CCASE:
SOL (MSHA) V. U.S. STEEL MINING
DDATE:
19831214
TTEXT:

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

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

v.

U. S. STEEL MINING CO., INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 83-221
A.C. No. 36-00970-03527

Maple Creek No. 1 Mine

DECISION

Appearances: Thomas A. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U. S. Steel Mining Company, Inc. for three alleged violations of the mandatory safety standards. 30 C.F.R. 75.1704, 75.200 and 75.1725(c

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing, I directed the filing of written briefs simultaneously by both parties within 21 days of receipt of the transcript (Tr. 137). The briefs have been received and reviewed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 6-8):

1. U. S. Steel Mining Company, Inc. is the owner and operator of the Maple Creek No. 1 Mine.

2. The Maple Creek No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding administrative law judge has jurisdiction over this proceeding.

4. The subject citations, modifications and determinations were properly served on the operator by a duly authorized representative of the Secretary. The citations, modifications and determinations may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of the statements asserted therein.

5. The authenticity of all exhibits is admitted, but not the relevancy or the truth of the matters asserted therein.

6. The alleged violations were abated in a timely fashion.

7. The operator has annual production of 10,943,308 tons.

8. The subject mine has annual production of 482,015 tons.

9. All witnesses are accepted generally as experts in coal mine health and safety.

10. There were 3 assessed violations of 30 C.F.R. 75.1704 in the 24-month period prior to the subject 75.1704 alleged violation but some of the prior violations may have been contested.

11. There were 28 assessed violations of 30 C.F.R. 75.200 in the 24-month period prior to the subject 75.200 alleged violation but some of the prior violations may have been contested.

12. There were 2 assessed violations of 30 C.F.R. 1725(c) in the 24-month period prior to the subject 75.1725(c) alleged violation but some of the prior violations may have been contested.

13. The payment of the penalties will not affect the operator's ability to continue in business.

Citation No. 2011053

The Mandatory Standard

Section 75.1704 of the mandatory standards, 30 C.F.R. 75.1704, provides as follows:

75.1704 Escapeways.

[Statutory Provisions]

> Except as provided in 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

The Cited Condition or Practice

Citation No. 2011053 cites a violation of 30 C.F.R. 75.1704 for the following condition:

> There was no directional sign provided where the designated intake escapeway from 53 room enters the main intake escapeway to Park [Shaft]. Persons could make a mistake and go inby to 56 room.

Discussion and Analysis

The inspector who issued the subject citation testified that there was no directional signal for the designated escapeway from the 53 room at the main intake escapeway to Park Shaft. The inspector expressed the opinion that miners could make a mistake and go inby (Tr. 11). The inspector testified that the operator marks its escapeways with reflectors and that reflectors were present in the escapeway on the day the citation was issued (Tr. 15). According to the inspector, the reflector nearest the cited intersection was 50 feet outby the intersection (Tr. 26-27). The inspector admitted that miners coming to the intersection would see a green reflector when looking to the left (outby) and would not see any reflector if they looked to the right (inby) (Tr. 16). The inspector stated that the reflector was readily visible when the miners got into the escapeway (Tr. 27). The inspector further agreed that there was a considerable volume of air coming up the intake escapeway at the cited intersection and that if a miner were knowledgeable of the air in the mine he would know which direction was outby based on the direction of airflow (Tr. 19). It was the inspector's position that an intersection should have a directional arrow marking the exit route even when a reflector is used. He acknowledged the operator was never put on notice an arrow was required in addition to the reflector (Tr. 23-24).

The assistant mine foreman who accompanied the inspector during the inspection testified that the intake escapeways are marked with green reflectors, the return escapeways are marked with red reflectors and the alternate return escapeway is marked with white reflectors (Tr. 31, 34). The reflectors are usually hung from the roof in the middle of the entry (Tr. 32). Contrary to the inspector's testimony, the assistant mine foreman stated that in this instance there was one reflector about 20 feet outby the cited intersection and another one approximately 85 feet outby (Tr. 32). He said that miners would see green reflectors if they looked to the left at the intersection and the miners were trained to follow the reflectors (Tr. 35-36). While admitting that miners must come into the intersection to see the reflector 20 feet away, the assistant mine foreman noted that the miners have to enter the intersection in order to escape (Tr. 37). He also stated that reflectors are a better indicator than arrows when smoke is present because the

arrows are on porcelainized metal signs that are not reflective (Tr. 33, 38). Additionally, the assistant mine foreman testified that in traveling to the shaft bottom in the intake escapeway miners simply keep the air current to their faces. He stated that the air velocity at the cited intersection is 24,000 cubic feet per minute, which is sufficient to enable miners to feel the air current on their faces (Tr. 33, 36).

The subject standard mandates only that escapeways be "properly marked." The term "properly marked" is not defined. Specific types of markings and their placement are not delineated. The evidence is clear that the operator used green reflectors in the cited escapeway. I accept as more persuasive the operator's evidence regarding the distance of the reflector from the intersection. Based upon the record I find that the reflector was clearly visible when looking left from the intersection and that miners were properly trained as to what the reflectors meant. I am unpersuaded by the Solicitor's argument that reflectors are inadequate because miners must enter the intersection before observing the reflector since miners must enter the intersection to make use of the escapeway. Also, there is no merit to the argument that the reflectors are inadequate because smoke would obscure miners' vision of the reflectors. The testimony shows that where there is smoke reflectors are more visible than arrows.

In light of the foregoing, I conclude the escapeway was properly marked within the meaning of the mandatory standard. If the Secretary believes something more or different than reflectors should be required, he must undertake to change the standard. He cannot accomplish such a result merely by issuing a citation on an ad hoc basis in an individual situation. Accordingly, I conclude there was no violation and the citation is Vacated.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

Citation No. 2012693

The Mandatory Standard

Section 75.200 of the mandatory standards, 30 C.F.R. 75.200 provides as follows:

75.200 Roof control programs and plans.

[Statutory Provisions]

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Condition or Practice

Citation No. 2012693 cites a violation of 30 C.F.R. 75.200 for the following condition:

> No. 33 room intersection in "A" heading was 35 feet from corner to corner both diagonals. Total distance 70 feet. One part of 33 room intersected at a 52 angle. The roof control plan stipulates if either diagonal or a total of both diagonals exceed 32 feet or 62 feet, respectively, additional support posts and/or crib will be installed. Section was supervised by R. Franks.

Discussion and Analysis

The inspector who issued the subject citation testified that the cited intersection was wider than allowed by the roof control plan (Tr. 44-45). Drawing No. 4 of the plan contains the statement that if the diagonal distances in an intersection exceed 32 feet each or if the sum of the diagonals exceeds 62 feet, additional support shall be provided (MSHA Exh. 3). According to the inspector's measurements, each diagonal distance in the cited intersection was 35 feet (Tr. 45). These measurements are not disputed. Drawing No. 4 itself is a four-way intersection with the entries meeting at right angles. The cited intersection was not created by four entries joining at right angles. One of the entries joined the intersection at a 52 angle ("B" on Op. Exh. 1, Tr. 60).

The existence of a violation depends upon whether the statement on Drawing No. 4 applies to this case. The operator contends it does not because the statement only applies when entries meet at right angles as they do in the drawing. I must reject this argument. I find the drawing illustrative rather than exclusive and conclude that the statement applies to all four-way intersections where the entries come together at the same place regardless of the precise angles at which they meet. The title of Drawing No. 4 is "Minimum Permanent Roof Support for Intersections." Moreover, the plan contains no other provision concerning minimum diagonal lengths for intersecting entries. To limit the general statement requiring additional supports to the precise configuration depicted by the drawing would render

the plan wholly inadequate by leaving untreated a large and crucial portion of roof control. Accordingly, I find that in this case additional bolting should have been provided as required by the plan. Because there was no such additional bolting I conclude a violation existed.

I further conclude the violation was significant and substantial. The inspector testified that there was a slip running down the center of the roof of the 33 room which went across the intersection and into the rib where entry "B" entered the intersection (Tr. 46). The inspector sounded the top of the roof with a metal-capped walking stick and noted that the top was heavy. The heavy top indicated to the inspector that the roof could change at any time, especially where, as here, the intersection was larger and the diagonals greater than allowed by the plan. I conclude that based on the foregoing factors the violation was "significant and substantial" within the meaning of that term as defined by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981).

I further find the operator was negligent. The operator drove entry "B" at a 52 angle because track was going to be put down. Although driving the entry at such an angle is permissible, additional roof support should have been provided as required by the plan because more coal had been cut away than in normal situations. The slip added to the hazard. There is no dispute that the operator knew of all these things.

The remaining statutory criteria are set forth in the stipulations. After consideration of all the criteria a penalty of $250 is assessed for this violation.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

Citation No. 2012695

The Mandatory Standard

Section 75.1725(c) of the mandatory standards, 30 C.F.R. 75.1725(c) provides as follows:

> 75.1725 Machinery and equipment; operation and maintenance.
>
> (c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

The Cited Condition or Practice

Citation No. 2012695 cites a violation of 30 C.F.R. 75.1725(c) for the following practice:

> Men were observed in the boom at the continuous miner, working on the conveyor chain and the power source for CM-12 S/N JM 3226 was not disconnected at the power source. Section supervised by R. Franks.

Discussion and Analysis

The inspector who issued the subject citation testified that he saw men in the boom of a continuous miner and beside the boom beating with a sledge hammer on what appeared to be a flight chain. The power was cut off at the machine rather than disconnected at the source (Tr. 102-103). The inspector took the position that the miners might be seriously injured or killed if the machine became energized and that power had to be cut off not only at the machine but at the power source (Tr. 103-104). However, he was not certain what the miners were doing at the machine (Tr. 107-108). He did not appear to be familiar with how the cited continuous miner actually worked (Tr. 106-107, 110-113, 115-116, 136).

The operator's maintenance foreman who testified demonstrated familiarity and knowledge about the operation of the continuous miner. He explained that in order for power to reach the tail section of the conveyor where the miners were located, someone would have to set the main power breaker

and the control breaker on the left side of the machine, walk around to the right side of the machine and turn on a control switch in the cab, turn on the pump motor and then start the conveyor (Tr. 118, 121-123). The maintenance foreman admitted that equipment can malfunction, but stated that in this instance five different pieces of equipment would have to malfunction at the same time for power to extend to the area in question (Tr. 120).

The maintenance foreman stated that the miners were repairing a broken conveyor chain when the citation was issued and that the machine's power must be used to repair the chain (Tr. 123-124). He further explained that the conveyor has to be raised, lowered, and swung to one side; that the conveyor is swung to one side and brought back to the normal position to slacken the chain; that the chain is then recoupled and put back on the drive sprocket; and that the chain comes off the drive sprocket every time it breaks (Tr. 125). According to the foreman machine power is necessary to make all these various adjustments because the pump motor must be running to raise the conveyor, swing it and drop it (Tr. 126-127).

I accept the foregoing testimony from the foreman. Indeed, as already noted the inspector did not know how the machine operated or even what repair work was being done. I am constrained to decide this case on this record where the evidence submitted by the operator is manifestly superior to that offered by the Solicitor who barely cross-examined the operator's witness and whose inspector did not know much at all about the machine he cited.

Accordingly, I conclude that machinery motion was necessary to make adjustments and that under the circumstances the operator should not have been required to cut the power at the source and necessitate frequent trips back and forth from it to the continuous miner in order to effectuate the necessary repairs to the broken chain. I conclude there was no violation. This citation is Vacated.

I have reviewed the briefs. To the extent they are inconsistent with the findings and conclusions set forth above they are rejected.

ORDER

In light of the foregoing, it is hereby ORDERED that Citation Nos. 2011053 and 2012695 are VACATED.

It is further ORDERED that with respect to Citation No. 2012693, the operator shall pay $250 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge