

CCASE:
SOL (MSHA) V. CONSOLIDATION COAL
DDATE:
19930329
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 92-1016
Petitioner	:	A.C. No. 46-01438-04017
v.	:	
	:	Docket No. WEVA 92-1017
CONSOLIDATION COAL COMPANY,	:	A.C. No. 46-01453-04019
Respondent	:	
	:	Docket No. WEVA 92-1065
	:	A.C. No. 46-01453-04027
	:	
	:	Docket No. WEVA 92-1095
	:	A.C. No. 46-01453-04030
	:	
	:	Humphrey No. 7
	:	
	:	Docket No. WEVA 92-1166
	:	A.C. No. 46-01452-03883-R
	:	
	:	Arkwright No. 1

DECISION

Appearances: Charles Jackson, Esq., U.S. Department of Labor,
Office of the Solicitor, Arlington, Virginia
for Petitioner;
Daniel Rogers, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Feldman

The above proceedings are before me as a result of petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (The Act). These matters were scheduled for hearing in Morgantown, West Virginia.

At the hearing, the parties moved to settle the citations associated with Docket Nos. WEVA 92-1016, WEVA 92-1017, and WEVA 92-1065 in their entirety. With respect to Docket No. WEVA 92-1095, the Secretary presented his direct case for Order No. 3108895 and Citation No. 3108433. After the Secretary's presentation I expressed my concern regarding certain factual issues. I urged the parties to confer during a recess to discuss

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settlement. The parties did ultimately reach an accord with respect to this order and citation. The remaining citation in Docket No. WEVA 92-1095 was incorporated in the parties'

settlement motion presented at the hearing. Thus, Docket Nos. WEVA 92-1016, WEVA 92-1017, WEVA 92-1065 and WEVA 92-1095 have all been disposed of through the settlement process.

With regard to the remaining docket, the parties reached settlement on 12 of the 13 citations contained in Docket No. WEVA 92-1166. The settlement motion proffered by the parties concerning all of these dockets was granted on the record and will be incorporated as part of this decision. The motion was supported by information that was provided that pertained to the penalty assessment criteria set forth in Section 110(i) of the Act.

The only matter heard was Citation No. 3313118 in Docket No. WEVA 92-1166. Spencer A. Shriver testified on behalf of the Secretary and William Lafferty and Robert Gross were called upon to testify on behalf of the respondent. The parties stipulated to my jurisdiction in this matter. At the conclusion of the hearing, the parties elected to make closing statements in lieu of filing post-hearing briefs. This decision formalizes the bench decision I rendered at the conclusion of the parties' closing presentations.

The essential facts are not in dispute and can be briefly stated. Spencer A. Shriver has been a mine inspector for 15 years. He has a Masters Degree in electrical engineering and he is a certified mine electrician and registered professional engineer in West Virginia. (Tr.115-116).

On October 21, 1991, Shriver inspected the respondent's Arkwright No. 1 Mine in accordance with Section 103(g) of the Act as a result of a complaint received concerning the operating condition of the respondent's jeeps and mantrips. Shriver was accompanied by company representative Fred Morgan. Upon inspecting the No. 9 Jeep, Shriver noted a damaged fuse holder evidenced by several wraps of black plastic tape around the outer perimeter of the fuse holder. The fuse holder is in line between the jeep motor and the conductor coming down from the trolley wire through the trolley pole. (Tr.118). The fuse holder contains a fuse that is designed to stop the flow of current (blow) in the event the conductor on the jeep became short circuited to the frame. The fuse holder is comprised of a phenolic plastic material that is designed to withstand heat resulting from arcing and ultimate fuse failure. (Tr.118-212).

Upon removing the tape, Shriver observed that the end cap of the fuse holder had broken away. He proceeded to open the fuse holder and noticed evidence of black soot which indicated the presence of electrical arcing. He also observed a 1/8 inch hole that had burned through the metal end of the fuse which also indicated that arcing had occurred. Based on the fact that the

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No. 9 Jeep was on the track parked in the mantrip spur, from which jeeps are routinely taken back into the mine at the beginning of each shift, Shriver concluded that the jeep was in service. (Tr.120). Consistent with this conclusion, Shriver testified that he did not recall anyone alleging that the jeep was out of service. (Tr.121).

Based upon these observations, Shriver issued Citation No. 3313118 citing a violation of the mandatory safety standard specified in section 75.1725(a).(Footnote 1) The citation stated:

On wells bottom, No. 9 Jeep has fuse holder broken on trolley pole. Fuse is taped into place but is not making efficient electrical contact into end sockets. A 1/8 inch hole has been burned in end of fuse from arcing. A catastrophic failure of the fuse is reasonably likely if the fuse remains in service. Persons riding near the pole would be exposed to flash burns and physical burns. Also, vehicle would be disabled if fuse blew, and could result in wreck on main line.

The subject citation characterized the alleged violation as significant and substantial. In support of his S&S designation, Shriver testified that he believed that there were two hazards associated with the defective fuse holder. The first hazard concerned the possibility of injuries sustained to occupants of the jeep in the event of a catastrophic failure of the fuse holder.(Footnote 2) In such event, passengers of the jeep could sustain flash burns to the eyes, actual physical burns to the head and body, and possible shrapnel wounds. (Tr.131,133-134). The second hazard was a loss of power due to fuse failure which could result in a wreck caused by a collision with another track vehicle.

Shriver provided conflicting testimony regarding the significant and substantial nature of these two hazards. For example, Shriver testified that it was possible for the fuse to just heat up and crumble away causing an interruption of the flow of current without catastrophic consequences. (Tr. 196-197). Moreover, Shriver testified that he could not remember any signs of melting on the fuse holder. (Tr.202). In addition, Shriver testified that there were vent holes on each end of the fuse holder through which the conductor passed through. Thus, Shriver

1 Section 75.1725(a) provides:

"Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

2 Shriver equated a "catastrophic failure" with an explosion and disintegration of the fuse holder. (Tr. 133-134).

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conceded that the fuse holder was not airtight further minimizing the chances of catastrophic failure due to heat or pressure buildup. (Tr.190, 194, 226). Significantly, Shriver stated that, with the exception of a fuse holder failure created by overloading the fuse contained therein by two hundred to three hundred percent in a laboratory setting, Shriver has never known of a catastrophic failure of a jeep fuse holder. (Tr. 212,216). In fact, Shriver admitted that this laboratory test was not analogous to the routine current flowing through a jeep fuse. (Tr.218). Finally, Shriver testified that it was unlikely from a "statistical standpoint" that a catastrophic failure would occur. (Tr.199-200).

William Lafferty and Robert Gross, employees of the respondent, testified that in over 25 years of their combined mine experience, they had never heard of a catastrophic failure of a fuse holder. Gross also testified that he had contacted an applications engineer of the fuse manufacturer who was also unaware of any past catastrophic fuse holder failure. (Tr.241).

As noted in my bench decision, I credit Shriver's testimony that something "dramatic" such as popping or sparking might have occurred given the continued operation of the jeep (Tr. 202). However, the testimony, when considered in its entirety, does not provide an adequate basis for concluding that catastrophic failure of the fuse holder with resultant serious injury was likely to occur.

Shriver's testimony regarding the likelihood of a wreck was also contradictory. In this regard, he stated that, assuming the jeep lost power and was stranded on the track, the engineer of a locomotive, if alert, could "probably see [the jeep] and probably could stop." (Tr.155). Shriver also indicated that headlights on a locomotive project approximately 200 feet. (Tr.156). While a stalled track vehicle contributes to a potential wreck, one must assume that the operators of other vehicles are alert and in control of such vehicles. Thus, I conclude that this hazard was also not significant and substantial in nature.

As a result of the trial record, I issued the following bench decision which is edited with non-substantive changes:

The first issue is the fact of occurrence. Section 75.1725(a) provides that mobile equipment shall be maintained in safe operating condition or be removed from service. There is no indication that this jeep was removed from service at the time of the inspection. There was no such allegation at the time of the inspection by Mr. Morgan and Mr. Morgan isn't here to testify. So I conclude that the jeep was in service.

The issue of the safe operation of the jeep is dependent upon the condition of the fuse holder. I believe that the testimony is un rebutted that the fuse holder was damaged. It resulted in a loose connection which caused arcing and would have ultimately resulted in failure of the fuse.

Therefore, I believe it was a violation of the regulation in that it was not safe to be in a vehicle in which the fuse could fail at any moment. In such an event, power could not be restored until the fuse was replaced. Restoration of power could be further delayed if replacement of the fuse holder was necessary. This would expose the jeep to a possible wreck and establishes that the jeep was not being operated in a safe condition.

Having established the fact of occurrence, the second issue is the significant and substantial question. I find that a vehicle de-energized and exposed on a track creates a hazard. However, it is a hazard that can be mitigated by the person operating another vehicle on the track. Thus, I presume the attentiveness of the other operator and the ability of that operator to control the vehicle and avoid an accident.

I now turn to the second hazard concerning catastrophic failure which was really the thrust of Mr. Shriver's testimony. I acknowledge Mr. Shriver's expertise in the area of electrical engineering. However, I am called upon to conclude, if I were to accept the Secretary's arguments, that there is a reasonable likelihood that damage to the fuse holder would result in catastrophic failure. In analyzing this issue, I am being called upon to conclude that something is reasonably likely to happen that has never happened before with the exception of a laboratory experiment that tripled the normal current to determine how much abuse a fuse holder could withstand. I do not equate this laboratory experiment with routine operation of a jeep.

Moreover, even if I were to conclude that such a catastrophic failure could occur although it has not been shown to have previously occurred in the course of regular mining operations, I am asked to conclude that it would occur at a time when passengers would be so close to the fuse holder that they would sustain serious injuries. I am unable to conclude that such an event was likely to occur.

Therefore, I conclude that this was a violation of 75.1725(a). However, I am modifying the 104(a) citation to reflect that this violation was not significant and substantial in nature.(Footnote 3) Consequently, I am assessing a \$105 penalty.

In view of the above, I have removed the significant and substantial designation from Citation No. 3313118. As a result, I have reduced the proposed assessment from \$157 to \$105. The penalty assessment for this citation and for the other citations that have been settled in all of these docket proceedings is as follows:

Docket No. WEVA 92-1166

Citation or Order No.	Proposed Penalty	Assessed Penalty	Modified from S&S to Non S&S
3715568	\$213	\$128	*
3715569	\$213	\$213	
3715570	\$213	\$128	*
3715571	\$213	\$128	*
3715572	\$213	\$128	*
3716074	\$105	\$105	
3715580	\$ 98	\$ 98	

3 At trial, the Secretary cited Consolidation Coal Company, 12 FMSHRC 2643 (December 1990) for the proposition that a violation resulting in the loss of power of a trolley car constitutes a significant and substantial violation. Although Judge Weisberger did conclude in that contest proceeding that a disabled trolley creates a hazard, he did not address the issue of significant and substantial. Therefore, the Consolidation case is not dispositive of this issue. It is, however, dispositive of the issue of fact of occurrence. In Consolidation, in contesting an alleged violation of Section 75.511, the respondent argued that a stalled trolley car constitutes a hazard justifying the replacement of a fuse by a non-qualified electrician. Thus, I find that the respondent is collaterally estopped from its attempt at trial to deny that loss of power of a trolley creates a discrete safety hazard. (See Tr. 169-183).

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3313118	\$157	\$105	*
3715582	\$213	\$128	*
3716295	\$213	\$128	*
3716298	\$213	\$213	
3715583	\$213	\$128	*
3715584	\$213	\$128	*
Docket No. WEVA 92-1016			
3108483	\$267	\$267	
Docket No. WEVA 92-1017			
3108778	\$309	\$ 50	*
3108881	\$ 50	\$ 50	
Docket No. WEVA 92-1065			
3108775	\$206	\$206	
Docket No. WEVA 92-1095			
3108892	\$267	\$ 50	*
3108895(Footnote 4)		\$1,500	\$267
3108433	\$267	\$267	

3 As reflected in this decision, the significant and substantial designation has been deleted from this citation.

4 The parties' motion to modify this citation from a 104(d)(2) order to 104(a) citation was granted on the record. The significant and substantial designation for the underlying violation remains in effect.

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ORDER

ACCORDINGLY the citations as noted in the settlement motion as well as Citation No. 3313118 addressed in this decision ARE HEREBY AFFIRMED. Consequently, the respondent IS ORDERED TO PAY a total civil penalty in the amount of \$2915 in satisfaction of the violations in issue. Payment is to be made within (30) days of the date of this decision, and upon receipt of payment of this matter IS DISMISSED.

Jerold Feldman
Administrative Law Judge

Distribution:

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