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

SECRETARY OF LABOR, PETITIONER	Civil Penalty Proceedings
v.	Docket No. WEVA 80-516 AC No. 46-01436-03094
CONSOLIDATION COAL COMPANY, RESPONDENT	Docket No. WEVA 80-517 AC No. 46-01436-03095

DECISION

These cases were brought by the Secretary of Labor under section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., for civil penalties for alleged violations of safety standards.

The cases were consolidated and heard in Pittsburgh, Pennsylvania.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent operated Shoemaker mine, which produced coal for sale or use in or substantially affecting interstate commerce.

The Belt Fire Alarm System

2. On February 25, 1980, Federal Inspector Edwin Fetty, accompanied by Respondent's Maintenance Foreman, Gary Harvey, noticed that the monitoring light on the belt fire alarm system in the tailpiece 3 Left, 4 North, was not on, and tried to test the system by pushing the test button. This did not produce a warning signal, audible or visual.

3. The fire sensor system runs on AC power. When the AC power is turned off, the Ni-cd batteries in the control panel provide the power to monitor the system for another 4 hours. After 4 hours, the system goes into a "conservation mode," which conserves the batteries and makes the system inoperative until the AC power is turned on.

When the test was unsuccessful, Mr. Harvey told Inspector Fetty that the likely cause was either that the AC power was not on or that the dry cell battery in the alarm was dead.

Neither tested the system with the AC power on.

4. The inspector issued citation 627724, charging Consol with a violation of 30 CFR 75.1103-1 (FOOTNOTE 1) and stating:

> The automatic fire warning device to provide both audible and visual warning when a fire occurs on or near the No. 2 conveyor belt from the 3 Left 4 North Section tailpiece transporting coal to the No. 1 conveyor belt is not maintained in an operative condition. When the proper test was performed the device would not give an audible or visual warning.

5. The next day, Mr. Harvey talked to the electrician assigned to abate the alleged violation and learned that there was in fact nothing wrong with the system once the power was turned on. The reason for the negative test was that Fetty and Harvey had failed to turn on the AC power.

6. Three Left, 4 North Section was idle from the day shift of February 22 until the afternoon of February 27.

Recorded Tests of Methane Monitors

7. On February 25, 1980, Federal Inspector John Phillips issued Citations 813295 and 813296 because 2 methane monitors were not recorded as having been calibrated within 31 days, as required by an MSHA policy memorandum to federal inspectors. These charged violations of 30 CFR 75.313-1, which provides:

> The operator of any mine in which methane monitors are installed on any equipment shall establish and adopt a definite maintenance program designed to keep such monitors operative and a written description shall be available for inspection. At least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibration tests shall be kept in a book approved by the Secretary.

Respondent's books reported the last test of the methane monitors on January 5, 1980.

8. On February 25, 1980, Inspector Fetty issued Citation 627721 because a methane monitor was not recorded as having been calibrated within 31 days.

DISCUSSION WITH FURTHER FINDINGS

The Belt Fire Alarm System

To establish a violation of 30 CFR 75.1103-1, the Secretary must prove that the fire alarm system did not operate when properly tested. The Secretary concedes in his brief that if the AC power at the belt head had been off for more than 4 hours, the fire alarm equipment could not be properly tested without turning on the AC power. The evidence shows that the AC power had been off for far more than 4 hours, and that neither Fetty nor Harvey turned the AC power on to test the fire alarm system.

There is a conflict of testimony as to the reason for the inadequate test: The inspector recalled that he asked Harvey to turn on the AC power and Harvey left to do so, but Harvey recalled that he stayed with the Inspector and was not requested to turn on the power. I find that the evidence does not preponderate to resolve this conflict in favor of the inspector's recollection. The government therefore did not meet its burden of proving a proper test of the fire alarm system.

The evidence indicates that neither Inspector Fetty nor Mr. Harvey really understood the way the fire alarm system worked at the time the citation was written. Inspector Fetty had never seen this particular kind of system until February 25, 1980. Mr. Harvey was not very familiar with the system either, and in his testimony relied on discussions with the Electrical Foreman and on the manufacturer's instruction manual for knowledge of the system.

Since Inspector Fetty did not fully understand how the system worked, he wrote a citation on a piece of equipment that was in fact operable. Mr. Harvey did not protest the citation or show Inspector Fetty that the system was in fact in working condition, because he was not familiar enough with the system to recognize why it had not responded to the test.

Citations Involving Recorded Tests of Methane Monitors

These citations charge a violation of 30 CFR 75.313-1 relating to the maintenance of methane monitors. The applicable part of the regulation reads: "(A)t least once each month the methane monitors shall be checked for operating accuracy with a known methane-air mixture and shall be calibrated as necessary. A record of calibrated tests shall be kept in a book approved by the Secretary."

The controlling question is whether the phrase "once each month" means each calendar month, as Respondent contends, or once every 31 days, as the Secretary contends.

In MSHA v. CR&I Steel Corporation, DENV 76-62-P (June 17, 1977), pp. 4-5, Judge Morehouse decided that the term "monthly" in 30 CFR 77.502-2 contains an ambiugity "which, when combined with the severity of the possible sanction for violation of a mandatory health and safety standard, fails to satisfy specificity standards for penalty enforcement." In a similar case, Judge Mesch dismissed a citation in MSHA v. CF&I Steel Corporation, DENV 77-43-P, (November 18, 1977), when he found that "weekly" examinations meant once a week, and not an interval of 7 days. Support for these interpretations is found in the scheme of the regulations. The regulations usually specify when a period is to be counted in days rather than a calendar month or week. For example, 30 CFR 75.305-1 specifies that once each week means at intervals not to exceed 7 days and 57.21-65 specifies not more than 7 days.

I conclude that the phrase "once a month" in 30 CFR 75.313-1 reasonably means once each calendar month. MSHA's policy memorandum is not binding on the operator, and stretches the meaning of the regulation beyond its plain meaning.

The recent holding of the Ninth Circuit, in Phelps Dodge Corporation v. Federal Mine Safety and Health Review Commission, et al., ÄÄÄÄÄ F. 2d ÄÄÄÄÄ (1982) applies here. There the court decided that a regulation was unenforceable as interpreted by MSHA because:

> The regulation inadequately expresses an intention to reach the activities to which MSHRC applied it. Therefore, we join in the observation: "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." (citations omitted). Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 528 F. 2d 645, 649 (5th Cir. 1976).

The facts show that the methane monitors were tested on January 5, 1980, and the citations were issued February 25, 1980. Respondent still had 4 days to comply with the standard. In fact, before the end of February, the tests were made and recorded in Respondent's books. There was no violation.

Accordingly, the regulation cannot serve as the basis for issuance of the citation or for the levy of the fine.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding.

2. As to each of the citations involved, the Secretary failed to prove a violation.

Proposed findings and conclusions inconsistent with the above are rejected.

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

WILLIAM FAUVER
JUDGE

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~FOOTNOTE_ONE

1 Section 75.1103-1 provides:

A fire sensor system shall be installed on each underground belt conveyor. Sensors so installed shall be of a type which will (a) give warning automatically when a fire occurs on or near such belt; (b) provide both audible and visual signals that permit rapid location of the fire.