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SOL (MSHA) V. U.S. STEEL
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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. PENN 79-31 A/O No. 36-05018-03018
v.		Cumberland Mine
U.S. STEEL CORPORATION,	RESPONDENT	

DECISION

ORDER TO PAY

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA Louise Symons, Esq., U.S. Steel Corporation, for Respondent, U.S. Steel Corporation

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by MSHA against the U.S. Steel Corporation. A hearing was held on May 14, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4):

(1) The operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) I have jurisdiction of this case;

(4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;

(5) the inspector and other witnesses who will testify are accepted as experts generally in mine health and safety;

(6) imposition of any penalty herein will not affect the operator's ability to continue in business;

(7) the alleged violation was abated in good faith;

(8) the operator's history of prior violations is average;

(9) the operator is large in size.

At the hearing documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-201). 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. 201). A decision was rendered from the bench setting forth findings and conclusions with respect to the alleged violation (Tr. 214-220).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty. The alleged violation is of 30 CFR 75.523 which provides as follows:

> An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be de-energized quickly in the event of an emergency.

Also relevant to this case is section 75.523-1(b) which provides:

> Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirement of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

Further, section 75.1710-(b)(2) states that:

> For purposes of this section, a cab means a structure which provides overhead and lateral protection against falls of roof, rib, and face, or rib and face rolls.

Finally, section 75.1710(c)(5) provides as follows:

> Lateral protection, such as that afforded by a substantially constructed cab, may also be necessary where the occurrence of falls of rib and face, or rib and face rolls is likely.

The citation in issue, dated October 6, 1978, sets forth that panic bars were not maintained properly in that the operator had to reach for the bar from his operating position to actuate the device on the Jeffrey ram cars Serial Numbers 36823 and 36820, operating in the South Main's right section. The citation had a termination date of October 13, 1978. However, on October 19, 1978, November 22, 1978, January 5, 1979, January 12, 1979, January 24, 1979, and January 29, 1979, extensions of time were granted in order to allow the operator time to devise a new design for the panic bars on the two ram cars. On February 5, 1979, the citation was terminated on the basis that the new panic bar design met the requirements of the regulation.

The primary issue presented is whether a violation exists. First, the operator has argued that the Jeffrey ram car in issue had a cab, which under the regulations relieves it of the necessity of having a panic bar. Much testimony was taken on this issue. The operator maintained that the manufacturer of the Jeffrey ram car had received a letter from the Mining Enforcement and Safety Administration (predecessor to the Mine Safety and Health Administration) stating that its canopies on the ram cars constituted cabs.

The testimony from MSHA witnesses was directly to the contrary. Unfortunately, the letter was not produced. During the course of the hearing, I expressed distress at the operator's failure to produce the letter. The petition for civil penalty was filed over 10 months ago and the notice of hearing was issued 3 months ago. The operator has had ample opportunity to obtain the letter from the Jeffrey Manufacturing Company or through discovery procedures from the Mine Safety and Health Administration itself. Under the circumstances, I cannot accept testimony from the operator's witnesses that when confronted with this letter, responsible MSHA personnel refused to follow it. If such a letter exists, the operator should have produced it. The consequences of the failure to do so rest with the operator. I must therefore, accept the testimony from all the MSHA witnesses which was consistent to the effect that upon inquiry, they were advised that the canopies on these ram cars were never approved as cabs. Accordingly, the exemption from the requirement of a panic bar, where a cab is present, cannot be applied on the record made in this case.

Moreover, I accept the inspector's testimony that he made an independent judgment that the canopy on the ram cars did not provide sufficient lateral protection to constitute a cab. On this basis also, the exemption could not apply.

I have not overlooked the operator's allegation that panic bars have not been required on other Jeffrey ram cars in other mines. However, only the instant matter is before me and I can render a decision only on the basis of the facts which are presented to me. Here the evidence regarding a purported nationwide situation consists only of a few statements. I cannot decide this case on such a basis.

Section 75.523 requires that the electric face equipment be provided with devices that will permit the equipment to be deenergized "quickly" in the event of an emergency. I accept the testimony of the MSHA inspector and the MSHA electrical inspector to the effect that under certain circumstances with a disapproved panic bar being used, the operator of the ram car would not be able to reach the panic bar. For instance, if the operator were struck on the right side of his back so that his left arm were pressed against the contactor box, he would not be able to reach the panic bar. Also, MSHA testimony indicated that the operator could hit the contactor box without hitting the panic bar so as to move the bar enough to activate it. Other situations were also described. I accept such testimony and on the basis of it decide that the cited equipment could not be deenergized "quickly" within the meaning of the regulations. On this basis, I find the violation existed.

I also note in this connection the operator's mine superintendent expressed the view that the redesigned bar, which was accepted as adequate abatement, was in certain respects an improvement over the original panic bar. A great deal of time was spent at the hearing on the MSHA underground manual dealing with section 75.523 and following sections. The former Board of Mine Operations Appeals of the Department of Interior held that the manual does not have the status of official regulations. Kaiser Steel Corporation, 3 IBMA 489, at 498 (1974). In any event, as set forth above it is not necessary or appropriate to resort to the manual in order to decide this case. I would however, state that the cited panic bar does not satisfy either of the policies on pages 363 or 364 of the manual. Moreover, in my opinion, the reference to figures 3, 4 and 5 on page 364 of the manual is illustrative rather than exclusive.

Once again, based upon the mandatory standard itself and the language set forth therein, I find a violation

existed.

I find the violation was of moderate gravity because although an injury could have been serious, the probability of its occurrence was unlikely.

Most significantly, I find the operator was not negligent. The record shows that the operator did its best in installing the original panic bar which eventually was the subject of the citation. This is to me a most significant factor. There is in this case no question of the operator's good faith.

The parties have stipulated that the operator is large in size, has an average history and the imposition of a penalty will not affect its ability to continue in business and that abatement was undertaken in good faith.

Bearing in mind all these factors, especially the operator's lack of negligence and its good faith attempt to deal with this situation, only a most nominal penalty is appropriate. Accordingly a penalty of one dollar ($1) is imposed.

AFFIRMATION AND AMENDMENT OF BENCH DECISION

The foregoing bench decision is AFFIRMED except that it is AMENDED to provide that the penalty amount be $125. A penalty of $125 is more consistent with the moderate gravity than the amount set at the hearing.

ORDER

The operator is ORDERED to pay $125 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge