

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 10 1981

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 80-312
Petitioner : A.C. No. 15-07082-03030
v. :
LESLIE COAL MINING COMPANY, : Docket No. KENT 80-313
Respondent : A.C. No. 15-07082-03032
: Leslie Mine

DECISION

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

Before: Judge **Melick**

These consolidated cases are before me upon petitions for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810 et seq., the "Act," alleging violations of health and safety regulations. The general issue is whether Respondent has violated the cited regulations-and, if so, the appropriate civil penalties to be assessed. An evidentiary hearing was held in Prestonburg, Kentucky, on March 17, 1981. At that hearing, the parties filed a motion to settle all but one of the citations in these cases, which, with the exception of one citation, was approved. The latter citation was vacated and an evidentiary hearing was held as to the remaining citation. Evidence was submitted at hearing under section 110(i) of the Act regarding the criteria for determining the amount of penalty. This evidence was considered in reaching the penalty amounts approved herein.

Contested Citation: Docket No. KENT 80-313

Citation No. 724330, as amended at hearing, purports to charge a violation of the mandatory standard at 30 C.F.R. § 77.205(d). That standard provides as follows: "Regularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." More specifically, the

citation alleges as follows: "A safe means of access was not maintained where the employees are required to travel from the parking lot to the bathhouse in that ice from paper thick to approximately three inches in depth was present along the walkway." 1/

There is no dispute that when MSHA inspector Billy Tackett issued this citation on March 4, 1980, at **9:30** a.m., there was indeed some ice or "frozen moisture" as characterized by the operator, in the travelway leading from the mine parking lot to the bathhouse. It is not questioned that the miners regularly traveled this route. Tackett estimated that 99 percent of the parking lot itself was also covered with this substance. This too is not disputed by the operator. Tackett admitted, however, that he never determined how long these conditions had existed nor when the area had last been cleaned up. Tackett could not even state when it had last snowed and could only guess how long the ice had been there. He estimated that the ice could have been removed in 3 or 4 hours and he actually gave the operator 4 and **1/2** hours to complete the removal.

According to the stipulated testimony of mine official Bill **Wooten**, it had snowed the day before the citation was issued and that snow had been cleared off the parking lot by a front-end loader. Admittedly, however, a residue of frozen moisture remained at the time the citation was issued.

Within this framework of evidence, it is apparent that indeed there was "frozen moisture" (ice) on the employee parking lot and travelway to the employee bathhouse. The issue to be resolved then is whether that substance had been cleared "as soon as practicable." In order to make a determination of whether the operator failed to clear the ice here at issue within that time frame necessarily requires knowledge of when that ice first existed. No unambiguous evidence has been presented to establish that fact and therefore MSHA has not established an essential element of proof that the standard at 30 **C.F.R. § 77.205(d)** has been violated. Accordingly, the citation is vacated.

Motion for Approval of Settlement

A. Docket No. KENT 80-312

Proposals for penalties were first submitted in this case for five citations. At hearing, it was represented by MSHA that Citation No. 9927173 had been erroneously included in its petition inasmuch as that citation had been

1/ I observe that the citation, as amended, failed to allege that the cited **travelway** was not sanded, salted, or cleared of snow and ice "as soon as practicable"-- an essential allegation to establishing a violation of section 77.205(d). The operator did not claim that it was prejudiced in this regard, however, and such a technical defect under the circumstances is not sufficient to warrant dismissal. Secretary v. Ralph Foster and Sons, 3 FMSHRC (May 12, 1981).

previously vacated. Accordingly, the citation is withdrawn from the case and dismissed.

Citation Nos. 9927138 and 9927211 allege violations of the standard at 30 C.F.R. § 70.250. That standard sets forth the time periods within which respirable dust samples must be taken from individual miners. Inasmuch as these citations alleged only that the respirable dust samples had not been received by the MSHA office, it is apparent that they did not properly charge a violation of the standard cited. MSHA conceded, moreover, that its evidence would not support the violations alleged. Accordingly, counsel for MSHA moved to vacate the citations. Under the circumstances, I approve the motion and vacate those citations.

Citation No. 713638 alleges a violation of the standard at 30 C.F.R. § 75.400. That standard provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." While MSHA moved for approval of a 50-percent reduction in the initially proposed penalty of \$130, it conceded that it had no evidence to support a finding that the cited materials were indeed "combustible." Those allegedly "combustible" materials consisted of soda pop cans, empty hydraulic fluid cans, and apparently some sandwich wrappers the exact nature and quantity of which no one could recall. Under the circumstances, I find insufficient evidence that "combustible materials" were "permitted to accumulate" in active workings of the mine. Within the framework of the Commission decision in Secretary v. Co-Op Mining Company, 2 FMSHRC 3475 (1980), I cannot accept the proposed settlement. Since MSHA conceded that it could not produce this critical evidence even at hearing, I vacate the citation.

Citation No. 717362 alleges a violation of the standard at 30 C.F.R. § 70.100(b). The parties propose a settlement for \$60 as initially assessed. It is undisputed that the respirable dust concentration was in fact greater than allowed by the cited standard in effect at the time the citation was issued. The sampling revealed a concentration of 2.1 milligrams of respirable dust per cubic meter of air, whereas the standard then required that exposure be limited to 2.0 milligrams of respirable dust per cubic meter of air. The operator had no history of this type of violation and had no means of obtaining and testing dust samples on its own. Under the circumstances, I find that the proposed settlement is appropriate.

B. Docket No. RENT 80-313

Citation No. 724334 alleges a violation of the standard at 30 C.F.R. § 75.1003(c). That standard requires that trolley wires and trolley feeder wires be guarded adequately at mantrip stations. The parties propose a reduction in penalty from \$98 to \$49 because the hazard was in actuality not as serious as first thought. The subject trolley wire was on the far side of the mantrip against the rib in an area in which miners would not ordinarily

be exposed. In addition, it was subsequently determined that the plastic insulation that ordinarily guarded the trolley wire had shrunk because of the unusually cold weather at the time, thereby causing the cited exposure. Since the wire was only from 5 and 1/2 to 6 feet above floor level and could have caused death by electrocution upon contact, there was indeed a potential serious hazard. Under the circumstances, I find that the proposed settlement is appropriate.

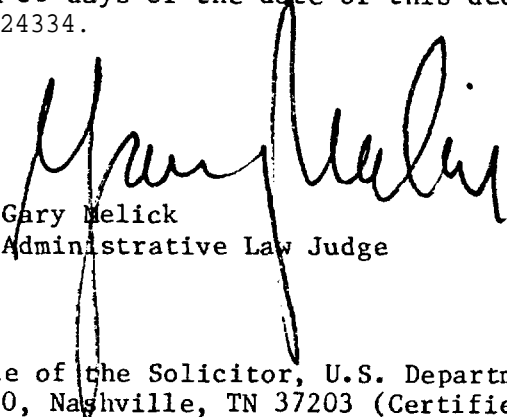
ORDER

Docket No. KENT 80-312

Citation Nos. 9927173, 9927138, 9927211, and 713638 are VACATED. The Leslie Coal Mining Company is ORDERED to pay a penalty of \$60 within 30 days of the date of this decision for the violation under Citation No. 717362.

Docket No. KENT 80-313

Citation No. 724330 is VACATED. The Leslie Coal Mining Company is ORDERED to pay a penalty of \$49 **within 30 days of the date of this decision** for the violation under Citation No. 724334.



Gary Melick
Administrative Law Judge

Distribution:

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