

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. YORK 95-70-M
Petitioner : A.C. No. 30-00611-05561
v. :
 : No. 1 Mine
GOUVERNEUR TALC COMPANY, :
Respondent :

DECISION

Appearances: James A. Magenheimer, Esq., U.S. Department of Labor, Office of the Solicitor, 201 Varick Street, Room 707, New York, New York, for the Petitioner; Sanders D. Heller, Esq., Gouverneur, New York, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Proposal for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Gouverneur Talc Company (Gouverneur) of 30 C.F.R. § 57.4362 and 30 C.F.R. § 57.12001. Pursuant to notice, the case was heard in Watertown, New York, on September 6 and 7, 1995. Subsequent to the hearing, Respondent filed a brief on March 30, 1995. On the same date, Petitioner filed a post-hearing memorandum. Respondent filed a Reply brief on December 26, 1995.

I. Introduction

Gouverneur Talc Company (Gouverneur) operates the No. 1 Mine, an underground Talc Mine located in St. Lawrence County, York. Talc was mined primarily using an open stope method.

A production shaft was used to transport men and/or supplies into the mine. There were openings at the 300 foot, 500 foot, 700 foot, 900 foot and 1100 foot levels into the ore veins.

At approximately 11:00 a.m. on June 21, 1994, William L.

Korbel Jr., an MSHA Electrical Mine Inspector, received a telephone call from Roger McClintock, advising him that there was an underground fire at Gouverneur, and to proceed there. Korbel went to the mine, and talked to Terry Jacobs (Gouverneur's Safety Director), Craig Woodard (Gouverneur's Foreman), Steven Smith (an electrician), Sheldon Maine (an apprentice electrician), Mark Trombley and Vincent Woods (welders), and Donald Fuller (General Mine Foreman), regarding an incident that had occurred at about 11:00 a.m. on June 21, at the 19-A stope on the 500 level, in the area of a Miller welder wherein smoke had been observed. At 2:40 p.m., Korbel went underground to the area in question and observed that a 225 amp circuit breaker was hooked to the welder. He testified that the name-plate on the welder "... listed thirty-eight amps full load current" (Tr. 43). Korbel examined the welder and observed that a fist-size section of the secondary coil had been blown out, a part of the primary coil was missing, and there were pieces of metal and soot at the bottom of the welder. He also observed that varnish had melted off the wires feeding the transformer coil. Korbel issued a Section 104(a) citation (subsequently amended to a section 104(d)(1) order) alleging, in essence, that subsequent to the occurrence of the an underground fire and a decision to evacuate underground employees, two employees who were not using SCBA protection went underground and did not sample for standard gases. Korbel cited Gouverneur with violating 30 C.F.R. § 57.18002(a), which was subsequently modified to allege a violation of 30 C.F.R. § 57.4362.

Korbel also issued a Section 104(a) citation, subsequently modified to a Section 104(d)(1) order, which alleges that the welder was not provided with proper circuit overload protection, and that a 225 amp circuit breaker provided power to the welder cable. The order alleges a violation of 30 C.F.R. § 57.12001.

II. Findings of Fact and Discussion

Korbel testified as to a series of events and actions of Gouverneur's employees prior to, and subsequent to, the incident that had occurred on the morning of June 21, 1995, on the 500 level at the 19-A stope. However, only his testimony relating to his observations of the condition of the welder was based upon his personal knowledge. The balance of his factual testimony was based upon information provided to him by Jacobs, Fuller, Woodward, Smith, Trombley and Maine. Petitioner did not offer the testimony of any these individual as part of its case-in-chief. Thus, my findings of fact in this case, with the exception of the condition of the welder, are based primarily upon the testimony of Gouverneur's witnesses, who have personal knowledge of the events and conditions at issue, rather than

Korbel's testimony as to what these individuals told him.

A. The Miller Welder

For approximately 8 years, the welder at issue had been protected by a 60 amp disconnect switch hooked to the welder plug (disconnect box). Sometime prior to June 17, 1994, the disconnect box was removed. There is no evidence when this occurred, nor is there any evidence that the welder had been put in operation after the disconnect box was removed.

Steven Smith, an electrician, testified that on June 17, 1994, Sheldon Maine, an apprentice electrician, whom he does not supervise, told him that he was instructed to install a welder disconnect on the welder in issue. According to Smith, he told Ward Bacon, the mine foreman, that the welder disconnect box had previously been removed. Smith indicated that Bacon told him that he wanted to know if a welder whip (a cord with a plug that does not provide overload protection), could be installed.

On June 20, 1994, Maine hooked up the welder to a breaker. Maine testified that he did not know whether Smith or Bacon told him to do this. On June 21, 1994, the welder was connected to a 225 amp breaker. The welder had a rated full load current of 38 amps. According to the uncontradicted testimony of Korbel, the National Electric Code provides that proper protection is at 200 percent of the rated amps.

B. The June 21 Incident

On June 21, 1994, Mark Trombley, a repairman, and Vincent Woods were assigned to operate the Miller welder at issue to repair a bucket blade. Trombley indicated that as Woods was welding a washer, the welder was "sparking", "growling", "sizzling", and "popping" (Tr. 285). Trombley testified that the welder started "lighting up the drift" (Tr. 285). His testimony continues as follows: "[s]o we just dropped everything that we had and stepped off the steel ramp, because it was lighting up the drift where you walk up onto the ramp where we were working" (Tr.285). According to Woods, the noise from the welder started getting louder and "smoke started rolling ... [s]o Vinney and I decided that we'd better go to the second exit" (Tr. 285). Trombley and Woods then walked up the stope, spoke to Bob Lucas and Robert Church, and went up the 300 level with them. The group attempted to call the hoist man, Gary Hopper, but the telephone did not work. According to Trombley, they decided to walk out of the mine, and "... just tell them to go shut the main off" (Tr. 287). They then reported the situation to Donald Fuller, who at that time was the General Mine Foreman on a

temporary basis. Smith, who was present, told Fuller that he thought that they should shut off power to the 500 level. Fuller indicated that he went with Smith to investigate. Smith and Fuller went underground to the 500 level, but did not take any self contained breathing apparatus (SCBA). Fuller told the cageman, Lenny Zeller, to take Herb Simmons and Tom McDonald out of the shaft, as they were working near the fan, and he and Smith intended to turn the fan on. At the shaft, which was approximately 1500 feet from the 19-A stope, Smith turned off the disconnect, shutting off power to the 19-A stope. Smith noted that the air was flowing toward the 19-A stope, whereas normally the air goes in the opposite direction from the 19-A stope to the shaft. Smith and Fuller proceeded to the 19-A stope where Smith turned off the disconnect to the welder, and unplugged the welder. Smith felt the cables from the main power source to the disconnect and the cable to the welder, and all were cold. He felt the outside of the welder and it too was cold. Fuller and Smith then exited the 500 level, along with Dick Card, Jerry MacIntosh, Zeller, and Woodward, all of whom had been working at the 500 level. In response to a leading question on direct-examination, Fuller indicated that he and Woodward discussed bringing the men up because it was lunchtime, and "... we said as long as it is this close to noon, lets bring them up and see whats going on" (Tr. 272). Fuller indicated that he and Jacobs are the managers who have the responsibility of calling for an evacuation of miners from the mine, but that on June 21, no decision was made to evacuate. Appendix B to the MSHA Accident Investigation Report, (Exhibit P-3), contains a statement that at 11:00 a.m., "the decision was made to remove all personnel and activate their mine rescue team." Petitioner did not adduce any direct testimony or documentary evidence to support this statement. On the other hand, Respondent's witnesses testified that no evacuation order had been given.

Woodward indicated that he, Zeller, Card, and Macintosh, all went up to the surface for lunch at 11:45 a.m . At approximately 12:35 p.m., the official rescue team was sent underground.

C. Violation of Section 57.4362, supra

Section 57.4362, supra, provides as follows:" Following evacuation of a mine in a fire or emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and fire fighting operations in advance of the fresh air base."

According to the clear language of Section 57.4362, supra, a violation occurs only in the event of (1) an evacuation of a mine

in a fire emergency, and 2) persons participating in rescue and fire fighting operations did not wear mine rescue apparatus.

Title 30 of the Code of Federal Regulations does not define the term "fire emergency." No evidence was adduced by either party as to the common meaning of this term in the mining industry. I find that, due to the presence of sparking and rolling smoke in the area of the welder, there was a fire emergency. The regulations do not define the term evacuation. Neither Fuller nor Jacobs, who had the responsibility of calling for an evacuation, ordered miners to evacuate; nor did any other of Gouverneur's agents. Gouverneur's Disaster Directory for Mine Evacuation and Rescue Only (Exh. P-4) provides a disaster and emergency plan, including evacuation, "in the event of disaster (major fire or flooding)" (Exh. P-4, page 2). I find that this provision in Gouverneur's emergency plan is not controlling on the issue of the scope to be accorded the terms in Section 57.4362, supra.

Webster's Third New International Dictionary (1986 Ed.) defines the term evacuation as follows: "... b: any organized withdrawal or removal (as of persons or things) from a place or area esp. as a protective measure."

Trombley, and Woods, who were present when the incident at issue occurred and observed sparking and rolling smoke, left the area along with Lucas and Church, after having spoken to the latter. According to Trombley, the group decided to go to the surface as the telephone did not work, and they wanted to tell management to shut the power off. However, this task could have been accomplished by one person. Since they all left together after Trombley and Woods had observed sparking and smoke, I find that they did evacuate in a fire emergency. However, the evacuation was not total, as Card, MacIntosh and Woodward were still at the 500 level.

I observed the demeanor of Fuller and Smith and find their testimony credible that they went to the 500 level to shut off the power to the 19-A stope. Petitioner has failed to adduce sufficient evidence to establish that Fuller and Smith were participating in rescuing and fire fighting operations. Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA apparatus. However, there was no violation of section 57.4362 supra, as they were not participating in rescuing and fire fighting operations. By its terms, Section 57.4362, supra, does not prohibit persons not participating in rescuing and fire fighting operations from entering the mine when not wearing SCBA equipment. Since Section

57.4362, supra, has not been violated, Order No. 4086984 shall be dismissed.

D. Violation of 30 C.F.R. § 57.12001.

30 C.F.R. § 57.12001 provides as follows: "Circuits shall be protected against excessive overloads by fuses or circuit breakers of the correct type and capacity."

There is no dispute that the welder at issue was connected to a 225 amp circuit breaker, or that the welder was rated at 38 amps. Gouverneur did not dispute Korbels testimony that according to the National Electric Code, proper protection is provided at 200 percent of the rated amps. Hence, proper protection of this welder was at a maximum of 76 amps. As explained by Korbels, in the event of a short circuit and a current flow of up to 220 amps, the circuit breaker that was attached to the welder would not trip. As a consequence, current would continue to flow and cause overheating. This explanation is consistent with the intended purpose of Section 57.12001, supra, ie, the requirement of the correct capacity of circuit breaker in order to protect against excessive "overloads." In this connection, I note that 30 C.F.R. § 57.2 defines an "overload" as follows: "Overload means that current which will cause an excessive or dangerous temperature in the conductor or conductor insulation." It appears to be Gouverneur's position, based upon the testimony of its expert witness, Art Thompson, a Professional Engineer, that a circuit breaker would not protect against a overload if the duty cycle of the welder, 40 percent, would be exceeded. Thompson opined, in essence, that the overheating that had occurred in the welder was caused by the transformer overheating, and would not have been prevented by a circuit breaker whose amperage was 200 percent of the maximum rated amperage for the welder (38 amps). It appears that the gravamen of Gouverneur's position is that there was little, if any, hazard created by the lack of the proper capacity of the circuit breaker that had been installed. However, this argument does not negate the fact that the welder was not connected to a circuit breaker of the correct capacity, nor was it protected by a fuse of the correct capacity. Accordingly, I find that it has been established that Gouverneur did violate Section 57.12001, supra.

1. Significant and Substantial

Korbels, on cross examination, was asked the criteria for a significant and substantial finding. He responded as follows: "It has to be at least reasonably likely, and lost work days or

greater" (Tr. 139). It should be noted initially that Korbel did not utilize the proper test in evaluating whether the violation was significant and substantial. In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial if, based on 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 explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). 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)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). (Southern Ohio, supra, at 916-917)).

According to Thompson's testimony, due to the lack of evidence of a fire within the welder, and the absence of any

observed short in the welder, it is likely that what had occurred on June 21 was as a result of the transformer overheating and failing. According to Thompson, a likely cause was the stinger of the welder being in contact with a return path or ground "for a long period of time" (Tr. 436). He further indicated that this contact would have produced heat, and would not have been prevented by having the welder connected to a breaker with the correct amperage. However, the issue presented is not whether the violative condition cited caused the incident that had occurred on June 21, but rather whether, in the continuation of normal operations, the violative condition contributed to a safety hazard, and whether there was a reasonable likelihood that the hazard, contributed to will result in an injury of a reasonable serious nature. (See, Mathies, supra). Thompson indicated that the welder was equipped with a fan inside the welder housing which, in the event of overheating caused by the violative condition, would dissipate the heat. However, there is no evidence in the record to base a conclusion that, in the event an overload as a result of the incorrect breaker protection, the fan would continue to operate. Indeed, in the overheating incident that had occurred on June 21, sparking and smoke were still observed. Thompson also opined that should a short circuit occur in the electric flow going to the housing of the welder, a person touching the housing would probably not be injured, as his resistance would be higher than the path to the ground through the metal housing. However, Thompson did not support this conclusion with any empirical data comparing the differences in resistance. Thompson did not contradict or impeach the testimony of Korbelt that, in the event of an overload, given the incorrect amperage of the breaker in question, the breaker would not trip quickly, and the fault would continue and lead to an electric fire or smoldering which would produce gases and toxic fumes. I therefore accept Korbelt's testimony. Given the gross disparity between the amperage of the breaker in question, and the correct amperage for a breaker as indicated in the National Electric Code, I find that the violation was significant and substantial.

2. Unwarrantable Failure

The order at issue was issued as a Section 104(d)(1) order. Hence, the Secretary must establish that the violation herein constitutes an "unwarrantable failure" to comply with the provisions of Section 57.12001, supra. The Commission, in Emery Mining Corp., 9 FMSHRC 1997 (1987), held that in order to establish that a violation results from an operator's

unwarrantable failure, it must be established that an operator has engaged in aggravated conduct which is more than ordinary

negligence.

According to Korbelt, on June 22, 1994, he talked to Sheldon Maine, an electrician, who told him that he had been directed by Steven Smith, an electrician, to hook the leads of the welder to a 225 amp breaker. According to Korbelt, Smith told him the same thing. Korbelt further testified that he asked Smith why he wired the welder without additional circuit or overload circuit protection and Smith said, " ... that they had been doing it this way for over a year" (Tr. 64). Korbelt indicated that Smith had also told him that two years prior to June 19, 1994, a box with additional protection had been removed.

In contrast, Smith testified that Maine is an apprentice electrician and that he (Smith) is not responsible for supervising Maine, or giving him assignments. Further, according to Smith, he did not direct Maine to connect the welder to a 225 amp breaker. He stated that he was not present when the connection was made. Smith indicated that prior to June 21, he was not aware that the welder had been hooked up to a 225 amp breaker and did not have overload protection. According to Smith, a 60 amp disconnect box that had been in use for eight years had previously been removed. Maine testified that the welder was hooked up to the 225 amp breaker the day prior to the date of the incident. He said that he was ordered to do so by either Smith or Ward Bacon, the mine foreman, but he did not know whether Smith or Bacon told him to perform that task. He indicated that prior to that time the welder had not been in use on the 500 level.

Neither Smith, nor Maine, who testified subsequent to Korbelt, contradicted or rebutted the testimony of Korbelt regarding conversations he had with them. I find that Maine had been instructed by either Smith or Bacon to connect the welder to the 225 amp breaker. It is not necessary to reach a determination as to which of these individual required Maine to perform that task. Due to the gross disparity between the correct breaker amperage, and the amperage of the breaker that was installed, and the fact that either an electrician or a mine foreman directed Maine to make that installation, I find that the conduct of Gouverneur,

acting through its agents, can be characterized as aggravated conduct. Hence, I conclude that the violation was the result of its unwarrantable failure.

Considering the high level of Gouverneur's negligence, and the remaining factors set forth in section 110(i) of the Act as stipulated to by the parties, I find that a penalty of \$1,500 is

appropriate.

ORDER

It is ORDERED that Order No. 4086984 be DISMISSED. It is further ORDERED that Order No. 4686982 be affirmed as written, and that Gouverneur pay a penalty of \$1,500 within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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