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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

Docket No. PENN 79-24
A/O No. 36-00823-03016

v.

Jane Mine

KEYSTONE COAL MINING CORPORATION,
RESPONDENT

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA
Jerome H. Simonds, Esq., Freedman, Levy, Kroll and Simonds, Washington, D.C., for Respondent, Keystone Coal Mining Corporation

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Mine Safety and Health Administration against Keystone Coal Mining Corporation. A hearing was held on December 13, 1979.

At the hearing, the parties agreed to the following stipulations (Tr. Vol I, 4-5):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) I have jurisdiction.

(4) The inspector who issued the subject citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

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(6) Copies of the subject citation and termination of the violation at issue in this proceeding are authentic and may be admitted into evidence for purposes of establishing their issuance but not for purposes of establishing the truthfulness or relevancy of any statements asserted therein.

(7) The alleged violation was abated in good faith.

(8) Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.

(9) The operator is large in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. Vol. I, 1-103). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. Vol. I, 103). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. Vol. II, 2-6).

Bench Decision

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty under Section 110 of the Act. The alleged violation is of 30 CFR 75.807. This mandatory standard provides:

All underground high-voltage transmission cables shall be installed only in regularly inspected air courses and haulageways, and shall be covered, buried, or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6-1/2 feet or more above the floor or rail, securely anchored, properly insulated, and guarded at ends, and covered, insulated, or placed to prevent contact with trolley wires and other low-voltage circuits.

The citation sets forth, in part, that the 4160 volt high-voltage cable was not protected from damage nor was it guarded where persons were required to cross under it. At issue here is the provision in 75.807 that guarding be provided "%y(3)5C where men regularly work or pass under" the high-voltage cable. There is no dispute that the cable in question was high voltage within the purview of the mandatory standard. In addition, there is no dispute that the cable was 4 feet from the floor. During the course of the hearing, I earlier ruled that "regularly" modified both "work" and "pass under." I adhere to that ruling.

The travelway in question, along which this high-voltage cable was hung, passes by two crosscuts identified as "C" and "D" on Respondent's Exhibit No. 1. The evidence shows that in crosscut "D," there was a supply car with some roof bolts and also some other junk in it. In crosscut "C," there were 15 posts.

The inspector testified that he cited these areas as ones where men regularly worked or would pass under the cable because miners would go into these crosscuts to get the materials there. However, the operator's safety inspector testified that by the time the citation was issued, the working face had advanced 200 more feet beyond this area and that there were crosscuts further inby where posts and other materials were stored. Accordingly, the operator's safety inspector testified that even if these crosscuts previously had been supply areas, they no longer were so. Moreover, the operator's safety inspector testified that on the day before the subject citation was issued, the inspector had traveled further inby the cited area past new crosscuts which now constituted present supply areas. I accept the testimony of the operator's safety inspector.

It appears, therefore, that at the time the subject citation was issued, the inspector actually knew that the areas cited here were not places where men working in the section would ordinarily go to get supplies. The Solicitor expressly admitted that the fact that the posts or other materials in crosscuts "C" and "D" might be obtained in an emergency or when other supplies ran out would not bring those crosscuts within the scope of the mandatory standard.

In light of the foregoing, I conclude that men did not regularly work or pass under the high-voltage cable with respect to crosscuts "C" and "D."

The high-voltage cable entered the transformer box in the crosscut identified as "B" on Respondent's Exhibit 1. I reject, as unpersuasive, evidence that either a man or a toolbox was in that crosscut on the day the citation was issued. No such contention is made in the citation itself. The allegation made at the hearing is belated and not probative. Men could conceivably go under the high-voltage cable to reach the transformer box, although this would be very unlikely because, as the operator's safety inspector testified, the cable was 4 feet off the ground at the entrance to this crosscut and then ran down to 2 feet from the ground where it entered the supply car in the crosscut. Even more importantly, the operator's safety inspector testified that although the transformer could malfunction, it rarely breaks down. I found the operator's safety inspector a persuasive witness. I accept his testimony.

Based upon the testimony of the operator's safety inspector and upon his description that a breakdown in the transformer box is a rare occurrence, I find that men would not regularly work or pass under the high-voltage cable in order to reach the transformer box. Accordingly, I find that there was no violation of this mandatory standard with respect to crosscut "B."

On the basis of the foregoing, the citation must be vacated.

There is, however, another basis for vacating the citation. The mandatory standard requires that the high-voltage cable be guarded unless it is 6-1/2 feet or more above the floor. The inspector testified that at the dinner hole and other places, high-voltage cables are "additionally" guarded. However, no sample of a high-voltage cable was introduced into the record and there was no evidence from MSHA as to precisely how much or what kind of guarding is required by 75.807. From the record MSHA has made before me, it does not appear what 75.807 requires of the operator in the form of guarding; whether the operator knows what these requirements are; whether any guarding was present here and, if so, why it did not satisfy the standard; and finally whether any requirement of additional guarding can be read into the standard. On this basis also, the citation would have to be vacated.

In light of the foregoing, I conclude there was no violation. The citation is vacated, the Solicitor's petition is dismissed.

The foregoing bench decision is hereby AFFIRMED.

ORDER

It is hereby ORDERED that Citation No. 229408 be VACATED and the instant petition be DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge