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SOL (MSHA) V. SOUTHWESTERN ILLINOIS COAL  
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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. LAKE 82-38  
A.O. No. 11-00609-03034

v.

Captain Mine

SOUTHWESTERN ILLINOIS COAL  
CORPORATION,  
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S.  
Department of Labor, Chicago, Illinois, for Petitioner  
Brent L. Motchan, Esq., St. Louis, Missouri,  
for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

The parties have filed cross motions for summary decision based on the pleadings, affidavits and admissions, and each asserts that there is no genuine issue of material fact necessitating a hearing. Each party has filed a memorandum in support of its position. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this decision, Respondent owned and operated a surface coal mine in Perry County, Illinois, known as the Captain Mine.

2. Bituminous coal is extracted from the subject mine and the operation of the mine affects interstate commerce.

3. Respondent produces over two and one-half million tons of coal annually at the subject mine, and employs approximately 600 miners. I find that Respondent is a large operator.

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4. There were 53 violations at the subject mine during the year prior to the violation alleged herein. I find that penalties otherwise appropriate should not be increased because of the operator's history of previous violations.

5. The imposition of a penalty in this case will not affect Respondent's ability to continue in business.

6. On September 18, 1981, Federal Coal Mine Inspector Ronald M. Zara issued a citation to Respondent under 104(a) of the Mine Safety Act charging a violation of 30 C.F.R. 77.1710(g).

7. The condition which prompted the issuance of the citation was the following:

On September 18, 1981, Tom Johnson, a company engineer, was working approximately 18 feet above the ground on the lazer tower and was not wearing a safety belt. His knee was around the vertical leg of the tower and he was using both hands to reposition the lazer sending unit.

8. The alleged violation was abated when Mr. Johnson was removed from the lazer tower and instructed in the use of safety belts. The citation was then terminated.

9. Respondent had a written safety policy at the time of the alleged violation herein. The policy required all employees to comply with Federal mine health and safety regulations and specifically provided that "safety belts and lines shall be worn at all times where there is a danger of falling." The safety policy contained an enforcement procedure providing for notices of violation, suspension without pay and discharge. Between October 1978 and April 1983, approximately 60 violations notices were issued for violations of the safety policy, four of which were for failure to wear safety belts. In addition, one person was discharged, three were suspended and six received disciplinary letters during the same period of time, for violations of company safety rules.

10. A safety belt was not present on the ground lazer unit where the employee involved herein was working on September 18, 1981. However, safety belts were present in the mine supply office, the safety office and the tipple. The subject employee's office was adjacent to the safety office and approximately 50 feet from the mine supply office. There was also a safety belt present on a machine located about 3 minutes walking distance from the ground lazer unit.

11. The employee had received safety training and specifically had been instructed in the requirement to use safety belts, and the proper method of using them.

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12. There is no evidence that any supervisory person was present in the area where the employee was working or was aware that he was working without a safety belt.

#### REGULATION

30 C.F.R. 77.1710 provides in part:

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:

\* \* \* \* \*

(g) Safety belts and lines where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

#### ISSUES

1. Whether the decision of Judge Koutras reported in 3 FMSHRC 871 is res judicata in the present proceeding.
2. Whether the fact that an employee was working 18 feet above ground in a situation where there was a danger of falling in itself establishes a violation of 30 C.F.R. 77.1710(g)?
3. If the answer to issue 2 is negative, whether Petitioner has established that Respondent failed to require its employees to wear safety belts where there is a danger of falling.

#### CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the Captain Mine, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
2. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue, even if the first proceeding is pending on appeal.

#### DISCUSSION

Under the rule followed in the federal courts, res judicata or collateral estoppel precludes a party from raising an issue that has previously been decided against him even if the prior decision has been appealed. *Deposit Bank v. City of Frankfort*, 191 U.S. 499 (1903); *United States v. Abatti*, 463 F. Supp. 596 (D.C. Calif. 1978). A different rule is followed in a minority of state courts, but it seems clear that the Review Commission should follow the federal rule.

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3. The case decided by Judge Koutras, Secretary v. Southwestern Illinois Coal Corporation, 3 FMSHRC 871 (1981) involved the same parties and the same mine as the instant case. Respondent was charged with violating the same mandatory safety standard. The Secretary apparently contended that the failure of a miner to wear a safety belt where a danger of falling exists is a violation per se of 30 C.F.R. 77.1710(g). Judge Koutras decided this issue adversely to the government on the authority of North American Coal Corporation, 3 IBMA 93 (1974). The government had a full and fair opportunity to litigate this issue and is estopped from relitigating it here.

4. Therefore, applying the principle of res judicata, the fact that an employee was working 18 feet above ground in a situation where there was a danger of falling does not in itself establish a violation of 30 C.F.R. 77.1710(g).

5. Since I cannot assume that the evidence before Judge Koutras is the same as is now before me, his decision is not res judicata on the issue whether Petitioner established that Respondent failed to require its employees to wear safety belts in situations involving a danger of falling.

6. I conclude on the basis of the evidence before me that Petitioner has not established that Respondent failed to require that its employees wear safety belts where there is a danger of falling. The evidence shows clearly that employees were instructed to wear safety belts in such situations and that the instruction was enforced by disciplinary action.

ORDER

On the basis of the above findings of fact and conclusions of law, Petitioner's motion for summary decision is DENIED; Respondent's motion for summary decision is GRANTED; Citation No. 1115998 is VACATED; Petitioner has previously voluntarily vacated Citation No. 1115976. Therefore, the proposal for a penalty is DISMISSED.

James A. Broderick  
Administrative Law Judge