

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

February 2, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-451
Petitioner	:	A.C. No. 15-02132-122679
v.	:	
	:	Docket No. KENT 2008-73
	:	A.C. No. 15-02132-127206
	:	
WEBSTER COUNTY COAL, LLC,	:	Dotiki Mine
Respondent	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, and Gary McCollum, Esq., Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon 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,” charging Webster County Coal, LLC, (Webster County) with violations of mandatory standards and proposing civil penalties of \$21,403.00 for the violations. The general issue before me is whether Webster County violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings, the parties advised that all but two of the charging documents at issue had been settled and a motion confirming that settlement was filed post-hearing. Considering the representations and documentation submitted therewith, I am able to conclude that the proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act. Approval of that settlement will be incorporated in this decision. The two citations remaining at issue are addressed below.

Citation No. 6693541, issued May 30, 2007, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.604(b), and charges as follows:

The Trailing Cable on Joy Shuttle Car co. no. B 4000ET-16403 located on unit #1 has an

opening in a permanent splice exposing the inner insulated conductor. This is a 300VDC cable and the floor in this area is damp. Trailing cables are sometimes handled by the miners to allow other mobile equipment to pass under the cable.

The cited standard provides that “[w]hen permanent splices in trailing cables are made, they shall be... (b)effectively insulated and sealed so as to exclude moisture...”.

At hearings, Webster County admitted the violation as charged and challenged only the “significant and substantial”, gravity and negligence findings and the amount of the Secretary’s proposed civil penalty.

Edward Nichols, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) has an associate degree in mining technology from Madisonville Community College and extensive industry experience. He has been an MSHA inspector for eight years. According to Inspector Nichols, the subject citation was issued when he observed the cited trailing cable with what he considered to be a bad splice. The subject trailing cable supplied power from the power station to various mobile equipment. The cable consisted of an outer jacket of hard rubber and two inner cables with dielectric insulation. The cable carried 300 volts direct current and power was engaged at the time of the violation.

More particularly, Nichols set forth the basis for his “significant and substantial” findings in the following colloquy at hearings:

Q And do you believe this condition contributed to a safety hazard?

A Yes, sir.

Q And what was that hazard?

A The hazard is that, as I stated, the mining floor is wet down to allay the dust and application of this water, cable laying on the ground, that the cable is also being watered -- water has been applied to it, and the use of the mining -- piece of mining equipment back and forth will allow the cable to pick up moisture.

Q And how would that pose a hazard to a person?

A Sometimes these cables are handled by miners to allow other mobile equipment to pass under them. The miners physically pick the cables up and hold them up out so that the mobile equipment can pass under them or they take a spad type nail and hang it up that way by wire.

Q In order to achieve the same objective?

A Yes, in order to achieve the same purpose.

Q Now, how did you conclude that it was reasonably likely that this hazard would contribute to an injury?

A Because of the moisture there at the ground and the continued use of this cable will just further deteriorate the splice. The inner insulation is a dielectric strength type insulation. It has no mechanical value as far as hardness to insulate.

Q So what's the purpose of that inner insulation?

A The purpose of the inner insulation is to separate the two conductors from coming in contact with each other. It's just a dielectric strength insulation only.

Q And what protects the cable from the mining environment?

A The outer jacket of the cable, the hard -- hardened rubber protects it.

Q Why did you conclude that miners sometimes handle these cables?

A Because I have seen them handle the cables.

Q At this particular mine?

A Yes.

Q Now, if you knew that a shuttle car operator would routinely do a preoperational check before using a car on a particular shift, would that in any way change your opinion about the likelihood of an injury here?

A No.

Q Why is that?

A Starting time for day shift is 7:00 o'clock, given the time that it would take to transport the miners from -- from the opening of the mines, say, approximately 8:00 o'clock in the morning. This violation was cited at 11:25. If the operator had done his preop check at 8:00 o'clock, then approximately three -- three hours and 25 minutes had passed since he had done his first preop check.

Q And I think -- when you observed miners handle these cables, were they wearing gloves?

A Most of the time -- it's a company policy that the miners there at that mines wear gloves. I had at different occasions cautioned miners when they go to reach -- it's just kind of a reactive response. Sometimes they'll reach to grab ahold of a cable to move it out of

somebody's way or to help somebody move a piece of equipment, but I have at times cautioned them before they grabbed ahold of the cable bare handed.

Q And do you recall or do you have any knowledge of what type of gloves these were?

A These are common type leather -- leather gloves. The company I think also issues a rubber type glove which is a cloth type glove with a rubber application put over top of the glove. It's kind of a spray on type or a dipping process to apply this rubber coating over the glove to make it somewhat insulated.

THE COURT: Who was responsible at that mine for the preoperational check of the cable?

THE WITNESS: The equipment operator, sir, would be.

THE COURT: Miner operator?

THE WITNESS: Yes, sir.

THE COURT: Do you know who that was that day?

THE WITNESS: At that time, no, sir. I didn't note the person's name.

THE COURT: I see. All right.

Q (By Mr. Barber.) Does the fact that the the company has a policy for miners wearing gloves and that you've actually observed miners handling cables with gloves on, does that in any way change your opinion about the likelihood of an injury here?

A No, sir. Perspiration and gloves handling other pieces of equipment and so forth, moisture may gather on the gloves and make it conductive.

Q How did you conclude that the injury here would result in lost workdays or restricted duty?

A From receiving an electrical shock, burns or the shock itself to the body.

Q And how would that occur? What would have to happen for that to occur?

A Sometimes permanent splices and even the bare trailing cable itself under excessive wear creates an air gap situation where the metals actually separates from one another. This air gap then is where the cable -- the conductor in the cable will actually arc and try to keep its path of electricity going, but in this arcing situation, the cable actually burns and burns the rubber, and it's an explosive type.

Q And the condition –

THE COURT: You mean even with the insulation in place? Are you saying –

THE WITNESS: Yes, sir.

THE COURT: -- even if the inner insulation is in place, you know of situations where there is arcing?

THE WITNESS: I've seen permanent splices – one time at another mines when I was giving a safety talk, one of the car cables was laying up -- pulled up against the rib, and during that safety talk, some of the miners and I were discussing some of the safety issues, that the permanent splice itself just arced and it exploded.

On cross examination Nichols acknowledged however that without “pinholes” or other exposure to the inner wires, there was no hazard or risk of injury and for someone to be injured they would actually need to be in contact with a defective splice. Nichols did not perform any test to determine whether there were any pinhole leaks. He also acknowledged that the cable was not wet and that this area of the mine was dry.

MSHA electrical supervisor, Michael Moore, has a bachelors degree from Western Kentucky University in electrical engineering technology. He also has significant industry experience as an electrician and electrical inspector for MSHA. Moore’s testimony in support of his “significant and substantial” findings with respect to this citation was intermixed with his testimony regarding Citation No. 6693992 and is set forth therein.

Mr. Donnie Gatten is training director for Alliance Coal, Respondent’s parent company. He has a bachelors degree in electronic engineering technology, several electrical certifications and industry experience. Gatten testified that permanent splices on trailing cables have been damaged in the past. If a piece of equipment struck a cable, it could result in a cable explosion due to a phase to phase contact as described by Mr. Moore. The Dotiki mine’s policy with respect to handling trailing cables requires miners to wear gloves and to avoid trying to pick up any energized cable in a spliced area. Dotiki policy also requires miners to wear boots with protective insulation of up to 14,000volts.

Gatten opined that it was not likely that a person would be injured by the described conditions because there was no break in the insulation, and the mine has no practices that would create a pinhole in conductors. Mr. Gatten opined that the inner insulation would not wear from contact with the mine floor because the outer jacket was still on the cable. Gatten agreed that under continued mining operations the shuttle car cable and the damaged splice would continue to suffer damage.

Gary Thweatt is Respondent’s director of training and safety. He has been a miner since 1993, as a section foreman, an assistant safety director, and as the safety director. Thweatt testified

that the shuttle car cable at issue would not be handled very often because a mobile equipment operator would ordinarily have to wait less than a minute for the shuttle car to return from the face to the feeder, and its cable to reel in, allowing the other equipment to pass.

It is not disputed that Respondent performs weekly examinations of the equipment, including trailing cables, and that equipment operators perform preoperational checks on equipment, including trailing cables, on every shift. Thweatt has seen miners pick up cables without gloves, although he could not recall observing that practice at the Dotiki mine. The continuous miner operator's feet or legs could contact the cable inadvertently during the mining process. There could be inadvertent contact with either the miner cable even if someone is not intentionally picking up the cable. Miners intentionally step on cables to cross over them.

Citation No. 6693992, issued August 5, 2007, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.604(b), and charges as follows:

The trailing cable on Joy continuous miner co, no. 6345 located on MMU-029-0 #4 unit has an opening in the outer jacket exposing the inner insulated conductor. The permanent splice 4 inches from this exposed insulated conductor was rolled back from the splice, continuous use of this cable will cause ware[sic]. Miners handle this cable to hang the cable. The floor in this are[sic] is damp.

As previously noted, the cited standard provides that "[w]hen permanent splices in trailing cables are made, they shall be "...(b) effectively insulated and sealed so as to exclude moisture...".

At hearings, Webster County admitted the violation as charged and challenged only the "significant and substantial", gravity and negligence findings and the amount of the Secretary's proposed civil penalty.

Inspector Nichols described his "significant and substantial" findings in the following colloquy at hearings:

Q (By Mr. Barber) Can you tell us - - what's the difference between a continuous miner cable and the shuttle car cable that we just finished discussing.

A Physically the miner cable is a much larger cable. It is a three phase cable that conducts in this case 995 volts of AC in comparison to the DC cable which is a much smaller two conductor cable that conducts approximately 300 volts DC.

Q Any other differences in the way this cable is constructed versus the shuttle car cable?

A There is more -- there's more outer insulation I think on this particular cable than there is on a trailing cable. There's a -- each one in the Dotiki mine, they use shielding over each one of the phases.

Q And what's shielding?

A Shielding is a grounding. If the ground opens, the shielding is supposed to detect this electricity and knock the breaker at the substation.

Q What's the shielding made out of?

A It's a metal construction, a web like constructed metal material that is tube like that fits on the outer side of the dielectric insulation of the phase.

Q Does it provide any mechanical protection for the cable such as protection from abrasions and –

A No.

Q How long was this cable?

A This cable is approximately 750 foot in length.

Q And was it energized and in use when you observed it?

A Yes, it was.

Q And do you recall where it was located? Was it suspended or on the ground or –

A It was laying on the ground.

Q And were there people in the area of this cable?

A The miner helper was in this area. Other people who passed by would be -- would be in the area.

Q And who might those be? Would those be the same people that –

A Yes.

THE COURT: Well, maybe you ought to finish your question.

Q Those would be the same people that you spoke of in discussing the previous citation?

A Yes.

Q Does this particular cable -- would it be your testimony that this cable is exposed to the same conditions of the mine environment during use as the shuttle car cable?

A Yes. This cable is mostly on the ground. Sometimes it is hung over the entries to allow other mobile equipment to pass under it but miner cables are mainly up close. The miner itself -- if you need more cable to reach farther -- another place or the next place and so forth, they carry loops of trailing cable and they pull this cable with the miner itself so it is subjected to -- due to its weight and the weight of the other parts of the cable laying on it, it is subjected to kind of a sandpapering like effect.

(Tr. 45-47)

* * * * *

Q (By Mr. Barber.) Did this particular condition create a hazard?

A Yes, sir.

Q And what was the hazard?

A The hazard was the exposed inner -- the opening in the outer jacket exposing the inner insulated conductor.

Q How could that injure a person?

A Through the contact with this area and the continued use of this cable which in my opinion would continue throughout the day that it would be further damaged.

(Tr. 49)

* * * * *

Q (Mr. Barber.) What's the basis or how did you conclude that it was reasonably likely that this condition would result in an injury?

A Because of the exposed inner insulation -- insulated conductors.

Q Well --

THE COURT: Go ahead. You can continue. Did you have further response to that?

A With continued use -- the dielectric portion of a cable is a very soft material, and through continued use of it, it will deteriorate the insulation of the conductors.

Q When you say dielectric material, are you referring to the inner insulation?

A Yes.

Q And I believe you testified that miners sometimes handle this cable, and what's the basis for that testimony?

A Miners handle the cable to hang the cable up. The cable will be hung from the transformer where it receives its power over the crosscuts to allow scoops, supply jeeps, and other normal pieces of mining equipment that are used to travel. Sometimes it's hung even at the face for a pinner if the pinner/roofer bolters don't have crossover pads to cross over the cable. They hang it temporarily.

THE COURT: Same reasons as you stated for the prior violation?

THE WITNESS: Yes, sir.

Q (By Mr. Barber.) And I assume then for your conclusion that the injury would result in lost workdays or restricted duty, the basis would be the same as with the prior violation?

A Yes, sir.

(Tr.50-51)

Electrical Inspector Moore's findings in support of his "significant and substantial" findings for this citation were discussed in the following colloquy at hearings:

Q And you heard Mr. Nichols' testimony earlier today with respect to that citation; is that correct?

A Yes, sir.

Q And do you have an opinion about whether the condition described in that citation and by Mr. Nichols here today was reasonably likely to contribute to an injury?

A Yes, sir, I do.

Q And what is that opinion?

A The outer jacket of a trailing cable is designed to-- for abrasion only, and the inner conductors has a dielectric strength rating around each phase conductor. Also that shielding that's around that particular phase is copper. It's soft alloy. And there's about a three to one ratio as far as the insulation. Insulation in comparison like -- I think the insulation -- all cables are designed by IPCEA ratings.

THE COURT: What does IPCEA mean? What does that stand for?

THE WITNESS: IPCEA is Industrial Power Cable Engineering Association, and that has

changed. ICEA is Industrial -- excuse me. Insulated Cable Engineering Association. It gives a design for all cables that are used underground and MSHA accepts that design.

THE COURT: Sets an industry standard?

THE WITNESS: Yes, sir. It's -- and by that standard, I'm saying that the insulation around each phase conductor is, for example, 80,000 in thickness versus the outer jacket which is 250,000ths in thickness, which would be a three to one ratio --approximately a three to one ratio.

THE COURT: Are you talking about the cables here we're talking about today?

THE WITNESS: Yes, sir.

THE COURT: You know the dimensions of these cables?

THE WITNESS: Yes, sir.

THE COURT: Okay. Go ahead.

Q (By Mr. Barber.) And we're talking right now about the continuous miner cable that's described in Government Exhibit 6?

A Yes, sir, that's correct.

Q As part of your answer you just explained that the inner insulation is dielectric strength insulation. What's the purpose of that inner insulation?

A Insulation on each phase conductor is rated for 2,000 volts. Insulation is -- and the voltage that's in the cable is 995 volts. That insulation which is rated for 2,000 volts contains that working current and voltage from the unit transformer to the miner, and the shielding on the outside of each -- each phase conductor is in case you get any type of damage to the phase conductor itself that when it -- when that power exits the insulated conductor and makes contact with the shielding, there will be a phase to ground fault and the ground to phase protected device that the circuit breaker will open. And, again, you have -- and not only is that designed -- or that particular trailing cable has got two grounding conductors inside, and they are contacting the copper shielding around each phase conductor, and then we have this outer jacket which is for abrasion because the cable is flexed and twisted and carried on and bent and looped and dragged.

THE COURT: What was the question? I think I lost track of the question. We seem to be going on here beyond any question. What was the precise question you asked him?

Q (By Mr. Barber.) The precise question was why he agreed that this condition was

reasonably likely to lead to an injury. So why -- given all the substance of that answer, why do all those facts lead you to conclude or to agree with inspector Nichols that injury was reasonably likely here?

A Because the fact that the cable was a poorly designed -- poorly made splice that rolled up the way he described it, if the company had their preop, normally a cable that -- spliced and on a 995 miner cable is designed in such a manner that it would roll back like that in a short period of time of four hours, and that it's obvious that the phase conductors were exposed with that copper coating on the outside of each phase, and that with continuous working -- or continuous dragging of this cable, it will deteriorate that soft copper shielding and also that soft inner insulation around each phase conductor.

THE COURT: Then what would happen in your opinion?

THE WITNESS: Somebody could touch that particular damaged spot and receive electrical shock or it could explode if it was a phase to phase of those. Those phase conductors are -- if they're damaged for a low KBA rating on that transformer --

THE COURT: What kind of rating?

THE WITNESS: Low rating on that --

THE COURT: I thought you said APA or something. What was that? A low rating?

THE WITNESS: KBA.

THE COURT: What does KBA stand for?

THE WITNESS: A thousand volt amps. We've got -- if you've got a transformer --

THE COURT: I don't want to go beyond --

THE WITNESS: I'm trying to explain why that would blow up.

THE COURT: All right. Go ahead.

THE WITNESS: Okay. I've got a transformer that's got 1,000 KBA transformer and it's got a cadence of five percent, then you're going to have 11,000 amps that's going to be generated when you have a phase to phase fault, and this has happened time and time again in the industry. Any time we get 11,000 amps flowing, you're starting to take that soft copper and you're vaporizing it, you're creating copper metal alloys that are flying off of that stuff, you're going to have a cloud of dust, you're going to have an explosion type, like an arc welder, and if anybody is anywhere close to that, they could be damaged, their hands, even if they've got rubber gloves or leather gloves or cotton gloves on, they're going to get

damaged. That damage can burn all the way up their hands and arms which has happened in our district.

Q (By Mr. Barber.) How does this condition that the inspector described in this citation contribute to that hazard? Is it your testimony that it does contribute to that?

A Yes, because it's -- my outer jacket is gone now and it's done rolled up on this poorly made splice and you've got everything exposed now. If that continues to operate like that, the outer -- the protection of that cable is going to be gone, which is the copper outer shielding which is soft copper and that soft insulation which has dielectric strength -- dielectric rating of 2,000 volts.

Q What is that soft insulation made out of? Do you know?

A It's just a rubber compound that's designed by -- it can be bought by the company and different compounds can be ordered for that particular insulation.

THE COURT: So you don't know exactly what this insulation was in this case?

THE WITNESS: I don't know the brand name. If I know the brand name and the number on it, then I can get that -- get the --

THE COURT: But regardless of the nature of the material, your testimony would be the same?

THE WITNESS: Yes, sir. Regardless if it's Tiger or whatever brand, Anaconda or whatever brand they use, they're normally a compound that's rated for 2,000 volts.

Q (By Mr. Barber.) Is there a particular reason why that material is soft?

A Because the -- the reason why the inner -- why the phase insulation is soft because of the -- because of the abrasive outer jacket is designed by the ICEA program that MSHA recognizes.

Q But in order to do its job, the inner insulation, does it have to be a softer material?

A It's designed that way.

Q This particular cable, does it have a feature that would cause it to de-energize if somebody contacted a bare wire or contacted the energized portion of the conductor?

A If that particular area that was in question here on this citation 6693992, if -- let's say, we had a damaged spot in there and had a fault condition there, phase to ground, the breaker would -- or when that has a phase to ground fault on it to that shielding, that shielding

vaporizes, and you go back down there and they put the breaker back up. Now I've got a damaged place in that 995 where the shielding is gone, and a man touches that, he's going to be electrocuted or -- go ahead.

Q What would happen -- if he touches it, would the breaker knock?

A No.

Q Why?

A It will not break. It will not open. Even though it would cause -- a human body for a man is usually 1,000 ohms. That's what we calculate that at, all our electrical measurements that we go by. So if I have a damaged spot in that cable and if I contact it, I will be -- receive 575 volts of voltage through me and into -- because I'm standing on -- or -- which is the same potential that's all the grounding median in that mines. It don't make any difference if that ground --

THE COURT: What would that do to a person?

THE WITNESS: It would kill them.

THE COURT: I see. All right.

Q (By Mr. Barber.) And that would happen before the cable would be de-energized by any sort of safety feature?

A Yes, sir, that's correct.

Q If a person touched the cable in that same manner but they were wearing gloves, if they touched the bare copper on this cable, would the gloves protect them from being injured?

A No, sir, they will not, not that kind of voltage -- not that 995, no.

Q Are there any -- are you aware of any type of gloves that would --

A We wear gloves that is rated for 750 volts. When we're working with circuit breakers

THE COURT: The question was, are you aware of any gloves that would protect you from that voltage?

THE WITNESS: Yes, sir.

THE COURT: Okay. Next question.

Q (By Mr. Barber.) What are those gloves?

A They're -- they're dielectric rated gloves with leather coating, leather cover on the outside that I wear.

Q I believe you heard Mr. Nichols testify about the gloves that he has observed miners in the Dotiki mine wear. Is that the same type of glove that you're talking about here, the dielectric strength?

A No, sir, it is not.

Q And what's the difference between the gloves?

A My gloves are rated at 750 volts. The gloves they wear are not rated for any type of electrical -- dielectric strength -- dielectric rating.

THE COURT: I didn't hear that testimony from the other witness. Did he testify that they didn't have those kind of gloves at the mine?

MR. BARBER: I believe he testified --

THE COURT: Well, you're satisfied that he did testify to that? If it's not in the record, then it's not in the record. All right.

Q (By Mr. Barber.) Have you been to the Dotiki mine?

A Several times.

Q And have you observed miners wearing gloves when they handle cables?

A Yes, sir.

Q And do you know what kind of gloves those are?

A They're cotton gloves or they're rubber gloves or they're leather gloves.

Q Are they the -- is that the same type of glove that would protect them from injury if they contacted this cable?

A No, sir.

Q This particular citation notes that the floor in this area is damp. Does that have any relevance to your opinion that it would be reasonably likely that this condition would result in an injury?

A It has -- ask me that again, please.

Q If the floor in this area was damp, does that have any relevance -- is that relevant to your opinion that it was reasonably likely that this condition would result in an injury?

A Reasonably likely whether it's wet or damp.

THE COURT: Restate the question. Listen carefully to the question.

THE WITNESS: Yes. Sorry, sir.

Q (By Mr. Barber.) If the floor in this area was damp, how is that relevant to your -- is it relevant and how to your opinion that it was reasonably likely that this condition would result in an injury?

A It wouldn't change my opinion. It still would be reasonably likely.

Q If the floor was dry --

A Or wet.

Q -- would your opinion be the same?

A Yes, sir.

Q Why is that?

A Because if it's wet or dry, the only value of that mine floor that we stand on is always less than three -- less than three ohms. Therefore, the water in the mines is contaminated which gives it as the same potential as the dry ground is due to the fact that I've took numerous earth meager type readings in our area and I know that that -- at Dotiki, they drill the bore hole down below the fire clay and that's what the men stand on which is the mine floor.

THE COURT: All right. Did you want a full explanation or just the answer?

Q (By Mr. Barber.) If I understand you correctly -- in other words, are you saying that the ground --

THE COURT: It's difficult for lay people to follow you sometimes.

THE WITNESS: But we need to know --

THE COURT: That's why we want to know basically what your conclusion is, and on cross examination, if she wants a further explanation, she can ask it.

Q (By Mr. Barber.) Are you saying that the dry ground is as good a conductor as damp ground?

A Yes, sir, absolutely, due to my tests.

(Tr. 67-78)

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) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

It is undisputed, of course, that, with respect to both citations, the Secretary has established a violation of a mandatory safety standard. With respect to both citations, I find that damage to the outer jacket and to the permanent splice on the cited cables contributed to the discrete safety hazard of contact with exposed energized conductors inside the cables and phase-to-phase contact between the conductors. There also can be little dispute that damage to, and contact with, the conductors inside the cables would result in reasonably serious injury such as electrical shock and burns. The Secretary has therefore established the first, second, and fourth elements of the *Mathies* test.

With respect to the third element of the *Mathies* inquiry, I find that for both citations the credible evidence establishes a reasonable likelihood that the hazard contributed to would result in an injury. There is no dispute that when Inspector Nichols observed the violative conditions described in these citations that the cables were in use, energized, and subject to continued wear. I find therefore that during continued normal mining operations the cables would likely sustain

further wear and that the splices would likely deteriorate.

The credible record evidence also shows that miners will pick up cables for various reasons. Inspector Nichols credibly testified that he has observed miners handling cables at this mine, and on different occasions he has cautioned miners as they reached for cables bare-handed. The credible evidence also shows that the miner cable is subjected to an abrasive environment in the mine

I also note that although the inspector observed no pinholes or bare wire when he wrote the citations that does not bar a finding that the violations were of a significant and substantial nature. See *Harlan Cumberland Coal Company*, 20 FMSHRC at 1286 (Dec. 1998) and *U. S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984). In reaching my conclusions herein I have also not disregarded Respondent's claims that protective gloves and boots worn by its miners would prevent electrical shock, however, such equipment would not in any event protect from explosions from phase to phase contact. I also note that the cases cited by Respondent, i.e. *Oak Grove Resources, LLC*, 29 FMSHRC 1089 (Nov. 2007) (ALJ), and *Lone Mountain Processing, Inc.*, 29 FMSHRC 957 (June 2007) (ALJ), are factually distinguishable. Accordingly, those cases provide no support to its argument. For the reasons noted above I also find that the violations were of significant gravity.

I further find that the violations were the result of the operator's moderate negligence. It is apparent from the record evidence that the cited splices were obvious. Moreover, the record shows that this operator had a number of violations of the same standard at issue herein i.e. 30 C.F.R. § 75.604(b), during relevant times preceding these violations.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. It has been stipulated that the Dotiki Mine is a large mine and Alliance Resources Partners LP is a large controlling entity. It has been further stipulated that the Secretary's proposed penalties would not affect Respondent's ability to remain in business. Respondent has a significant history of violations (Exh G-2). The gravity and negligence findings have previously been discussed.

ORDER

Citation Numbers 6693541 and 6693992 are affirmed with "significant and substantial" findings and Webster County Coal, LLC is directed to pay civil penalties totaling \$17,531.00 (which includes penalties of \$1,900.00 and \$2,000.00, for the violations charged in Citation Numbers 6693541 and 6693992, respectively).

Gary Melick
Administrative Law Judge
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