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MONTEREY COAL v. SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

MONTEREY COAL COMPANY,  
CONTESTANT  
v.

Notice of Contest  
Docket No. WEVA 81-203-R

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
RESPONDENT

Wayne Mine

DECISION

Appearances: Timothy M. Biddle, Esq., Washington, D.C., and Kenneth C. Minter, Esq., Houston, Texas, for Contestant; Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Chief Administrative Law Judge Broderick

The above case was called for hearing on January 9, 1981, in Charleston, West Virginia. Following the presentation of evidence, counsel waived their rights to file written proposed findings of fact and conclusions of law and the following decision was issued from the bench:

JUDGE BRODERICK: We'll go back on the record. This case was called for hearing on January 9, 1981, in Charleston, West Virginia, pursuant to notice. Marvin Vernatter, a Federal mine inspector, and a duly authorized representative of the Secretary of Labor, testified on behalf of the Government; Charles Pate, Barney Frazier, and Rodney Hunt testified on behalf of Contestant. The basic issue in this case is whether the violation of 30 C.F.R. 77.1700, which was charged in the citation, occurred.

The mandatory standard contained in 30 C.F.R. 77.1700 reads as follows: "No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist, that would endanger his safety, unless he can communicate with others, can be heard, or can be seen."

Based on the evidence presented here today, and on the contentions of the parties, I make the following findings of fact and conclusions of law:

- (1) Contestant, at all times pertinent to this decision, was the operator of a coal mine located in Wayne County, West Virginia, known as the Wayne Mine.
- (2) Contestant was, at all times pertinent to this decision, subject to the provisions of the Federal Mine Safety and Health Act of 1977, in the operation of that mine.
- (3) I have jurisdiction over the parties and subject matter of this proceeding.
- (4) On or about November 3, 1980, Contestant operated a 50-ton Euclid truck during the second shift on the haul road between the slate bin and the dumping area on the subject mine.  
  
The truck was operated during almost the entire shift by a mobile equipment operator, Barney Frazier. He operated the truck alone, and no one else regularly worked during that shift at or near the bin, the road, or the dumping site. This was the only occasion that the truck was used for this purpose during the second shift, at the subject mine.
- (5) There was a telephone at the slate bin. The truck was not equipped with a two-way radio. There was no phone or other means of communication along the road or at the dumping site.
- (6) The driver's foreman, Rodney Hunt, checked with the driver three times during the shift, once at about 8 p.m., once at about 10 p.m., and once at about 11:15.
- (7) The haulage road surface is of stone; it is 40 to 45 feet wide, and has berms on both sides with a minimum height of 42 inches. The berms were in good condition. The road has a slight grade of about 5.6 degrees. The road was in good condition except for the last 150 to 200 yards beyond the dump site, which were muddy, apparently resulting from the dumping of refuse. The road was approximately one-half mile in length. A truck at the dumping site is not visible from the loading bin.
- (8) Federal mine inspector Vernatter issued a section 104 citation, No. 910228 on December 8, 1980, charging a violation of 30 C.F.R. 77.1700, in that:

A truck driver operating a 50-ton capacity Euclid dump truck had been assigned to haul slate at the refuse site alone on the second shift. The foreman states that he checked the worker twice during the shift, and two telephones are available at the slate bin. The driver hauls slate from the slate bin, down a declined haul road to the dumping area. The haul road and dumping location is not visible from the other surface facility.

(9) On December 16, 1980, the citation was modified to read as follows: "The operator was requiring the refuse truck driver to perform work alone where he could not be heard or seen, nor was communications provided. This work was being performed alone on an elevated roadway in the area of a valley fill.

(10) On December 16, 1980, Order of Withdrawal No. 913603 was issued because the condition cited was not abated. The order prohibited the use of the Euclid slate truck.

(11) On the same date, December 16, 1980, the order was modified by Order No. 913603-1:

To permit the use of the truck provided one of the four means of communication is provided; one, a man is not alone -- two people in the area; two, direct radio communication is provided; three, the driver calling in to some person each hour, with someone checking on the driver, should the call be ten minutes late; four, a person visually checking on the driver each hour.

(12) On November 3, 1980, Barney Frazier, an employee of the Contestant, was assigned to perform work alone on the haulage road described above.

(13) The said employee was assigned to work in an area where he could normally communicate with others only at the loading bin. He would normally be at the loading bin every 45 minutes to 1 hour as he loaded his truck with refuse. During the course of his work in hauling the refuse to the dumping site, he normally could not be heard or seen by other employees.

(14) The Government has not established that the area where the said employee was assigned to work was an area where hazardous conditions existed that would endanger his

safety. I do not accept the interpretation that apparently MSHA follows, that any work at a mine site is in an area where hazardous conditions exist that would endanger an employee's safety. Such an interpretation would render the words meaningless. And I am bound to give all words in a mandatory standard meaning, and can only conclude that the standard applies to areas where conditions exist that are hazardous, which would endanger an employee's safety, over and above the conditions that exist throughout the mining industry, or indeed in any industry.

The evidence submitted here today does not show that such hazardous conditions existed on the haulage road where the employee in question drove his truck. Therefore, based upon the above findings of fact and conclusions of law, I issue the following order: Citation No. 910228, issued December 8, 1980, and Order of Withdrawal No. 913603, issued December 16, 1980, are vacated. A written decision will be issued confirming this bench decision.

The above decision is AFFIRMED.

James A. Broderick  
Chief Administrative Law Judge