could assist them." (Tr. 195).

Thompson's actions at the site at issue were extremely limited. The weight of the evidence establishes that he assisted in the testing of a defective fuse with a meter along with Shivley and Clay, and subsequently discussed with Roach where fuses may be obtained. Also, he talked to Clay and Shivley about testing motors. When Clay informed him about the presence of tape on the leads at the belt motor, Thompson told him that he could get the same reading at the motor starter. However, he did not direct Clay where to go to do any testing at the motor starter. Moreover, there is not any evidence that the motor starter was located in the cabinet at issue.

Thompson had not performed any work relating to the compartments at issue, was not responsible for them, and did not know their electrical layout. Also, there is not any evidence that he received any training regarding the electrical layout. Further, it has not been established that Thompson knew or was aware of work to be performed at the compartment at issue. Moreover, he did not witness the violative acts at issue.

The Secretary relies on *Capital Cement, supra*, (aggravated conduct was found where a trained shift supervisor responded to a safety concern that a crane was shaking, operated the crane and began to work on the craneway; but failed to lock out any power sources to the crane or, to wear a safety belt while working on the craneway); *Midwest Material Co., supra*, (a serious lack of care and indifference was found where the actions of a foreman, designated to be in charge of a boom extension project, failed to lower the crane boom in accord with proper procedures, and did not warn a miner working with him of the danger of the actions the latter took to disassemble the crane boom was found to constitute a lack of care and indifference "... given his experience and familiarity with [the] task ...") (*Midwest Material, supra*, at 35) and *Lion Mining Co.*, 19 FMSHRC 1774 (1997), (relied on the Secretary's Post-Hearing Reply Brief)

(affirmed the trial judges' determination that the conduct of the section foreman who observed

⁹According to Thompson's uncontradicted testimony, he builds and maintains power lines and is called on to address problems with the high-voltage lines or transformers, but not relating to the compartments at issue.

the miner operator starting to take a cut without installing roadway posts in violation of the roof control plan, was a factor tending to establish an unwarrantable failure).¹⁰

Thus, in each of these cases, the basis for a finding of unwarrantable failure was (1) conduct of a supervisor who was actually performing or supervising the repair work at issue, (*Capital Cement, supra, Midwest Material, supra,*) or (2) the observations of a section foreman that a violation was taking place and his failure to stop the operation.

In contrast, in the case at bar, Thompson did not either perform or supervise the repair work at issue. Nor did he observe a violation actually taking place.

Within the context of all the above, and considering the presence of significant mitigating factors, I find that it has not been established that the level of Thompson's negligence regarding Citation No. 724658 and Order Nos. 7224659 and 7224660 reached the level of aggravated conduct. Thus, I find that it has not been established that these violations were as the result of Elk Run's unwarrantable failure. (*See, Emery Mining Corp., supra*).

G. Penalty

I find, for the reasons set forth above, (*II, infra*), that the level of gravity in each of the violations herein was relatively high, as serious injuries could have resulted as a consequence of employees not wearing protective gloves, while working in close proximity to energized equipment. Also, essentially for the same reasons as discussed above (*V, infra*), and noting the lack of evidence that Elk Run had provided training to Clay and Shivley regarding the wiring of the cabinet at issue, I find that the negligence in each of the violations to have been moderately high. Taking into account the remaining factors in Section 110(i) of the Act as stipulated to by

¹⁰The Secretary in a Post-Hearing Reply Brief ("Reply Brief") also relies on *Wilmot Mining Company*, 9 FMSHRC 684 (1987). The Secretary asserts that *Wilmot, supra*, held that it is sufficient for a supervisor to allow a hazard to remain uncorrected to justify a finding of unwarrantable failure (Reply Brief at 3). It is argued that accordingly, *Wilmot, supra*, supports its position that the Commission has never held that a foreman must actively supervise the work being performed to support a finding that his or her actions or inaction constitute an unwarrantable failure. (*Id.*). However, *Wilmot, supra*, does not support the Secretary's position. In *Wilmot, supra*, contrary to the Secretary's assertion, the issue was not unwarrantable failure, but whether the operator was negligent and whether its supervisor's negligence should be imputed to the operator, or if it was unforeseeable. It thus is not applicable to the issues presented in the case at bar.

The Secretary also relies on *Mountain Cement Co.*, 15 FMSHRC 1418 (1993), (ALJ), and *Peabody Western Coal Co.*, 25 FMSHRC 293 (ALJ) (2003). Inasmuch as these are decisions by fellow Commission judges, I am not bound by them. To the extent that they are not consistent with the decision reached in this proceedings, I choose not to follow them.

the parties, the lack of evidence justifying either an increase or decrease in penalty based on the operators' good faith abatement, and history of violations, and placing significant weight on the high level of gravity for each of the violations, I find that a penalty of \$8,000 for each violation is appropriate.

ORDER

It is **Ordered** that Citation No. 7224658 and Order Nos. 7224659 and 7224660 be amended to Section 104(a) citations that are significant and substantial. It is **Further Ordered**, that within the thirty days of this decision, Elk Run pay a total civil penalty of **\$24,000** for the violations found herein.

Avram Weisberger
Administrative Law Judge

Distribution List:

J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Spilman Center, 300 Kawawha Blvd., East, P.O. Box 273, Charleston, WV 25321-0273

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