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

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

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-479

v.

ARCH MINERAL CORPORATION,
RESPONDENT

Appearances:
Katherine Vigil Esq. Office of
Henry C. Mahlman Associate Regional Solicitor
United States Department of Labor
Denver, Colorado,
for the Petitioner

Brent L. Motchan Esq.
Arch Mineral Corporation
St. Louis, Missouri,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, Arch Mineral Corporation, with violating Title 30, Code of Federal Regulations, Section 77.1710(i),(FOOTNOTE 1) a regulation adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Laramie, Wyoming.

The parties filed post trial briefs.

ISSUES

The threshold issue is whether the MSHA inspector acquired sufficient information to justify the issuance of the citation.

An additional issue is whether an operator is relieved from liability for a violation of the seat belt regulation when he shows that his policy "required" the use of such seat belts.

STIPULATION

The parties stipulated that this mine produces annually 2,719,890 production tons of coal of respondent's total annual production of 8,719,876 tons. In the prior 24 months no violations of this regulation have been assessed against respondent. Finally, respondent's ability to remain in business will not be impaired by payment of the proposed penalty (Tr. 6, 7).

SECRETARY'S EVIDENCE

John Thompson, a federal coal mine inspector experienced in mining, inspected the Seminoe No. 1 mine on April 21, 1980 (Tr. 19)

Close to the entrance ramp, on a coal bench, a D9 Caterpillar bulldozer appeared in a nearly upset condition. It was tilted at a 35 to 40 per cent angle (Tr. 19, 20, 29, 30). The dozer had been working the coal bench when the outer edge of the bench collapsed (Tr. 20). One 24 inch track was on the bench and one was below it (Tr. 20-22, P 1). The dozer, equipped with an enclosed cab, had roll-over protection (Tr. 30).

Inspector Thompson didn't see the dozer in operation but the engine was warm (Tr. 23). He spoke to the operator who said he hadn't been wearing the seat belt (Tr. 30). The inspector, after viewing the seat belt, concluded the belts weren't being used. They were under the seat, had an appearance of non-use, and had dust and hand prints on them (Tr. 30-31, 43, 44).

The dozer was in an area where equipment gets dusty (Tr. 44).

The roll-over structure protects the dozer operator. The seat belts also prevent the operator from being thrown out of the cab of the 70,000 pound vehicle (Tr. 31).

The inspector was aware of accidents involving similarly equipped vehicles (Tr. 32-35).

RESPONDENT'S EVIDENCE

Steve Edwards and James Baxley, experienced in safety, oversee respondent's compliance with MSHA regulations (Tr. 61-63).

Respondent's written rules provide that "seat belts must be worn in vehicles where roll-over protection is provided (Tr. 64, R 1 on page 6). Respondent's own enforcement procedure includes progressive penalties for violations (Tr. 65). Respondent's safety rules are distributed to workers. This included Ken Braden, the bulldozer operator (Tr. 67, 68, R1, R2).

Respondent's previous miner training for operator Braden was completed July 27, 1979. The training dealt with seat belts as well as their importance and repair (Tr. 69-71). Slides dealt with roll-over accidents (Tr 71).

Braden also received new task training which was completed on April 21, 1980 (Tr. 72-75, R3, R4). The training for a scraper operator, approved by MSHA, covers seat belts (Tr. 74-76, R 4).

Macklin R. Miller, the reclamation foreman, trained Braden (Tr. 78, 95-96).

Company policy is to issue its own citation if a worker receives an MSHA citation (Tr. 99, 100, R6). Braden, due to the policy, received a citation from respondent's safety director James Baxley (Tr. 101, R6). Company citations remain in a worker's file for a year after they are issued. They are then removed (Tr. 100).

Some 18 to 20 supervisors, which would include pit and reclamation foremen, company safety inspectors, and upper level mine management may issue citations (Tr. 103-104).

Baxley asked Braden if he was wearing his seat belt and he replied affirmatively. But when he was asked a second time he said he wasn't wearing the belt or something to that effect (Tr. 106, 107).

DISCUSSION

The evidence, as noted herein, is uncontroverted. The Secretary establishes the events that occurred on the day of the inspection. Respondent counters with its safety program consisting of education, training, and enforcement relating to seat belts.

The threshold issue is whether the inspector may issue a citation alleging a violation of 77.1710(i) relying on the facts he observed on this particular day.

Section 104(a) of the Act, 30 U.S.C. 814(a), provides the Secretary may issue a citation upon inspection or investigation if "he believes that an operator . . . has violated this Act, or any mandatory health or safety standard . . . ." The legislative history dealing with this portion of the Act does not address this point. Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, 618. But, in considering the remedial purposes of the Act, I conclude that the belief of the Secretary does not necessarily require the Secretary's representative to observe the operative fact of the violation to issue a citation. In other words, as in this factual setting, he is not required to observe the driver sans seatbelt in the seat on the dozer. It is true that the inspector did not see that occur, but he may rely on other circumstances. To hold otherwise would reduce mine safety to a game akin to hide and seek. The Act does not countenance such a charade.

Here the inspector observed the dozer at a tilt, its motor warm, the seat belt under the seat, the seat belt dusty. He talked to Braden, the operator. The operator admitted he hadn't been wearing the belt (Tr. 30). The totality of these facts are sufficient to establish the belief of the Secretary that a violation occurred.

In support of its position that an inspector must see the actual operative event establishing a violation, respondent cites these cases: Pennsylvania Glass Sand Corporation, 1 FMSHRC 1191 (1979) (Koutras, J); Eastern Associated Coal Corp., MORG 73-336 (1974) and Burgess Mining and Construction Corp., BARB 78-91-P (Cook, J).

At the outset I note that all of the above cases are unreviewed decisions of Commission Judges. They are not binding on other Judges, Commission Rule 29 C.F.R. 2700.73. But a careful reading of such cases indicates they are not factually controlling.

In Pennsylvania Glass Judge Koutras rejected MSHA's position which "appears to be that any time anyone advises an inspector of some past condition or practice outside of the inspector's own personal knowledge or observations, the inspector must issue a citation" (Emphasis added), 1 FMSHRC at 1210. In the instant case the inspector made personal observations as described above. These observations and conversations establish a prima facie case

for a violation of the regulation, Cf. Pennsylvania Glass at 1212.

In Eastern Associated Coal Corporation Judge Merlin vacated a withdrawal order for the alleged violation of 30 C.F.R. 75.400-2. That case is not factually relevant.

In Burgess Mining Judge Cook refused to sustain a violation based solely on the hearsay statements of a "truck driver" and a "truck foreman". Judge Cook noted MSHA could have subpoenaed the persons who made the statements or "the inspector could have personally checked the brakes." (Slip op. at 6).

In the cited cases relied on by respondent, the inspector did not observe the violation nor did he acquire any probative circumstantial evidence indicating that a violation existed. In this case, the facts observed by Inspector Thompson justify his belief that a violation occurred. It accordingly follows that the citation was legally issued.

The secondary issue on this case concerns the construction of 30 C.F.R. 77.1710. The central focus of the case now becomes whether the coal operator "required" the use of seat belts rather than whether the dozer operator in fact used the seat belt. Respondent, in its post trial brief, urges that the regulation should be constructed as it was in North American Coal Company, 3 IBMA 93 (1974).

The gist of the cited case is that when the regulation mandates that seat belts "shall be required" an operator is in compliance if it has a safety system designated to assure that all reasonable efforts are employed to insure that miners wear such "required" protective equipment and that such "requirement" is enforced with due diligence.

The Secretary's post trial brief states that a case factually similar to North American is now pending on review before the Commission in Southwestern Illinois Coal Corp., 3 FMSHRC 871 (1981), (Koutras, J). But, the Secretary correctly observes that the Commission's disposition of Southwestern Illinois may or may not affect the instant case. However, this Judge is obliged to follow the doctrine expressed in North American as binding precedent. New Jersey Pulverising Company, 2 FMSHRC 1686 (1980).

The Secretary may have anticipated the foregoing ruling because he states that even by North American standards, no defense has been established. He argues that respondent has shown little more than a general safety program. In short, the Secretary asserts that neither respondent's safety program nor its enforcement procedures constitute the kind of thorough and comprehensive program relied on by the Board in North American. The Secretary characterizes the program in North American as one designed to eliminate a particular hazard through constant reminders to employees. Respondent, he argues, has no such comparable program regularly emphasizing to the employees the need to wear seat belts in certain vehicles (Brief at 6-7).

I disagree. Respondent educates, trains, and enforces.

Concerning education: It's safety handbook is distributed to its workers. The handbook provides, in part, that:

> Seat belts must be worn where rollover protection is provided
> (Tr. 64,67, R 1 at page 11)

A sticker entitled "pre-shift examination", (yellow in color and measuring 3 inches by 6 1/2 inches), refers to "seat belt" (Tr. 79, 80, R 4A). This exhibit was furnished with a training packet (Tr. 79).

Concerning training: In 1979 respondent used a personal protection module dealing with the importance of seat belts. Braden attended the session (Tr. 71, 87).

In January 1979 a "safety check list" memorandum was issued to the miners and the name of Ken Braden appears on the exhibit (R5). The three page memorandum states, in part:

> BE SURE TO -
> 1.-
> e) Seatbelts - must use-

An MSHA form indicates Braden received miner training in 1979. He completed the training July 27, 1979 (R2, MSHA form 5000-23).

Braden also received the new task training course from Macklin Miller. He completed the training on April 21, 1980, which happened to be the day of this inspection (Tr. 73, 78, R3, MSHA certificate of training form #5000-23). The MSHA approved training course includes seat belt training (Tr. 75, 76).

Concerning enforcement: Workers have been disciplined for violating regulations in the company handbook (Tr. 88). It is company policy to issue its own citation when a worker receives an MSHA citation. Braden received a citation at the date and time of the MSHA citation. The MSHA citation indicates it was issued at 1750. This 24 hour clock is equivalent to the time on the company's citation of 5:50 p.m. on the same date (Tr. 99, Citation, R6).

The foregoing uncontroverted evidence places respondent within the doctrine expressed in North American. In sum, respondent has avoided liability under the regulation notwithstanding the fact that a prima facie case for the violation of 30 C.F.R. 77.1710(i) exists.

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

ORDER

Citation 828398 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

FOOTNOTE START HERE-

1 The cited regulation provides as follows:

77.1710 Protective clothing; requirements.

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.