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SOL (MSHA) V. CONSOLIDATION 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. WEVA 79-362
A.O. No. 46-01436-03048I

v.

Shoemaker Mine

CONSOLIDATION COAL CO.,
RESPONDENT

DECISION AND ORDER

Appearances: Barbara K. Kaufmann, Esq., U.S. Department of Labor,
Office of the Regional Solicitor, Philadelphia,
Pennsylvania, for Petitioner Michel Nardi, Esq.,
Consolidation Coal Company, Pittsburgh,
Pennsylvania, for Respondent

Before: Judge Kennedy

The captioned proposal for the assessment of a civil penalty for an alleged violation of the mandatory safety standard that requires troubleshooting of electric power circuits and electric equipment with the power off except where necessary to correct the trouble encountered (30 C.F.R. 75.509) came on for an evidentiary hearing in Pittsburgh, Pennsylvania on April 9, 1980. After hearing the parties at length and carefully considering the evidence and testimony adduced, the trial judge made the following bench decision:

Based on a preponderance of the reliable, probative and substantial evidence, and after observing the demeanor of the witnesses, I find:

1. The violation charged did not, in fact, occur because Mr. Harrigan and Mr. Shaw were properly engaged in troubleshooting the circuit breaker in question at the time it exploded for reasons not disclosed by the record.
2. The opinion testimony of Inspector Kinser as to the limited meaning assigned by him, and presumably MSHA, to the term troubleshooting is not in accord with the common understanding of the term or any persuasive evidence as to a more limited trade usage.

3. Furthermore, the more limited meaning is contrary to the exception which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction.
4. As presently written, the standard prohibits troubleshooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of a fix or repair without the power on.
5. That the exception largely swallows what appears to be a salutary rule is the reason why the Act provides for the issuance of improved safety standards.(FOOTNOTE 1)
6. The rule of liberal interpretation cannot be expanded beyond the limits of its logic, especially where the result may impose a stigma on miners and the operator for conduct not clearly prohibited.
7. Most significant to my determination was Mr. Kinser's statement that he did not believe that what Mr. Harrigan did was a deliberate by-pass of a safety device (the undervoltage regulator) but merely an effort to make the electromagnetic coil resume its normal function without the necessity for extensive repairs.
8. Nothing said here is to be taken as a condonation or approval of Mr. Harrigan's "short-cut" or of the obvious and serious hazard it created.
9. I urge the parties, and especially MSHA, to take immediate action to preclude this type of accident by clarifying the conduct prohibited under the guise of troubleshooting with the power on.

The premises considered, it is ORDERED that the petition for assessment of a civil penalty be, and hereby is, DISMISSED.

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With the addition of the footnote, which merely summarizes a discussion in the record, the foregoing is a true and correct copy of the bench decision entered in this matter. Accordingly, it is ORDERED that the same be, and hereby is, ADOPTED AND CONFIRMED as the trial judge's final decision in this matter.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE 1

Over two years ago, Judge Lasher dismissed a stronger case for enforcement on the ground that the standard in question is too vague and ambiguous to be enforceable. Secretary v. Peabody Coal Company, Dkt. No. DENV 77-67-P, Nov. 13, 1978. Despite the fact that neither the Secretary nor the Commission questioned the correctness of Judge Lasher's analysis of the infirmities of the standard from the standpoint of due process, his suggestion for clarifying amendments under the rulemaking process was ignored. The policy of attempting to achieve amendment of defective standards through endless and fruitless litigation while miners continue to be killed or seriously injured because the standards in effect do not guarantee the level of protection contemplated is not in accord with the fundamental purposes and policy of the Act.