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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EASTERN ASSOCIATED COAL
CORPORATION,
CONTESTANT

v.

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

UNITED MINE WORKERS OF
AMERICA,
INTERVENOR

Contest of Citation

Docket No. WEVA 80-619-R

Federal No. 2 Mine

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

v.

EASTERN ASSOCIATED COAL
CORPORATION,
RESPONDENT
UNITED STEEL MINE WORKERS
OF AMERICA,
INTERVENOR

Civil Penalty Proceeding

Docket No. WEVA 81-218

A.C. No. 46-01456-03087

Federal No. 2 Mine

DECISION

Appearances: Sally S. Rock, Esq., Eastern Associated Coal Corporation,
Pittsburgh, Pennsylvania, for Eastern Associated Coal Corp.;
Edward H. Fitch, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Secretary of Labor;
Terry Osborne, United Mine Workers of America, Morgantown,
West Virginia, for Intervenor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

Eastern Associated Coal Corporation (hereinafter "Eastern")
commenced this action on August 11, 1980, by filing a Notice of
Contest, concerning Citation No. 0631927, against the Secretary
of Labor, Mine Safety and Health

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Administration (hereinafter "MSHA") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 (hereinafter "the Act"). On February 18, 1981, MSHA filed a civil penalty proceeding against Eastern arising out of the same citation. Subsequently, the two proceedings were consolidated.

Upon completion of prehearing requirements, hearings were held in Pittsburgh, Pennsylvania on January 22 and 23, and March 30 and 31, 1981. The following witnesses testified for MSHA: Kevin Cross, Dominic Salentro, William Deegan, James Merchant, Lawrence Knisell, John Phillips, Fred Williams, and Paul Hall. The following witnesses testified on behalf of Eastern: Lamar Richards, Gary Cumberledge, Gary McHenry, Frank Peduti, and John Hetric. The United Mine Workers of America (hereinafter "UMWA") participated in this case as an intervenor on January 22, 1981, but not thereafter. Eastern and MSHA filed posthearing briefs.

ISSUES

Whether the citation was properly issued and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. 75.1401-1 provides as follows: "The American National Standards Institute "Specifications For the Use of Wire Ropes for Mines," M11.1 - 1960, or the latest revision thereof, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting."

STIPULATIONS

The parties stipulated as follows:

1. Eastern is the owner and operator of the Federal No. 2 Mine.
2. The operator and the Federal No. 2 Mine are subject to the jurisdiction of the Act.
3. The presiding Administrative Law Judge has jurisdiction over this proceeding.
4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.
5. True and correct copies of the subject citation, modification, and termination thereof were properly served upon the operator.
6. Copies of the subject citation, modification, and termination are authentic and may be introduced into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

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7. All witnesses who will testify are accepted generally as experts in coal mine health and safety.

8. The latest revision of the American National Standards Institute "Specifications for the Use of Wire Ropes for Mines," M11.1-1960 is the 1980 edition, approved March 14, 1979. The standards set forth therein are the standards to be used in the inspection and removal of hoist ropes pursuant to 30 C.F.R. 75.1401-1.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Eastern is the owner and operator of Federal No. 2 Mine in Fairview, West Virginia. The controversy at issue relates to the wire rope used on the manhoist at A shaft. During a normal working day, 40 miners simultaneously ride the manhoist between the surface and the area of the active workings located about 740 feet below. The manhoist and wire rope are used 80 times a day, 365 days a year.

2. The wire rope in question was installed by Eastern in 1968. In addition to the visual inspection required by law, Eastern contracted with Rotesco to perform electromagnetic tests of the rope. The last such test was performed on April 15, 1980. On May 21, 1980, Rotesco reported that the rope had lost a maximum of 13 to 14 percent of its strength but did not recommend that it be removed.

3. The American National Standards Institute approved the latest revision of its "Specifications for the use of wire ropes for mines" M11.1-1980 on March 14, 1979.

4. On April 15, 1980, three broken wires were found in one strand (FOOTNOTE.1) in one lay (FOOTNOTE.2) of the counterweight rope at A shaft. Thereafter, the counterweight rope was replaced by the only spare rope available at the mine property. On April 16, 1980, Eastern issued a purchase order for two spare wire ropes. Although these ropes were to be delivered to the mine on June 27, 1980, they were not received until July 24, 1980.

5. At Eastern's inspection on April 16, 1980, one broken wire in one strand of the hoist rope was discovered. This fact was recorded in the Report of Daily Inspection of Hoisting Equipment.

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6. Between April 17, 1980 and July 21, 1980, the date the citation was issued, MSHA conducted seven separate inspections of the rope in question pursuant to UMWA complaints under section 103(g) of the Act. The dates of these inspections and the pertinent findings by MSHA are as follows:

(a) April 17, 1980. Thirty broken wires were found. Two broken wires were found in the same lay, but the MSHA inspectors were not sure if they were in the same strand. The diameter of the rope was not recorded. MSHA inspectors advised the UMWA that there was no criteria by which to order the rope out of service.

(b) May 15, 1980. Thirty-three broken wires were found. Two broken wires were found in one strand and one lay.

(c) May 19, 1980. Thirty-three broken wires were found but the entire rope was not inspected. The MSHA inspectors again said there was no criteria by which to retire the rope because the rope did not have three broken wires in one strand or six broken wires in one lay.

(d) June 25, 1980. Thirty-nine broken wires were found in three different locations, with two broken wires in one strand in one lay.

(e) July 14, 1980. No record of results of inspection.

(f) July 16, 1980. Forty broken wires were found. In four strands, two broken wires were found in one lay. The smallest diameter of the wire rope was 2.14 inches. Eastern stated that a new wire rope was to be delivered on July 28, 1980.

(g) July 21, 1980. Forty-one broken wires were found. Four strands had two broken wires in one lay. The smallest diameter of the rope was 2.13 inches. Citation No. 0631927 was issued.

7. On July 21, 1980, MSHA Inspector John Phillips issued Citation No. 0631927 pursuant to section 104(a) of the Act and 30 C.F.R. 75.1401-1. The citation alleged the following:

The time for removal of the man cage wire rope in A shaft is indicated by the increased No. of broken wires; four locations with two broken wires in one strand in one lay, 33 broken wires at different locations, making a total of 41 broken wires. A marked reduction in rope diameter at four locations in the entire rope from a nominal diameter of 2.25 inches to a diameter of 2.13 inches. Evidence of excessive abrasion on the outside wires is evident. The above mentioned was determined by an inspection of the entire wire rope. The termination due date was established as midnight, July 28, 1980.

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8. On July 28, 1980, Inspector Phillips modified and terminated the citation as follows:

This citation is modified to indicate the American National Standards Specifications for use of wire ropes for mines M11.1 1960 or the latest revision thereof was not being used as a guide for inspection and removal of the man cage wire rope as indicated by the above mentioned conditions in the original Citation No. 0631927 and the Mine ID should have been 46-01456 instead of 46-01455.

The Company installed a new wire rope on the man cage in A shaft.

9. On March 14, 1979, the American Standards Institute, Inc., approved a revision of the "American National Standard for wire rope for mines" ANSI M11.1-1980 (hereinafter ANSI Standard). The pertinent provisions of the above standard are as follows:

1.5 Mandatory and Advisory Rules. In the standard, the word "shall" is to be understood as denoting a mandatory requirement; the word "should" is advisory in nature and is to be understood as denoting a recommendation.

3.11.3 Visual Evidence of Rope Degradation. In addition to the regularly scheduled inspections, the machine's operating personnel should report any visual evidence of rope degradation, such as:

(1) Severe abrasion, scrubbing, peening, or kinking, or broken outer wires

* * * * *

(3) Severe reduction of rope diameter or an observable increase in rope lay.

* * * * *

(8) A rapid increase in the number of broken wires....

4.6.2 Retirement Criteria

4.6.2.1 Causes for Rope Retirement. The following are causes for removal of wire rope:

(1) Visible Wire Breaks. More than six randomly distributed broken wires on one rope lay or three broken wires in one strand in one rope lay.

(2) Worn Wires.

(3) Evidence of Loss of Strength. An estimation of from 10%-25% loss of rope strength (based upon measurements of rope diameter, wear pattern dimensions, corrosion, and the number of broken wires), estimated with a series of charts and graphs; charts and graphs may be provided by a wire rope or equipment manufacturer. Electromagnetic or other non-destructive testing devices may be used as a supplement but not as a substitute for recommended inspection and tests.

(4) Evidence of Rope Abuse. The following are typical evidences of rope abuse: a kink (a pulled-out twisted loop); a dogleg (a simple, permanent bend); a birdcage (strands separated and ballooned out); loose or high strand(s); a badly out of round section; a crushed or flattened section with abraded or broken wires; loose or looped wires with no visible breaks; a protruding core; a local section with an unusually small diameter; or a local section with an usually short or unusually long lay length. It should be noted that these conditions are all evidence of radical changes - that is, constructional upsets - in the structure of the rope. Removal is not required if the abuse can be removed by an end cut.

10. The rope in question did not have more than six randomly distributed broken wires in one rope lay or three broken wires in one strand in one rope lay.

11. The maximum amount of reduction in the diameter of the rope was from 2.25 inches to 2.13 inches, or 5.3 percent.

12. MSHA did not issue a safeguard or limitation on the maximum load to be carried on this rope at any time prior to the issuance of the citation.

13. The term "worn wires" is not defined in the ANSI standard.

14. After the rope in question was removed, a 14 foot piece of the rope was tested to failure by Bethlehem Steel Corporation. The rope had a catalogue strength of 480,000 lbs. and failed at 453,000 lbs or 5.6 percent less than the catalogue strength.

15. The UMWA protested the continued use of the rope by refusing to work as follows:

| | |
|----------------|----------|
| April 24, 1980 | 1 shift |
| July 16, 1980 | 3 shifts |
| July 17, 1980 | 1 shift |
| July 21, 1980 | 3 shifts |
| July 22, 1980 | 2 shifts |
| July 23, 1980 | 1 shift |

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16. MSHA does not allege that the rope presented an "imminent danger" under section 107(a) of the Act.

DISCUSSION

Difficulty of Determining Time for Removal of Wire Rope

At the outset, it is recognized that determining the time for removal of a wire rope is an extremely difficult and complicated decision. This fact is demonstrated by section 4.6.1.1 of the ANSI Standard which states in pertinent part: "The decision concerning the proper time to retire a wire rope from service is difficult to make because of a significant lack of rope retirement criteria related to mining." MSHA's wire rope expert, Inspector Fred Williams, agonized over the "great burden to ... look at a rope and make a decision and knowing that person's lives are involved and finally deciding that it is safe for another month or safe for another two months, it is quite a decision to make." (Tr. 302).

However, it must also be noted that this is not a case involving an alleged "imminent danger" under section 107(a) of the Act. MSHA never asserted that the rope presented an imminent danger. Hence, much of the evidence and argument presented by MSHA concerning the fears of miners and inspectors about the "last safe trip" of the manhoist is irrelevant to this proceeding. The basic issue here is whether MSHA established the violation of 30 C.F.R. 75.1401-1 pursuant to the citation issued under section 104(a) of the Act.

Analysis of the ANSI Standard

The issue of whether the 1960 ANSI Standard is a mandatory or advisory standard is presently pending before the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). In *Jim Walter Resources, Inc.*, 2 FMSHRC 1890 (July 25, 1980) Judge George Koutras reviewed and analyzed the 1960 ANSI Standard and concluded that "the specific ANSI Standards relied on by MSHA in support of the alleged violation in this case are advisory guides for voluntary use by the industry." *Id.* at 1902. (Emphasis in original.) Judge Koutras was construing 30 C.F.R. 77.1903(b) which is identical to the instant regulation at 30 C.F.R. 75.1401-1. The Commission directed review of that decision. Curiously, MSHA neither addresses the issue of whether the ANSI Standard is mandatory or advisory nor mentions the *Jim Walter Resources, Inc.*, decision, in its brief. Moreover, MSHA did not reply to Eastern's assertion that 30 C.F.R. 75.1401-1 is not a mandatory standard.

It must first be determined whether the citation alleged the violation of a mandatory standard. Section 104(a) of the Act permits MSHA to issue citations for violations of the "Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." Thus, a citation may be issued to an operator for violation of a regulation which is not a mandatory health or safety standard. However, section 110(a) of

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the Act permits the assessment of a civil penalty only against a person who violates "a mandatory health or safety standard or who violates any other provisions of this Act"

30 C.F.R. 75.2 states that all safety standards in Part 75 are mandatory. 30 C.F.R. 75.1401-1 states that the ANSI Standard shall be used as a guide. However, section 1.5 of the ANSI Standard provides that these standards using the term "shall" are mandatory while others using the term "should" are advisory in nature.

In the instant case, the record is replete with references to various ANSI Standards. MSHA's inspectors allege violations of ANSI Standards concerning daily examination of the rope and record keeping requirements. This evidence is irrelevant since the citation in issue alleges only the violation of ANSI Standards for failure to remove or retire the rope. It is clear that Inspector Phillips issued the citation because of the reduction in the diameter of the rope and the existence of broken wires. Inspector Hall stated that the substance of the alleged violation was broken wires, marked reduction of the rope diameter, and excessive abrasion. Inspector Williams and Inspector Phillips expressed their belief that Eastern violated sections 3.11.3 and 4.6.2.1 of the ANSI Standard.

ANSI Standard section 3.11.3 begins as follows: "In addition to the regularly scheduled inspections, the machine's operating personnel should report any visual evidence of rope degradation, such as" (Emphasis supplied.) Pursuant to section 1.5 of the ANSI Standard, the use of the term "should" renders section 3.11.3 an advisory standard. Thus, since section 3.11.3 is not a mandatory standard, no civil penalty can be assessed for a violation of that section. Moreover, ANSI Standard 3.11.3 only suggests that "operating personnel should report any visual evidence of rope degradation" And does not purport to establish criteria for removal or retirement of the rope. The citation in issue was based upon Eastern's failure to remove or retire the rope. MSHA did not cite Eastern for violation of 30 C.F.R. 75.1400-3 which sets forth the requirements for the daily examination of hoisting equipment. Therefore, I find that MSHA's reliance upon section 3.11.3 of the ANSI Standard is misplaced, since the issue here whether Eastern violated the ANSI Standard by failing to remove or retire the rope prior to the time the citation was written.

The only ANSI Standard applicable to this case is section 4.6.2.1 which describes "causes for rope retirement." It is noted that this standard does not contain the terms "shall" or "should" as defined in section 1.5 of the ANSI Standards. However, the introductory language of this section states: "The following are causes for removal of wire rope" I find that the above quoted language of this section denotes a mandatory requirement. Hence, if MSHA establishes a violation of section 4.6.2.1 of the ANSI Standard, the citation will be affirmed and a civil penalty assessed.

Section 4.6.2.1(1) provides for the removal of wire rope where there are "more than six randomly distributed broken wires on one rope lay or three broken wires in one strand in one rope lay." On this question, there is no conflict in the evidence. There is no evidence of more than six randomly distributed broken wires in one rope lay. Likewise, there is no evidence of three broken wires in one strand in one rope lay. On the date the citation was issued, MSHA found four strands with two broken wires in one lay. This evidence does not meet the criteria in section 4.6.2.1(1) concerning visible wire breaks.

Section 4.6.2.1(2) provides for the removal of wire rope when there are "worn wires." The term, "worn wires," is not defined in the ANSI Standard. MSHA contends that there were worn wires while Eastern denies this assertion. The evidence establishes that wearing or abrasion begins with the first use of every wire rope. To that extent, every rope in service has "worn wires." The failure of the ANSI Standard to define the term "worn wires" renders this section too vague to be enforceable. See Connally v. General Construction Co., 269 U.S. 385, 391 (1926). In any event, UMWA Safety Committeeman Kevin Cross testified that he inspected the wire rope on four occasions between April 17, 1980 and the date of this citation and he saw no evidence of wear on the rope.

Section 4.6.2.1(3) provides that a cause for rope removal is as follows:

* * * * *

(3) Evidence of Loss of Strength. An estimation of from 10%-25% loss of rope strength (based upon measurements of rope diameter, wear pattern dimensions, corrosion, and the number of broken wires), estimated with a series of charts and graphs; charts and graphs may be provided by a wire rope or equipment manufacturer. Electromagnetic or other nondestructive testing devices may be used as a supplement but not as a substitute for recommended inspection and tests.

It must first be determined if this provision even qualifies as a standard of any kind. The section apparently provides that if it is estimated that there is a 10 to 25 percent loss of rope strength, the rope should be removed. It does not appear that ANSI intended that ropes with less than a 10 percent loss of strength should be removed. The standard can be read as requiring the removal of ropes with a loss of strength of 25 percent or more. For losses of strength of less than 25 percent but more than 10 percent, the standard is vague and unenforceable under the Act. Since there is no evidence in the record of a 25 percent loss of strength of the rope in question, MSHA failed to prove a violation of this section.

Section 4.6.2.1(4) deals with evidence of rope abuse. However, MSHA's wire rope expert, Inspector Fred Williams, conceded that there was no evidence of rope abuse in this case.

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In conclusion, MSHA has failed to establish a violation of the applicable ANSI Standard. The foregoing discussion illustrates the problems encountered by MSHA in its attempt to delegate the promulgation of mine safety enforcement standards to a non-governmental body. On April 28, 1981, MSHA published a notice that it intends to propose "specific requirements for wire ropes [which] will eliminate the need to incorporate by reference the ANSI Standard." 46 Fed. Reg. No. 81 at 23987 (April 28, 1981).

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. Eastern and its Federal No. 2 Mine are subject to the Act.
3. The evidence of record fails to establish that Eastern violated the ANSI Standard as alleged and Citation No. 0631927 is vacated.
4. The evidence fails to establish the violation of a mandatory health or safety standard and the petition to assess a civil penalty is dismissed.

ORDER

WHEREFORE IT IS ORDERED that Eastern's Contest of Citation No. 0631927 is SUSTAINED and Citation No. 0631927 is VACATED.

IT IS FURTHER ORDERED that the petition to assess a civil penalty is DISMISSED.

James A. Laurenson Judge

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~FOOTNOTE_ONE

A strand is a number of steel wires grouped together by twisting. The steel wire rope in question consists of a number of strands laid around a fiber core.

~FOOTNOTE_TWO

A lay is the distance it takes one strand to make one complete turn around the axis of the rope.