FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 16, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-190
Petitioner	:	A.C. No. 15-02085-24601
v.	:	
	:	
PERRY COUNTY COAL CORP.,	:	
Respondent.	:	HZ4-1

DECISION

Appearances: MaryBeth Zamer Bernui, Esq., U.S. Department of Labor, Nashville, TN, for the Secretary;
LaToi Mayo, Esq., Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, KY, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor alleging violations of various mandatory safety standards by Perry County Coal Company (Perry County), and seeking the imposition of civil penalties for these violations. The case was heard in Johnson City, Tennessee, on February 1, 2005. Subsequent to the hearing, the parties each filed Proposed Findings of Fact and a Brief.

Citation No. 7517685

Findings of Fact

MSHA Inspector Patrick Stanfield, who is an electrical specialist, was at Perry County's HZ4-1 mine on June 24, 2003. While on the surface of the mine, Inspector Stanfield was informed that the day shift electrician, Don Moore, had received electrical burns while attempting to energize a pump.[1] Inspector Stanfield went underground to the 017 Section to investigate the accident.

[1]There were not any witnesses to the accident, and no one had observed Moore's actions. Stanfield subsequently determined, based on his investigation, that Moore was burned while attempting to energize a return pump by plugging the cathead of a 10/5 cable attached to the pump into the receptacle located below the No. 2 breaker. Stanfield explained that an arc was created when Moore plugged the cable into the receptacle because the contacts inside the breaker had become fused together which energized the breaker.

Stanfield examined the power center in the 017 Section which contained 14 circuit breakers. In normal operations, the cathead (plug) of the cable connected to a piece of equipment would be inserted into a receptacle located below a breaker. Each breaker had a dial with a limited range of amperage settings, which controlled the amperage level at which the breaker would trip, shutting off power to the equipment it serviced. The amperage range setting on the dial was not uniform for all the breakers.

Stanfield observed that the amperage dial on the No. 2 bolter breaker had been set at 300 amps, its lowest setting.

Stanfield noted that the 10/5 cable at issue was required to have short circuit protection of no more than 150 amps. Since the amperage setting on the No. 2 breaker has been set at 300 amps, its lowest setting, he concluded that there was not adequate short circuit protection for the 10/5 cable, and cited Perry County for violating 30 C.F.R. § 518.

Further Findings and Discussion

Section 518, supra, provides, as pertinent, that "[a]utomatic circuit breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short circuit and overloads."

The plain clear wording of Section 75.518, supra, requires: (1) the installation of automatic circuit breakers; (2) of the correct type and capacity to protect all electrical equipment against short circuits and overloads.

It appears to be the Secretary's position that Perry County was in violation of Section 518, supra, because one the breakers did not have the proper setting to provide short circuit protection for the 10/5 cable and pump. This interpretation of the requirements of Section 518, supra, imposes an obligation that goes beyond the plain wording of Section 518, supra, which requires only that circuit-breaking devices (breakers) be installed to protect all equipment. The requirement that every breaker be capable of protecting all equipment would result in amending Section 518, supra, by adding words not found in the regulation. I thus reject the Secretary's argument.

The Secretary has not adduced any evidence that the breakers installed on the power center could not protect all electrical equipment against short circuits and overloads. At least one of the breakers on the center was of the correct type and capacity to protect the 10/5 cable at issue, i.e., its dial had a law setting of 150 amps. (Tr. 40, 85). I thus conclude that the Secretary failed to prove that circuit breakers of the correct type and capacity were not installed to protect all electrical equipment against short circuits and overloads. Thus, I find that it has not been established that Respondent violated the requirements of Section 518, supra. Accordingly, Respondent's Motion to Dismiss the citation at issue, made at the hearing, is presently granted.

Citation No. 7517686

The Inspector's Testimony

According to Stanfield, during the course of his investigation of the accident relating to the No. 2 breaker, Bob Shell, Perry County's Chief Electrician, told him that the breaker to the left, the No. 8 breaker, was "burnt in" (Tr. 110, 115). Stanfield indicated that on June 24 he observed that this breaker had been locked out. According to Stanfield, once Perry County became aware that the No. 8 circuit breaker had malfunctioned, the other breakers, including the No. 2 breaker, at issue, should have been tested with a voltage meter. This test would have revealed that contacts inside this breaker had melted together resulting in the receptacle becoming energized, which could have led to arcing, and a resultant electrical burn injury. In addition, there was the possibility of the occurrence of a mine fire or ignition of combustible airborne accumulations.

Stanfield issued a citation alleging a violation of 30 C.F.R. Section 75.512, which, as pertinent, provides that "[A]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions."

Discussion

Section 75.512, supra, requires the "frequent" examination of electrical equipment to assure safe operating conditions, but does not specify the frequency of the examinations. Section 75.512-2 provides that the examinations and tests required by Section 75.512, supra, "... shall be made at least weekly."

The parties agreed that Respondent did conduct its weekly examinations as required by Section 75.512-2, supra. The Secretary argues that Perry County was in violation of Section 75.512, supra, because it should have made a more frequent examination of the power center after the No. 8 circuit breaker malfunctioned, to ensure that all circuit breakers were being maintained in a safe operating condition. In this connection, I note the Inspector's testimony that Shell had told him that this breaker "was burnt in". (Tr. 110) However, Shell testified that when he made the statement he was not referring to the No. 8 breaker, but to the No. 2 breaker. I observed the demeanor of both witnesses testifying on this point and find Shell to have been the more credible witness.

The Secretary further argues that because the No. 8 circuit breaker had been locked out prior to the accident at issue, Perry County had been put on notice that further examination of the power center was required to ensure that all other circuit breakers were functioning safely.

Moreover, the record does not clearly establish when Respondent was given notice that the No. 8 circuit breaker had been locked out. According to Stanfield, Shell did not know who had placed the lock on the breaker, nor when it was done. There was not any evidence adduced by the Secretary as to when and why a padlock was placed on the No. 8 circuit breaker. Further, there was not any evidence adduced as to the specific nature of the condition of the breaker that led to it being padlocked.

Further, the regulations do not clearly specify under what conditions, if any, an operator is required to conduct an examination more frequently than weekly. Thus, to impose such a requirement herein would go beyond the terms of Section 75.512-2, supra, as it would require an examination of all breakers in a situation where one breaker had been locked out. In this connection, I note that on cross examination, Stanfield agreed that there was not any requirement to check all circuits when one is found to be operating properly. Also, on cross-examination, he agreed that the fact that one breaker may not have been operating properly does not indicate that other breakers were not functioning properly.

Further, for all the above reasons, I find that it has not been established that Respondent violated Section 75.512, supra.

Citation No. 7517687

Violation of 30 C.F.R. §75.607

According to Stanfield's testimony, during the investigation of the accident at issue it was determined that the victim had attempted to plug a cathead into the receptacle on the No. 2 breaker that had been energized. Perry County did not rebut or impeach this testimony.

Stanfield issued a citation alleging a violation of 30 C.F.R. § 75.607, which provides that trailing cable and power cable connections to junction boxes "... shall not be made or broken under load."

Based on the inspector's uncontradicted and unimpeached testimony, I find that Perry County did violate Section 75.607, supra.

Significant and Substantial

According to the inspector, placing a plug in a receptacle that was energized creates a hazard of a mine fire, electrical burn, or electrical shock. The uncontradicted evidence in the record indicates that the victim did receive burns and electric shock. Within this framework I conclude that all the elements set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) have been met, and that it has been established that the violation was significant and substantial.

Penalty

Based on the parties' stipulations, I find that Perry County Coal is a large operator and a penalty will not affect its ability to remain in business. I have reviewed Perry County's history of violations and find that it is not a significant factor to cause either a significant increase or decrease in the amount of penalty to be assessed. There is no evidence that the operator did not exhibit good faith in abating this violation. Since the violative condition herein, as discussed above, contributed to the hazards associated with the injuries received by the victim, I find that the gravity of the

violation was high.

The inspector conceded that in his opinion the operator's negligence was only "moderate" because there were "mitigating circumstances leading up to the accident." (Tr. 198). In this connection, I note that the violative condition was created when the victim attempted to insert a plug into a receptacle that was energized. However, it had become energized as a result of the fusion of cables within the breaker, a condition that could not have been observed. Thus, although the victim was negligent to some degree in inserting the plug into an energized receptacle, and this negligence is imputed to the operator, the level of the operator's negligence is to be mitigated considerably because it did not know of this condition. Further, for essentially the same reasons discussed above[2], I find that it has not been established that Perry County had notice of the conditions within the No. 2 breaker.

Taking into account all the above factors, and putting considerable weight on mitigating factors relating to the company's negligence, I find that a penalty of $1,000 is appropriate for this violation.

Order

It is **Ordered** that Citation Numbers 7517685 and 7517686 be **Dismissed**. It is further **Ordered** that Respondent pay a civil penalty of **$1,000.00** within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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/sb

[2]Citation No. 7517686.