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SOL (MSHA) V. MIDDLE KENTUCKY CONSTRUCTION
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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. KENT 79-7 Assessment Control No. 15-09827-03002
v.	
MIDDLE KENTUCKY CONSTRUCTION, INC.	Crapshooter No. 2 Strip Mine

DECISION

Appearances: Darryl A. Stewart, Office of the Solicitor, U.S. Department of Labor, for Petitioner
Byron W. Terry, Field Safety Director, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to notice of hearing issued February 22, 1980, a hearing in the above-entitled proceeding was held on April 3, 1980, in Evansville, Indiana, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the bench decision which is reproduced below (Tr. 57-65):

> This hearing involves a Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-7 on May 21, 1979, by the Mine Safety and Health Administration seeking to have civil penalties assessed for two alleged violations of 30 CFR 77.1710(e) by Middle Kentucky Construction, Incorporated.
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> The issues in this proceeding, of course, are whether a violation of section 77.1710(e) occurred, and, if so, what civil penalty should be assessed after consideration of the six criteria in section 110(i) of the Act. The parties have entered into stipulations with respect to some of the criteria, but the first matter to be considered and really the largest issue in this case is whether a violation occurred.
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> Section 77.1710 provides that employees working in a surface coal mine shall wear protective clothing. And subsection (e) of that section provides that the employees will wear suitable protective footwear. There is a practically identical provision in the underground portion of the regulations which is section 75.1720, subsection (e) which has the same language as section 1710 has. Namely, that the miners will wear

suitable protective footwear.

The two citations involved in this proceeding are Citation Nos. 399710 and 399711. Both of them were issued the same day and the only difference between them is a mechanic, in one instance, was not wearing what the inspector felt to be suitable protective footwear, and in the other instance a person who lubricates equipment and does other maintenance work was not wearing what the inspector felt was suitable protective footwear.

In his testimony, the inspector indicated he believed the term, suitable protective footwear, had to be interpreted in accordance with the job that a given miner is doing. In these two instances, the inspector felt that it was quite likely and, in fact, that it was probable a mechanic or a maintenance man might have something fall on his feet which could crush them.

And, that he felt that these two gentlemen involved in the two citations should have been wearing steel-toed shoes. The operator's contention in this case is that he agrees that the term, suitable protective footwear, should be interpreted to deal with the situation confronting the individual miner and that he stresses the fact that in this instance the men, both the mechanic and the maintenance worker, were working around equipment which is subject to having diesel fuel and other greases or greasy substances accumulate on the floor or spill on the ground and that it's quite possible for these individuals to slip.

And that he felt that the greater danger to the employees was that they would slip and hurt themselves rather than that something would fall on their feet, because, for example, he says that any heavy piece of equipment that might be used by a mechanic, such as a part of an engine or transmission, would be lifted by a crane and that the men themselves would not be handling heavy equipment or parts.

There is a considerable amount of merit to the operator's contention that the phrase, suitable protective footwear, in the instances here involved could well indicate that the men ought to wear equipment that would keep them from sliding on floors or places that are slippery, but there's also a considerable amount of merit to the inspector's contention that even though he agrees that it's helpful to have nonslipping soles on the shoes that the men wear in such an area, that it's also important that they be protected from falling objects. And, of course, even a big wrench or a big hammer could easily fall on a person's foot with enough force to cause him to miss a day's work that he wouldn't have missed otherwise had he had on the steel-toed shoes.

So, the regulations are designed to protect people against all dangers and while there's a considerable amount of merit to the operator's argument in this case, I think that the inspector's contention that steel-toed shoes are required is also a reasonable interpretation of the phrase, suitable protective footwear, and, therefore, I find a violation of section 77.1710(e) did occur.

The inspector presented as Exhibit 8 a picture of a sign which indicates that the operator does require that hard hats and steel toes be worn in the area involved in this proceeding.

The spokesman for the operator in this proceeding indicated that the company is extremely safety minded and it was their intention for people to wear steel-toed shoes in this area, and the inspector agreed this is a company which should be at the top of the list for those who encouraged and insisted on safety-minded activities at its mine.

The facts did show also that the gentlemen involved in these two citations, the mechanic and the maintenance man, did not specifically obtain the operator's permission to wear shoes which may have protected them from slipping but did not have steel toes on them.

The former Board of Mine Operations Appeals in North American Coal Corp., 3 IBMA 93 (1974), held with respect to a similar provision in section 75.1720, that if any operator had erected a sign advising people to wear safety goggles and the individual miner did not wear the safety goggles, even though they were provided by the company, that no violation of the section there involved should be found to have occurred.

The Commission in United States Steel Corp. v. MSHA, in a decision issued September 17, 1979, 1 FMSHRC 1306, held that that North American case decided by the Board should be limited to the language of that standard which was, as I said, 30 CFR 75.1720.

The effect of that is that I don't think the Commission would favorably look upon a holding in this instance that the fact that these two gentlemen had failed to comply with the operator's clearly exhibited sign as shown in Exhibit 8, that steel toes were required, is a reason to find that no violation occurred.

We now come to the six criteria, as to which there have been some stipulations. First, it has been agreed that Middle Kentucky Construction, Incorporated, is subject to the jurisdiction of the Act and the regulations promulgated

thereunder. It was also stipulated that the inspector involved was properly a representative of the Secretary and has the authority to make the inspection involved in this case. As to the criterion of whether the payment of penalties would cause the operator to discontinue in business, it was stipulated that payment of penalties would not cause the operator to discontinue in business. It was also stipulated that Middle Kentucky is a small company and, therefore, I find that any penalties should be in a low range of magnitude.

The inspector's Exhibits 3 and 6 show that the operator made a normal good faith effort to achieve rapid compliance and it was so stipulated; therefore, any penalties assessed should take, and will take, that mitigating factor into consideration.

The inspector's Exhibits 2 and 5 show that the inspector did not think the operator could have known or predicted the occurrence of the two workers failing to wear safety-toed shoes. And that finding by the inspector is consistent with the operator's testimony to the effect that neither the mechanic nor the maintenance man obtained the operator's permission when they came to the mine without safety-toed shoes. Therefore, the evidence shows that the operator was nonnegligent in the occurrence of the two violations.

The only criterion left to be considered then is that of gravity. The inspector agreed that it was important that the men wear shoes that would keep them from slipping and they apparently were doing so. So, that would have been some protection from one of the hazards to which they are exposed in their work. The inspector's illustration of an accident that occurred to him when he was not wearing safety-toed shoes many years ago before the effective date of this Act and also one given by the operator's spokesman show that safety-toed shoes may or may not be sufficient to keep a person from having an injury, but they at least are some protection and it's better to have some protection than none.

The specific point that is being made here is that a heavy object may fall on one's toes where the safety toe is helpful, as in the illustration given by the inspector, but in the one given by the operator's spokesman the object fell just past the area covered by the safety-toed shoe and therefore injured the miner's arch at a point that was not protected by the steel toes. Of course, the inspector pointed out that some operators require a steel protective plate over the arch as well as over the toe and that, of course, would have been protection in the situation given by the operator's spokesman.

But the inspector does not feel that requiring a steel plate over the arch is within the confines of protective footwear as it's now interpreted by the inspector. So, I think in this instance that we can find that considering the type of work these two miners were doing and the possibilities that still exist for injury that the violation was only moderately serious.

There was some testimony in this case about the fact that the operator requires the miner who violates the regulation which the company is trying to enforce to pay the penalty, if one is assessed, for his failing to carry out the company's and the Government's safety regulation.

That may be effective in bringing about more consistent conscientious adherence to the safety regulation than we would have without the provision, but I don't believe that the Act contemplates that I am to take the financial circumstances of a given miner into account in assessing a penalty. As the Commission stated in the United States Steel case cited above, it is well settled that operators are liable for violations without regard to fault. So, I don't think in the assessment of a penalty I should transfer from respondent to an individual miner application of the criteria of negligence or gravity or whether the payment of penalties would affect an individual's financial condition. I don't think those are matters that I should consider in light of the way the Act was drafted and should be enforced. Consequently, I'm not taking those matters into consideration.

Nevertheless, I think that there are many extenuating circumstances about this case and the conditions under which the employees were working and the fact that the inspector does not think that the operator was negligent which indicates that a small penalty should be assessed in this instance. Therefore, a penalty of $15.00 will be assessed for each violation.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $30.00 which are allocated to the two violations as follows:

Citation No. 399710 10/31/78	77.1710(e).....	$15.00
Citation No. 399711 10/31/78	77.1710(e).....	15.00
Total Penalties in Docket No. KENT 79-7.....		$30.00

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)