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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. VA 80-84
A.C. No. 44-00294-03032V

v.

EASTOVER MINING COMPANY,
RESPONDENT

Virginia No. 1 Mine

DECISION

Appearances: Catherine Oliver, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for Petitioner
Karl S. Forester, Esq., Harlan, Kentucky, 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 Eastover Mining Company (hereinafter Eastover) for a violation of a mandatory standard. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. 75.507 in that nonpermissible power connection points were located in return air.

The parties filed preliminary statements and a hearing was held in Abingdon, Virginia, on November 5, 1980. Inspector Herman Lucas testified on behalf of MSHA. Larry Baker, David Gilly, and Robert Jessee testified on behalf of Eastover. The parties submitted closing arguments at the hearing.

ISSUES

Whether Eastover violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. 75.507 provides as follows: "Except where permissible power connections are used, all power connection points outby the last open crosscut shall be in intake air."

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Section 110(i) of the Act, 30 U.S.C. 820(i), provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalties, the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. Eastover owns and operates Virginia No. 1 Mine, and both Eastover and the mine are subject to the jurisdiction of the Act.

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to the Act.

3. The subject order, No. 682886, and termination thereto, were properly served by a duly authorized representative of MSHA, Herman Lucas.

4. A copy of Order No. 682886 attached to the petition for adjudication of a civil penalty is an authentic copy of the original order.

5. The assessment of a civil penalty in this proceeding will not affect Eastover's ability to continue in business.

6. The pump control box which is the subject of Order No. 682886 was located in the last open crosscut of the 2 Right Section, which is a return airway.

7. The subject pump control box did not have permissible power connection points at the time the subject order was issued.

8. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of MSHA.

9. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that Virginia No. 1 Mine has an annual tonnage of 236,248 and Eastover has an annual tonnage of 1,679,965.

SUMMARY OF THE EVIDENCE

During the course of a spot inspection of Eastover's Virginia No. 1 Mine on September 12, 1979, MSHA inspector Herman Lucas issued an order of

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withdrawal pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.507. The order in question alleged, in part, as follows: "Nonpermissible power connection points, Gorman Rupp water pump control box was being used in the last open crosscut in return air of 2 Right Section." As noted in the stipulations in this case, Eastover admits that the pump control box did not have permissible power connection points and was located in a return airway at the time the order was issued. However, Eastover contends that the pump control box was not energized at the time the order was issued. Hence, it asserts that there was no violation of the regulation and no civil penalty should be assessed.

Inspector Lucas testified that he did not know whether the pump was working or whether the pump control box was energized at the time he issued the order. He stated that he assumed that the pump control box was energized or that it had been energized previously. The inspector admitted that Robert Jessee, the assistant mine foreman and the operator's escort during this inspection, told him that the pump control box was not energized. Inspector Lucas did not attempt to make a determination whether the pump control box was energized. He stated that, in his opinion, if the equipment had never been energized, there would be no violation of the regulation.

Larry Baker, formerly Eastover's general mine foreman on the third shift, testified that he installed the pump on the shift prior to the one on which the order was issued. After he set the pump in water, he found that there was not enough cable to connect the pump to the power center. Since he could not complete the installation of the pump, he hung the nonpermissible pump control box on a roof bolt in return air to keep it out of the mud. He asserted that he was familiar with the regulation in question and would not have left the pump control box in the return air if it were energized.

Robert Jessee, Eastover's assistant mine foreman on the day shift, testified that he accompanied the inspector on the day in question. He testified that he told the inspector that the pump control box was not connected. He walked to the power center and confirmed the fact that the pump control box was not energized.

The undisputed evidence on the remaining issues indicate that energized, nonpermissible power connection points in return air could cause a methane explosion which could be fatal. At the time of the order, .1 to .2 percent methane was found at the working places in this section. This mine has a history of methane liberation. However, if the pump control box was not energized, it could not cause an explosion and the violation would not be serious. In May 1979, there was a violation of this regulation, 30 C.F.R. 75.507, at this mine.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. Eastover contends that the

pump control box was not energized and, hence, no violation of the regulation occurred. The

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inspector admitted that he did not know whether the pump control box was energized at the time he issued this order. He assumed that it had been energized at some prior time in nonpermissible condition but testified that if the box had not been energized at any time since its placement in return air, no violation would occur. However, whether or not the pump control box was ever energized is irrelevant to a determination of whether the regulation was violated.

Eastover should be aware that its defense, that the nonpermissible power connection points were not energized, is no defense to a charge of violation of 30 C.F.R. 75.507. In *Secretary of Labor v. Eastover Mining Company*, Docket Nos. NORT 78-54-P and NORT 78-55-P (November 8, 1978), Judge Steffey rejected Eastover's defense as follows:

Since section 75.507 prohibits the placing of nonpermissible power connection points in return air outby the last open crosscut, I think the inspector is correct in stating that respondent violated section 75.507 by placing the charger in return air even though the charger was not being used at the time Order No. 1 MLH was written.

Eastover did not seek review of that decision.

Thereafter, in *Secretary of Labor v. Southern Ohio Coal Company*, Docket Nos. VINC 79-109-P, et al. (October 19, 1979), Judge Koutras rejected the same defense to the same regulation as follows:

I find and conclude that the petitioner has established a violation as charged in the citation by a preponderance of the evidence. Respondent's contention that petitioner must first establish that the battery charger unit in question was energized in order to support a violation of section 75.507 is rejected, notwithstanding the inspector's practice of not issuing citations if it is not energized. I find no such requirement in the standard and respondent has not persuaded me otherwise. The question of whether the unit was energized at the time of the inspection goes to the question of gravity and may not serve as an absolute defense to the violation. The citation is AFFIRMED.

The Federal Mine Safety and Health Review Commission denied the petition for discretionary review.

In the instant case, Eastover cites no legal precedent in support of its defense. As noted above, the prior decisions of judges have held that the placement of nonpermissible power connection points in return air is a violation of 30 C.F.R. 75.507 even if the units are not energized. I conclude that the evidence of record establishes a violation of 30 C.F.R. 75.507. However, I also find that the pump control box in controversy had

not been energized at the time the order issued.

ASSESSMENT OF CIVIL PENALTY

MSHA proposed that a civil penalty in the amount of \$2,500 be assessed for this violation. I have found that there was a prior violation of the same standard, 30 C.F.R. 75.507, cited in this case, in this same mine in May 1979. Eastover was negligent in that it knew or should have known of this violation since the area where the violation occurred had been preshifted. This mine liberates methane and had the control box been energized, an explosion source would have been present. However, I have found that the control box was not energized at the time the order was issued, nor was it ever energized at the point at which it was found in return air. The gravity of the violation was therefore much less than was assumed by MSHA when it proposed a penalty of \$2,500.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of \$500 should be imposed for the violation found to have occurred.

ORDER

WHEREFORE IT IS ORDERED that Eastover pay the sum of \$500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. 75.507.

James A. Laurenson, Judge