

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 25, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 93-462-M  
Petitioner : A.C. No. 04-04679-05510

v. :

Montague Plant

CONTRACTORS SAND & GRAVEL :  
SUPPLY, INCORPORATED, :  
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-409-M  
Petitioner : A.C. No. 04-04679-05514 A

v. :

Montague Plant

ERIC SCHOONMAKER, owner & agent :  
CONTRACTORS SAND & GRAVEL :  
SUPPLY, INC., :  
Respondent :

**SUMMARY DECISION**

**Before: Judge Cetti**

I

**Background**

Contractor's Sand and Gravel, Incorporated, operates two small portable sand and gravel surface mining operations located near Yreka, California. The Scott River Plant has two employees and produces about 10,000 to 15,000 tons annually. The Montague Plant has two employees and produces about 10,000 to 15,000 tons annually.

Eric Schoonmaker, the company's general manager, oversees both operations. Mr. Schoonmaker's responsibilities include, for example, managing the business, directing sales, marketing and customer relations, organizing production, coordinating equipment

maintenance and repair, and making sure that the operations are safe. He is also the company's primary liaison with regulating authorities such as MSHA. He asserts the plant has been in operation for many years and passed all MSHA's electrical inspections until the grounding citation in question was issued on March 10, 1993, by Inspector Ann (Johnson) Frederick.

## II

Mr. Schoonmaker is the 110(c) agent charged in Docket No. WEST 94-409-M with the knowing violation of 30 C.F.R. § 56.1205 at the Montague Plant. That safety regulation 30 C.F.R. § 56.1205 reads as follows:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

The single citation at issue in both of the above-captioned dockets charges both the operator and the manager Eric Schoonmaker with the unwarrantable failure to comply with the above-quoted safety standard. The citation reads as follows:

The frame of the crusher was being used as the grounding conductor. The ground solid strand copper wire ran from a rod (found +18" below the surface near the van used as a control electrical installation) under the van through an underground pipe and connected directly to the frame of the portable crusher operation. Another jumper (solid copper wire) was found from the upper head pulley frame to the metal of the chute where the crushed rock transferred to the stacker conveyor belt. The wires from both motors found on these belts was SO P123 MSHA 14/3 stamped. No other visible grounds were found at the motors. Effective equipment ground conductors have not been installed as evidenced. The electrical grounding tests performed at the Montague plant and stated to on Sept. 15, 192 (1992) state that the grounding had been found to conform to applicable code. Frame grounding has been forbidden for over fifteen years. This is an unwarrantable failure by operator to comply with the standards.

Respondents do not dispute that the paths to ground for the stacker motor and crusher delivery motor passed through the frame of the crusher. Respondents do, however, dispute that such a grounding system violates the regulatory requirement of 30 C.F.R. § 56.12025.

Respondents' counsel asserts that Petitioner has not even established a prima facie case that the two motors in question were not grounded. Respondent contends that at the time the citations were issued, the two motors in question were effectively grounded. MSHA performed no test and has no other definitive evidence to show that the motors, at the time the citations were issued, were not effectively grounded or were, in any way, in violation of the plain, clear provisions of the cited safety standard.

Both parties agree that there is no dispute as to any material fact and that the matter is ripe for summary decision on the single legal issue of whether Respondent's reliance on the crusher and stacker frames to serve as the path to ground for the electric current violates the provisions of 30 C.F.R. § 56.12025. The parties have cross-moved for summary decision on this single legal issue.

Both parties agree that although the grounding issue is only one issue, among many, in the nine consolidated cases concerning 33 citations, Citation No. 3911909 is the most significant of the citations and has generated, by far, the largest of the proposed penalties in these cases. Although the parties here seek summary decision on only one of many issues in the consolidated cases, the parties agree that the resolution of the grounding issue will allow the remaining citations in the consolidated cases to be resolved by amicable settlement without need for a hearing.

#### STIPULATIONS

In March 1996, the parties entered into the record the stipulation that the record for summary decision on the grounding issue consists of the following:

1. Citation No. 3911909.
2. All pleadings filed with the presiding judge, including but not limited to, motions, oppositions, and prehearing statements, to show the respective litigation positions of and representations made by the parties.

3. Respondent's Request for Admissions and MSHA's Responses to Respondent's Request for Admissions; Respondent's Interrogatories and MSHA's Responses to Respondent's Interrogatories, Plaintiff's (Petitioner's) Interrogatories and Respondent's Responses to Petitioner's Interrogatories.

4. The affidavit of Eric Schoonmaker.

5. The declarations of Paul Price and Gordon Vincent.

6. The deposition transcripts of Paul Price, Ann (Johnson) Frederick, Eric Schoonmaker and Frank Casci.

7. Article 250 of the 1993 National Electrical Code (NEC), to show the NEC's definitions of "grounded" and "grounded, effectively."

8. Article 250 of the 1993 National Electrical Code (NEC), to show the electrical grounding requirements of the NEC.

9. Order No. 3913901, issued subsequent to Citation No. 3913895 and under contest in Docket No. WEST 93-141, to show that Order No. 3913901 was terminated.

10. Photographs A-1, A-2, A-3 and A-4 to show the equipment used at the Montague Plant.

11. August 3, 1995, letter from Paul Price to Mark Ode, to show that MSHA requested an interpretation of Article 250 of the 1993 National Electrical Code from the National Fire Protection Association.

12. August 14, 1995, letter from Mark Ode to Paul Price, to show the National Fire Protection Association's unofficial interpretation of Article 250 of the 1993 National Electrical Code as it applies to the hypothetical scenario set out in Mr. Price's August 3, 1995, letter.

The February 29, 1996, letter transmitting the above stipulations also states "the stipulated record contains a few items that have not been previously cited by the parties and attached to prior motions or pleadings. These items are being included to make the record complete for appeal purposes."

Both parties in their pleadings and arguments have stated their respective cases very well. Upon careful review of the record, I am persuaded that the undisputed material facts in this case do not establish a violation of 30 C.F.R. § 56.12025.

The cited standard 30 C.F.R. § 56.12025 plainly and clearly requires that "metal enclosing ... electrical circuits shall be grounded." The regulation is specific and not broadly worded. 30 C.F.R. § 56.12025 is a "performance standard." It does not specify or require that the operator achieve an effective ground in a specific manner.

I find that Respondent complied with the requirement of the cited standard by intentionally grounding the stacker conveyor and crusher discharge conveyor motors by using the stacker and crusher frames as conductors in carrying ground fault current to earth. Part 56 which sets forth the mandatory safety standards for surface nonmetal mines, such as we have here, clearly provides that "electrical grounding means to connect with the ground to make earth part of the circuit." 30 C.F.R. § 56.2. The company's resistivity tests conducted on September 15, 1992, pursuant to 30 C.F.R. § 56.12028 indicated that there was an effective path to ground from both of the motors. Thus, the motors in question were connected with the ground to make the earth part of the circuit. There is no contrary evidence.

The Secretary should not be permitted through interpretation to expand the regulation beyond its plain meaning. The Secretary's purported longtime interpretation of the regulation to prohibit per se frame grounding constitutes an impermissible expansion of the plain meaning of the standard. It constitutes an impermissible avoidance of the rulemaking requirements of section 101 of the Mine Act. Since the Secretary purports to impose additional requirements and prohibitions without proper rulemaking, it lacks the "force and effect of law". Western-Fuels Utah, Inc., 11 FMSHRC 278, 286-87 (March, 1989); see also Asarco Inc., 14 FMSHRC 829, 835 (1992).

If the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rulemaking to achieve its goal rather than attempting to do so by its interpretation of the regulation beyond its plain meaning. (See Mathies Coal Company, 5 FMSHRC 300, 303 (March 1983)).

With respect to the application of the reasonable, prudent person test, I find that a reasonable, prudent person familiar with the mining industry would have recognized that the two motors, which were connected to earth through a series of metal frame and wire connections, were "grounded" and were, thus, in compliance with the requirement of the cited regulation. I base this on the definition of grounding at 30 C.F.R. § 56.2 which specifically states that "electrical grounding means to connect to the ground to make the earth part of the circuit". 30 C.F.R. § 56.2.

In this connection, I also find it noteworthy that in the National Electrical Code, "grounded" is defined as "connected to earth or to some conducting body that serves in place of earth." NEC, Article 100 (definitions) (1993) and that "grounded effectively" is defined as "Intentionally connected to earth through a ground connection or connections of sufficiently low impedance and having sufficient current carrying capacity to prevent the buildup of voltages that may result in undue hazards to connected equipment or to persons. NEC, Article 100 (definitions) (1993).

Also noteworthy in the application of the reasonable prudent person test is the fact the Secretary's purportedly longstanding interpretation has never been published in MSHA's Program Policy Manual and furthermore, MSHA's purported interpretation is contrary to two unappealed, well-reasoned decisions of two Commission Judges who I believe to be reasonable, prudent persons familiar with the mining industry. See Mulzer Crush Stone Company, 3 FMSHRC 1238 (May 1981) in which Judge Laurenson rejected MSHA's contention that the frame was not a source of grounding. See also McCormick Sand Corporation, 2 FMSHRC 21, 24 in which Judge Michels rejected MSHA's contentions and held that 30 C.F.R. § 56.12025 "fairly read, requires only a "ground" or its equivalent. It does not mandate a particular ground such as that mentioned in the citation ...". I have not been able to find any Commission authority contrary to these two unappealed Administrative Law Judge decisions.

I conclude, primarily on the basis of the plain, clear language of the cited regulation, that Citation No. 3911909 should be vacated. I find nothing in the transcript and declaration of Paul Price, the transcript of Ann (Johnson) Frederick and the other material and arguments on which MSHA relies that persuades me to a contrary conclusion. Such testimony and arguments would be more appropriate in a section 101 rulemaking proceeding.

#### ORDER

##### Docket No. WEST 93-462-M

Citation No. 3911909 is **VACATED** and its related \$7,000.00 proposed penalty is set aside. I retain jurisdiction of the two remaining citations in the docket.

##### Docket No. WEST 94-409-M

Citation No. 3911909 is **VACATED**; its related \$6,000.00 proposed penalty is set aside. Docket No. WEST 94-409-M is **DISMISSED**.

August F. Cetti  
Administrative Law Judge

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