CCASE:
SOL (MSHA) V. BURGESS MINING & CONSTRUCTION
DDATE:
19800805
TTEXT:

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. SE 79-9 A.C. No. 01-01897-03002
v.		Gurnee Strip Operation No. 2
BURGESS MINING AND CONSTRUCTION CORPORATION,	RESPONDENT	

DECISION

ORDER TO PAY

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Petitioner, MSHA W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the government against Burgess Mining and Construction Corporation. A hearing was held on August 20, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4-6):

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. The Administrative Law Judge has jurisdiction over this proceeding.

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation and termination was properly served upon the operator in accordance with the Act.

6. Copies of the subject citation and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance but not for the purpose of establishing the truthfulness or the relevancy of any statements asserted therein.

7. In 1977, the Gurnee Strip Operation No. 2 produced an annual tonnage of 55,772. The controlling company, Burgess Mining and Construction Corporation, had an annual tonnage of 540,361. The operator is medium in size.

8. Gurnee Strip Operation No. 2 had no assessed violations in the preceding 24 months and the company, as a whole, had 116 assessed violations.

9. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

10. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business; but it noted that the Gurnee Strip Operation No. 2 is no longer operating although, of course, Burgess Mining continues to operate other mines.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-56). At the conclusion of the taking of evidence, the parties waived the filing or 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. 56). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 75-79).

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 Section 77.410 of the mandatory standards, which provides the following: "Mobile equipment, such as trucks, forklifts, front-end loaders, tractors, and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

The subject citation recites in pertinent part that the mechanics truck, working in the pit area, was not provided with an automatic warning device which would give an audible alarm when it was put in reverse.

It is undisputed that the cited truck did not have a backup alarm. The operator contends, however, that Section 77.410 is so ambiguous that it should be invalidated. I reject this argument because I am convinced that the standard is not ambiguous. On the contrary, its meaning is plain and clear. Mobile equipment such as trucks must have automatic backup alarms. The regulation, therefore, applies to all specified equipment which moves.

The Court of Appeals for the Third Circuit, in Lucas Coal Company v. Interior Board of Mine Operations Appeals, 522 F.2d 581 (1975), not only recognized the validity of this standard but went further and applied it to bulldozers which are not specifically mentioned in this standard. The Third Circuit held that the examples given in the mandatory standard are not all inclusive. This case, therefore, is even stronger than Lucas for application of the standard.

The cited equipment in this case is a truck, which is mobile. It falls, therefore, squarely within the terms of 77.410. I find, therefore, that a violation exists.

In addition, I note that 77.410 does not distinguish between various types of trucks. I will not create an exception to the plain language of the standard for pickup trucks or for any other kind of trucks. If it is desirable to do so, then proper procedures exist through the rulemaking process. Administrative Law Judge Melick in Secretary of Labor v. King Knob Coal Company, WEVA 79-360, (June 27, 1980), held that pickup trucks were covered by this standard.

A great deal of testimony was taken with respect to whether the rear view from the truck was obstructed. I find it more probative and accept the inspector's testimony that it was. The operator's witness did not see the truck on the day in question. It appeared from the testimony of the inspector and from statements by the Solicitor that the Secretary has adopted a policy whereby these warning devices need not be provided for pickup trucks unless the rear view is obstructed. I was not furnished with any documentary evidence of this policy. However, I have with me the particular page from the March 9, 1978, MSHA Surface Manual which provides in pertinent part as follows: "The warning device required by this Section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles where the operator's view directly behind the vehicle, is not obstructed."

I believe that if the Secretary wishes to so circumscribe this standard, then he should follow the rule-making process rather than just placing a change in the inspector's manual. I am not bound by the manual. North American Coal Corporation, 3 IBMA 93, 106 (1974). Kaiser Steel Corporation, 3 IBMA 489, 498 (1974). Indeed, the Third Circuit, in Lucas said: "We need only say that there is nothing in 77.410 which limits its coverage to vehicles with an obstructed view to the rear." 522 F.2d at 585.

In any event, having accepted the inspector's testimony, I find a violation existed even under the interpretation set forth in the manual because based upon the inspector's testimony the rear view from the truck was obstructed.

I conclude the violation was serious because a major injury could result. This truck was used in areas where people work.

I conclude the operator was negligent because, as I have already stated, the language of the mandatory standard is so clear. I further conclude the operator was negligent because even under the interpretation set forth in the inspector's manual the operator knew, or should have known, that the rear view from the truck should not be obstructed.

I reject the operator's contention with respect to what customary usage of various terms are in the mining industry as a basis for not applying the standard. It would be an easy matter for the mandatory standard to specifically incorporate industry interpretation. This standard does not do so. Its meaning is plain on its face.

Other criteria have been stipulated to and I take them into account into fixing the penalty.

In light of the foregoing, and having due regard for all the statutory criteria, a penalty of $250.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $250 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge