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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
v.
PIKEVILLE COAL COMPANY, RESPONDENT

Civil Penalty Proceeding

Docket No. KENT 81-12
Assessment Control No. 15-12272-03002

Chisholm Mine No. 2

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 12, 1981, a hearing in the above-entitled proceeding was held on May 7, 1981, in Prestonsburg, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.   815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 84-95):

> This hearing involves a Proposal for Assessment of Civil Penalty filed on November 21, 1980, by the Secretary of Labor in Docket No. KENT 81-12, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R.   75.1101 by Pikeville Coal Company. The issues in a civil penalty case are whether a violation of the mandatory safety standards or the Act occurred and, if so, what penalty should be assessed, based on the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977. I shall first make some findings of fact.
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> 1. On June 9, 1980, Inspector Kellis Fields made an investigation at the Chisholm No. 2 Mine of the Pikeville Coal Company. At that time, he examined the belt drive, located on the surface, for the underground belt conveyor which extended up the No. 4 entry. He observed that there was no fire suppression system on the belt drive, and he therefore issued Citation No. 722892 alleging a violation of section 75.1101. The language in that citation reads as follows: "Deluge type water sprays or foam generators were not provided for the main belt conveyor drive that is installed within 25 feet of the No. 4 portal drift opening of the south side mains." Subsequently,

on June 18, 1980, the inspector issued a modification of that citation in which he inserted the words, "intake air" between the word "portal" and "drift opening," so that the language would read that the belt drive did not have "installed within 25 feet of the No. 4 portal intake air", etc., the proper fire suppression system required by section 75.1101.

2. At the hearing, the inspector explained that the reference in his citation to the 25-foot distance from the highwall had been alleged in the citation because the inspector's manual provided some guidelines for the requirement of application of section 75.1101 to surface belt drives, and those guidelines provide that the fire suppression system is required if the belt drive is within 25 feet of the portal.

3. The inspector made it clear in his testimony that while he used the guidelines in the manual and made the measurement to show that, in his opinion, he was justified under the manual for citing a violation of section 75.1101, he believed that he was citing respondent for a violation of section 75.1101, not for a violation of a guideline in a manual. Technically, he said that he could cite respondent for a violation of section 75.1101 even if the belt drive were a thousand feet from the portal. In other words, in his opinion, the distance from the portal is not relevant for finding a violation of section 75.1101.

4. Respondent presented its safety director at the Chisholm No. 2 Mine as a witness. His name is Charles Dotson. Mr. Dotson presented as Exhibit A a diagram showing that the No. 4 entry has an apron located over it with solid walls on each side of the apron to support it, and he stated that when he measured the distance from the coal rib itself to the belt roller, that he obtained a measurement of 38 feet 7 inches. He also said that, in his opinion, the manual requires the measurement to be made to the belt roller, rather than to the motor itself, that had been used as a point of termination of measurement when the inspector obtained the distance of 25 feet from the motor on the belt conveyor drive to the highwall. Mr. Dotson's Exhibit A also shows that if the measurement had been made from the edge of the right wall facing the No. 4 entry of the apron, it would have been a distance of 18 feet 8 inches to the roller at the motor. The inspector obtained a distance of 15 feet when he made a measurement from the wall of the apron to the motor. The distance between the motor itself and the roller is two or three feet, and I think that the angle from which the two gentlemen made their measurements accounts for the remaining difference in the masurements obtained by Mr. Dotson and Inspector Fields.

5. It was the inspector's opinion that any fire that might start on the belt drive, even though it was located outside the mine could get into the No. 4 entry, which is also the belt line, and he said that despite the fact that the belt line contains what is known as a neutral split of air, it does take air into the mine from outside, and it does therefore carry whatever is in the outside air, and if there were a fire outside, it was his opinion that some smoke from the fire would be carried up the belt line, and that it would be possible for the smoke to get into the intake, and therefore, reach the working faces. He admitted that if

that were to occur, there would have to be some problem in one or more curtains being out at the end of the belt line, or between the belt line and the intake and return.

6. Mr. Dotson presented as Exhibit B a diagram of the ventilation system in the Chisholm No. 2 Mine and his diagram shows that there are -- first of all there's a check curtain just inby the No. 4 entry portal, and that is supposed to keep all but a small amount of air from going up the belt line, and, of course, some oxygen has to be in the belt line in order to supply life to the people who work along the belt line from time to time, or travel it. In addition to the check curtain at the intake or portal of the No. 4 entry, there are other check curtains arranged just inby the tailpiece of the belt line, and those check curtains prevent air from the belt line traveling to the face. Of course, there is also a check curtain just outby the belt tailpiece. All of the protective check curtains would prevent air from getting into the intake if the air should be carrying smoke from a fire from the outside. As all parties agree, there would have to be some kind of damage to the ventilation system in order for smoke from the outside to be carried to the working face up the No. 4 entry.

7. From the standpoint of gravity, not only would it be difficult for any smoke from a fire to get up the No. 4 entry, but at the time the citation was written, there was already installed in the vicinity of the head drive, about which we are talking, a large tank containing water, and that tank is equipped with pumps and water lines so that if a fire had occurred on the surface a person on the surface would have been able to combat the fire by the use of a hose attached to that water supply.

8. Mr. Dotson testified that if the inspector had not written this citation that respondent would not have installed a fire suppression system using water on this belt drive on the outside. In fact, the citation was abated by the installation of a dry chemical system because Mr. Dotson said that outside the mine the deluge water system, referred to in section 75.1101, would not have been appropriate because it would have frozen in the wintertime and would have become inoperative.

I believe that those are the principal facts that should be controlling in a decision in this case. Respondent makes two primary arguments with respect to this notice of violation. First of all, Mr. Stephens for respondent, has argued that the facility here, the belt drive, is on the surface of the mine, and that section 75.1101 clearly is a portion of the regulations which is designed to apply to underground mines, and he

argues that it was improper to cite a belt drive on the surface for a violation of a safety standard which clearly applies only to underground facilities. Mr. Drumming, on behalf of the Secretary of Labor, contends with respect to that argument, that the belt conveyor involved definitely extended underground, and therefore the underground portion couldn't work if it didn't have a drive located somewhere, and even though the drive happened to be on the surface, that that drive was an integral part of

an underground belt conveyor system, and therefore was appropriately cited under a section of the regulations which is applicable to underground mines.

I am in sympathy with Mr. Stephens' position and I think there is a lot of merit to his argument here, but I have for 8 years been applying that section to underground belt drives, even though some of those belt drives have been located on the surface, and I have taken the position that Mr. Drumming takes in this case, which is that since this belt drive is an integral part of that first flight of the belt conveyor that goes underground, there is no way that we can exempt the belt drive on this portion of the conveyor belt from the underground provisions of the regulations. Therefore, I agree that it is appropriate for section 75.1101 to be cited in connection with a belt drive which is located on the surface.

We then come to Mr. Stephens' other argument, or at least one of his other arguments, and that is, he says that although he doesn't like certain portions of the manual because they also refer to application of section 75.1101 to surface facilities, he says that as a matter of fact, if you are going to follow the manual, that this particular belt drive was farther from the portal than 25 feet and, therefore, that Inspector Fields was not really following the guidelines when he cited section 75.1101.

As to whether Inspector Fields followed his guidelines depends in large part on how you look at the measurements of the two individuals who were witnesses in this case. I think we must get back to the fact that the possibility of any smoke going underground would depend on that smoke going into the No. 4 entry, and to get into the No. 4 entry, the smoke has to pass by the two supports of the apron, which are on the outside of the mine, and which really are the beginning of the No. 4 entry. So, if you considered the belt drive to be within the 25-foot distance required by the manual, then even under Mr. Dotson's measurements, the belt drive would be within 25 feet of the No. 4 portal. Consequently, I think that the manual would have been complied with in this instance, even if that were necessary.

I think, however, that I have to agree with Mr. Drumming and Inspector Fields that we're here dealing with a citation of a regulation and not with a policy in a manual. The Commission stated in Secretary of Labor v. Old Ben Coal Company, 2 FMSHRC 2806 (1980), that failure to follow a manual by itself is not a sufficient basis for vacating a notice of violation or a citation. The Commission held in that case that such instructions are not officially promulgated and do not

prescribe rules of law binding upon an agency. So, I would say, if I were confronted with a choice here where the inspector is required to follow the manual down to the last inch in order for him to cite section 75.1101, I would not say that he has to follow the manual. Therefore, even if the measurements didn't come within the 25-foot provision, I would, and do, hold that it is not necessary for him to follow the manual in order to cite a violation of section 75.1101.

I believe that I have taken care of the basic legal arguments that Mr. Stephens has made, and having found that those arguments should not prevail, I find that a violation of section 75.1101 occurred.

Having found that a violation occurred, it is now necessary to assess a civil penalty based upon the six criteria. The parties have stipulated that Pikeville Coal Company is subject to the Act and that I have jurisdiction to hear and decide the case, and that respondent operates the Chisholm No. 2 Mine. It has also been stipulated that respondent is a large operator, that respondent would not be adversely affected by the assessment of a civil penalty, and that its ability to continue in business would not be adversely affected by paying a civil penalty. Those stipulations cover two of the criteria that have to be considered.

It has been stipulated as to a third criterion, that respondent demonstrated a good-faith effort to achieve rapid compliance. As to a fourth criterion, history of previous violations, it was stipulated that respondent has not previously been cited for a violation of section 75.1101.

The remaining criteria to be considered are negligence and gravity. As to negligence, Mr. Dotson stated that he thought that there was almost no possibility that smoke from any fire on the outside could get up this No. 4 entry where it would endanger anyone working underground, and he stated for that reason, the company interpreted, and he interpreted, section 75.1101 as not being applicable to this belt drive. In addition to the other reason that has already been given, namely, that the belt drive was on the surface, section 75.1101 was, in his opinion, not applicable because the belt drive was more than 25 feet from the drift opening, and was subject to freezing in winter. All these factors, in his opinion, made this belt drive exempt from having to have an automatic fire suppression system on it. Moreover, he pointed out that someone had to be stationed on the surface, in the vicinity of this belt drive, and was stationed on the surface; that all the employees in this company, both those stationed on the surface and assigned to work underground, a e trained to apply fire-fighting equipment and methods and, therefore, could have fought any fire that might have developed. They could have done so through the use of the fire hose and other facilities on the surface. Consequently, I cannot find that Respondent was negligent in having violated section 75.1101 under those conditions.

As to the criterion of gravity, I have already indicated in my findings of fact above that there was

almost no probability that any smoke from a fire on the belt drive would have gone underground and would have been a hazard to anyone working underground. In view of the fact that someone was on the surface at all times, it is very likely that any fire that might have started would have been seen as soon, or about as soon, as an automatic system could have taken affect. It should be pointed out also that the company installed a dry chemical system so that it would work in any kind of weather regardless of freezing temperatures.

> In addition to that, I might say that I've had several cases involving Pikeville Coal Company, and it is a very safety-oriented company. It does try to see that hazards are reduced around its mine and I think it has an excellent reputation in that regard.
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> Because of all the aforestated extenuating factors and circumstances, I believe that a civil penalty in this instance should be the minimum permitted by the Act. Therefore, I assess a civil penalty of $1.00.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Pikeville Coal Company shall pay a civil penalty of $1.00 for the violation of section 75.1101 alleged in Citation No. 722892 dated June 9, 1980.

Richard C. Steffey
Administrative Law Judge