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SOL (MSHA) V. PITTSBURGH COAL  
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TTEXT:

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

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

v.

THE PITTSBURGH & MIDWAY COAL  
COMPANY,

RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-405

MSHA CASE NO. 05-00303-03005

MINE: Edna Strip

Appearances:

Katherine Vigil, Esq., Office of Henry C. Mahlman, Associate  
Regional Solicitor, United States Department of Labor,  
Denver, Colorado,

For the Petitioner

Terrance M. Cullen Esq.  
Denver, Colorado,

For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges that respondent, The Pittsburgh and Midway Coal Mining Co., (P & M), violated Title 30, Code of Federal Regulations | 77.1110, (FOOTNOTE 1) a regulation adopted under the authority of the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

ISSUES

The issues are whether P & M violated the regulation. If a violation occurred, what penalty, if any, is appropriate.

STIPULATED FACTS

The parties waived a hearing and filed the following written stipulation:

1. Respondent operates a surface coal mine at Oak Creek, Colorado, called the Edna Strip Mine;
2. The operation of the Edna Strip Mine affects commerce and is thus subject to the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et. seq., (the "1977 Act").
3. That this proceeding is properly before the Honorable John J. Morris.
4. An authorized representative of the Secretary of Labor conducted an inspection of the Edna Strip Mine on June 12, 1979, in order to determine respondent's compliance with the 1977 Act and valid regulations promulgated by the Secretary of Labor pursuant to the 1977 Act.
5. As part of that inspection, the authorized representative of the Secretary discovered a damaged fire extinguisher on an explosives truck of the respondent. This fire extinguisher was inoperative on the day of the inspection because of a damaged release lever. As a result, the authorized representative of the Secretary of Labor issued Citation No. 791622 to the respondent, which citation alleges that respondent's damaged fire extinguisher constitutes a violation of 30 C.F.R. | 77.1110 by the respondent. The respondent does not dispute the existence of an inoperative fire extinguisher on the explosives truck.
6. The authorized representative of the Secretary did not allege that respondent had violated 30 C.F.R. | 77.1109 despite the presence of the inoperative fire extinguisher on the respondent's explosives truck.
7. On June 12, 1979, there were two operative type ABC fire extinguishers with a combined rated extinguishing capacity of 15 BC on the cited vehicle, one 10 BC and one 5 BC. Thus, respondent states it was in compliance with 30 C.F.R. | 77.1109(f) on the day Citation No. 791622 was issued.
8. The damage to the inoperative fire extinguisher for which Citation No. 791622 was issued was not obvious during the daily inspections of the cited vehicle. In addition, the permanent tag attached to the cited fire extinguisher indicated that it had been completely examined by the respondent within the six months preceding June 12, 1979.

DISCUSSION

The stipulated facts clearly support the conclusion that P & M violated 30 C.F.R. | 77.1110. The regulation provides that fire fighting equipment shall be usable and operative. A fire extinguisher on the explosives truck on the day of this inspection was inoperative and consequently unusable. The extinguisher had a broken release lever.

P & M's defense evolves in this fashion: Section 77.1110 states that "firefighting equipment shall be continuously maintained . . .". 30 C.F.R. 1109(f) (FOOTNOTE 2) relating to the quantity and location of fire fighting equipment states that vehicles shall be equipped in accordance with the National Fire Protection Association Handbook, 12th Edition 1962. The parties and their post trial briefs agree that P & M was in compliance with 30 C.F.R. | 77.1109(f) on the day the citation was issued.

I am not persuaded by P & M's argument. Section 77.1110 in effect states that [all] firefighting equipment shall be continuously maintained in a usable and operative condition. Section 77.1109(f) establishes the minimum quantity of such fire fighting equipment. If P & M places a quantity in excess of the minimum such fire extinguishers must nevertheless be usable and operative. This view necessarily conflicts with P & M's contention that a violation cannot be based on the existence of an inoperative fire extinguisher where the explosives truck also has operative fire equipment meeting or exceeding the requirement of 30 C.F.R. | 77.1109(f).

I agree with P & M's view that it need only meet the minimum requirements of two fire extinguisher required by 30 C.F.R. 77.1109(f); however, having undertaken to provide more equipment, it must be usable and operative.

P & M states the Secretary's view is unreasonable because under his construction a fire extinguisher which is awaiting or being repaired could be in violation of the regulation. I disagree. A fire extinguisher awaiting repair seems hardly by any stretch of the imagination to be "fire fighting" equipment. In any event P & M has not presented those facts for adjudication.

P & M says no diminution of a miner's protection could occur because two operative fire extinguishers were present. Such a factual situation would require the miner to guess which two of the three extinguishers were operative. There are no doubt situations in a fire when a miner would not have a wealth of time to make his choice. Further, P & M's argument leads me to extend it. Consider the hazards if only two extinguishers out of a total of, say six extinguishers, were operative. The law is clear that if a conflict exists between an interpretation that promotes safety and an interpretation that would serve another purpose at the possible compromise of safety the first should be preferred U.M.W.A. v. Kleppe 562 F. 2d 1260, 1265 (D.C. Cir. 1977).

CIVIL PENALTY

P & M, in the alternative, argues that the \$114 proposed civil penalty is excessive. This view rests on the proposition that the fire extinguisher damage was not obvious and that the extinguisher had been examined within the six months preceding the date of the inspection. This issue goes to P & M's negligence which I consider higher than usual inasmuch as this was an explosives truck.

P & M further notes it immediately complied and abated the violation and it also reargues its view that no safety problem existed. Abatement is a factor favorable to P & M.

Section 110(i) 30 U.S.C. 820(i) sets forth the criteria for assessing civil penalties and on the basis of the stipulated facts and the statute I deem that the proposed civil penalty of \$114 is appropriate.

Based on the foregoing facts and conclusions of law I enter the following:

ORDER

Citation 791622 and the proposed civil penalty therefor are affirmed.

John J. Morris  
Administrative Law Judge

AA

~FOOTNOTE\_ONE

1 The cited standard provides as follows:

77.1110 Examination and maintenance of firefighting equipment. Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

~FOOTNOTE\_TWO

2 The standard, 30 C.F.R. 1109(f), referred to by P & M reads as follows:

(f) Vehicles transporting explosives and blasting agents shall be equipped with fire protection as recommended in Code 495, section 20, National Fire Protection Association Handbook, 12th Edition, 1962.