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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	Contest of Citation Docket No. WEVA 79-440-R Civil Penalty Proceeding
v.		
CONSOLIDATION COAL COMPANY,	RESPONDENT	Docket No. WEVA 80-183 Ireland Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Michel Nardi, Esq., Consolidation Coal Company, for Respondent

Before: Judge Lasher

These proceedings arose under section 105(b) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Wheeling, West Virginia, on March 18, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record.(FOOTNOTE 1) My oral decision containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar, punctuation and the excision of dicta.

> This proceeding which involves two dockets, Civil Penalty Docket No. WEVA 80-183 and Contest of Citation Docket No. WEVA 79-440-R, both of which have been consolidated by my order earlier in this hearing, involve a single citation, No. 0807767, which was issued on August 27, 1979, and which alleges a violative condition as follows: "Repairs were being performed on the No. 26 mining machine by Glen Strohanyber, [FOOTNOTE 2] mechanic, and the power was on, in No. 2 entry of 2 Mains East, ID 001, supervised by Ray Franklin."

The hearing in this matter was conducted pursuant to section 105(b) of the Federal Mine Safety and Health Act of 1977 and both parties were very well represented by counsel at the hearing. Counsel have complied with the requirements of the Administrative Procedure Act by presenting argument at the close of hearing, thus making it possible for me to give my decision at this time on the record, which oral decision will subsequently be incorporated in a written decision and served upon the parties.

The citation (Exhibit M-1) charges the Respondent coal operator with a violation of 30 C.F.R. 75.1725(c) which provides: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The heading of 75.1725 is "Machinery and Equipment; Operation and Maintenance." As pointed out by counsel for Respondent during cross-examination of MSHA witness, inspector Kenneth Williams, a statutory provision related to 75.1725, namely, 30 C.F.R. 75.509, covering "Electric Power Circuit and Equipment; De-energization," provides, "All power circuits and electric equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing."

I note initially that we have a statutory provision and and implementing regulation which appear to apply to the factual situation which I am about to describe. First of all, I find that the condition described in the citation did occur since there is no specific or general dispute concerning the general allegations thereof. In addition, it appears that on August 27, 1979, Inspector Williams, while engaged in a Triple A inspection of Respondent's Ireland Mine observed the mechanic, Strohsnider, changing a hose on a Joy Manufacturing Company continuous miner. According to Inspector Williams, and I so find, the trailing cable attached to the continuous miner which is approximately 600 feet long, was plugged into a power center. The trailing cable was therefore energized. I also find that Strohsnider advised the inspector that he had cut the breaker off, or words to that effect, and when asked by the inspector if he knew that the power was supposed to be off the trailing cable too, that Strohsnider said, "No." When Inspector Williams posed the same question or a similar question to the foreman who was present, the foreman replied, "I thought it was de-energized."

I find that the trailing cable was attached to the continuous miner--at the time observed by Inspector Williams--at two points, the first point being where it is attached to the outside of the miner but not "plugged in" to the miner, and that it ran a distance of approximately 8 to 12 feet to the junction box where it became joined to the continuous miner and where it ran for approximately 2 more feet while energized. I find that the mechanic, Strohsnider, was engaged in replacing a hydraulic hose on the continuous miner in question at the time the citation was issued by the inspector and that the process of changing such a hose could be either simple or lengthy, according to the testimony on this record, and could range from a matter of minutes to much longer to complete.

I find that MSHA had a policy of enforcement ranging back to approximately 1973 or 1974 which constituted an administrative interpretation of the regulation by the administering agency to the effect that turning the power off meant unplugging the trailing cable to the continuous miner at the power center and did not include within the definition of turning the power off the act of turning off the circuit breaker on the continuous miner--which I note was the second point of connection of the trailing cable and the terminal point of the trailing cable.

I find, based upon the inspector's testimony, that the Respondent was aware of the MSHA interpretation to this effect and that the Respondent's general policy was to follow the MSHA interpretation.

I also find that part of MSHA's enforcement policy was to permit a mine operator in at least two situations to perform two types of repairs without unplugging the trailing cable from the power center; namely, when bits on the continuous miner were changed and when water sprays were cleaned. Both of these procedures take only a few seconds and have the incidental health and safety effect of keeping down dust. The Respondent's contention is that by turning off the circuit breaker on the continuous miner, it complies with section 75.1725(c), since such act constitutes putting the piece of machinery in such a state that the "power is off." The Government contends that for the power to be off of the piece of machinery the trailing cable must be unplugged at the power center.

I am constrained to reject the Respondent's view for two reasons even though there are certain equities involved in the instant fact situation which serve to bolster the interpretation urged by the Respondent. To begin with, I

believe that regulation 75.1725(c) must be read in light of the statutory provision, section 75.509. I find specifically that the continuous miner involved is a piece of electric equipment, as that term is used in 75.509, and is also "machinery" as that term is used in 75.1725(c). Also preliminarily, I find that none of the exceptional circumstances mentioned in the two regulations are applicable here, i.e., that there was troubleshooting or testing going on or that machinery motion was necessary to make the repairs which Strohsnider was engaged in.

The record is clear based both on the testimony of the inspector and also of the Respondent's witness, Mr. Allen Newcome, that the circuit breakers can malfunction and become defective. Testimony and evidence in the record is also clear that at least to some extent for a minimum of 2 feet electric current does flow into the continuous miner and that should a malfunction occur electric current would flow beyond the 2-foot distance into the piece of machinery involved. So to that technical--and I would say very technical standpoint--I conclude that the two regulations should be construed to indicate that the continuous miner is energized in the sense of section 75.509, and that the power is on the continuous miner within the meaning of section 75.1725 even though the circuit breaker is turned off-when the trailing cable is plugged into the power center. The cases are legion to the effect that the Federal Coal Mine Health and Safety Act is to be interpreted liberally to the effect to protect the safety of the miners. I therefore do follow a liberal interpretation of these two regulations in so finding.

A second basis for this conclusion, which is the resolution of the critical issue posed in this case, is that I also find the trailing cable to be part of the machinery. I must confess that my original inclination as the hearing started out was to the contrary. The evidence, however, does indicate that the trailing cable, although not part of the original equipment of the Joy continuous miner, is permanently attached to the continuous miner at two points. Particularly, it becomes permanently attached to the junction box. As Mr. Newcome, who I recognize as a master mechanic and electrical expert, pointed out, the trailing cable, once it is connected to the junction box, becomes part of the box to the extent that the total connection, that box, must be certified as permissible.

There is also evidence that the trailing cable can thus remain on the continuous miner for as long as a year, although I do have in mind Mr. Newcome's testimony that sometimes it has to be changed in the same shift that it is connected. I analogize this generally to a lamp, where the cord at one end has a plug in it and at the other end it is connected to the lamp. I think once the cord is attached to the lamp permanently or in that manner it become part of the lamp and thus, as in the case of the continuous miner, the power is shut off by unplugging it at the point where it connects to a flow of electricity, in this case the power center. Turning off the switch on the lamp turns the light out but does not render the lamp safe to work on as long as it is plugged in.

Mr. Newcome, as counsel for the Government points out, did concede that the safest means of deenergizing the continuous miner was to unplug it at the power center.

I find therefore that the trailing cable is part of the continous miner and that the trailing cable was not deenergized, or in the terms of section 75.1725, had not had the "power cut off" at the time the condition was observed by the inspector. Accordingly, a violation of section 75.1725(c) did occur and I find that the citation was properly issued in those circumstances.

Turning now to the statutory criteria, I find, based upon stipulation, that in the 2-year period prior to the issuance of the citation that the Respondent had 922 previous violations; that the Respondent is a large operator; that following the issuance of the citation Respondent proceeded in good faith to achieve rapid compliance with the violated safety standard; and that any penalty I assess in these proceedings will not be beyond the economic ability of the Respondent to pay and simultaneously remain in business.

The Government has not made any contention of gross negligence or ordinary negligence and there is no need for me to belabor the point other than to note that Respondent's basic bone of contention, is, in my opinion, justified. I believe that we are in this hearing today because of Respondent's difficulty in dealing with the enforcement policy of the Government and possibly even more specifically the lack of precision of the wordsmiths which the Government employs to draft these regulations.

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I think the ambiguities can be easily catalogued by one or two people which would save a tremendous amount of problems in the everyday operation of the mines as well as in the administration of the administrative justice system in trying to clarify these things on the basis of fact situations which I believe like this one many times are not typical of those which arise in the mines. I find the Respondent's proceeding to try to obtain a clarification in this case is in good faith and I do consider that in my evaluation of the negligence factor although I also believe the violation was probably one which occurred through some negligence based upon the inspector's account of the foreman's reply, to wit: "I thought it was de-energized." In any event, the amount of the penalty will be significantly decreased on the basis of the negligence factor--and the seriousness factor.

Briefly, the inspector's testimony (with respect to gravity) does indicate that the possibility of any hazard coming to fruition was very remote and his description of possible injuries was devoid of any medical precision. Therefore, I am inclined to fully credit the evidence presented by Respondent, which was well analyzed and thorough with respect to seriousness, indicating: that no coal was being mined; that the machine was not being operated at the time; that the hose is separate from the electrical circuit; that the breaker on the machine was knocked to the off position; that there are several motors, I think four, on the continuous miner; that the main motor, the pump motor, has to be energized before the other motors can be engaged; that the Ireland Mine is an open mine in the sense that the visibility is good; and that the mechanic, Strohsnider, was standing up and visible to anyone standing on the other side of the machine.

Finally, I note that there is no contention of any serious degree of gravity from the Government. I find that this was not a serious violation. Considering the six statutory criteria, a penalty of $100 is assessed in this case.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $100 within 30 days of the issuance date of this decision.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1
Tr. 108-117.

~FOOTNOTE 2

The correct name is Emerson Strohsnider.