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Federal Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

THE YOUGHIOGHENY & OHIO
COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. LAKE 80-104
A/O No. 33-01070-03050

Allison Mine

Appearances: Linda Leasure, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Petitioner;
Robert C. Kota, Esq., The Youghioghenny & Ohio Coal
Company, Martins Ferry, Ohio, for Respondent.

DECISION

Before: Judge Cook

I. Procedural Background

On December 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). On January 21, 1980, the Youghioghenny & Ohio Coal Company (Respondent) filed an answer.

On April 21, 1980, the Petitioner filed a motion to approve settlement. On April 29, 1980, an order for production of additional information was issued requiring the Petitioner to submit more detailed justifications, if any existed, in support of the proposed settlement. On May 21, 1980, the Petitioner filed a response to the order for production of additional information stating that it could not submit additional justifications in support of the proposed settlement, and requesting that the matter be set for hearing.

On August 13, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 18, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating.

Prior to the presentation of the evidence, the Petitioner moved to amend the proposal for a penalty to charge a violation of mandatory safety standard 30 C.F.R. 75.1725(c) instead of mandatory safety standard 30 C.F.R. 75.511. The Respondent had no objection to the motion, and, accordingly, the motion was granted (Tr. 8-9). The Respondent made an oral motion to dismiss at the close of the Petitioner's case-in-chief, arguing that the Petitioner had failed to establish a prima facie case for a violation of mandatory safety standard 30 C.F.R. 75.1725(c). The motion was denied (Tr. 50-53).

Toward the conclusion of the hearing, Exhibit M-2 was reserved for the posthearing filing by the Petitioner of a computer printout setting forth detailed information as relates to the Respondent's history of previous violations. Exhibit O-1 was reserved for the posthearing filing by the Respondent of any documents it wished to file in response to Exhibit M-2. Also, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law.

Exhibit M-2 was filed on October 14, 1980, and was received in evidence by an order dated October 31, 1980. The Respondent did not file any documents in response to Exhibit M-2.

The Petitioner filed proposed findings of fact and conclusions of law on January 26, 1981. The Respondent did not file a posthearing brief or proposed findings of fact and conclusions of law.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
779722	June 25, 1979	75.1725(c)

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witness Federal coal mine inspector (electrical) Victor H. Patterson.

The Respondent called as its witness Mr. John Yarnell.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Directorate of Assessments summarizing by standard the Respondent's history of previous violations at the Allison Mine for which assessments have been paid, from June 26, 1977, to June 25, 1979.

M-2 is a computer printout compiled by the Directorate

of Assessments setting forth a detailed listing of the Respondent's history of previous

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violations at the Allison Mine for which assessments have been paid, beginning June 26, 1977, and ending June 25, 1979.

2. The Respondent did not introduce any exhibits in evidence.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations, (2) appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the proceeding (Tr. 10-11).

2. The Respondent's Allison Mine constitutes a mine within the meaning of the 1977 Mine Act (Tr. 10-11).

3. The Respondent produced approximately 1,356,816 tons of coal in 1979. The Allison Mine produced approximately 527,843 tons of coal in 1979 (Tr. 10-11).

B. Occurrence of Violation

Federal mine inspector Victor H. Patterson issued Citation No. 779722 during the course of his June 25, 1979, inspection at the Respondent's Allison Mine. The citation alleges that work was being performed on the Jeffrey continuous miner (Serial No. 34397), located in the No. 3 entry of the Main West section, in that a drive shaft was being installed by the gathering head. It is further alleged that the machine was energized, but that it was not being used for positioning or troubleshooting. The proposal for a penalty, as amended, alleges that the cited condition violates mandatory safety standard 30 C.F.R. 75.1725(c), which provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The evidence presented reveals that a three- or four-man repair crew was installing a drive shaft between the cutting motor and the gathering head on the righthand side of the electrically powered Jeffrey continuous miner,

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Serial No. 34397. The evidence presented also reveals that machinery motion was not necessary to make adjustments during such operation.

The inspector concluded that the continuous miner had not been deenergized because the trailing cable had not been deenergized. The inspector testified as an expert that the trailing cable, and hence the continuous miner, must be deenergized at the power center through the following two-step operation: Trip the circuit breaker at the power center and then disconnect the trailing cable from the power center. The inspector did not check the circuit breaker on the machine because he felt it was unnecessary to do so. According to the inspector, it was unnecessary to check that particular circuit breaker because the machine is energized whenever the trailing cable is energized.

Mr. John Yarnell testified on behalf of the Respondent that turning the power off on the continuous miner simply required one to trip the circuit breaker on the machine. He did not interpret this to require disconnecting the trailing cable.

Essentially, this case presents two questions for resolution. The initial question presented is whether the term "power is off," as used in mandatory safety standard 30 C.F.R. 75.1725(c) with reference to electrically powered equipment, means "deenergized." The second question presented is what is necessary to have the power off on a continuous miner during repairs or maintenance?

The resolution of these issues has turned, in large measure, on the expert testimony of Inspector Patterson and Mr. Yarnell. I find the inspector's testimony more probative because his credentials in electrical matters are more substantial than those of Mr. Yarnell.

The initial question presented is whether the term "power is off," as used in mandatory safety standard 30 C.F.R. 75.1725 with reference to electrically powered equipment, means "deenergized." I conclude that it does for two reasons. First, Inspector Patterson, an electrical inspector, indicated that the term "power is off" means "deenergized." It is, therefore, logical to conclude that experts in electrical matters consider the power to be off a given piece of electrically powered equipment for purposes of repair and maintenance only when it has been deenergized.

Second, a comparison of 30 C.F.R. 75.509 and 30 C.F.R. 75.1725 indicates that the term "power is off" means "deenergized" when used in reference to electrically powered equipment. The scope of mandatory safety standard 30 C.F.R. 75.509 is confined to electric power circuits and electric equipment. The standard provides that: "All power circuits and electrical equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing." (Emphasis added.) The wording of

the regulation indicates that power is removed from electric circuits and electric equipment for purposes of repair and maintenance only when such circuits and equipment have been "deenergized."

Mandatory safety standard 30 C.F.R. 75.1725 is a miscellaneous provision setting forth requirements for the operation and maintenance of machinery and equipment. It is generally applicable to the maintenance and operation of all machinery and equipment. Its reach is not expressly confined solely to electric machinery and electric equipment. Therefore, the term "power is off," as used in 30 C.F.R. 75.1725(c), must be interpreted in light of the expansive reach of the standard so as to encompass power applications including, but not limited to, electrical power. 30 C.F.R. 75.509 and 30 C.F.R. 75.1725(c), when read together, indicate that the "power is off" electrically powered equipment only when such equipment has been "deenergized."

The second question presented is what type of action is necessary to deenergize a continuous miner? Is it sufficient to turn off the motor and to move the circuit breaker on the machine from the "on" to the "off" position; or is it also necessary to trip the circuit breaker at the power center and disconnect the trailing cable from the power center? For the reasons set forth below, I conclude that in order to deenergize a continuous miner within the meaning of mandatory safety standard 30 C.F.R. 75.1725(c), it is necessary to trip the circuit breaker at the power center and then disconnect the trailing cable from the power center.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, 31.06, p. 362 (1972). According to 2 Am.Jur.2d, Administrative Law, 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe work places must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. *Brennen v. Occupational Safety and Health Review Commission*, 491 F.2d 1340 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." *District 6, UMWA v. Department of Interior Board of Mine Operations Appeals*, 562 F.2d 1260 (D.C. Cir. 1972).

Inspector Patterson's testimony indicates that merely tripping the circuit breaker on the continuous miner is insufficient to deenergize the machine because, under the proper circumstances, power can accidentally be restored to the machine (Tr. 23-24, 26, 28-29, 34). A malfunction in the circuit breaker can cause it to be "on," notwithstanding the fact that it has been switched to the "off" position. The motor could have started under a single-phase condition, notwithstanding the fact that the circuit breaker was in the "off" position. The

inspector was personally familiar with several such occurrences. The testimony of Mr. Yarnell tends to confirm that, no matter how remote, the possibility of such occurrences does exist. Tripping the circuit breaker at the power center and disconnecting the trailing cable from the power center eliminates the problem.

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Additionally, according to Paul W. Thrush (ed.), A Dictionary of Mining, Mineral and Related Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 306, the term "deenergize" means "to disconnect any circuit or device from the source of power." (Emphasis added.)

In view of the expert testimony of Inspector Patterson and the foregoing definition of the term "deenergize," I conclude that a continuous miner is deenergized within the meaning of 30 C.F.R. 75.1725(c) only when the circuit breaker has been tripped at the power center and the trailing cable has been disconnected from the power center. Accord, Consolidation Coal Company, 2 FMSHRC 965 (1980) (Lasher, J.)

A violation of mandatory safety standard 30 C.F.R. 75.1725(c) has been established by a preponderance of the evidence.

C. Negligence of the Operator

The inspector testified that, based upon the amount of work performed, the men probably had been working on the machine for approximately 1 hour. There is no probative evidence tending to show that supervisory personnel knew or should have known of the condition. Accordingly, I conclude that the Petitioner has failed to prove operator negligence.

D. Gravity of the Violation

The occurrence of the event against which the cited standard is directed was improbable. The repair crew consisted of three or four men. In the event of an occurrence, it is more probable than not that one person would have sustained serious or fatal injuries as a result of achieving contact with rotating machine parts.

Accordingly, it is found that the violation was accompanied by moderate gravity (see Tr. 23).

E. Good Faith in Attempting Rapid Abatement

The violation was abated in a prompt fashion. The repair crew immediately disconnected the trailing cable and locked it out (Tr. 19, 24).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. Size of the Operator's Business

The parties stipulated that the Respondent produced approximately 1,356,816 tons of coal in 1979. The parties further stipulated that the Allison Mine produced approximately 527,843 tons of coal in 1979 (Tr. 10-11).

G. History of Previous Violations

The history of previous violations at the Allison Mine for which the Respondent had paid assessments, beginning June 26, 1977, and ending June 25, 1979, is summarized as follows:

30 C.F.R. Standard	Year 1 6/26/77 - 6/25/78	Year 2 6/26/78 - 6/25/79	Total
All sections	246	467	713
75.1725(c)	0	1	1

(Exh. M-2). (All figures are approximations.)

H. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of a civil penalty in this case will adversely affect the Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that a penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.
2. The Youghiogheny & Ohio Coal Company and its Allison Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.
3. Federal mine inspector Victor H. Patterson was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.
4. The condition cited in Citation No. 779722 existed in the Respondent's Allison Mine on June 25, 1979, and constituted a violation of mandatory safety standard 30 C.F.R. 75.1725(c).
5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

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VII. Proposed Findings of Fact and Conclusions of Law

The Petitioner's proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
779722	June 25, 1979	75.1725(c)	\$175

ORDER

IT IS ORDERED that the oral determination made during the hearing denying the Respondent's motion to dismiss be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the amount of \$175 within the next 30 days.

John F. Cook
Administrative Law Judge