FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

27 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-360
	:	A.C. No.
v.	:	
	:	Robinson Run 95 Strip Mine
KING KNOB COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Catherine Oliver, Esq,, and James Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Duane Southern, Esq., Fairmont, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"). On October 5, 1979, Petitioner filed a proposal for assessment of civil penalty, for an alleged violation on January 29, 1979, of mandatory safety standard 30 C.F.R. § 77.410, charging that one of the operator's pickup trucks had no backup alarm, Respondent King Knob Coal Company, Inc. (King Knob), filed its answer on October 22, 1979, and an evidentiary hearing was held in Wheeling, West Virginia, on March 19, 1980,

The primary issues in this case are (1) whether Respondent has violated the provisions of the Act and implementing regulation as alleged in the petition for assessment of civil penalty filed herein, and, if so, (2) the appropriate civil penalty to be assessed for the alleged violation,

I. The Alleged Violation

The cited standard, 30 C.F.R. § 77,410, provides as follows: "[M]obile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an automatic warning device which shall give an audible alarm when such equipment is put in reverse," Clearly, pickup

trucks are "mobile equipment such as trucks" and therefore, under the standard, must be equipped with automatic backup alarms, Since King Knob concedes that the subject pickup truck did not have the specified warning device it is apparent that the violation is proven as charged.

By way of defense King Knob argues that MSHA had previously advised it that pickup trucks need not comply with the cited standard so long as the operator's view directly behind the vehicle is not obstructed. King Knob also contends, of course, that the truck at issue did not have an obstructed view to the rear and argues that MSHA should therefore be estopped from enforcing the standard against it. MSHA admits that it had such an enforcement policy and that it informed King Knob of that policy before the violation in this case had occurred. 1/

The argument presented by King Knob is essentially one of equitable estoppel. Generally stated, equitable estoppel is a doctrine for adjusting the relative rights of parties based upon a consideration of justice and good conscience, Small v. Robinson, Inc. v. United States, 123 F. Supp. 457, 463 (S.D. Cal, 1954) Peoples National Bank v. Manos, Inc., 84 SE.2d 857, 870, 45 ALR 2d 1070 (1954); 28 Am. Jun. 2d Estoppel and Waiver $28, The doctrine does not generally apply against the Government, however. Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed 791 (1916); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 92 LEd 10, 68, S.Ct. 1 (1947). Although these decisions have been somewhat eroded and, according to one commentator, 2/ have been "effectively overruled or superseded by lower court decisions" that erosion has occurred where the governmental action has involved a nronrietary function but not where it has involved a sovereign function. Cf. United States v. Georgia Pacific Co., 421 F.2d 92 at pp. 100-101 (9th Cir. 1970) Davis, n. 2, supra, § 170.03 and cases cited therein. Enforcement of mine safety standards is clearly not a proprietary function but is a unique governmental function for the benefit of the public, Georgia Pacific, supra at p. 101. It is similar to the enforcement discretion of Federal prosecutors found in United States v. Wallace, 578 F.2d 735 (8th Cir. 1978) not to be a proper subject for judicial scrutiny. See also, United States v. Hayes, 589 F.2d 811 (5th Cir, 1979). Indeed even Professor Davis concludes that enforcement officers may safely issue nonenforcement or selective enforcement guidelines, without fear of conferring rights on private parties. Davis, Administrative Law Treatise, 2nd Ed. (1979), § 9:10. I conclude, therefore, without considering whether the facts herein would otherwise warrant application of the principles of equitable estoppel, that the doctrine can not be successfully invoked as a defense to violations of the Act and its implementing regulations. This

1/ While this apparent exception seems to have some substance, since in reality no pickup truck has a completely unobstructed view to the rear, a literal reading of the policy would mean that there is in fact no exception at all.

2/ Davis, Adminstrative Law of the Seventies, supplementing Administrative Law Treatise (June 1976), § 17 .01.

conclusion does not mean, however, that due consideration will not be given to equitable factors present in any such case in determining negligence vel non, and the amount of penalty to be imposed under section 110(i) of the Act. Moreover, this conclusion should not be construed as condoning the ill-advised practices followed by MSHA in this case.

II. The Appropriate Penalty

In determining the amount of a civil penalty to be assessed, section 110(i) of the Act requires that six factors be considered: (1) whether the operator was negligent; (2) the gravity of the violation; (3) the history of previous violations; (4) the appropriateness of the penalty to the size of the operator's business; (5) the operator's good faith in attempting rapid abatement of the violation; and (6) the effect of the penalty on the operator's ability to continue in business:

Negligence: As previously discussed, MSHA in fact had an enforcement policy (and had informed King Knob of that policy before the violation in this case had occurred) that pickup trucks need not comply with the cited standard so long as the operator's view directly behind the vehicle is not obstructed. Under MSHA's regulations, "no negligence" means that the operator could not reasonably have known of the violation. 30 C.F.R. §100.3(d)(1). Under the circumstances if King Knob believed that it was in compliance with the MSHA policy directive and that belief was reasonable thkn I would be inclined to find an absence of negligence.

The essential facts are not in dispute. The subject pickup truck was equipped with dual outside rearview mirrors and one inside rearview mirror and had a rear window 16 inches high by 60 inches wide. The lower 6 inches of the window was covered, however, by a tool box mounted directly behind it. The truck operator, pit foreman Richard Ford, testified however that the tool box did not obstruct his view of the critical area behind the truck but only the truckbed itself. MSHA produced no probative evidence as to the degree of obstruction and therefore Ford's testimony is uncontradicted. The inspector who testified on behalf of MSHA had no firsthand knowledge of the degree of obstruction, if any, and only surmised that the view to the rear was obstructed based on what he heard from others. The inspector who actually did look through the rear window did not testify. His observations were deficient in any event since when he looked through the window there was an additional 6 to 7 inches of snow piled on top of the tool box leaving only 3 or 4 inches of window exposed. 3/ No one apparently bothered to remove the snow to make a determination of the obstructive effect, if any, of the tool box itself.

3/ Even though MSHA made its estimates of restricted vision while snow was covering part of the rear window, it conceded at hearing that such a temporary obstruction in itself would not warrant the use of a backup alarm under its policy. What MSHA policy would have been if the tool box in this case had not been bolted down but rather was a permanently placed portable toolbox is anybody's guess.

believed it was in compliance with MSHA's policy excepting pickup trucks from the backup alarm standard where the operator's view to the rear is not obstructed. I therefore find King Knob not to have been negligent in failing to have a backup alarm on the cited truck. I of course make no conclusion as to whether negligence may otherwise have been involved in the fatality in this case. That is not an issue before me.

Gravity: The violation here was serious (though due in large part to MSHA's confusing enforcement policy) and was no doubt a factor resulting in the tragic death of a miner employed by King Knob, when the subject truck backed into him,

History: King Knob has no history of violations at the Robinson Run Mine,

Size of Business: Annual production for the mine was 172,464 tons and for the operator was 1,299,949 tons, thereby placing it in a medium size category.

Good Faith Abatement: A backup alarm was installed on the truck within the time allotted,

Ability to Stay in Business: There is no evidence that any penalty would affect the operator's ability to stay in business,

Considering all of these factors, I conclude that a nominal penalty of $10 is appropriate. The operator is therefore ordered to pay a penalty of $10 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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