

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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JUL 21 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 80-365  
Petitioner : A.O. No. 11-00599-03040  
v. :  
Respondent : Orient No. 6 Mine  
FREEMAN UNITED COAL MINING COMPANY, :  
Respondent :

DECISION

Appearances: Rafael Alvarez, Trial Attorney, Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois, for the  
petitioner;  
Harry M. Coven, Esq., Chicago, Illinois, for the  
respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for two alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened in Terre Haute, Indiana, on May 20, 1981. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

### Discussion

Citation No. 1003913, May 8, 1980, charging the respondent with an alleged violation of the provisions of 30 C.F.R. § 75.1719(1)(d), was settled by the parties in advance of the commencement of the hearing. The parties were afforded an opportunity to state their arguments in support of the settlement on the record, and after due consideration of same, the settlement was approved, and a payment of a civil penalty in the amount of \$90, rather than the initial assessment of \$106, was agreed to as a reasonable and proper settlement disposition for this citation.

Citation No. 1003911, issued on May 6, 1980, cites an alleged violation of 30 C.F.R. § 75.503, and the condition or practice described by the inspector on the face of the citation is as follows: "A non-permissible transformer welding machine was located inby last open crosscut in No. 2 entry of the 4th South entries off the 2nd main east entries, section I.D. 088."

### Petitioner's Testimony and Evidence

MSHA Inspector Laverne Hinkle confirmed that he issued the citation in question during an inspection of the mine in question and that he did so after finding an energized non-permissible welder located in an area of the mine which he considered was inby the last open crosscut and therefore a violation of the provisions of section 75.503.

Inspector Hinkle determined that the last open crosscut was at a point shown on Exhibit P-4, a sketch of the scene of the alleged violation, marked with a notation "LOX" and circled with an X mark (Tr. 38). He believed the term "inby the last open crosscut" means anything in the direction of the ventilation flow of the air current as shown on the exhibit, or away from, or following the return air direction as depicted by the arrows on the

sketch as they proceed from right to left along the top of the sketch. The term "outby" would mean away from or down and towards the intake air flow from the mark "LOX" shown on the sketch toward the mine opening (Tr. 67-70).

With regard to the question as to how he determined there was a violation in this case, Mr. Hinkle testified that he relied on the Inspector's Manual "policy" statement found under the discussion of section 75.503, and specifically, the instruction that requires an inspector to cite section 75.503 when he finds any electric, non-permissible face equipment in a return air entry (Tr. 23, 30, 33-34, 37-38, 54; Exh. P-9). He candidly conceded that the reason he cited the law rather than the policy on the face of the citation was that it was his understanding that policy statements found in the manual are not enforceable (Tr. 37). His rationale for issuing the citation is reflected in the following colloquy (Tr. 160-163):

THE COURT: I don't want to put you on the spot; that's not my intent in asking you my leadoff question.

But when you went into the section, found this welder over in the return air--

THE WITNESS: Yes, sir.

THE COURT: --did you at that point make up your mind there was a violation because of what was the policy guidelines?

THE WITNESS: No, sir. No, sir. I remembered what was in the policy guidelines. I did not decide it was a violation based on the policy guidelines. I decided it was a violation on the fact it was nonpermissible equipment in return air.

THE COURT: Well, that's--you may--

You made the decision that it was a piece of nonpermissible equipment in return air?

THE WITNESS: Yes, sir.

THE COURT: That's what I asked. What I am saying is--

THE WITNESS: I'm sorry.

THE COURT: --standard 75.503 makes no mention of return air.

THE WITNESS: Correct.

THE COURT: So, if you made the decision that nonpermissible equipment being in return air was a violation, how

can you say it was a violation of a standard which doesn't mention return air?

THE WITNESS: In or inby the last open crosscut.

THE COURT: In other words, it met both criterias, if you will? Met not only the one on return air but it was also inby the last open crosscut?

THE WITNESS: Whether or not I followed the manual or not, the situation remains the same.

THE COURT: Again I think I am beating a dead horse, but when we think about the last open crosscut, your measurement is from a different reference point, is it not?

THE WITNESS: Yes, sir, frankly.

THE COURT: You are, aren't you? You are pursuing it from the standpoint of the ventilation--

THE WITNESS: Yes, sir. And Freeman is basing their measurement on geography.

THE COURT: That's right. And the standard doesn't say which party is right?

THE WITNESS: Right.

THE COURT: The standard doesn't say whether it's based on geography or whether it's ventilation or whether it's the way the moon comes out at night; isn't that correct?

THE WITNESS: Yes, sir.

MR. ALVAREZ: The case really is based on two factors, I guess you might say: the Inspector, despite that policy guideline there, the Inspector would still view it as inby the last open crosscut, and/or with the policy guidelines.

THE COURT: Well, you know, you can argue the case any way you want, but if the Inspector finds a piece of nonpermissible equipment in return air, then it's not too difficult for him to find inby the last open crosscut, but it depends on which reference point he is using; isn't that true? Intake or return--

With regard to the question as to how he applied the term "inby the last open crosscut" in this case, Inspector Hinkle testified as follows (Tr. 113-118):

THE COURT: Do you understand what I am talking about here? The terms, "inby" and "outby", you explained to us, was it used in relationship to the face?

THE WITNESS: It was used in relationship to the last open crosscut, sir.

THE COURT: That's right. What does-- The dictionary definition seems to define inby in relation to the working face; in other words, anything that is from this point here of this ribline toward the face would be inby the last open crosscut.

THE WITNESS: I believe my definition of inby the last open crosscut, if you use the face as a reference point, yes, sir, anything beyond that rib, away from the face, would be outby the last open crosscut.

THE COURT: If you used the face as a reference point?

THE WITNESS: yes, sir.

THE COURT: The Dictionary of Mining Methods and Terminology which Mr. Coven has a copy of defines inby as toward the working face or interior of the mine, away from the shaft or entrance.

How would that comport with your definition of it?

THE WITNESS: This definition, of course, is reliable, and everyone depends on it. However, I wrote the citation to say the welder was inby the last open crosscut, but in that place, sir, it would be inby the face, which is impossible because it had not been mined yet, virgin territory, so if we are going--if we are going in this direction from the face, according to the discussion we have just had, we are going outby, and going in this direction in relationship to the face is going inby. However, the violation as I seen it at the time I issued it was, in fact, the welder was inby the last open crosscut in a ventilating current of air. It was not a term to indicate geography; it was inby the last open break, crosscut, in the ventilating current of air.

\* \* \* \* \*

MR. COVEN; You are going to 75.503, your Honor--

THE COURT: Why does someone pick return air as the reference point?

THE WITNESS: I don't believe I am qualified to answer that, sir, but return air becomes return after it passes the last open crosscut, ventilating these faces. It's right there, becomes return air. That is defined in the regulations.

THE COURT: If you are measuring--if the reference point in determining whether it's inby or outby would be toward the face, could it be toward the face?

THE WITNESS: Yes, sir.

THE COURT: When could it be toward the face?

THE WITNESS: Well, if this welder were placed right here, it would be inby the last open crosscut.

THE COURT: Why would it be inby?

THE WITNESS: Because the ventilating current of air goes here, sir. It's in the middle of it.

THE COURT: Then it's inby the last open crosscut?

THE WITNESS: Yes.

If it's back this way it's still inby, sir.

THE COURT: Where would it become outby?

THE WITNESS: If it were here, sir, outby the last open crosscut (indicating).

THE COURT: In relationship to which way the air is flowing?

THE WITNESS: Yes, sir.

THE COURT: You would say anything that is in intake area from that point, from that last open crosscut back towards the mine entrance, would be outby, and anything that, as it goes along the return air path, is inby?

THE WITNESS: Yes, sir.

THE COURT: We're using two different reference points. When you determine the inby, aren't you determining that as far as the last open crosscut as far as the ventilating air current, are you not?

THE WITNESS: Yes, sir.

THE COURT: Somebody else might use the face as a reference point; isn't that true?

THE WITNESS: Yes, sir.

THE COURT: So if someone is using the face as a reference point, they would come around 180 degrees from if you were using the ventilating current of air as the reference point as to location of the face equipment; isn't that true?

THE WITNESS: It would come out that way.

THE COURT: It would come out that way, wouldn't it? What do you mean, "could come out that way?" Wouldn't that logically follow? Tell me how it would come out the same if someone were to use toward the face as a reference and someone were to use ventilating current of air?

THE WITNESS: Okay.

This welder here, irrespective of our point of reference in our discussion, is still outby; it's outby this face, outby this face. In perfect, strict mining terminology, this direction would be outby.

THE COURT: Would it also be outby the last open crosscut from the face?

THE WITNESS: yes, sir, geographically it would still be outby the last open crosscut, because you are mining, in this case, in this direction.

THE COURT: This is inby, that is outby the last open crosscut geographically, and the standard doesn't make any distinction, does it?

THE WITNESS: No, sir.

THE COURT: Then how is there a violation here?

THE WITNESS: Because anything in return air must be permissible construction [sic], 75.507, sir.

THE COURT: 75.507?

Well then, why didn't you cite 507 in this case?

THE WITNESS: Well, may I please refer to the manual? It indicates we should cite nonpermissible conditions under 503.

#### Respondent's Testimony and Evidence

Thomas R. Mitchell, respondent's maintenance chief, disputed the location of the welder in question as stated by Inspector Hinkle, and he testified that the welder was located in intake air outby the No. 12 room in the second crosscut outby the No. 2 entry at the time it was cited. To achieve abatement, he had it moved approximately 70 feet toward the main entry in the No. 2 entry approximately one crosscut outby where it had been previously located (Tr. 91-94). Using respondent's sketch, Exhibit R-2, Mr. Mitchell indicated where he thought the last open crosscut was located by penciling in "LOX" on the sketch, and he testified that using the faces of the Nos. 11 and 12 rooms as a point of reference, the welder in question would have been located outby the last open crosscut (Tr. 97-98). He also indicated that the terms "inby" and "outby", as commonly used by the industry in Southern Illinois, mean towards the working face and away from the working face (Tr. 99).

Thomas Bubanovich, employed by the respondent as its chief industrial engineer, testified that the terms "inby" and "outby" the last open crosscut, as used in the coal fields, refer to the direction of mining. Using a new vertical mine shaft as an analogy and reference point, he indicated that if one were driving away from the shaft in a northerly direction, the term "inby" would mean in that northerly direction, and the term "outby" would mean in a southerly direction coming back to the mine shaft (Tr. 120-121). Using the inspector's sketch, Exhibit P-4, Mr. Bubanovich expressed disagreement with the inspector's interpretation that the welder in question was located inby the last open crosscut, and he stated that he had never heard of the use of the flow of air as a reference point for applying the term "inby" as the inspector has in this case (Tr. 120-121, 127).

Mr. Bubanovich testified further that he visits the section in question once every month but that he was not with the inspector during the inspection in question (Tr. 135). However, he disputed the extent of the development of the section as depicted on the inspector's sketch (Exh. P-4), and he indicated that the mine records show that mining had not advanced or developed as far as the inspector indicated (Tr. 130-134).

#### Findings and Conclusions

##### Fact of Violation

Respondent is charged with a violation of the provisions of mandatory standard 30 C.F.R. § 75.503, which provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."



The critical issue presented in this case is whether or not the welding machine in question was located inby the last open crosscut as alleged by the inspector on the face of the citation which he issued. The testimony presented by the inspector and respondent's witness Mitchell indicates a conflict as to where they believed the welder was actually located. The inspector's testimony reflects that it was located in return air, while the testimony of Mr. Mitchell reflects that it was located in intake air. The critical question, however, is whether it was located inby the last open crosscut as that term is generally understood and defined in the mining community. If the welder was inby the last open crosscut, then a violation occurred; if it was not, there is no violation.

The condition or practice stated in the citation issued by Inspector Hinkle makes no reference to the fact that the welder in question was located in a return air entry. The inspector simply states that it was located "inby the last open crosscut." It seems obvious to me that the reason Inspector Hinkle failed to include the fact that the welder was located in return air on the face of the citation is the fact that the standard makes no mention of any such prohibition. In this instance, Inspector Hinkle conceded that he issued the citation because the welder was located in a return air entry contrary to the policy stated in the inspector's guidelines.

The condition or practice cited by Mr. Hinkle on the face of the citation which he issued makes no reference or allegation to the fact that the welder in question was located in return air. It simply states that it was "inby the last open crosscut." However, the language contained in the Inspector's Manual policy statement prohibits such equipment from being operated in a return entry or in or inby the last open crosscut. These prohibitions are stated in the alternative, and unless they mean the same thing, MSHA may not rely on one to support the other. In this case, the terms are not synonymous since the inspector testified that in any section in a room and pillar-mining system intake air is not always inby the last open crosscut, and that once the intake air leaves the last open crosscut it becomes return air (Tr. 67).

It is well settled that inspectors' guidelines and manuals do not have the status of official mandatory regulatory safety standards. Kaiser Steel Corporation, 3 IBMA 489, 498 (1974); King Knob Coal Company, Inc., WEVA 79-360 (June 29, 1981). The "policy" statement instructing inspectors to issue citations citing section 75.503 when they find nonpermissible electric face equipment operating in a return entry is an expansion of the clear statutory language limiting such violations to equipment observed operating in or inby the last open crosscut. MSHA has cited no authority, short of formal rulemaking under the Act, legally authorizing such an amendment or expansion of a mandatory statutory standard through the publication of "policy" statements. Since the policy statement is stated in the alternative, an inspector could use it to cite a violation of section 75.503 if he observes non-permissible electric face equipment in or inby the last

open crosscut, and he may also cite a violation if he finds such equipment located in a return air entry. Since MSHA has not established that such a return air entry is always inby the last open crosscut, and since the cited standard does not prohibit such equipment from operating in a return air entry per se, MSHA must establish through credible evidence that the cited welder was in fact located and operating inby the last open crosscut in order to sustain the violation and citation which was issued in this case.

It seems clear to me that Inspector Hinkle's interpretation of the term "inby the last open crosscut" was based on his reliance on the policy statement found in the Inspector's Manual as well as his use of a reference point which is directly related to the ventilating current of air rather than to the working face of the mine (Tr. 24, 30, 33-34, 37-38, 54). As a matter of fact, Mr. Hinkle candidly admitted that anytime he finds non-permissible electric face equipment located in a return air entry he is free to issue a citation under section 75.503, and the reason he cites the "law" rather than the "policy" is that his instructions are not to cite the manual policy provision because an inspector may not rely on it (Tr. 37).

Unless the inspector can establish that the cited non-permissible welder was located inby the last open crosscut as that term is generally understood in the mining industry, he should not be permitted to arbitrarily rely on policy statements which clearly enlarge on a statutory regulation simply because he believes that non-permissible equipment should not be allowed to operate in return air. If MSHA believes that the operation of such equipment in return air is per se a hazard, then it is incumbent on MSHA to promulgate a mandatory standard prohibiting such a practice, rather than attempting to do so through unpublished policy statements. Further, if MSHA believes that the use of the terms "inby" and "outby" in the mining industry are outmoded, then I suggest MSHA redefine them through normally acceptable rulemaking rather than through the issuance of policy statements. Petitioner's counsel conceded that the policy statement found in the Inspector's Manual expands the statutory language found in section 75.503, but he nonetheless maintained that an inspector may rely on the policy in citing an operator for a violation of that section if he finds a non-permissible welder located in return air (Tr. 36).

Respondent's defense to the citation is that the petitioner has failed to carry its burden of proof and has not established that the non-permissible welder was in fact located inby the last open crosscut as that term is defined by the mining dictionary as well as the commonly understood and applied meaning of that term within the coal-mining industry. Respondent maintains that the point of reference for determining the meaning of the terms "inby" and "outby" should be the working production faces and not the flow of ventilating currents. Respondent also maintains that since the Inspector's Manual policy guidelines are not mandatory standards, the inspector cannot legally apply them to expand the statutory language contained in section 75.503 (Tr. 79-82).

After careful review of the testimony presented during the hearing, I find the inspector's testimony as to the location of the welding machine in

question to be credible and I accept it. That is, I find that the welder was located at the approximate location and place in the return air entry as testified to by Inspector Hinkle and as reflected in his notes made at the time the citation issued, and as depicted in the sketch which is a part of the record (Exh. P-4).

The next question to be determined is whether the welder in question was inby or outby the last open crosscut. In this regard, I take note of the fact that neither the Act nor the standard defines the terms "inby" or "outby." However, the term "inby" is defined by the Dictionary of Mining, Mineral and Related Terms, U.S. Bureau of Mines, 1968 ed., p. 527, as follows:

a. Toward the working face, or interior, of the mine; away from the shaft or entrance; \* \* \* b. In a direction toward the face of the entry from the point indicated as the base or starting point. c. The direction from a haulageway to a working face \* \* \* d. Opposite of outby. [Emphasis added.]

The term "outby" is defined by the mining dictionary as follows:

a. Nearer to the shaft, and therefore away from the face, toward the pit bottom or surface; toward the mine entrance. The opposite of inby. Also called outbyeside. B.C.I.; Fay. b. In a direction toward the mouth of the entry from the point indicated as the base or starting point.

In a 1977 publication entitled Introduction to Underground Coal Mining, NMHSA-CE-001, published by the U.S. Department of the Interior, and apparently used at the National Mine Health and Safety Academy in the training of MSHA's inspectors, the term "inby" is defined as follows in a glossary of terms listed at page 216: "Toward the working face or interior of the mine, away from the shaft or entrance."

The mining dictionary referred to above defines the term "face" in pertinent part as "the solid surface of the unbroken portion of the coalbed at the advancing end of the working place," "a point at which coal is being worked away," or "a working place from which coal or mineral is extracted." The term "face equipment" is defined as electrical equipment "normally installed or operated inby the last open crosscut in an entry or room."

In one of the earlier cases decided under the 1969 Act, Mid-Continent Coal and Coke Company, 1 IBMA 250 (December 29, 1972), the former Board of Mine Operations Appeals had occasion to define the term "inby the last open crosscut," and in so doing affirmed a judge's ruling that it means "inby the interior-most rib or wall." 1 IBMA 254.

Respondent maintains that the term "inby" must be determined by use of the dictionary definition of that term, and that the starting reference

point should be the interiormost rib or wall as stated in the Mid-Continent Coal and Coke Company case, supra, and that as applied to the facts of this case, it is clear that the welder was in fact located outby the face and not inby as contended by the inspector.

After careful review and consideration of all of the testimony and evidence adduced in this proceeding, including the arguments made by counsel in support of their respective interpretations of the term "inby," I conclude and find that the respondent has the better part of the argument and I accept those arguments and reject those advanced by the petitioner. I conclude and find that the applicable dictionary definition of the term "inby," coupled with the interpretation placed on that term in the Mid-Continent Coal and Coke Company case, supra, is controlling in this case. I therefore conclude that by utilizing the innermost rib of the block of coal which was being mined in this case as a starting reference point (Exh. P-4), the welder in question was located outby the last open crosscut labeled "LOX" on that exhibit, and that it was not in fact located inby the last open crosscut. I further find that the welder was outby the face which was being mined at the time in question, down the return air entry, and way from the face area as depicted on the sketch. The fact that it was in that location is not per se a violation, and MSHA's attempts to expand on the statutory language found in section 75.503, by means of a policy prohibition against the use of non-permissible electric face equipment in a return air entry is rejected. If MSHA believes such a practice should be prohibited, then I suggest it take the proper steps to promulgate an appropriate safety standard through the proper rulemaking procedures.

In view of the foregoing findings and conclusions, I find that the petitioner has failed to establish a violation of section 75.503, as charged in Citation No. 1003911, issued on May 6, 1980, and the citation is VACATED.

#### ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED THAT Citation No. 1003911, issued on May 6, 1980, charging a violation of 30 C.F.R. § 75.503, is VACATED, and petitioner's proposal for assessment of civil penalty for the alleged violation is DISMISSED.

In view of the approved settlement for Citation No. 1003913, May 8, 1980, 30 C.F.R. § 75.1719(1)(d), respondent IS ORDERED to pay a civil penalty in the amount of \$90 in satisfaction of this violation, payment to be made within thirty (30) days of the date of this order, and upon receipt of payment by the petitioner, this matter is DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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