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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

MCCOY ELKHORN COAL CORPORATION, APPLICANT	Application for Review
	Docket No. KENT 80-122-R
v.	
	Order No. 721484
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	December 5, 1979 No. 4 Mine

DECISION

Appearances: Fred G. Karem, Esq., Lexington, Kentucky, for Applicant
William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order issued February 20, 1980, a hearing in the above-entitled proceeding was held on March 28, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 260-275):

> This proceeding involves an Application for Review which was filed by McCoy Elkhorn Coal Corporation on December 31, 1979, in Docket No. KENT 80-122-R. The Application seeks review of Order No. 721484 issued under sections 107(a) and 104(a) of the Federal Mine Safety and Health Act of 1977. The order alleges a violation of 30 CFR 75.703. The civil penalty issues which will be raised when and if MSHA files a Petition for Assessment of Civil Penalty were consolidated with the issues raised by the Application for Review and evidence was received at the hearing concerning the six criteria which must be considered if a violation under section 75.703 is found to have occurred. This decision will sever the civil penalty issues for future decision when I have received the Petition for Assessment of Civil Penalty. That may be several months after this decision is issued. The Applicant has raised several factual issues in its Application for Review but the primary issue, of course, in any case where an order is issued under section 107(a), is whether an imminent danger existed at the time the order was issued. In order to apply the law to any case, it's necessary to make some findings of fact and I shall now make those findings.

Findings of Fact

1. McCoy Elkhorn Coal Corporation operates three coal mines which have been numbered 1, 3 and 4. The No. 4 mine is the one which has primarily been discussed in this proceeding. That is the mine in which the imminent danger order was issued. The No. 4 mine operates on two production shifts and has a maintenance shift on the third shift. The mine utilizes conventional mining methods and uses a cutting machine, loading machine, two shuttle cars, a conveyor belt, and two roof bolting machines. The average daily production from the No. 4 mine is approximately 600 tons. The production from the No. 3 mine is also 600 tons and the No. 1 mine produces approximately 1,200 tons of coal a day. The total production, therefore, of the three mines is, depending on how well coal is running, 2,400 to 3,400 tons per day. McCoy Elkhorn is an affiliate of General Energy which seems to own some other coal mines and may do some oil exploration.

2. Inspector Charles Chafin on December 5, 1979, made an inspection at the No. 4 mine. He was accompanied underground by Mr. Michael Norman who is McCoy Elkhorn's Safety Director. When Inspector Chafin arrived on the section he first made an inspection to determine whether the equipment had frame grounds. To do that, it was necessary to pull the shuttle car, which in this instance was the right-drive shuttle car, up beside the loading machine. By doing that, he could check with his ohmmeter to determine whether there was continuity of the frame ground on both pieces of equipment.

At that time it was agreed by both Inspector Chafin and the company's electrician, who was Mr. Reed, that the frame ground was inoperable on either the shuttle car or the loading machine. Therefore, the inspector checked the frame of the right-drive shuttle car and determined that it was not energized. Then he had the right-drive shuttle car operator, who was Mr. James Stotridge, to back the right-drive shuttle car up approximately 40 feet outby the loading machine. At that point, Inspector Chafin knew that either the loading machine or the right-drive shuttle car had a defective frame ground. He did not know which had the defective frame ground, so he instructed the mine personnel to get the disconnect, which is also called a cathead in this case, and bring it up to the right-drive shuttle car so that he could check the continuity of the ground wire in the trailing cable.

He determined when he was able to place his ohmmeter on the shuttle car and also upon the ground wire on the shuttle car, that there was not continuity in the ground wire of the

shuttle car's trailing cable. At that point, he told Mr. Norman, the Safety Director, that the shuttle car should stay parked where it was until the trailing cable had been further checked.

3. While the men were in the process of bringing the cathead or disconnect for the trailing cable up to the right-drive shuttle car, Inspector Chafin also pulled, or had someone pull, the left-drive shuttle car over to the loading machine and made a check for frame-ground purposes on those two pieces of equipment and it was established that they both did have operable frame grounds. By process of elimination, Inspector Chafin knew that the right-drive shuttle car was the one which had a defective trailing cable or defective frame ground.

4. The right-drive shuttle car operator, Mr. James Stotridge, got off of the right-drive shuttle car as soon as he had pulled it back from the loading machine and proceeded to assist the electrician in bringing the cathead or disconnect up to the right-drive shuttle car so it could be inspected by Inspector Chafin.

5. After the inspector had determined that the ground wire was defective in the trailing cable, the electrician and Mr. Stotridge began to look for the defective place in the cable and they found it before the inspector and Mr. Norman had gotten out of shouting distance. The result was that the inspector came back and looked at the place which they had located which was a soft area in the permanent splice. A cut was made into the permanent splice. It was determined that the ground wire was separated approximately one inch which meant there was no continuity and the trailing cable would not have performed its intended purpose of grounding the machine in case of an electrical fault. The inspector, at that point, asked the personnel to cut the defective permanent splice out of the trailing cable and asked them for the splice so that he could use it as the subject of a memo to the head of the Mine Safety and Health Administration for the purpose of trying to get the maker of the splice, the Southern Mine and Cable Service Company, to improve on the quality of its splices since the inspector had encountered several other defective splices made by the same company. All mine personnel indicated to the inspector that the should ask their supervisor, Mr. Charles, the Superintendent of the mine, about taking the splice.

6. Mr. Reed, the electrician, then proceeded to install a new permanent splice. He then checked the trailing cable to determine that there was continuity on the

ground wire and the equipment was reenergized even though there was no use made of that right-drive shuttle car on December 5 for production of coal. Coal was produced on the section that day, but because of the mining development at that point only the left-drive shuttle car was utilized for transporting coal.

7. When Inspector Chafin and Mr. Norman reached the surface of the mine, they went into the mine office where Mr. Charles, the Superintendent, was waiting for them and the inspector was carrying the defective permanent splice. The inspector either asked or told Mr. Charles that he was going to take the cable back to the MSHA Office for the purpose of demonstrating what a poor splice the Southern Mine and Cable Service had installed in the cable to the right-drive shuttle car. Mr. Charles took exception to giving the inspector the splice because Mr. Charles stated that he wanted to show the splice to Southern Mine and Cable Service Company, so that he could ask them to improve on their splices. Mr. Charles had been using that company's services for approximately 5 years to repair his trailing cable and had not previously been dissatisfied with its work. Also, if one looks at the defective permanent splice which is Exhibit 2, it is actually impossible to determine whether the splice was actually defective at the time it was made. As the inspector testified, and as others also testified, the ground wire in the splice probably separated under strain. If it separated under strain, then it could have been made properly in the first place, but still would have looked defective, and would have been defective, at the time it was found to have a separated ground wire on December 5, 1979.

In order to apply the foregoing findings of fact to the law as it exists at the present time, I think I should give the definition of imminent danger which was set forth by the Seventh Circuit Court of Appeals in Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, (1974). In that case, the court said that an imminent danger exists when the condition is of such a nature that a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger. That definition was also adhered to by the Fourth Circuit Court of Appeals in Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2D 277 (1974). Of course, the court in each of those cases was affirming the former Board of Mine Operations Appeals which had originally formulated a very similar definition in a case known as Eastern Associated Coal Corp., 2 IBMA 128 (1973).

In United States Steel Corp., 3 IBMA 50 (1974), the former Board held an imminent danger must be based on the facts existing at the time the order was issued. Another well known case the former Board decided in dealing with the question of imminent danger occurred in Old Ben Coal Co., 6 IBMA 256 (1976). In that case, the inspector had seen a miner riding on a man trip with his feet dangling over the side of the car and the inspector said that it was an imminent danger for a man to ride with his feet dangling off the car. The miner got off the car. The inspector then wrote an imminent danger order. The Board affirmed the judge's decision in that case which had held that since the imminent danger had to exist at the time the order was issued, the inspector's order was invalid because the imminent danger did not, in fact, exist after the miner got off the car.

I think the Old Ben case applies very strongly to the facts we have in this case. We have a situation in which Inspector Chafin was very concerned about whether this right-drive shuttle car should continue to be used. The inspector said that if it were to continue to be used with the lack of a proper frame ground on it, that it could become energized, and if it did become energized, either the operator in getting off of it could be electrocuted, or any other miner who might touch the frame of the machine could be electrocuted.

The inspector's concern was justified, but the difficulty that I have with the order is that the inspector says he issued it when he determined that the frame ground wire was separated. Now, we have a diagram in this case which is Exhibit 6, which was drawn by the inspector and that shows without any doubt and the testimony also shows without any doubt that when the inspector determined that there was no continuity in the ground wire, there was no power on the shuttle car whatsoever. Not even the power of a battery was involved because the determination of continuity of the ground wire is based on the ability of the ohmmeter to test the existence of an operable grounding mechanism. Since the inspector issued the imminent danger order verbally at a time when there was no power on the machine, there could not have been an imminent danger at that moment.

Now it is true, just as in the case where the miner's feet were dangling off the car, that there could have been an imminent danger at the time the operator of the shuttle car moved it back from the loading machine, but the inspector didn't know at that point that the right-drive shuttle car was the piece of equipment which had the defective permanent ground and the inspector didn't say that he issued the imminent

danger order at that point. He couldn't have, because he didn't know for certain that the lack of a frame ground might not be on the loading machine, and he didn't issue one for the loading machine and the shuttle car. He only issued it on the right-drive shuttle car. So it is the equivalent of the foot-dangling situation as I see it. The inspector was concerned about the existence of a frame ground and the possibility of someone being electrocuted and he was justified in being concerned, but he did not issue the imminent danger order at the time the hazard may have existed because the inspector was not certain that there was a lack of a frame ground until after the shuttle car had been deenergized.

In the arguments today, I think the attorneys may have overlooked one of the points that most concerned the inspector, and that concern was discussed in the Eastern Associated case, supra, which was appealed to the court, wherein the Board of Mine Operations Appeals had inserted the clause; "if normal operations designed to extract coal in a disputed area proceed". That proviso was not in the definition that Congress placed in the Act, but all the courts which considered the issue agreed with the Board that the proviso was legitimately inserted because, unless the miners were going to keep mining coal, there wouldn't be exposure to hazards. Here the inspector said that he was concerned that if he issued only a citation, that they might put this defective trailing cable back on the right-drive shuttle car so that the strain would continue on the trailing cable and produce an energized frame which might have caused someone to be electrocuted.

Well, in this case we have all sorts of facts that just simply do not support the inspector's concern in this instance because first of all, there's nobody that challenges the company's testimony through all it's witnesses that the right-drive shuttle car was not going to be used that day. So, if normal mining operations had continued, that shuttle car would not have been used. In addition to that, before the inspector left the area, the defective ground wire having been discovered, covered, the trailing cable had been severed and the defective splice had physically been removed. Therefore, he could have left the area knowing that the trailing cable could not be used again until it had been properly repaired.

There are some other aspects of the case which have been argued by the parties and I think that there is some merit in most of them. One of them is whether the inspector ever made it clear that he had really issued an imminent danger order. The inspector said, and Mr. Taylor argues, that the inspector told them that the right-drive shuttle car

was parked and was not to be moved until the trailing cable had been corrected. Mr. Norman says that he asked the inspector if that statement was meant to be an order or a citation, and apparently the inspector did not give him a candid reply. That is, the inspector left the company in doubt as to whether he had found existence of an imminent danger.

I'm not holding in this case that an inspector has to use the exact definition that I just discussed in the Court of Appeals cases, nor am I saying that he has to use the exact language in the Act, but, when he was asked whether he had issued an imminent danger order, I think he was obligated to make it perfectly clear that he either had or had not. I don't think there should be any doubt about it. Yet, every witness who testified here today on behalf of the Company, without exception, and those witnesses were put out of the hearing room until they testified, all said they thought they had been issued a citation and not an imminent danger order.

Whatever language the inspector uses, he must make sure that the company knows that he has issued an imminent danger order. Although the imminent danger had ceased to exist in this case before a violation was cited, miners who are in doubt about the inspector's action may continue to work and expose themselves to an imminent danger without actually realizing that they have been ordered to withdraw from the mine except for purposes of correcting the imminent danger.

In Kaiser Steel Corporation, 3 IBMA 489 (1974), the former Board of Mine Operations Appeal stated that an inspector's manual does not have the force of regulations. I think the inspector correctly said in this case that he was not obligated to follow the exact provisions of the inspector's manual, a portion of which is Exhibit B in this case, which does say or at least suggests, that the inspector when he issues an imminent danger order should place a closed poster on the controls of the equipment if equipment is involved. Now, the inspector explained his reason for not doing that in this case by saying that he actually issued an imminent danger order on the trailing cable and not the right-drive shuttle car, and that if he had tried to put a danger poster, closed poster, on the trailing cable, that it would not have stayed on it even if he had done so. Regardless of whether the inspector has to follow the manual, as I have indicated, I think he has to make it clear to the company's personnel that he has issued an imminent danger order. If the inspector had put a closed poster on the trailing cable or had laid one down there by it, no one would have been likely to have claimed in this case that there was doubt as to whether he had issued an imminent danger

order.

Also the inspector's order states that a violation of section 75.703 existed at this mine in that the frame of the right-drive shuttle car was not frame grounded. So it is a little hard when you read that order to put out of your mind the fact that you have only a trailing cable that has been cited and not also a right-drive shuttle car. The inspector said his primary concern was that someone would use the right-drive shuttle car, that its frame would become energized, and that someone would touch the frame and be electrocuted. There is no reason why the inspector could not have put his closed poster on the right-drive shuttle car because that would have kept anyone from using the very piece of equipment about which he was concerned. It's true that his order says the area covered by the withdrawal order was the trailing cable to the right-drive shuttle car; even though that is stated, the fact remains that he was concerned about someone using the right-drive shuttle car. So, it is difficult to separate the trailing cable from the right-drive shuttle car since the imminent danger has to relate to the shuttle car as well as relate to the trailing cable.

Mr. Taylor has indicated that he feels that this Order No. 721484 complies with all the provisions of section 107(a), as well as subparagraph (c) because the order contains the detailed description of the condtions or practices which cause and constitute an imminent danger. The former Board of Mine Operations Appeals held in Armco Steel Corp., 8 IBMA 88 (1977), that an inspector is required to write an imminent danger order so that the person who receives a copy of it will know exactly what constitutes the imminent danger. I am not at all sure that the inspector made it clear in this case because, you see, he issued the imminent danger order verbally before he knew for certain about the separation of the ground cable and yet, the order itself states "when checked with an ohmmeter the Ground Conductor was separated approximately one (1) inch in a vulcanized splice made by Southern Mine and Cable Service." Now, you see that separation was not known at the moment he issued the order, so it is not a part of the imminent danger at that point. I think one other problem here was that the inspector was intent on, and I think he was properly motivated, but he was intent on trying to get Southern Mine and Cable Service to do a better job on their splices. In trying to fight that battle and show documentation of it in the order he was issuing, the inspector lost sight of what he really wanted to cite as an imminent danger. Now perhaps not any one of these items by itself would be sufficient for me to hold that the inspector's order was invalid, but I think when you add all these problems up, that the company had a legitimate complaint here about whether it had been properly treated.

In Old Ben Coal Corp., v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975), the court held that inspector should be upheld unless he has severely abused his discretion. The court, in that case, said the operator of a coal mine is primarily interested in production and that he may, in some instances, give less emphasis to safety than he should because giving attention to safety regulations may cut down on the amount of coal he can produce. So the court said when an inspector is in the mine he is concerned about mine safety and he is the one who may have to disagree with management, as to enforcement of safety regulations. So the court gave the inspector, as it should, an edge any time we have a real close point about whether there was an imminent danger or wasn't. Any time there is doubt, the inspector should be upheld unless he has clearly abused his discretion. I think in this case there are just too many areas where the inspector's order was unclear as orally issued and, when written, was based on facts not known when the order was orally issued.

I agree whole heartedly that the inspector was properly motivated and I congratulate him on being concerned. It is certain that he accomplished his objective in seeing that this equipment was repaired and that is was not used in a condition that could have caused someone to be electrocuted. But I'm required to follow the precedents the former Board has laid down, until the Commission disagrees with the Board, or the Commission reverses me for misunderstanding the precedents, but I think in this instance, there was not an imminent danger on the facts that existed at the time the inspector issued the order. Therefore, I find that the order is invalid and should be vacated.

WHEREFORE, it is ordered:

(A) Order No. 721484 dated December 5, 1979, is vacated and the Application for Review in Docket No. KENT 80-122-R is granted.

(B) The civil penalty issues are severed from the issues raised by the Application for Review and the civil penalty issues will be decided on the basis of evidence received in this proceeding when I receive a petition for assessment of a civil penalty for the violation of section 75.703 alleged in Order No. 721484.(FOOTNOTE 1)

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

~FOOTNOTE 1

Even after an imminent danger order has been vacated, the

violation cited therein may become the subject of a civil penalty proceeding (Eastern Associated Coal Corp. 1 IBMA 233 (1972); Zeigler Coal Co., 2 IBMA 216 (1973); and Zeigler Coal Co., 3 IBMA 64 (1974)).