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SOL (MSHA) V. VALLEY CAMP 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 Proceedings Docket No. WEVA 79-111 A/O No. 46-01483-03021
v.		Docket No. HOPE 79-318-P A/O No. 46-01483-03017
THE VALLEY CAMP COAL COMPANY,	RESPONDENT	Valley Camp No. 1 Underground

DECISION
ORDER TO PAY

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, MSHA Ronald Johnson, Esq., Schrader, Stamp and Recht, Wheeling, West Virginia, for Respondent, The Valley Camp Coal Company

Before: Judge Merlin

These cases are two petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, petitioner, against The Valley Camp Coal Company, respondent. They were duly noticed for hearing and were heard as scheduled on March 11, 1980. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision (Tr. 3).

At the hearing, the parties agreed to the following stipulations (Tr. 6-7):

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

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

(3) I have jurisdiction of these cases.

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

(5) True and correct copies of the subject citations were properly served on the operator.

(6) Copies of the subject citations attached to the petition are accurate and may serve in lieu of ordinary documentary exhibits.

(7) Imposition of any penalties herein will not affect the operator's ability to continue in business.

(8) All of the alleged violations were abated in good faith.

(9) The operator has a moderate history of prior violations as evidenced by the printout attached to the stipulations which I received on February 7, 1980.

(10) The operator is large in size.

(11) Ordinary negligence was present in all the alleged violations.

(12) All the alleged violations were of ordinary gravity.

(13) The witnesses of both parties are accepted as experts in the field of mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-187). 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. 188). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 193-199).

Bench Decision

The bench decision is as follows:

These cases are two petitions for the assessment of civil penalties. Docket No. HOPE 79-318-P contains three violations, and Docket No. WEVA 79-111 contains two violations.

Both cases and all the violations contained therein present only one issue in dispute between the parties. This issue is whether the Souttell Run Tunnel of the Valley Camp No. 1 mine is covered by Part 75 or by Part 77 of the mandatory standards.

The violations in these cases were issued under Part 75. Accordingly, if Part 75 applies, the violations were issued under the proper sections of the regulations; whereas, if Part 77 applies, they were not. In paragraphs 16 and 17 of the detailed stipulations submitted by the parties prior to the hearing, it was agreed that if I should hold that Part 75 applies, the operator does not contest the fact of violation and agrees to the originally assessed penalties; whereas, if I should hold that Part 77 applies, the parties agree that violations do not exist.

The stipulations as well as the testimony which I have heard today describe the tunnel in very great detail. The tunnel is 9,200 feet long, five to five and a half feet high, and 14 feet wide. No coal is exposed in the entire length of the tunnel. Approximately 4,500 feet of the tunnel is covered by an overburden averaging 100 feet in height, another 4,500 feet of the tunnel is covered by an overburden averaging 120 feet, and approximately 200 feet of the tunnel is covered by an overburden averaging 290 feet in height. Twelve inches to 16 inches of the immediate overburden remaining over the tunnel is coal.

The tunnel contains a conveyor belt 42 inches wide which moves beside a track composed of 40 pound steel rails. A barrier coal pillar of at least 250 feet separates the tunnel from all other areas of the Valley Camp mine. The coal that moves along the belt conveyor in the tunnel has been extracted from the mine and processed through a cleaning plant which admittedly is a surface installation. The coal is then brought by conveyor belt to the tunnel and conveyed through the tunnel to a loading dock along the Ohio River. The testimony this morning with respect to the structure and functions of the tunnel as compared with the operations which are carried on in the rest of the mine expands upon the stipulations previously submitted.

In my view, the issue presented is a relatively simple one. Section 75.1 states that Part 75 "sets forth safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977". Section 77.1 states that Part 77 "sets forth mandatory standards for * * * surface work areas of underground coal mines".

These words mean exactly what they say and what they say is crystal clear. The Souttell Run Tunnel is not a surface work area because it is underground.

The stipulations of the parties and the testimony this morning demonstrates that the entire tunnel is under the ground. If "underground" means anything, it means under the ground. Moreover, it is agreed that this tunnel was driven through coal and that 12 inches of the immediate overburden now on top of the tunnel consists of coal. Also, the tunnel is adjacent to a large area of unmined virgin coal which is part of the subject mine.

This is dispositive. The Souttell Run Tunnel is both underground and part of a coal mine. The words are too clear to admit of any other meaning and I cannot and will not distort them. Part 75 applies and the citations were therefore, issued properly.

Moreover, there is no basis upon which to apply Part 77. Clearly, the tunnel is not a surface work area and to hold that neither Part 75 nor Part 77 applies would be a result at variance with the intent and spirit of the Act. Indeed, even the operator does not contend the tunnel should be left unregulated.

If the operator is not satisfied with the result reached herein, recourse can be had to rulemaking so as to amend the scope of Parts 75 and 77. I would state, as I have stated in other contexts on other occasions, that the administrative law judge is not a substitute for rulemaking.

I decide this case on the foregoing basis. However, a further word appears appropriate. I recognize the testimony from the operator's witnesses that the tunnel is well constructed. I recognize too that the tunnel is used solely to transport coal. Nevertheless, I am persuaded by MSHA's evidence that there are hazards from methane, roof falls, and other circumstances that are peculiar to underground coal mines. And I am persuaded that these hazards apply to this tunnel as well as to other parts of the mine. Certainly, every hazard does not have to apply or be present to the same degree in the tunnel as in the rest of the mine for Part 75 to apply to the tunnel. The fact that methane never has been detected in the tunnel also is not determinative. It is well known that methane can be liberated spontaneously and unpredictably. Finally, I am convinced that the Souttell Run Tunnel is an integral part of the extraction and production process. Admittedly, coal is transported through the tunnel in a somewhat different manner than in areas closer to the actual face. But everything is part of the same process. It makes little practical or legal sense to draw artificial distinctions in what is in fact one continuous activity.

Nor have I overlooked the fact that before the coal enters the tunnel it spends some time above the surface in the preparation plant. This interruption in the coal's presence underground is not, in my view, determinative.

Finally, the Act is to be liberally construed. As already pointed out a conclusion that neither Part 75 nor Part 77 applies is one to be avoided. And as between Part 75 and Part 77 a liberal construction is furthered by the application of Part 75 where, as the evidence I have heard today makes clear, the standards for pre-shift examiners are more stringent under Part 75 than those in Part 77. In addition, Part 75, unlike Part 77, contains specific standards with respect to many items involved, such as fire sensors, water lines, and sanding devices.

Therefore, as an additional but wholly separate reason, I note the foregoing practical and policy considerations which in my view further support the result which is in any event compelled by the precise language of the mandatory standards.

In light of the foregoing, I conclude that Part 75 applies and that, therefore, as the parties have agreed, the citations were properly issued. I have reviewed each of the citations in accordance with the six statutory criteria and based upon this review, I conclude that the originally assessed amounts are appropriate and consistent with the provisions of the law.

Accordingly, the operator is order to pay $372 within 30 days for the violations contained in the subject docket numbers.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $372 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge