FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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3 JUL 1980

SECRETARY OF LABOR, 'MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : : Docket No. PENN 79-142 : A.C. No. 36-06100-03004
v.		:
SOLAR FUEL COMPANY,	Respondent	: Solar No. 9 Mine :

SUMMARY DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; James L. Custer, Manager, Safety and Health, Solar Fuel Company, Somerset, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Solar Fuel Company (hereinafter Solar) for a violation of a mandatory safety standard. The case is presently at issue upon the filing of cross motions for summary decision by the parties.

This matter involves the alleged violation of 30 C.F.R. § 75.503, failure to maintain in permissible condition all electric face equipment required to

be permissible "which is taken into or used inby the last open crosscut." Two citations were issued in May 1979, for the alleged violation of the above regulation. Solar contends that the citations are invalid and should be vacated. MSHA contends that the citations are valid and a civil penalty should be assessed.

ISSUE

Whether a citation under 30 C.F.R. § 75.503 may be issued for electric face equipment which is intended for use in or inby the last open crosscut when such equipment is not in permissible condition when cited outby the last open crosscut.

APPLICABLE LAW

30 C.F.R. § 75.503 provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open'crosscut of any such mine."

STIPULATIONS

The parties stipulated the following:

1. On May 3, 1979, and May 4, 1979, duly authorized representative of the Secretary of Labor, coal mine inspector Earl Miller, perforned a regular quarterly inspection at the Solar Fuel Company's Solar No. 9 Mine.

2. During the course of his inspection on May 3, 1979, Inspector Miller observed that a Jeffrey mining machine located in an Intake air course outby the last open crosscut, was not in permissible condition. (See Citation No. 0617857,

attached hereto as Exhibit No. .G-1). He also observed a roof bolting machine, in non-permissible condition in an intake air course outby the last open crosscut, on May 4, 1979, at the same mine in the same working section. (See Citation No. 0617859, attached hereto as Exhibit No. G-2).

3. The section of the mine in question was being prepared for mining operations which were scheduled to begin shortly after the issuance of the subject citations. The operator intended to use both pieces of equipment inby the last open crosscut while performing these mining operations.

4. On May 3, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617857 was issued, produced 105 tons of coal after the citation was issued.

5. On May 4, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617859 was issued, produced 285 tons of coal after the citation was issued.

DISCUSSION

Solar contends that a citation issued under 30 C.F.R. § 75.503 may be issued only if the nonpermissible equipment is seen inby the last open crosscut. MSHA contends that nonpermissible equipment intended for use inby the last open crosscut may be cited even if found outby the last open crosscut. Both parties cite authorities in suppport of their positions.

Solar relies primarily upon two decisions issued by administrative law judges and MSHA's Draft Electrical Manual. In Raiser Steel Corporation, Docket No. DENV 73-131-P (April 9, 1974), an administrative law judge vacated a notice of violation because the equipment was not actually inby the last open crosscut, stating: "I do not construe the regulation as requiring that all electric face equipment, irrespective of where it is located, must at all times be maintained in permissible condition simply because it is intended to

be taken into or used inby the last open crosscut." In Mineral Developing Company, Inc., Docket No. MORG 74-739-P (February 25, 1975), an administrative law judge vacated a notice of violation because MESA (MSHA's predecessor) provided no information to indicate where a nonpermissible scoop was operating and the judge was therefore "unable to determine that the scoop was located inby the last open crosscut."

The MSHA Draft Electrical Manual relied upon by Solar in reference to 30 C.F.R. § 75.503 states, "[e]nergized electric face equipment must be observed in or inby the last open crosscut or in a return entry before a permissibility violation exists." Solar concedes that the Draft Manual has never been in effect and is not a regulation or official policy of MSHA.

MSHA relies upon Peabody Coal Company, Docket No. VINC 77-88 (October 10, 1978). In Peabody Coal Company, the judge rejected the reasoning of Kaiser Steel Corporation. The judge in Peabody Coal Company held:

> This language clearly supports the proposition that all electric face equipment falls under the protection of 30 CFR 75.503 regardless of its location in the mine. Thus, the said shuttle car, which was intended to be used inby the last open crosscut (see Applicant's brief, p. 2), was in violation of 30 CFR 75.503. --

The holdings of the cases cited by Solar and MSHA are in direct conflict. In the instant case, MSHA has not shown and does not contend that the equipment in question had been taken into or used inby the last open crosscut at the time the citation was issued. MSHA asserts that the fact that the operator intended to take the machines inby the last open crosscut was sufficient to prove a violation. That reasoning, however, ignores the plain language of

the regulation which requires that the equipment be electric face equipment "which is taken into or used inby the last open crosscut." To prove a violation of 30 C.F.R. § 75.503, MSHA must show that Solar did not maintain in permissible condition, equipment which was "taken into or used inby the last open crosscut."

While I am mindful of the remedial nature of the Act and the fact that the Act is to be construed broadly to accomplish congressional policy, I find nothing in the legislative history which would support the position of MSHA and the holding in Peabody Coal Company, supra. On the contrary, section 318(i) of the Act provides in pertinent part: "'Permissible' as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry * * *." In order to support MSHA's position I would have to find that the language "taken into or used inby the last open crosscut" as used in this regulation is redundant. Nowhere in the Act or regulations is there a requirement that a mine operator maintain electrical face equipment in permissible condition if it is "intended" to be taken into or used inby the last open crosscut. The authority cited for the contrary holding in Peabody Coal Company, supra, was 30 C.F.R. § 18.90 titled "Field Approval of Electrically Operated Mining Equipment" which provides in pertinent part as follows:

> The regulation of this subpart (e) set forth the procedures and requirements for permissibility which must be met to obtain MESA full approval of electrically operated machinery used or intended for use inby the last open crosscut of a coal mine which has not been otherwise approved, certified or accepted * * *. (Emphasis supplied.)

I find that 30 C.F.R. § 18.90 concerning "Field Approval of Electrically Operated Mining Equipment'* is irrelevant to a determination of whether Solar violated 30 C.F.R. § 75.503. The former section does not purport to be a definitional section for the regulation in controversy. Moreover, it would be unreasonable to expect a mine operator to conclude that the language "intended for use" contained in 30 C.F.R. § 18.90 would apply to 30 C.F.R. § 75.503 when the opposite conclusion is manifest from the language employed.

MSHA does not allege that the electric face equipment involved in the instant citations was taken into or used inby the last open crosscut. Therefore, MSHA has not alleged facts which, as a matter of law, constitute a violation of 30 C.F.R. § 75.503.

Under 29 C.F.R. § 2700.64(b):

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

Here, the record shows that there is no issue as to any material fact and, based upon the foregoing, Solar is entitled to summary decision as a matter of law.

ORDER

WHEREFORE IT IS ORDERED that Citation Nos. 0617857 and 0617859 are VACATED, Solar's motion for summary decision is GRANTED, and the petition is

DISMISSED. IT IS FURTHER ORDERED that MSHA's motion for partial summary decision is DENIED.

James A. Laurenson

James A. Laurenson, Judge

Distribution by Certified Mail:

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