

COMMONWEALTH OF KENTUCKY
MINE SAFETY REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. **12-MSRC-156**

COMMONWEALTH OF KENTUCKY,
OFFICE OF MINE SAFETY AND LICENSING

COMPLAINANT

v.

FINAL ORDER

ROBERT V. BRANDENBURG, CLARK BURNETT,
EARNEST D. CALDWELL, JEFF I. CRAIG,
CHRISTOPHER D. NAPIER and
GEORGE A. SAYLOR

RESPONDENTS

Introduction

This matter comes before the Mine Safety Review Commission (“Commission”) upon a Complaint which the Commission heard on March 14, 2013. Jeff Craig and George Saylor filed Answers; appeared and participated in the hearing. Clark Burnett filed a letter deemed an Answer but did not participate in the hearing despite notice. All other Respondents failed to appear, respond or participate. Having considered the evidence presented, as well as the arguments of counsel, and being otherwise sufficiently advised, it is hereby ordered and adjudged as follows:

Procedural History

On October 12, 2012, the Commonwealth of Kentucky, Office of Mine Safety and Licensing (“OMSL”) filed a Complaint, 12-MSRC-156, with the

Kentucky Mine Safety Review Commission (“MSRC”), against the Respondents Robert V. Brandenburg, Clark Burnett, Earnest D. Caldwell, Jeff I. Craig, Christopher D. Napier and George A. Saylor containing numerous allegations as more specifically detailed in the non-compliances of record herein and below. The allegations surround the accident on May 22, 2010 at power station #2 in which an arc flash caused electrical burns to three miners at Left Fork Mining Company, Inc., P. O. Box 311, Brookeville, Kentucky at Mine No.1 located in Clay County near the towns of Arjay and Gardner on KY Route 66.

The Complaint identified the parties and established the jurisdiction of the Commission relevant thereto pursuant to KRS 351 and 352 which was not contested and thus not at issue herein. The Complaint alleged that on May 22, 2010, Michael Bradley, Matthew Evans and Christopher Napier were injured in an electrical accident at the Left Fork Mining Company, Inc. Mine No. 1 during the second shift. Improper installation of the trailing cable into the circuit breaker receptacle of a four hundred and eighty (480) volt electrical circuit breaker resulted in an arc flash when the circuit breaker was energized. The circumstances and conditions of the accident existed during the first and second shift.

The Complaint made the following allegations as noted on the attached NonCompliances (“NNC”) as to each Respondent:

- a. NNC 1074-006 for a violation of KRS 351.109(1) for performing electrical work without certification or direct supervision by a certified electrician. Person deemed responsible: Christopher Napier.

- b. NNC 1074-007 for a violation of KRS 351.109(1) for performing electrical work without certification or direct supervision by a certified electrician. Person deemed responsible: Robert Brandenburg.
- c. NNC 1074-008 for a violation of KRS 352.220(5) for performing electrical work without certification or direct supervision by a certified electrician. Person deemed responsible: Robert Brandenburg.
- d. NNC 1074-009 for a violation of KRS 352.220(5) for performing electrical work without certification or direct supervision by a certified electrician. Person deemed responsible: Christopher Napier.
- e. NNC 1074-010 for a violation of KRS 352.220(1)(f) for failing to make electrical splices in a workmanlike manner. Person deemed responsible: Robert Brandenburg.
- f. NNC 1074-011 for a violation of KRS 352.220(l)(s) for failing to failing to deenergize power circuits and electrical equipment prior to performing electrical work. Person deemed responsible: Robert Brandenburg.
- g. NNC 1074-012 for a violation of KRS 352.220(1)(s) for failing to failing to deenergize power circuits and electrical equipment prior to performing electrical work. Person deemed responsible: Christopher Napier.
- h. NNC 1074-013 for a violation of KRS 352.220(1)(k) for failing to failing to failure to provide suitable fire suppression system for the step-up transformer utilized while moving a continuous mining machine underground. Person deemed responsible: Robert Brandenburg.
- i. NNC 1074-014 for a violation of KRS 352.220(l)(k) for failing to failing to failure to provide suitable fire suppression system for the step-up transformer utilized while moving a continuous mining machine underground. Person deemed responsible: Earnest Caldwell.
- j. NNC 1074-015 for a violation of KRS 352.220(l)(k) for failing to failing to failure to provide suitable fire suppression system for the step-up transformer utilized while moving a continuous mining machine underground. Person deemed responsible: Jeff Craig.
- k. NNC 1074-016 for a violation of KRS 352.210 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Clark Burnett.

l. NNC 1074-017 for a violation of KRS 352.210 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Robert Brandenburg.

m. NNC 1074-018 for a violation of KRS 352.210 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Christopher Napier.

n. NNC 1075-016 for a violation of KRS 352.410(3) for failing as mine superintendent to ensure that all employees under him comply with the applicable laws related to underground mining.
Person deemed responsible: George Saylor.

o. NNC 1075-017 for a violation of KRS 352.180(1) for failing to notify OMSL of an accident resulting in serious physical injury within fifteen (15) minutes of having actual knowledge of the accident.
Person deemed responsible: Earnest Caldwell.

p. NNC 1075-018 for a violation of KRS 352.350(3) for failing to ensure compliance with the applicable laws related to underground mining, i.e. KRS Chapters 351 and 352. Persons deemed responsible: George Saylor, Jeff Craig, and Robert Brandenburg.

q. NNC 1075-019 for a violation of KRS 352.220(1)(s) for failing to have electrical work performed by a certified electrician which resulted in a failure to de-energize power circuits and electrical equipment prior to performing electrical work. Person deemed responsible: Earnest Caldwell.

r. NNC 1075-020 for a violation of KRS 352.2 10 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Jeff Craig.

s. NNC 1075-02 1 for a violation of KRS 352.2 10 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Jeff Craig.

t. NNC 1075-022 for a violation of KRS 352.2 10 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the

underground mine. Person deemed responsible: Earnest Caldwell.

u. NNC 1075-023 for a violation of KRS 352.210 for allowing electrical work to be done by non-certified workers and without proper equipment thereby endangering the life or health of persons employed in the underground mine. Person deemed responsible: Earnest Caldwell.

v. NNC 1075-024 for a violation of KRS 352.180(1) for altering the scene of a mine accident thereby interfering with the investigation of the accident by the state. Person deemed responsible: Earnest Caldwell.

As its remedy for OMSL requested the following disciplinary measures be taken in regard to the certificates:

a. Find that Respondent, Robert Brandenburg, violated the Commonwealth's mine safety laws, specifically KRS 351.109(1), KRS 352.210, KRS 352.220(1)(t), KRS 352.220(1)(k), KRS 352.220(1)(s), KRS 353.220(5), and KRS 352.250(3). Order that Brandenburg's Underground Mine Foreman Certification be revoked for one (1) year and that he be ineligible to obtain Electrical Worker Certification for one (1) year. Find that the violation of the Commonwealth's mine safety laws by Brandenburg constitutes a "first offense" as defined at 805 KAR 8:010, § 1(13).

b. Find that Respondent, Clark Burnett, violated the Commonwealth's mine safety laws, specifically KRS 353.2 10. Order that Burnett's Electrical Worker Certification be revoked for one (1) year. Find that the violation of the Commonwealth's mine safety laws by Burnett constitutes a "first offense" as defined at 805 KAR 8:010, §1(13).

c. Find that Respondent, Earnest Caldwell, violated the Commonwealth's mine safety laws, specifically KRS 352.180, KRS 352.210, KRS 352.220(1)(k), and KRS 352.220(1)(s). Order that Caldwell's Underground Mine Foreman Certification be revoked for two (2) years. Find that the violation of the Commonwealth's mine safety laws by Caldwell constitutes a "first offense" as defined at 805 KAR 8:010, § 1(13).

d. Find that Respondent, Jeff Craig, violated the Commonwealth's mine safety laws, specifically KRS 352.210, KRS 352.220(1)(k), and KRS 352.250(3). Order that Craig's Underground Mine Foreman Certification be revoked for one (1) year. Find that the violation of the Commonwealth's mine safety laws by Craig constitutes a "first offense" as defined at 805 KAR 8:010, §103).

e. Find that Respondent, Christopher Napier, violated the Commonwealth's mine safety laws, specifically KRS 351.109(1), KRS 352.210, KRS 352.220(l)(s), and KRS 352.220(5). Order that Napier's Underground Miner Certification be subject to three (3) years probation. Find that the violation of the Commonwealth's mine safety laws by Napier constitutes a "first offense" as defined at 805 KAR 8:010, § 1(13).

f. Find that Respondent, George Saylor, violated the Commonwealth's mine safety laws, specifically KRS 352.250(3) and KRS 352.410(3). Order that Saylor's Underground Mine Foreman Certification be revoked for one (1) year. Find that the violation of the Commonwealth's mine safety laws by Saylor constitutes a "first offense" as defined at 805 KAR 8:010, § 1(13).

At the call of the hearing on March 14, 2013, OMSL called two witnesses and presented the exhibits as attached to the Complaint, and additionally two mine maps and photographs in support of the allegations. Respondents Craig and Saylor appeared pro se and called no witnesses. Although Respondent Burnett filed an Answer he did not participate in the hearing, offer testimony or make any other motion. None of the other Respondents appeared, participated or defended in any way.

After considering all of the evidence adduced at the hearing, the Commission submits the following Findings of Fact, Conclusions of Law, and Final Order.

Findings of Fact

Based upon the evidence admitted, and the record taken as a whole, the Commission finds the following facts as established by a preponderance of the evidence:

1. OMSL is the agency charged with administering the Commonwealth's safety laws as set forth in KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto.

2. Respondents were at all times relevant to this action residents of Kentucky, at the address provided in the Complaint and held the certificates indicated in the Complaint issued by the Commonwealth of Kentucky and subject to the jurisdiction of MSRC.
3. Respondent's were at all relevant times employees at the mine in various capacities as alleged in the Complaint.
4. Service of the Order and Complaint upon Respondents is determined to be perfected pursuant to 825 KAR 1:020 Section 5 (3) and KRS 13B.050.
5. Jurisdiction for this action is founded upon KRS 352.390, which provides that the "Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the Commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just cause;" on KRS 351.025(1), which requires the Department of Mines and Minerals (now the Office of Mine Safety and Licensing) to "promulgate administrative regulations...for the imposition and enforcement of sanctions against certified...personnel...whose intentional violation of, or order to violate, mine safety laws places miners in imminent danger of serious injury or death;" and on 805 KAR 8:030 ("Criteria for the imposition and enforcement of sanctions against certified miners").

6. Probable Cause was found on October 11, 2012 and Respondents Craig and Saylor filed an Answer thereafter on October 31, 2012, and Respondent Burnett filed an Answer on December 5, 2012.
7. Respondents Craig and Saylor appeared pro se at the hearing and participated, Respondent Burnett did not.
8. At the hearing, OMSL called its first witness; Ernest Hawkins of the Harlan District Office. He is an Electrical Inspector and advised that an accident wherein 3 men were burned at Left Fork Mining, Brookeville, Ky was called in on May 22, 2012. He stated he went to the mine, interviewed Henry Root, the mine electrician. Hawkins was advised by Root that the Mine Forman, Ernest Caldwell had gone back into the mine. Hawkins went into the mine to the site of the accident and took photos that were introduced as Ex 1-4, showing a mine power cable that had been cut, the power box where the electrical burn had occurred, and 2 photos showing a cable coupler that had been disassembled that was on the power box.
9. OMSL next called Tim L. Fugate. Fugate is the Deputy Chief Accident Investigator for OMSL. He is also a former Mine Inspector for OMSL with 26 years in the mining industry. He was qualified as an expert witness. He was notified of the accident at Left Fork on May 23. He and Wes Gearheart and Ernest Hawkins conducted a site investigation on the same day. He introduced Photo 5- the breaker panel of the power box, photo Ex 6- the step-up transformer that was used to tram the continuous miner ("CM")

Photo EX 7- the cable coupler of #2 belt drive. Photo Ex-8 showing an electrical splice that was improperly completed and photo Ex-9 the Mine Electrical plan showing the electrical layout of the mine, including all power boxes.

10. Fugate stated the following; that CM was taken from the mine shop to the slope on Friday May 20. Robert Brandenburg and the Mine Manager spliced the cables to move the miner into the mine; it is undisputed that Brandenburg is not a certified electrician. On Sunday, May 22 the CM, which was loaded on a flat car was dropped into the mine slope, the step up transformer was in the bed of the CM at the point where the CM was to be unloaded, a bridge was built and Brandenburg pulled the CM power cable into the power center for the #2 belt drive Ex-7. Brandenburg energized the power and told them CM was "ready to go." The CM was trammed to the Air Lock (a double set of ventilation doors) and the step-up transformer was removed from the CM because it would not go through the Air Lock doors. It was placed behind the CM and drug through the Air Lock doors on the ground. The electrical coupler was taken off the CM cable (because it would require a different coupler). Brandenburg told Caldwell (also a Respondent) to go get the correct coupler. According to the testimony, Napier (also a Respondent) stated there were no tools for the coupler. Caldwell stated "Won't need them."

11. Fugate testified that the CM power cable was installed by Napier in the step-up transformer by taking a screwdriver and pushing bare electrical leads into the electrical receptacle. When the power cable was removed and carried to the #2 belt power center, the cable was installed by Napier by the same method, by pushing the bare electrical leads into the receptacle.
12. Fugate testified that Napier saw the #2 power center, where the accident had occurred still had power on it and disconnected it, because the CM power cable was "burned in" the receptacle. He also stated Root had told him Caldwell had admitted to Root that he had cut the electrical power leads and had started putting the plug on the miner cable altering the accident scene.
13. Respondent Saylor cross examined Fugate about the citation for cutting the lead and attempting to install a new plug intermingled with statements of fact and opinion that were actually part of his direct testimony.
14. At this juncture in the testimony it was apparent that the Respondents did not dispute the facts of the case from comments openly made by them in cross examination and in response to the testimony. At the Commission's suggestion it was agreed by the parties to allow the Respondents to present their case now based upon the facts as admitted rather than have them interject their testimony piecemeal. The Commission notes that stipulations agreed to prior to the hearing between the parties could have eliminated the

need for much of the testimony because the Respondents admitted the majority of facts as alleged by OMSL.

15. Jeff I. Craig stated that he was foreman as the miner was dropped down the slope. He also stated he gave the CM power cable to Brandenburg to power up the miner. He admitted that the miner was trammed and the step up power box was placed behind the CM and dragged by it through the Air Lock doors contrary to law. He stated there were 2 fire extinguishers on the miner and fire suppression at the nearby belt head drive. He stated he left miner de-energized at the end of his shift. It is noted that the CM had already been hooked up improperly at this time. He stated he supplied the T1 "cat head" or correct coupler to properly hook up the CM to the power center.
16. Craig then noted that Brandenburg is a certified electrician by both Federal (MSHA) and the state of Tennessee, although no further proof was offered about this. Craig admitted he took CM power cable to Brandenburg at the power center.
17. George A. Saylor testified that he thought Brandenburg was a certified electrician (see Ex-15). He then admitted Brandenburg was not certified. He said he took cat head (electrical coupler) for second shift to use. Saylor said "Napier was aggressive in the use of a screwdriver." The Safety Department at the mine was responsible for all certifications. The Safety Department was under the direction of George Bryant. He admitted and stated that at

the time of the accident, there was no certified electrician at the mine site. He reiterated that Napier was aggressive with the screwdriver. This concluded the testimony of Craig and Saylor and OMSL called its next witness.

18. OMSL next called Wesley Gearheart. Gearheart is an OMSL inspector. He stated that he did not see any fire fighting equipment on the CM when he went to Left Fork mine on May 23. There were no fire extinguishers or rock dust to be seen by him. Respondent Craig stated there was 250 lbs of rock dust at the belt header. (This is a fire suppressant and the absence of rock dust at the belt drive was not cited.) Craig also stated fire extinguishers were on the miner.

19. It was noted from the record that the accident scene was under a closure order so no one should have moved anything. The Commission determined that the radio remote was definitely moved between the photo EX-2 taken by Hawkins and photo EX-6 taken by Fugate.

20. Henry Root, the Mine Electrician was called. He said he went to the accident as an MET and got there about 30-45 minutes after the accident. He stated that it was not safe to not use an electrical plug. He saw the cat head in the elevator at the beginning of the shift. This supports the testimony of Saylor.

21. Root stated he never saw Brandenburg do electrical work and he never asked him to perform electrical work. He also stated he thought that both Respondents believed they were in compliance.
22. Based upon the testimony and evidence the crux of the violations is essentially four fold: that there was no certified electrician, that the CM was trammed through the Air Lock while pulling the step up transformer, there was improper electrical Work and a lack of certifications by Saylor and Craig as to work performed. Other than the contested violation relating to fire extinguishers, all the violations alleged in the complaint occurred and were admitted by the participating Respondents.

Conclusions of Law

KRS 352.390, "Revocation of Certificates", provides as follows:

The Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just cause. The same procedure provided in subsections (10) and (11) of KRS 351.102 shall apply to the certificate holder.

The criteria for the imposition and enforcement of sanctions against certified miners is contained in 805 KAR 8:030, which provides for the enforcement against certified miners whose intentional violation of mine safety laws places miners in imminent danger of serious injury or death. As defined in KRS 352.010(O):

“Imminent danger” means the existence of any condition or practice which could reasonably be expected to cause death or serious physical harm before the condition or practice can be abated.”

This Commission’s criteria for imposing penalties against certified miners is set forth in 825 KAR 1:030, as follows:

- (1) Cooperation with investigators;
- (2) The severity of the harm done, such as whether the offense resulted in:
 - (a) Death;
 - (b) Serious physical injury; or
 - (c) The placement of an individual in imminent harm;
- (3) Acceptance of responsibility for actions;
- (4) History of violations;
- (5) Adjudicated violations in other states;
- (6) Mitigating circumstances; and
- (7) Aggravating circumstances.

(29 Ky.R. 201; Am. 1272; eff. 11-12-02).

Both Craig and Saylor allowed an uncertified person perform electrical work. Craig illegally moved the CM while dragging the step up transformer with it through the Air Lock doors. Clearly both Respondents were responsible for compliance with applicable law as to these events. The violations for failure to have fire suppression is disputed however since all witnesses are credible on this issue the burden of proof was not met. Since Burnett did not participate in the hearing despite notice and the Commission had no way to judge his credibility, demeanor, or question him about the accident and the witnesses who did participate appeared credible the Commission deems him responsible for the violations cited against him. Whereas no other Respondent

participated, they too are deemed responsible for the violations cited against them.

Based upon the evidence admitted and the record taken as a whole, the Commission finds the foregoing facts are established by a preponderance of the evidence. By reason of their roles in and responsibilities for the violations of Kentucky's mine safety laws as set forth above, Respondents are subject to the imposition of sanctions as provided in KRS 351.025, 352.390 and 805 KAR 8:030 and 805 KAR 8:060 Section 2.

Final Order

The General Assembly has declared in KRS 351.101(1) that the highest priority is the safety of the coal industry's most valuable resource, the miner. In KRS 351.241(6), the Legislature recognized that the American zeal for work and productivity very frequently causes the miner to give second priority to normal safety measures and precautions.

Coal production is important to this state; however, as recognized by the Legislature, highest priority must be given to the safety of the miners. Mine safety can be improved by enforcement of sanctions against certified personnel and operators whose willful violation of mine safety laws place miners in imminent danger of serious injury or death.

In the case now before the Commission, Respondents demonstrated negligence and disregard for safety because there was no certified electrician, that the CM was trammed through the Air Lock while pulling the step-up

transformer, there was improper electrical work and a lack of certifications by Saylor and Craig as to work performed and all these while conducting or otherwise participating in underground coal mining. These violations, taken together, demonstrate a willful violation of mine safety laws that placed miners in danger of serious injury or death.

IT IS THEREFORE ORDERED, that pursuant to KRS 351.194 (5) and (6); 805 KAR 8:030,

1. Craig's Underground Mine Foreman Certification shall be revoked for one hundred and twenty (120) days and reinstated thereafter.
2. Saylor's Underground Mine Foreman Certification shall be revoked for one hundred and eighty (180) days and reinstated thereafter.
3. Burnett's Electrical Worker Certification No. BE-155-90 shall be revoked for thirty (30) days from the date of this Order and reinstated thereafter.
4. The disciplinary measures requested by OMSL as provided herein above as to Respondent's Robert V. Brandenburg, Earnest D. Caldwell, and Christopher D. Napier shall be imposed.
5. This constitutes a "first offense", as that term is defined in 805 KAR 8:010, Section 1(5); as to all Respondents and any future adjudication by the Commission regarding a separate alleged offense shall be deemed a "subsequent offense" as defined in 805 KAR 8:010, Section 1(13).

THIS IS A FINAL AND APPEALABLE ORDER, after considering the evidence presented at the hearing and the pleadings and exhibits of record the Commission renders the forgoing Findings of Fact, Conclusions of Law, and this Final Order. Pursuant to KRS 351.194(8), an appeal of this Final Order shall be filed in the Franklin Circuit Court within thirty (30) days of the entry of this order.

SO ORDERED, this the 9th day of May, 2013.



HON. WILLIAM D. DONAN, CHAIR
MINE SAFETY REVIEW COMMISSION



HON. J. DUCAN PITCHFORD,
MINE SAFETY REVIEW COMMISSION



HON. DAVID BRYAN SLOAN,
MINE SAFETY REVIEW COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINAL ORDER** was mailed by certified mail, and by regular mail, postage prepaid, to the following, this the 10th day of May, 2013:

ROBERT V. BRANDENBURG
717 LANDMARK ROAD,
JACKSBORO, TENNESSEE 37757

CLARK BURNETT

72 HORIZON ESTATES,
PINEVILLE, KENTUCKY 40977

EARNEST D. CALDWELL
P.O. BOX 2093
HYDEN, KENTUCKY 41749

JEFF I. CRAIG
P.O. BOX 60,
PATHFORK, KENTUCKY 40863

CHRISTOPHER D. NAPIER
73 BETTY NAPIER LANE,
BARBOURVILLE, KENTUCKY 40906

GEORGE A. SAYLOR
481 MOLUS HOLLOW,
COLDIRON, KENTUCKY 40819

And by messenger mail to:

HON. C. MICHAEL HAINES
OFFICE OF GENERAL COUNSEL
#2 HUDSON HOLLOW
FRANKFORT KY 40601
502/ 564- 2356
FAX 502/ 564 - 9212

And the original shall be kept on file:

BRYON ALAN THOMPSON, GENERAL COUNSEL
MINE SAFETY REVIEW COMMISSION
132 BRIGHTON PARK BLVD.
FRANKFORT, KENTUCKY 40601


BRYON ALAN THOMPSON