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SOL (MSHA) V. AMERICAN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-218-P A.C. No. 42-00082-03003
v.	
AMERICAN COAL COMPANY, RESPONDENT	Beehive Mine

DECISION

Appearances: Thomas E. Korson, Esq., James Abrams, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Kent Winterholler, Esq., Patrick Garver, Esq., Parsons, Behle and Latimer, for Respondent

Before: Administrative Law Judge-Michels

This matter is before me for decision upon the petition of the Mine Safety and Health Administration for assessment of civil penalty filed against the Respondent, American Coal Company, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (the Act).

A hearing was held in this matter on May 17, 1979, in Price, Utah. Petitioner and Respondent appeared through counsel. The parties have field posthearing briefs and proposed findings and conclusions. (FOOTNOTE 1) Such of the proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

I.

Findings and conclusions in this part are applicable to all the alleged violations.

(a) History of prior violations: The parties stipulated to the receipt in evidence of a printout showing prior violations (P-1). It was agreed that only the violations issued prior to the citations charged in this case would be considered (Tr. 22-23). The beginning date of the printout is July 27, 1976, and the ending date is July 27, 1978. This document shows a significant prior history of violations and I so find.

(b) Appropriateness of the penalty to the size of the operator: It was stipulated that the annual tonnage of the Beehive Mine is 498,042 tons. I find it to be medium to large in size.

(c) Effect on the operator's ability to continue in business: I find that the fines, if any, assessed will not affect the operator's ability to continue.

(d) Good faith: I find, with no evidence to the contrary, that the operator achieved rapid compliance in good faith.

II.

Findings and conclusions as to each of the separate violations charged are set forth below.

(1) Citation No. 245458, July 11, 1978

The inspector, Donald B. Hanna, on July 11, 1978, issued a citation to Respondent reading:

> The main mine pump starter box, located in the No. 24 crosscut, between the intake and the 1st right entries was not properly maintained in that about 1-1/2 opening was present on the side of the 440 volt energized switch box allowing water to enter the box. Also, about 1 inch opening was present in the submersible pump box located about 20 feet inby the No. 24 crosscut on the intake entry.

This condition was charged to be a violation of 30 CFR 75.512. (FOOTNOTE 2) Later, on April 30, 1979, the citation was modified "to

show the correct section No. 75.520." Petitioner filed no motion to amend as to this charge and Respondent's motion in limine was granted so far as it involved the new charge of a violation of 30 CFR 75.520. The case therefor was tried as one charging only a violation of 30 CFR 75.512 (Tr. 20-21).

The evidence as to the alleged condition is not in serious dispute. The inspector testified he found "knockout" holes in two electrical boxes, and that in one such box, water was running down the side and into the disconnect switch (Tr. 32-33; R2, R3). Respondent's witnesses did not disagree with the inspector's description. The abatement consisted of placing folded tape in the hole and applying a clamp (Tr. 77).

The inspector claimed that the openings created a hazard by causing corrosion which could result in arcing, burning and a possibility of electrical shock (Tr. 34). The Respondent has generally denied the assertions that its electrical boxes were unsafe. Its safety director, Dixon Peacock, testified that all electrical parts are examined weekly and any violations would be recorded and, by inference, corrected (Tr. 76).

The regulation involved in this charge is general in nature. It requires in pertinent part that electrical equipment be "properly maintained by a qualified person to assure safe operating conditions." Although the regulation does not specify, the inspector asserts that proper maintenance includes the closing of holes in weather- or water-resistant boxes. The holes in this instance were caused by the removal of the knockouts. Knockouts are indentations in a electrical box which can be removed or knocked out for the purpose of inserting a cable or metal conduit (Tr. 43). If a cable is removed or if a hole once made is not used, an opening will remain in the box.

The question here is whether proper maintenance requires the closing of such openings in electrical boxes. The only evidence on the question is the testimony of the inspector and most of this is focused on the alleged hazard. The inspector asserted, based on his personal experience as an electrician, a weather-resistant box if not maintained will allow components to deteriorate causing arcing, burning and explosions (Tr. 34). He also contended that proper maintenance requires that one maintain an electrical component as good or better than when it was originally manufactured (Tr. 64). Neither Mr. Dixon Peacock, safety director, nor Mr. Stan Jensen, chief electrician for the operator, testified one way or the other whether proper maintenance requires the closing of open knockout holes in electrical boxes. Mr. Dixon appeared to admit the existence of the holes as charged, but asserted in effect that because of their location they did not cause a hazard. He further testified that he was not aware of any formal regulations nor had he received any written direction from MSHA on the proper maintenance of such boxes (Tr. 77). Mr. Jensen testified that the breaker arm on the

transformer would kick out if there was a short in the box (Tr. 85). He also testified that MSHA did not tell him the practice of leaving holes in boxes was either acceptable or unacceptable (Tr. 86-87).

The record contains no testimony or other evidence about the general practice in the trade with respect to closing the openings in electrical boxes. No witness other than the inspector expressed a view on that subject. Because there is no evidence other than the inspector's testimony, I accept his statement that proper maintenance requires the closing of a hole in an electrical box. As indicated above, the evidence on this citation generally concerns whether the condition was a hazard or not. That evidence relates to the gravity of a violation, if one is found, but it has no particular bearing on the fact of the violation.

I find therefore that the failure to close the openings in the electrical boxes was a violation by the operator of 30 CFR 75.512.

Findings on the specific criteria of gravity and negligence follow:

Gravity: The inspector did not look into the boxes. He speculated that arcing, fire and shock hazards were possible, but he did not know about the conditions inside the box. Mr. Peacock, on the other hand, testified that weekly examinations were made and in effect that any potential hazard would be found. Mr. Peacock had opened and examined the box and had determined that contact with wires through the holes would have been very difficult. It appears that the potential hazard in the particular circumstances was relatively remote especially since the transformer would kick out and deenergize the box instantaneously in the case of any short (Tr. 85). In the circumstances, I find that the violation was of moderate seriousness.

Negligence: The inspector testified that he had informed the operator's safety director on prior occasions to close these openings (Tr. 45, 55). He admitted, however, that this was probably a subject raised only generally in talking about boxes and maintenance problems. Mr. Peacock could not remember whether he had received any such warning. There is no clear evidence that electricians would routinely close such holes as a matter of normal maintenance. Under the circumstances, I find a small degree of ordinary negligence.

Assessment: Based on all the evidence, I find that the proper penalty should be $25 for each improperly maintained electrical box or $50 total for this violation.

(2) Citation No. 246521, July 11, 1978)

This citation reads: "Air currents used to ventilate the air compressor installed at 29 crosscut between 1st right and

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return
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entries were not coursed directly into the return." A violation of 30 CFR 75.1103 was charged. Prior to the hearing, on May 1, 1979, Petitioner moved to amend the petition to charge a violation of section 75.1105. This motion was granted by order of the court of May 11, 1979, subject, however, to reconsideration at the hearing upon a proper showing by the Respondent. In the meantime, Respondent filed a motion in limine requesting the Judge to enter an order prohibiting Petitioner from introducing any evidence that seeks to establish a violation of any standard other than that cited in Citation No. 246521, that is, 30 CFR 75.1103 and to specifically prohibit evidence of an alleged violation of 30 CFR 75.1105.

At the hearing, arguments were made on the motion in limine and this motion was denied on the record (Tr. 95-96). Evidence was received on behalf of the Petitioner on the merits of the charge. Respondent presented no evidence at the hearing. The Respondent requested at the hearing that the Judge reconsider the issue of the amendment of the pleading and has filed a posthearing brief addressed to the subject.

In this brief, Respondent argues first that the Interim Rules do not allow the Judge to amend the citation immediately prior to the hearing. Although the rules do not specifically provide for the amendment of citations, it is clear that this authority is inferred in several of the specific powers granted to the Judge.

Secondly, Respondent argues that the amendment should not be allowed because it deprives it of proper notice of the violation charged. Respondent was advised of the intended change in the mandatory standard to be charged by Petitioner's response to a prehearing order filed May 1, 1979, approximately 2 weeks before the hearing. After allowing time for an answer, the motion was granted on May 11, 1979. Respondent thus had considerable advance notice that the hearing would proceed on the basis of a charge of 30 CFR 75.1105 rather than 30 CFR 75.1103.

Respondent has made no argument either at the hearing or in its posthearing brief that an alleged lack of notice deprived it of the opportunity to properly prepare for the hearing. There is no suggestion that it was unable to obtain witnesses or other evidence to defend itself against the charge of 30 CFR 75.1105. The original citation, apparently as an inadvertent error, listed 75.1103, whereas it is clear that the condition as narrated in the citation has nothing to do with that particular regulation. It is equally evident that the proper citation based on the narrated condition is 75.1105.

The case law does not support Respondent's contention that it failed to receive proper notice in the circumstances of this case. In one of its early decisions, the Board of Mine Operations Appeals held that it found no violation of due process where conditions or

practices described in the order of withdrawal do not specify a particular section of the act or mandatory standard violated. Eastern Associated Coal Corporation, 1 IBMA 233, 235 (1972). See also, Old Ben Coal Company 4 IBMA, 198, 206-210 (1975). In National Realty and Construction Co. Inc. v. OSHRC, 489 F.2d 1257, 1264 (D.C. Cir. 1973), the court held "So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue. This follows from the familiar rule that administrative pleadings are very liberally construed and very easily amended." (Footnotes omitted.) In L. G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971), the court held "[t]he complaint is adequate if the one proceeded against be reasonably appraised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." In that case, the court held there was no claim that the petitioners were misled by the complaint nor evidence that they could have been so misled.

In summary, by apparent inadvertence, the Respondent was not immediately advised when receiving the citation of the correct number of the mandatory standard it was charged with violating, although the condition alleged is fully described in the narrative portion of the citation. The correct number was supplied several weeks before the trial and in time sufficient for the Respondent to prepare its defense. No representations have been made that such length of time was inadequate or that the Respondent was ever misled or deceived as to the exact nature or the charge. The charge, it is noted, was sufficiently clear to permit an abatement of the condition. Nor has Respondent made any showing of prejudice.

In the circumstances upon reconsideration, I affirm my decision to permit amendment of the citation.

The evidence presented on this citation, as previously noted, consists entirely of the testimony of the inspector, Donald B. Hanna. He testified that there was a violation because the air current in the mine intake air courses is directed to the working sections inside the mine, that it was passing over the energized compressor and not into the return and finally that this intake air is the main escapeway for the mine (Tr. 97). No evidence was submitted by the Respondent. Since this condition is prohibited by the regulation cited, it is found that Respondent was in violation of 30 CFR 75.1105.

The violation was serious because in case of a fire, the smoke gases, carbon monoxide, carbon dioxide and so on, passing over the energized compressor station could pass down the main escapeway into the intake air course and affect the workmen in the mine (Tr. 97). This was ordinary negligence because it should have been known to the operator that only one opening had been provided above this stopping where the compressor was permanently installed (Tr. 97).

Considering all the statutory criteria, I hereby assess the operator a penalty of $150 for this violation.

(3) Citation No. 246523, July 12, 1978

In this citation, the inspector charged a violation of mandatory standard 30 CFR 75.326(a) for the following condition: "The air currents in the operating belt entry, 9th east working section, were used to ventilate the active working places."

The Beehive Mine having been opened in 1950, the portion of 30 CFR 75.326 relevant to the condition is as follows:

> Whenever an authorized representative of the Secretary finds, in the case of any kind of coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than the belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places * * * .

The Respondent argues (1) that the citation issued is fatally incomplete and therefore must be vacated, (2) that the standard allegedly violated is not applicable to the Beehive Mine, and (3) assuming, arguendo, the applicability of 30 CFR 75.326, no violation has been proven. The first argument is rejected.

Respondent's second argument specifically is that a finding by the Secretary must be made relative to the coursing of the air and the lack of a need for air off the belt haulage entry and presented in writing to the operator before a citation may issue under the the second sentence in 75.326. Other administrative law judges have held to the affect that a finding by an inspector as to the adequacy of entries is a prerequisite for the issuance of a citation for an alleged violation. Knisley Coal Company, Docket Nos. PITT 76-66-P, etc. (October 22, 1974), by Judge Moore and Rushton Mining Company, Docket Nos. PITT 73-271-P, etc. (January 31, 1975), by Judge Cook. It is unnecessary to decide this issue in this case because of my finding below that no showing has been made sufficient to establish the existence of the alleged condition.

As noted above, Respondent argues that, assuming, arguendo, the applicability of 30 CFR 75.326, no violation has been proven. It contends first that there has been no showing of the use of air off the belt haulageway and that even if there was some movement of air off the belt it would exit through doors prior to reaching the working face.

MSHA's evidence on this point consists solely of the testimony of the inspector and his written statement which is identified as P-4. This evidence is insufficient in my view to establish that air was moving off the belt haulageway, at least in any quantity which would be deemed significant. The inspector could not get a valid reading of the movement of the air on his anemometer (Tr. 99-100). While he made a smoke tube test after the check curtain was installed, he conceded that there was no way that one could get an accurate measurement of how much air was being allowed into the section (Tr. 101). When the inspector was asked if he could feel the air moving at any time while investigating the condition he answered:

> Just by sense. The dust in the air and by, it was so slight it would be hard to say by your actual feeling. You would probably imagine it because of the way the dust was traveling. It is possible if we detect the movement of the air all the time if there is high enough velocity you can certainly detect it (Tr. 101).

In my view, this is insufficient evidence to prove that the belt haulage entry was being used to ventilate. Even if the showing were sufficient to establish a slight movement of air, there is no further proof that it in fact reached the working face. Other evidence suggests that any small amount of air from the belt haulage entry, and it appears there will be always some, would be sucked into the return before reaching the working face (Tr. 116-117, 122, 128). Furthermore, the evidence establishes that the working section was adequately ventilated with 34,000 cubic feet per minute.

This case is similar to that decided by Administrative Law Judge Sweeney in D. R. Campbell & Son, Inc., BARB 72-156-P (November 27, 1973), in which he also held that the evidence was not enough to to prove a "use" of belt entry air within the context of section 75.326.

Accordingly, Citation No. 246523 is vacated and the petition dismissed as to this charge for failure of proof.

(4) Citation No. 246524, July 12, 1978

In this citation, the inspector charged a violation of mandatory standard 30 CFR 75.1704 and he described the condition or practice as follows: "Only one escapeway, (return air course) was properly marked from the 9th east working section out to the main drift, a distance of about 1,000 feet."

Standard 75.1704 provides for appropriate escapeways and that these "shall be maintained in safe condition and properly marked."

Respondent argues as to this citation that insufficient notice of the violation has been given to the company as to the degree and character of the marking required and by the lack of specificity in the citation. Specifically, it contends that the standard is void for vagueness and that the notice and the citation are fatally incomplete. Respondent also takes the position that the evidence shows the intake escapeway in the 9th East section was properly marked.

I reject the contention that insufficient notice has been given to the operator. Respondent's argument on vagueness is that there are no standards as to what constitutes proper marking and that because of the allegedly vague nature of the requirement, MSHA should have promulgated regulations or other written directions. I do not believe that the regulation is of such a nature that it would necessarily require additional guidelines. The escapeways clearly have to be marked. The only issue that might arise is whether a particular marking is proper. In some instances that may present a difficult question but, in this instance, the inspector testified that there were no markings whatsoever.

Respondent's second argument as to sufficiency of notice is that the citation was fatally incomplete because it allegedly does not describe at all the condition in question or even the escapeway in question. It is true that the citation on its face does not exactly describe the condition or the place but, in light of the abatement and also the testimony received at the hearing, it is apparent that the Respondent knew exactly the condition or practice with which it was charged.

On the issue of whether the intake escapeway in the 9th East section was in fact marked, there is contradictory evidence. The inspector accepted, for the purposes of abatement, the placement of reflector tape along the escapeway and so at least for the purposes of this proceeding such a marking will be considered a proper making.

The evidence received on the question of the presence of markings consists mainly of the testimony of the inspector, Mr. Hanna, and Respondent's witnesses, Dixon Peacock, safety director for American Coal and Stan Jensen, maintenance superintendent for the company. The inspector testified that the intake escapeway in the 9th East section was not properly marked because there was no indication that it was an escapeway and it was not marked as an escapeway (Tr. 136-137). Mr. Peacock testified that there is a sign at the junction of the 9th East section which is a reflective and states, "intake escapeway, this way out." He also claimed that the escapeway was marked because, inby to the section, every permanent stopping is identified by large numbers (Tr. 149). Mr. Peacock finally asserted that there was reflective tape and an identifying tag starting at the junction and proceeding inby to the section (Tr. 150). These were located, it was claimed, at stations where rock dust samples were taken (Tr. 158).

The inspector, in rebuttal, claimed that he had not taken rock dust samples in the 9th East section, but rather, had taken them in the 8th West section (Tr. 172). He testified that he observed no reflector tape of any kind on the 9th East section (Tr. 173). He also asserted that he was not aware of an escapeway sign at the junction and that he saw it for the first time the next day after the citation when Mr. Peacock pointed it out to him. He testified that it was pointing up into the section instead of out (Tr. 173-174).

It is not clear that the sign is particularly relevant to the charge contained in the citation. The inspector appeared to be concerned with the lack of markings along the escapeway and markings such as a reflector tape would have been satisfactory to him. He accepted the placement of reflector tape as an abatement measure and no mention was made of a sign at the junction at the time of abatement. The inspector did not testify whether the reflective tape placed at the rock dust stations would be sufficient markings. He testified only to the effect that there were no reflective tape markings. Finally, Mr. Peacock in further testimony referred to his notes which he asserted indicated the location of dust samples and that these show dust samples taken specifically in the 9th East section.

The testimony of the inspector and Mr. Peacock is virtually irreconciliable on the question that whether or not the dust sample reflector tapes were present. Mr. Hanna testified that he did not observe any tapes, but it may be that he was not particularly looking for such dust sampling tapes and thus may have failed to notice them. On the other hand, Mr. Peacock appeared to have contemporary information in the form of his own notes that samples were taken specifically in the intake entry in the 9th East section which would mean tapes were present. With the issue as close as this and in the circumstances mentioned, I will accept Mr. Peacock's testimony. This is not intended to reflect in any way upon the veracity of Mr. Hanna.

Accordingly, I find that the charge of a violation of 30 CFR 75.1704 has not been proved. Citation No. 246524 is vacated and the petition dismissed as to this charge.

ORDER

It is ORDERED that Respondent, American Coal Company, pay the penalties assessed herein in the sum of $200 within 30 days of the date of service upon it of this decision.

Franklin P. Michels
Administrative Law Judge

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~FOOTNOTE_ONE

1 Counsel for both parties have noted certain errors in the hearing transcript and these have been corrected in the following manner:

(a) On line 13 of page 3, the words "to eliminate" have been stricken and the words "in limine" substituted;

(b) On line 7 of page 16, the word "Respondent" has been stricken and the words "of Respondent" substituted;

(c) On lines 8 and 9 of page 34, the word "arching" has been stricken and the word "arcing" substituted;

(d) The same correction as (c) has been made on line 12 of page 35;

(e) On line 25 of page 77, the words "finger into the box to energize the terminal is there some" have been stricken and the words "finger into the box to the energized terminal is there some" substituted;

(f) On line 19 of page 117, the words "at twenty-eight" have been stricken and the words "Between eight" substituted.

~FOOTNOTE_TWO

2 This mandatory standard reads in pertinent part:

"All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected."