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MSHA V. U.S. STEEL MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 26, 1988
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

	Docket Nos. PENN 87-37
v.	PENN 87-38
	PENN 87-127
U.S. STEEL MINING	PENN 87-157
COMPANY, INC.	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This consolidated civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), involves four separate citations issued to U.S. Steel Mining Company, Inc. ("USSM") alleging "significant and substantial" violations of 30 C.F.R. § 75.601 for improperly labeled trailing cable receptacles at USSM's Cumberland Mine. 1/ The parties stipulated at the hearing that resolution of the issue in the present matter (Docket No. PENN 87-37) would determine the result in all four proceedings. Tr. 3-4. Accordingly, Commission Chief Administrative Law Judge Paul Merlin

1/ Section 75.601, a mandatory safety standard for underground coal mines, restates section 306(b) of the Mine Act ("Trailing cables"), 30 U.S.C. § 866(b), and provides:

Short circuit protection of trailing cables
Short-circuit protection for trailing cables
shall be provided by an automatic circuit breaker
or other no less effective device approved by the
Secretary of adequate current-interrupting capacity
in each ungrounded conductor. Disconnecting devices
used to disconnect power from trailing cables shall
be plainly marked and identified and such devices
shall be equipped or designed in such a manner that
it can be determined by visual observation that the
power is disconnected.
(Emphasis added.)

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consolidated the proceedings for hearing and decision. Judge Merlin determined that USSM violated section 75.601 by failing to plainly mark and identify trailing cable receptacles in order to identify the equipment plugged into each receptacle at the cited power center. 9 FMSHRC 1771 (October 1987)(ALJ). Judge Merlin also found that the violation of section 75.601 was of a "significant and substantial" nature as alleged in the citation and assessed a civil penalty of \$200 in each of the four proceedings. 9 FMSHRC at 1778. We subsequently granted USSM's petition for discretionary review. For the following reasons, we affirm the judge's decision.

The facts in this proceeding are not in dispute. On September 18, 1986, Charles Pogue, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection at USSM's Cumberland Mine, an underground coal mine located in Greene County, Pennsylvania. Inspector Pogue observed that although the trailing cable plugs at the 8 Butt East Section's power center were plainly marked and identified with the names of the equipment that they powered (e.g., "S.C. 2" for shuttle car No. 2), the power center receptacles into which the plugs were inserted were not so marked. Instead, each trailing cable receptacle was labeled to identify the specific circuit breaker that controlled that receptacle. (Thus, the receptacles and circuit breakers were labelled "CKT 1" through "CKT 6.")

Inspector Pogue' believed that USSM's identification system for power center components did not comply with section 75.601. After questioning management about USSM's marking system, which represented a departure from its prior labelling system, the inspector left the mine without issuing a citation. He returned to the MSHA Field Office in Waynesburg, Pennsylvania, in order to consult with his supervisor. Inspector Pogue returned to the Cumberland Mine on September 18, 1986, and issued a citation to USSM pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a "significant and substantial" violation of section 75.601.

The citation states in relevant part:

As observed on September 18, 1986, at 9:30 a.m. the trailing cable receptacles were not properly identified or labeled so as to identify the electrical equipment plugged into the power center receptacles for the feeder, roof drill, welder, shuttle car no. 2, fan no. 2, scoop charger, ram car no. 2. Charger and continuous mining machine in the 8 Butt East [section].

The citation was terminated when USSM installed labels on the trailing cable receptacles to specifically identify the equipment

plugged into each receptacle.

In finding a violation of section 75.601, Judge Merlin credited the testimony of the Secretary's expert witness, Willis E. Cupp, an MSHA electrical specialist, that a "plug and a receptacle [are] one thing" (Tr. 107), and concluded that both electrical components together constitute a disconnecting device for purposes of section 75.601. 9 FMSHRC at 1774 75. The judge stated, "[o]nly when one is separated

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from the other does a disconnection occur. Therefore, they both together should be viewed as a unit for purposes of the mandatory standard." 9 FMSHRC at 1775. In reaching this conclusion, the judge also found that the Secretary's consistent interpretation of section 75.601 requirements since 1979 merited weight and should be accorded deference. 9 FMSHRC at 1776. 2/ Accordingly, he concluded that USSM had violated the standard as alleged. Finally, applying the Commission's Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981) and Mathies Coal, Co., 6 FMSHRC 1, 3-4 (January 1984) tests, he determined that the violation was of a significant and substantial nature. 9 FMSHRC at 1777 78.

On review, USSM contends that only the plug end of a trailing cable is a "disconnecting device" within the meaning of section 75.601 and that, therefore, the receptacle into which the trailing cable is plugged need not be "marked and identified" to correspond with that cable plug.

We conclude that the testimony of the MSHA witnesses in this case

2/ With regard to the Secretary's interpretative position, the MSHA Coal Mine Health and Safety Inspection Manual for Underground Coal Mines (March 9, 1978) provides, relative to section 75.601, that:

A visual means of disconnecting power from trailing cables shall be provided so that a miner can readily determine whether the cable is de-energized.

Plugs and receptacles located at the circuit breaker are acceptable as visible means of disconnecting the power. These devices shall be plainly marked. For example, the loading machine cable disconnecting device shall be plainly marked (LOADER), the shuttle car cable disconnecting device shall be plainly marked (S.C. No. 1 or S.C. No. 2) or the disconnecting devices shall be readily identifiable by other equally effective means.

Similarly, the MSHA Coal Mine Safety Electrical Inspection Manual, Underground Coal Mines (June 1, 1983) states with reference to section 75.601 that:

Plugs and receptacles located at the circuit breaker ... are acceptable as visual means of disconnecting the power.

These devices shall be plainly marked for identification to lessen the chance of energizing a cable while repairs are being made on the cable. For example, the loading machine cable plug shall be plainly marked "LOADER," the shuttle car cable plug shall be plainly marked "S.C. No. 1" or S.C. No. 2."

Exhibits GX-2, GX-3.

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affords substantial evidentiary support for the judge's finding that a trailing cable plug and receptacle are, in essence, an integrated disconnecting device for purposes of this standard. Although the term "disconnecting device" is not defined in the Act or the Secretary's regulations, the pertinent language of section 75.601 does not refer merely to such devices in a general sense, but rather focuses on devices "used to disconnect power from trailing cables." Deenergization of equipment powered by a trailing cable is achieved, as relevant here, by disconnecting the trailing cable plug from a receptacle. The plug and receptacle are designed to be used together as a means of connecting or disconnecting power.

The Secretary's position requiring that particular trailing cable plugs and receptacles be labelled identically is a reasonable construction of section 75.601. 3/ Since a trailing cable plug and receptacle are used together to effect a disconnection and since the purpose of the identification requirement is to provide a ready means of ascertaining trailing cable power status, it is an appropriate reading of the standard to require that a particular receptacle be marked to correspond to a particular trailing cable plug.

As recognized by the judge, the Secretary's position regarding the marking of trailing cable receptacles has been applied consistently for a number of years. Indeed, the evidence shows that the labelling system argued for by the Secretary was used at the subject mine from 1979 until 1986. USSM first adopted and utilized the system in January 1979 after a fatal electrical accident involving power center equipment at the Cumberland Mine. Also, in 1984, we affirmed a "significant and substantial" finding with respect to a violation of the cited standard at the Cumberland Mine in 1982, where the trailing cable plugs on certain power center equipment were not identified to correspond to the receptacles that powered them. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). Thus, it is apparent from the record that USSM has had longstanding notice of MSHA's interpretation of the requirements of section 75.601.

On review, USSM has presented no compelling reason why the Commission should disagree with the Secretary's interpretation. We reject USSM's contention that MSHA's internal policy statements in the manuals (note 2 supra) are inconsistent. Both refer to plugs and receptacles together as acceptable means of disconnecting power. We also reject USSM's argument that the Secretary's position with regard to

3/ While we have stated that secretarial interpretations or policy statements contained in such relatively informal publications as inspectors' manuals are not binding, we have also indicated that the expertise, soundness, and reasonableness of such interpretive matter may justify judicial deference in appropriate cases. See generally, e.g., *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 21 (June 1981). This is not a case where the Secretary has gone beyond the appropriate bounds of interpretation and attempted to revise or amend a mandatory standard outside the notice and comment publication requirements imposed by section 101 of the Mine Act, 30 U.S.C. § 811. Cf. *King Knob*, supra.

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section 75.601 is inconsistent with requirements imposed by electrical safety standards at 30 C.F.R. §§ 75.511 and 75.903.

As Judge Merlin noted, USSM's own witness admitted that receptacles, as well as plugs are capable of being locked out and tagged before electrical repairs are performed pursuant to section 75.511.

9 FMSHRC at 1775. Similarly, MSHA Electrical Supervisor Gerald Davis testified that although section 75.903 is interpreted by MSHA to refer to plugs, that standard does not specifically address trailing cable disconnecting devices, the focus of this proceeding. See 9 FMSHRC at 1775. In any event, the present case requires us to construe only section 75.601, and we reserve construction of other standards addressing other concerns to cases raising such issues.

Finally, we reject USSM's argument that a finding of violation is precluded here because the cited system of power circuitry identification at the Cumberland Mine has been utilized in other USSM mines with MSHA approval. The Secretary's witnesses uniformly testified and the judge found that, with the isolated exception of USSM's Maple Creek Mine, MSHA has consistently enforced its interpretation of section 75.601 requirements at all mines. Tr. 87-88, 139-43; 9 FMSHRC at 1776. Although USSM's disputed circuitry identification system was also employed at USSM's Maple Creek Mine, MSHA Electrical Supervisor Davis testified that the use of that system resulted from temporary acquiescence by MSHA in circuit breaker identification requirements imposed by the Commonwealth of Pennsylvania. (MSHA's enforcement of its usual

interpretation of section 75.601 at the Maple Creek Mine has been held in abeyance pending disposition of the present proceeding. Tr. 139-44.) The evidence thus reflects consistent enforcement of section 75.601 by MSHA over an extended period. Further, an inconsistent enforcement pattern alone does not estop the Secretary from proceeding under the interpretation of a standard it concludes is correct. See, e.g., King Knob, supra. 3 FMSHRC at 1421.22.

Thus, we conclude that the judge's finding of a violation of section 75.601 is supported by substantial evidence and is legally correct. We turn to the judge's additional finding that the violation was of a significant and substantial nature.

The Commission has held that a violation is properly designated as being of a significant and substantial nature 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., supra, 3 FMSHRC at 825. In Mathies Coal Co., supra, the Commission explained:

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

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result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. The Commission subsequently stated 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 1573, 1574 (July 1984).

USSM primarily contests the judge's findings with respect to the third element of the National Gypsum test. The judge determined that "it was reasonably likely that the wrong piece of equipment would be energized or that delay would occur in de-energizing the correct piece of equipment which would cause serious injury to [a] miner." 9 FMSHRC at 1777. We conclude that substantial evidence supports these findings.

MSHA Electrical Supervisor Davis testified without rebuttal that, "[w]hen it comes to working with cables, they are [the] most

dangerous area in the mine." Tr. 165. MSHA Electrical Specialist Cupp testified that there is a strong potential for electrical accidents when several pieces of equipment are being worked on simultaneously, and it can be difficult to distinguish which trailing cable powers what equipment because the cables "sometimes resemble spaghetti, the way they are all wrapped around one another."

Tr. 115-16. Without the required identification of the receptacles serving as an additional visual cue to alert the miner as to which cable is energized, a miner "may energize the wrong trailing cable, and that would be [connected to] the piece of equipment that is now being worked on, and an accident could occur...." Tr. 116. Further, there was also evidence that identification tags sometimes become dislodged from plugs. Tr. 47, 53, 56, 231 33. Under MSHA's system, however, labelling the receptacles serves as a backup to labelling the plugs and reinforces easy recognition of energization status.

Tr. 56, 57, 114, 150 52. In light of the evidence of record, we agree with the judge that the failure to label receptacles to identify the equipment each powers contributes to a discrete safety hazard of misidentification of power center circuitry, reasonably likely to result in electrical shock or electrocution to miners working with or repairing electrical equipment.

USSM does not dispute that any injury resulting from accidental energization or de-energization of a trailing cable would be of a reasonably serious nature. It argues, however, that the existence of the emergency stop ("crash") button at the power center eliminates any hazard of electrical shock created by misidentification of circuitry due to a violation of section 75.601.

Assuming arguendo that miners used the crash button in the event of an incident, the de-energization of the power center circuitry would not serve the purpose of the labelling requirement, to prevent accidental energization of equipment in the first instance. We accordingly conclude that substantial evidence supports the judge's finding that USSM's violation of section 75.601 was of a significant and substantial nature. Accord, U.S. Steel Mining Co., supra, 6 FMSHRC at 1836 38 (failure to label shuttle car trailing cable plug constituted significant and substantial violation).

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For the foregoing reasons, the judge's decision is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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