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SOL (MSHA) V. REPUBLIC STEEL
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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. PENN 81-139
A.C. No. 36-00808-03056

v.

Russellton Mine

REPUBLIC STEEL CORPORATION,
RESPONDENT

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA Bronius K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent, Republic Steel Corporation

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor against Republic Steel Corporation for an alleged violation of 30 C.F.R. 75.604(b).

The hearing was held as scheduled on March 15, 1983. Documentary exhibits, oral testimony and oral arguments were presented by the parties. At the conclusion of the hearing both parties waived the filing of written briefs and agreed I should render a decision based upon the transcript of the hearing and documentary evidence (Tr. 102-103).

The Mandatory Standard

Section 75.604(b) of the mandatory standards, 30 C.F.R. 75.604(b) provides as follows:

75.604 Permanent splicing of trailing cables.

When permanent splices in trailing cables are made, they shall be:

* * * * *

(b) Effectively insulated and sealed so as to exclude moisture.

The Cited Condition or Practice

Citation No. 843121 cites a violation of 30 C.F.R. 75.604(b) for the following condition:

A permanent splice installed in the trailing cable on shuttle car Serial No. 11341 being used in the (012) 4 west off 10 mains section was not effectively sealed so as to exclude moisture and a seven inch long area had the outer jack removed and was not reinsulated to the same degree as the remainder of the cable.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 5-11, 13):

1. Republic Steel Corporation was the owner and operator of the Russellton mine when the citation at issue in this case was written.
- 2 . The operator and the Russellton Mine were subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 at the time the citation was written.
3. The presiding administrative law judge has jurisdiction over this proceeding.

~1160

4. The inspector who issued the subject citation was a duly authorized representative of the Secretary.
5. A true and correct copy of the subject citation was properly served upon the operator.
6. Imposition of any penalty in this proceeding will not affect the operator's ability to continue in business.
7. The alleged violation was abated in good faith.
8. The mine was medium in size during the year prior to the issuance of the subject citation.
9. The Russellton Mine has been out of production since October 1982, although it has not been sealed and is being maintained for possible future production.
10. The operator was medium in size during the year prior to the issuance of the subject citation.
11. The condition or practice stated in the body of the subject citation, other than the fact that the shuttle car was being used, existed. The operator does not agree that the shuttle car was being used.
12. During the two years prior to the issuance of the subject citation, the operator and the mine had an average history of violations of 30 C.F.R. 75.604(b).
13. All witnesses are accepted generally as experts in coal mine health and safety.

Discussion and Analysis

This case presents a fundamental conflict in the evidence between MSHA and the operator which can be resolved only by a determination as to the credibility of those who testified. The inspector who issued the subject citation testified that the supervisory inspector who was accompanying him on the inspection told him when they were in the face area to return outby and to look at a defective

~1161

splice in the subject shuttle car (Tr. 14, 33-34). The issuing inspector stated that only the shuttle car operator was present when he arrived at the shuttle car and inspected the splice (Tr. 21, 25). His inspection of the cable revealed a splice with a sleeve that was not bonded to the outer jacket so as to exclude moisture (Tr. 14-15). The cable had been pulled off its reel and was lying on the ground (Tr. 23-24). He testified that the violation was not being corrected when he first observed it, that the splice had not been cut out of the trailing cable and that it was still a part of the cable (Tr. 21, 24).

The supervisory inspector testified that he saw the shuttle car operator pulling the cited trailing cable off the reel and that he helped her with this task (Tr. 45). While he was helping her, he saw a splice and another part of the cable which he thought needed attention. He said that he may have commented to the shuttle car operator that the splice looked bad (Tr. 46). He admitted that his recollection of this subject was not plain and he did not recall how long he helped her or whether they pulled the cable off together or alternately (Tr. 48, 98). Similarly, his recollection of seeing the splice was hazy. He was not clear about how much of the cable had been pulled off before the splice appeared or whether he saw the splice as it was being pulled off the reel rather than when it was lying on the ground (Tr. 49-50). He testified that he did not recall what he said about the splice, if anything at all (Tr. 98-100). The supervisory inspector testified that he has the authority to issue a citation but stated that instead he went to the face area and told the other inspector to go look at it (Tr. 46, 50-51).

The temporary shuttle car operator had served in that capacity approximately six times prior to the day the subject citation was issued (Tr. 56). Her section foreman reminded her as a shuttle car operator that the general procedure was to remove the entire cable from the machine and inspect it before energizing the cable (Tr. 57, 61, 66). She stated that she followed the general procedure on that day (Tr. 57, 61). She knew the cable was not energized because she saw that it was unplugged and she did not plug it in (Tr. 61). She started to remove the cable from the reel when the supervisory inspector walked past her (Tr. 57-58). She stated that he did not help her remove any of the cable. She said that she would remember if someone helped her because it is a difficult job (Tr. 57-58, 68-70). Moreover, she testified that the supervisory inspector did not point

~1162

out any deficiencies in the cable (Tr. 58-59). She pulled the portion of the cable containing the defective splice off the reel after the supervisory inspector passed her (Tr. 65). She felt she needed another opinion about the condition of the splice and went to alert the mechanic a few minutes after the supervisory inspector had walked passed the shuttle car (Tr. 59-60). The mechanic agreed that there was a problem with the splice. He went to get his equipment to repair it and she went to inform the section foreman of the problem (Tr. 60). She testified that she and the mechanic next cut the defective splice out of the cable (Tr. 62). Then the issuing inspector and several other people arrived at the shuttle car (Tr. 62-63). The splice was already cut out of the cable and was lying on the ground when the issuing inspector arrived and issued the citation (Tr. 63-64). The operator's mechanic and section foreman also testified and confirmed the evidence given by the shuttle car operator (Tr. 77-78, 89-90).

After observing and listening to the witnesses, I accept all the testimony of the shuttle car operator including her evidence that the damaged splice had been cut out of the trailing cable of the shuttle car and that the cable was being repaired before the citation was issued. The testimony of the shuttle car operator was clear, consistent and therefore, wholly credible. I also accept the testimony of the operator's other witnesses. I reject the inspector's testimony that when he arrived to check the cable no abatement of the condition had begun and the supervisory inspector's testimony that he stopped and helped the shuttle car operator unreel the cable. As already noted the supervisory inspector's testimony was vague, contradictory and therefore unconvincing. The evidence given by both inspectors is far outweighed by that given by the shuttle car operator and the operator's other witnesses. Since the defective splice was no longer part of the cable when the inspector observed the permanent splice, the condition described and therefore the alleged violation did not exist when the citation was issued. Under such circumstances the citation must be vacated.

At the hearing the Solicitor argued that a violation still existed even if the splice was cut out before it was cited because the splice had been defective. He cited Consolidation Coal Company, 1 FMSHRC 542 (June 1979) in support of his position. In that case it made no difference that the operator had begun abatement of a roof control violation when the condition was cited by MSHA. However, there the violation remained in existence when the withdrawal order was issued. In the present case there was no

~1163

violation at the time the citation was issued. The citation alleges a violation of 30 C.F.R. 75.604(b), which requires that permanent splices in trailing cables be effectively insulated so as to exclude moisture. By the time the inspector issued the citation, however, the defective splice was no longer in the cable.

ORDER

Accordingly, it is ORDERED that Citation No. 843121 be Vacated and that the petition for the assessment of civil penalty be DISMISSED.

Paul Merlin
Chief Administrative Law Judge