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CAMBRIA COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CAMBRIA COAL COMPANY,
CONTESTANT

v.

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

Contest of Citation

Docket No. PENN 81-169-R
Citation No. 1043934 5/8/81

Cambria Strips & Tipple

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

v.

CAMBRIA COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. PENN 81-231
A.C. No. 36-02738-03009

Cambria Coal Strips
& Tipples

DECISION

Appearances: Bruno A. Muscatello, Esq., Brydon, Stepanian
& Muscatello, Butler, Pennsylvania, for
Contestant/Respondent, Cambria Coal Company
David T. Bush, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent/Petitioner,
MSHA

Before: Judge Merlin

This is a consolidated proceeding consisting of a notice of
contest and a petition for the assessment of seven civil
penalties. A hearing was held on March 23, 1982. At the
conclusion of the hearing, counsel waived the filing of written
briefs and presented oral argument in support of their positions.

At the outset of the hearing the Solicitor moved to withdraw
the penalty petition with respect to Citation No. 1043930. From
the bench I granted the withdrawal.

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The Solicitor also submitted at the hearing a motion for approval of settlements. With respect to four citations the motion recommended approval of the originally assessed amounts totalling \$216. The proposed settlement for a fifth citation was \$64, \$20 less than the original amount. A lesser degree of gravity was explained for the reduction. I approved the settlements from the bench.

This left for hearing Citation No. 1043934 which is the citation in the notice of contest PENN 81-169-R.

The citation dated May 8, 1981 sets forth the alleged violation of 30 C.F.R. 77.1607(p) as follows:

The movable boom mast of the Bucyrus Erie 88-B Dragline was left in the upright position and at a location where a person or persons could walk under this boom mast at any time. This boom mast was also not either secured or lowered to the ground surface when this piece of equipment was originally parked and has been out of service for an unknown period of time. This piece of equipment is located at this time at the 045 pit area.

The mandatory standard, 30 C.F.R. 77.1607(p) provides as follows:

Loading and haulage equipment; operation. Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use.

There is no dispute about the facts. (FOOTNOTE 1) The dragline was parked about an eighth of a mile from the point where

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coal was being mined in the pit. The bucket of the dragline was down on the ground and the boom was up in the air. (Op. Ex. No. 3) The dragline had not been used for about 6 to 8 weeks.

Since the boom was not lowered to the ground and since it plainly was not in use, it must be determined whether the mandatory standard applies requiring it to be lowered or secured. If the mandatory standard applies, inquiry must be made whether or not the boom was secured.

The mandatory standard specifically enumerates dippers, buckets and scraper blades. The boom mast is not one of these. The standard also includes "similar movable parts." As the testimony shows, the boom mast moves. MSHA's position is that because the boom moves, it is a movable part similar to dippers, buckets and scraper blades. I cannot accept this argument. If similarity is satisfied only by movability, the word "similar" is superfluous and 1607(p) could accomplish its purpose by referring only to "movable parts." The Solicitor acknowledged this in his closing argument. An interpretation which relegates part of a definition to surplusage is to be avoided.

Dippers, buckets and scraper blades are similar to each other in function because they come in contact with the earth by picking it up or leveling it. All of them are the furthestmost part or the extremity of the total operation to which they are attached. The boom mast does not have these characteristics. Rather it moves and directs dippers, buckets and scraper blades and similar movable parts. In addition, the boom is an integral part of the assembly of the heavy-duty crawler machine as evidenced by the fact that it is included and described in the crawler's specifications (MSHA Exh. No. 2). Dippers, buckets and scraper blades are not so included. Accordingly, the boom is not similar either in placement or function to the items enumerated in the standard. Based upon the foregoing, I conclude the boom is not covered by the standard and the citation must be vacated.

The inspector's selective and uneven enforcement of the standard also demonstrates that it does not apply here. The inspector stated that he would not issue a citation where a lowered and not-in-use boom is in the active pit area. The inspector said that under these circumstances he would not issue a citation because no danger exists in the active pit area since people would not walk under the boom there. The standard however, is not premised upon the boom's location and the inspector has no authority to carve out such an exception. Conversely, if the citation in this case were upheld, citations would have to be issued in situations where the location is the active pit although the inspector himself admits they would not be necessary and does not issue them in such cases.

Finally, even if the boom were within the purview of the mandatory standard as a similar movable part, the citation still would be invalid because the boom was secured. The boom had a braking system. The inspector expressed the view that even with the braking system fully operative the boom was not secured because brakes are subject to mechanical failure. The inspector would require external blocks or cribbing although he admitted this would be difficult. Moreover, the inspector admitted there is no basis in the mandatory standard or any MSHA manual for his position. The testimony demonstrates that the boom in fact had three separate securing devices: (1) a brake on the drum; (2) a ratchet-type mechanism on the gear; and (3) a worm gear. All of these devices were explained in detail at the hearing. I find that any one of them secured the boom. MSHA introduced no evidence to show that they were inoperative. Indeed, the inspector expressly stated that he did not test the brakes. Accordingly, I conclude all three systems were working and that the boom was secured within the meaning of the standard.

