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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. LAKE 80-302 A.C. No. 12-01599-03009
v.	
J & R COAL COMPANY, RESPONDENT	J & R Mine

DECISION

Appearances: Thomas Lennon, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner
John Stachura, Jr., J & R Coal Company, Bicknell, Indiana, for Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Evansville, Indiana, on December 9, 1980. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred during argument, I entered an opinion on the record. (FN.1) My bench decision containing findings, conclusions, and rationale appears below as it appears in the record aside from minor corrections. This decision covers three of the four alleged violations remaining in this docket. The fourth, Citation No. 776820 was settled by the parties at the hearing for $55. The original assessment therefore was for $78. I approved this compromise settlement based on MSHA's indication that it initially over-evaluated the degree of Respondent's negligence and because Respondent abated the alleged violation in good faith and there were no injuries or fatalities resulting therefrom.

> The initiating pleading, the Secretary of Labor's so-called "Proposal for Penalty," was filed on July 10, 1980, and originally listed five citations for which penalties were sought. One of those citations, No. 1002184, dated March 27, 1980, was vacated prior to hearing. At the hearing, the Secretary was represented by counsel and Respondent was represented by one of its officers, Mr. John A. Stachura.

With respect to the statutory penalty assessment factors, the parties initially stipulated as to several of them. Based thereon, it is found that Respondent at all times material herein employed 50 miners as defined in the Act and, for fiscal year 1980, ending September 30, 1980, Respondent's annual tonnage of coal was 272,000 tons. I find that Respondent is in the upper range of "small" operators in terms of size.

Respondent has a history of 23 violations which occurred prior to October 31, 1979, which was the date of the first of the four violations in question and which occurred within the 24-month period prior to said date. With the exception of Citation No. 1002182, which will be discussed specifically hereinafter, I find that after being informed of the alleged violation Respondent proceeded in good faith to achieve rapid compliance with the allegedly violated standard involved. As to each of the remaining citations, I also find that any penalty that I will assess in this proceeding will not result in placing the Respondent in an adverse economic position so as to jeopardize it's ability to continue in business as a coal mine operator.

Accordingly, there remain for discussion with respect to each citation the questions whether or not a violation did, in fact, occur as alleged by the Government, and, if so, whether the violation resulted from any degree of negligence on the part of Respondent and if the conditions resulting from the violation were serious in the sense of posing a hazard to the health, welfare, or life of miners.

CITATION NO. 772654

Specifically, with respect to Citation No. 772654, the record consists primarily of the testimony of John Duncan, the Federal coal mine inspector who issued the citation on October 31, 1979, and John W. Pirtle, the Respondent's mine manager. In terms of documentary evidence, Respondent's Exhibit R-1, a belt inspection book, has also been considered.

Based on the inspector's testimony, I find that the condition described in the citation, to wit, "the battery for the belt sensor system was discharged; when replaced the unit indicated a short circuit on the line" did exist. The inspector cited 30 C.F.R. 75.1103 as having been violated by this condition. This regulation, which is also a mandatory safety standard provided in the Act itself, provides, inter alia, that, "devices shall be installed on all such belts which will give a warning automatically when a fire occurs on or near such belt." Respondent's contention is that, as I divine

it, no violation occurred because it did have a belt sensor system in place on the date the inspector cited the alleged violation and that it was in compliance with a related regulation, i.e., 30 C.F.R. 75.1103-8(a), which provides that "automatic fire sensor and warning device systems shall be inspected weekly and a functional test of the complete system shall be made at least once annually." The instant regulation also provides that inspection and maintenance of such systems shall be by a qualified person.

Turning now to the evidence, the Respondent does admit that on October 31, 1979, the battery for the belt sensor system was dead when it was observed by the inspector. There is no question that when the battery was replaced this unit indicated a short circuit on the line. I therefore find that the conditions described by the inspector in the citation occurred.

The belt in question is approximately 2,400 feet in length and the belt sensor system which monitors the belt is kept in a shed which is not subject to the constant supervision of any employee or management personnel of Respondent. To test the system, a button is provided which when pressed indicates a warning if the system is inoperable. According to evidence provided by Respondent, it checked the system and made the test of the battery approximately three times a day and, specifically, as indicated in Exhibit R-1 on October 30 in its belt inspection book it logged in an entry that would indicate the belt sensor system was working properly. That entry, signed by "T. Emmons," indicates "okay."

From Mine Manager Pirtle's testimony, I find that the Respondent did comply with the provisions of 75.1103-8 in that it made such a test on October 30 and made tests of the system within the specific requirements of the regulation. The question remains, however, whether the evidence establishes a violation of 75.1103. The inspector indicated that after he had issued the citation Respondent replaced the battery and the system did become workable. Respondent's evidence indicated that the short circuit detected by the inspector may have been caused by a falling rock from a roof fall which severed the wire in question and that the severance would have occurred on October 31 on the midnight to 8 a.m. shift. The company's evidence in this connection established that the October 30 entry in Exhibit R-1 indicated the battery was operating on the 4 to 12 midnight shift and that the battery was found dead sometime on the morning of October 31, 1979, during the inspector's inspection which commenced on or about 8:15 a.m. Thus, the falling rock would presumably have caused the short circuit sometime between midnight and 8 a.m. on October 31, 1979. This

evidence, of course, would mandate

a finding that the Respondent was not negligent should I find a violation of the cited regulation which, in turn, calls for an interpretation of the regulation.

Turning to that issue, I find preliminarily that the belt sensor system, when observed by the inspector, was not in such a condition that it would give a warning automatically when a fire occurred on or near the belt.

The regulation requires that devices be installed on such belt which will give a warning automatically when a fire occurs on or near it. Although the regulation which is relied upon by the Respondent, section 75.1103-8, sets forth a period of time during which the mine operator must inspect the fire sensor and warning device systems, i.e., weekly, compliance with that does not excuse the fact that a technical violation did occur on October 31, 1979. The violation is that the device itself was not working because it had a dead battery. This condition occurred even though there was no negligence on the part of the Respondent. It is a technical violation and technical violations are nevertheless violations in mine safety law. The Health and Safety Act passed by Congress imposes upon mine operators a high degree of care to ensure the health and safety of persons in a mine. Violations can occur without the fault of the mine operator within the scheme of this Act. (FN.2) The Respondent's evidence does have great relevance, however, with respect to the amount of any penalty which should be imposed.

Before assessing a penalty, I have to consider one last penalty assessment factor and that is the gravity of this violation. This is a very serious violation since it involves, in the context of the facts of this case, whether or not a fire would be detected should it break out along the belt line. A fire in this case could cause serious injuries and perhaps fatalities. Fires in mines are one of the primary reasons why the 1969 Health and Safety Act for coal mines was enacted. Considering the factors that (1) this is a relatively small mine, that (2) Respondent abated the condition promptly, (3) that the violation occurred totally without any knowledge on the part of the Respondent, and (4) that it was a technical violation in the circumstances--even though the consequences could create quite a hazardous condition--I find that the $15 penalty initially proposed by MSHA is appropriate. Accordingly, the respondent is assessed that penalty.

In Kaiser Steel Corporation, DENV 78-31-P, decided by the Federal Mine Safety and Health Review Commission on

August 3, 1979, the Commission specifically indicated its position that the Mine Safety Act imposes on the operator a high degree of care to ensure the health and safety of persons in the mine. Had I found with respect to this citation that the operator had been negligent or had not exercised a high degree of care, the penalty would have been quite a bit higher. I have take into consideration the operator's evidence that it had employees in the vicinity of the belt who might have observed and extinguished a fire and, also, the uncertainty that any degree of care that it might have taken with respect to the battery was no 100 percent guarantee that the battery would not have been dead as a result of shelf life or the life that it had in service prior to October 31, 1979. The nature of a battery, unlike other types of equipment, is such that it could have discharged itself at the wrong time even though the operator exercised a high degree of care. I am also obliged to consider the well established principle of law applicable to what is called remedial statutory legislation, such as the Mine Safety Act, which principle is that such legislation is to be liberally construed in light of the prime purpose of the legislation. In this case, considering the purpose of the regulation, a belt sensor unit that did not work even though there was technical compliance with an implementing regulation for checking it on a weekly basis constitutes a violation. The essence of the standard must be held to be that the unit be in a workable condition even though there is no fault on the part of the mine operator. As previously noted, liability without fault is a peculiarity of the law in this field. (FN.3)

CITATION NO. 100281

The violation cited involves the mine operator's alleged infraction of a provision of the roof-control plan, which at page 5 of Exhibit P-9, provides that permanent stoppings will be made up to and including the third connecting crosscut outby the faces of entries. Violations of a provision of a ventilation plan or other plans which are approved by MSHA constitutes violations of the Act itself. Affinity Mining Company v. MESA, et al., 6 IBMA 100 (1976), holds that if a violation of the plan has been established, a violation of the Act must be found. The violation charged is that "the approved MSHA ventilation plan was not being followed by the company inasmuch as the last three open crosscuts outby the last open crosscut in the line of pillars that separated the intake from the return air were not provided temporary or permanent stoppings."

The inspector testified that at four places there were no stoppings, temporary or permanent, in the return air course which points were designated A, B, C, and D, on MSHA's Exhibit P-10. Respondent's witness, Mine Manager Pirtle, denied that there were no stoppings at points C and D represented on Exhibit P-10. Thus, a clear conflict of testimony occurred in this record as to whether there were stoppings at the points designated between B and C and C and D. The matter ultimately boils down to whether the inspector's testimony with respect to this alleged violation is to be accepted or not. The inspector, in my judgment, is an honest man and, I am sure, sincere in his testimony; however, I did not feel that there was a certainty or a confidence which I acquired in listening to him testify here today which would overcome the relatively certain and clearcut testimony of Respondent's witnesses. As between the inspector and the mine manager and Mr. Stachura, it is clear that Respondent's witnesses are much more familiar with the geographic area of this mine and that is one of the criteria upon which the quality of testimony must ultimately rest. The inspector admitted that the map of the area which was prepared by Respondent (Exh. R-4), was a more accurate depiction of the area than Exhibit P-10. A time or two, he indicated that his memory of the events at the time the citation was issued was such that he could not definitely recall certain things. These disclaimers are factors which I must consider in evaluating which version of facts to accept.

The burden of proof is on the Government in a case like this to prove by substantive evidence the commission of a violation. In this sense, or in this aspect of the case, a strong showing must be made. It cannot be of a low quality or based on lukewarm presentation of evidence in the face of a clear-cut denial.

A further voucher of the position taken by the Respondent company is the fact that there was "good air" at a point at the face designated "X" on Exhibit R-4-meaning that the air exceeded the ventilation plan's requirement of 9,000 CFM at that point. The inspector did indicate that there was a sufficient velocity to the air, and also that even had there been insufficient stoppings at the point, a volume of air in excess of the standard might exist in the last crosscut. Even so, this is a piece of evidence which indicates that there were sufficient stoppings, particularly in view of the wavering and uncertain quality of his other testimony.

The evidence presented by Mr. Pirtle and particularly Mr. Stachura is found to be more persuasive. I thus resolve the dispute as to the existence of two of these permanent

stoppings in favor of Respondent. I conclude that the Government has failed to provide by a preponderance of the evidence that the violation charged occurred and, accordingly, Citation No. 1002181, dated March 19, 1980, is vacated.

CITATION NO. 1002182

The Respondent is charged with violating the approved ventilation plan (Exh. P-9) because check curtains outby the last open crosscut were not installed across Nos. 2, 3, 4, 5, 6, and 7 rooms as shown on the plan. The requirement for such curtains is shown on the sixth page of Exhibit P-9 in a diagram.

Briefly, Respondent admits the existence of the condition described in the citation, that is, that the curtains in question were not installed. However, Respondent contends that it had, in fact, installed a plan which provided a higher level of safety and that for a period of some 20 months prior to the issuance of the citation it had not been cited for a violation of the ventilation plan for failure to install these check curtains, even though there had been some three occasions when inspectors had inspected the mine.

The dispositive issue involved is a legal one. The question arises whether or not the Government is estopped from enforcing the Act or mandatory safety and health standards contained in approved plans or the safety standards themselves by the failure of inspectors to issue citations for violative conditions observed prior to the time a citation is issued for such conditions. Evidence establishing estoppel would necessarily be of a quality to establish the various elements thereof. One thing that would have to be established is the fact that an inspector on a prior inspection did actually observe the curtains not being in place and noting the same. There may be many violations present in a mine that are not observed by an inspector going through the mine. The circumstances under which these prior inspections were conducted and what occurred would have to be sufficiently described to indicate that the Government did, in fact, waive or ignore its responsibility to enforce the Act and therefore lead the respondent mine operator into a sense of security wherein it would be induced to proceed in a nonlegal manner as a result thereof. (FN.4) Lack of enforcement above does not constitute an authoritative interpretation by MSHA of its standards. Secretary v. Burgess Mining, Docket No. SE 79-42 (February 9, 1981).

I thus find that there is no factual basis upon which to apply the concept of estoppel in this case.

The evidence of Respondent with respect to the fact that its modification of the January 5, 1978, ventilation plan (shown by Exhibit P-9) even though not approved by the district manager of MSHA as required by 30 C.F.R. 75.316-2 was in fact of a higher degree of safety than the original plan is relevant in terms of the seriousness of the violation but it does not constitute an excuse for the failure to follow the ventilation plan in effect. The Respondent is obliged to follow roof-control plans, ventilation plans and the like which are approved by MSHA, as the same are approved. Before a deviation or modification can be effectuated by a mine operator, the approval of the district manager, who is the person charged with the public interest, must be obtained. Otherwise, the principle might spread where operators go their own way in the belief-and perhaps sincere belief-that what they are doing is in effect better than that which has been approved. Therefore, the principle is exceedingly important that a modification cannot be implemented unilaterally by mine operators. Otherwise, human nature being such as it is, there would be a diminution of the standards nationwide. * * * The principle of going through the approval process and obtaining the upfront, fully-informed, approval of the MSHA District Manager is important. Respondent admits that it did not obtain this approval prior to March 19, 1980, and that the violative physical conditions, i.e., the lack of the curtains in question, did exist. Accordingly, I find a violation of the regulation as cited and described in the citation.

I have previously found Respondent to be a coal mine operator in the upper ranges of smallness when viewed through a three-spectrum scale of small, medium, and large. The previous history of only 23 violations during the 24-month period

prior to the issuance of this citation is a factor which demonstrates that the operator is attempting to follow the safety standards. It is not a factor which should go to increase the amount of a penalty or to lower the amount of a penalty, all other factors being equal. On the basis of the Government's evidence that the Respondent did not proceed to immediately comply and at first disdained from abating the condition, I am inclined to view the same as strong evidence of bad faith on Respondent's part in proceeding to achieve rapid compliance with the standards after notification of a violation. On the other hand, there are some inequities from the standpoint of Respondent which go into the mix. Respondent followed the system which it believed to be more safe than the standard for some 20 months prior to the issuance of the citation. The matter was straightened out the following day. Respondent then proceeded to get its modification approved by the district director. On the other hand, the modification did contain the provision that curtains would be installed "if necessary." This provision would apply to the factual situation in this proceeding. Thus, I will upgrade, but only to a moderate degree, the penalty based upon the operator's tardy reaction to the obligation to achieve abatement after being served with a citation.

In terms of negligence, I do not find gross negligence or intentional or willful conduct-based upon the Respondent's representation that it overlooked the obligation to file for a modified plan.

I do not find this to be an extremely grave or very serious violation, but rather one of a moderate degree of seriousness.

Considering all these factors, a penalty of $100 for Citation No. 1002182 is assessed.

ORDER

1. Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $170 (FN.5) within 30 days from receipt of this decision.

2. Citation No. 1002181 is vacated.

3. All proposed findings of fact and conclusions of law not expressly incorporated herein are rejected.

Michael A. Lasher, Jr. Judge

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~FOOTNOTE_ONE

1 Transcript pages 69-76, 155-157, and 187-191.

~FOOTNOTE_TWO

2 Heldenfels Brothers, Inc. v. Marshall and MSHRC (5th Cir., January 15, 1981, No. 80-1607, Summary Calendar).

~FOOTNOTE_THREE

3 United States Steel Corporation v. Secretary of Labor, Docket Nos. PITT 76-160-P and 76-162-P, decided by the FMSHRC on September 17, 1979.

~FOOTNOTE_FOUR

4 Estoppel is an equitable remedy which is available against the government-but only where the misconduct of an agency or of its officials acting strictly within the scope of lawful authority threatens to work a serious injustice against a person who has reasonably relied upon such conduct to his detriment. Immigration Service v. Hibi, 414 U.S. 4, 94 S. Ct. 19, 38 L. Ed. 7 (1973). Here, there was no showing of misconduct on the part of any government official or agency, nor of the working of a serious injustice against Respondent. Respondent failed to establish that it was reasonable for it to rely upon the rather vaguely alleged failure of inspectors to issue citations for similar conditions on earlier inspections. A governmental agency will not be bound by ordinary errors or omissions in the conduct of its employees because there is generally a prevailing public interest in correcting erroneous interpretations of policy. American Training Services, Inc. v. Veterans Administration, 434 F. Supp. 988 (1977).

~FOOTNOTE_FIVE

5 For Citations numbered 776820 ($55.00), 772654 ($15.00), and 1002182