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SOL (MSHA) V. PEABODY 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. WEST 83-73 A.C. No. 02-00533-03503
v.	
PEABODY COAL COMPANY, RESPONDENT	Black Mesa Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Michael O. McKown, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Morris

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), arose from an inspection in November, 1982 of the Black Mesa surface coal mine of Peabody Coal Company. The Secretary of Labor seeks civil penalties because respondent allegedly violated two safety regulations adopted under the authority of the Act.

After notice to the parties, an expedited hearing was held in Phoenix, Arizona on December 13, 1983. Respondent's request for an expedited decision, made at the hearing, was granted.

Both parties filed post trial briefs.

Stipulation

The parties stipulated that Peabody is a large company with a moderate history. The company abated the alleged violation in good faith. Further, the imposition of a civil penalty will not affect the company's ability to stay in business (Tr. 5).

Citation 2006837

In this citation the Secretary of Labor seeks a civil penalty of $2,000 because respondent failed to provide a berm on its elevated roadway thereby violating the mandatory standard published at 30 C.F.R. 77.1605(k), which provides:

> (k) Berms or guards shall be provided on the outer bank of elevated roadways.

Issues

The issues are whether berms are to be provided at the edge of a 130 foot bench in the working pit of a multiple seam surface coal mine; further, a secondary issue is whether the diminution of safety doctrine is viable. If a violation exists then an issue is presented as to what penalty is appropriate.

Summary of the Evidence

The facts surrounding the death of dozer operator Cecil Yazzie are basically uncontroverted.

Petitioner's evidence, in the main, addresses the details of the accident. Respondent's evidence generally addresses the operation of its surface coal mine. A sketch, in Exhibit P1, illustrates the location of the highwall, the coal seam, the path of Yazzie's dozer, the keyway and the spoil pile.

William G. Denning testified for MSHA: In November 1982 MSHA Inspector Denning investigated a fatal accident that had occurred in the J1-N6 pit at respondent's Black Mesa coal mine (Tr. 7, 10, 11, Exhibit P1). His investigation established that on November 5, 1982, at the commencement of the shift, at 4 p.m., dozer operator Cecil Yazzie met his supervisor, Moreo, in the pit area. Moreo drove Yazzie through the pit from the coal face on the Blue seam coal bench to ramp C. Moreo instructed Yazzie in his work. His duties included leveling the shot coal from the previous shifts, making ramps up the coal face, and building portions of ramp C. (Exhibit P1).

After leveling the shot coal Yazzie proceeded to Ramp C and began working at that location. At about 11:30 p.m. Yazzie, Moreo and Ralph Charlie (shooter/blaster) were located near the bottom of Ramp C, preparing to set off a coal shot on the Blue coal seam. Yazzie's dozer, parked on the ramp, was used for protection from the blast. After a delay the shot was set off. Moreo found no misfires and he left the coal bench. While he was leaving the pit Moreo passed Yazzie who was starting to tram his dozer from Ramp C through the pit to the carry-all bus at Ramp E. Moreo continued out of the pit and stopped for a few minutes to

talk to the coal loader operators. He then proceeded to Ramp E. After arriving at Ramp E, Moreo became concerned because he could not find Yazzie. Moreo traveled to the coal face on the Blue seam and, after a brief inspection, he observed Yazzie's upset dozer in the keyway near Ramp C. (Tr. 13, Exhibit P1). Moreo, who was also an Emergency Medical Technician, and others could not revive Yazzie (Exhibit P1).

The keyway, or ditch, is an area excavated by the dragline along the seam coal bench. It was 31 feet to the bottom of the keyway. At the time of the accident the keyway extended from Ramp C approximately 600 feet toward Ramp E.

The inspector's investigation further established that, after leaving Ramp C, Yazzie's dozer traveled in a path at a slight angle away from the keyway. After traveling approximately 75 feet Yazzie made a correction toward the keyway. He made another slight correction when 40 feet from it but he continued in the general direction of the keyway. After the second change in direction he traveled approximately 35 feet before toppling off the coal bench into the keyway. At that point his dozer was at the edge of the coal shot (Exhibit P1).

The dozer tread marks for the final 35 feet indicate the dozer was still tramming forward at the time of the accident. It appeared that the outer edge of the coal bench collapsed under the dozer, causing it to roll sideways off of the bench (Exhibit P1).

The dozer fell about 31 feet, impacting on the top edge of the rollover protective structure. Yazzie remained inside the operator's cab; however, it appeared he was not wearing the seat belt that was provided (Exhibit P1).

After the coal shot and before this accident occurred the dragline had resumed operations. While digging, the dragline's lights illuminated the pit and accident area; however, as the dragline spoiled, it swung away from the pit, leaving the area relatively dark. This change from light to dark could have affected Yazzie's perception. Also while spoiling, the dragline created dust in the pit that could have affected visibility. (Exhibit P1).

Yazzie was normally assigned to work at the J-7 pit area. He worked in the J-1 pit only when needed. A keyway, as excavated in the J-1 pit, is sometimes, but not always, present in the J-7 pit. The unexplained changes in the direction of the dozer could have been made by Yazzie in order to tram the dozer around the shot coal. Since Yazzie was newly assigned to the J-1 pit he may have forgotten about the keyway being adjacent to the shot coal and trammed the dozer into it (Exhibit P1).

As a result of its investigation MSHA concluded that the accident occurred due to Yazzie turning the dozer and tramming it toward the keyway. The lack of a berm along the outer edge of the elevated Blue seam coal bench contributed to prevent travel into the keyway. MSHA could not determine the reason why Yazzie turned the dozer toward the keyway. In MSHA's opinion a contributing factor to the fatality was Yazzie's failure to wear the seat belt provided in the dozer (Exhibit P1).

MSHA's inspection manual contains guidelines construing the berm standard. The manual states:

> The requirements of Section 77.1605(k) apply to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.
>
> "Elevated roadways", as used in this requirement, are roadways of sufficient height above the adjacent terrain to create a hazard in the event mobile equipment ran (sic) off the roadway.
>
> "Berm" as used in this requirement means a pile or mount of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guard rails are used in lieu of berms, they shall be of substantial construction.
>
> The width of the haulage road does not preclude the need for berms or guard rails.
>
> (Exhibit P8).

In December 1981, in response to questions concerning the berm standard, the administrator for coal mine safety and health issued MSHA's policy memorandum 81-40C. The administrator, on behalf of MSHA, stated in part as follows:

> Section 77.1605(k), 30 CFR 77, is applicable to all elevated roadways on mine property, including roads used to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways. Berms or guards are required on all exposed banks of elevated roadways. Thus, elevated roadways with two exposed banks are required to have berms or guards on both sides.
>
> (Exhibit P7).

At the time of the accident the dragline had exposed the Blue coal seam. Two ramps were being used for access to the pit area (Tr. 12, 13, Exhibit P1).

In the inspector's opinion a berm should have been placed from the point where Ramp C intersected the Blue coal seam bench back towards Ramp E, a distance of about 600 feet (Tr. 22). The inspector considered the bench a roadway because the same type of equipment uses the coal bench and the haul roads (Tr. 23).

Surface changes occur in the mine as mining progresses from one seam to another but there is always a bench in the coal pit used for a travelway (Tr. 23).

The MSHA surface inspection manual (Exhibit P8, pages 336, 337) and the MSHA policy memorandum define an elevated roadway. These defintions are applicable to respondent's work place (Tr. 24-26, 61). The inspector relied on the policy memorandum in forming an interpretation of what constitutes a roadway (Tr. 43). A roadway is a travelway used to transport equipment, personnel and coal (Tr. 43, 44, 61). The inspector would not consider a surge pile to be a roadway (Tr. 49, 50).

In the inspector's opinion there are some "gray areas" as to what constitutes a roadway; in addition, an inspector has a degree of judgment as to the citations he can issue (Tr. 50, 51).

The lack of a berm, as here, presents a hazard to a miner such as Yazzie (Tr. 26). A berm can either stop a vehicle, redirect it, or warn an operator that he is in close proximity to the edge (Tr. 27, 39, 40).

In the inspector's opinion a berm would not be necessary if the dozer was cleaning the coal or pushing dirt off of the edge of the bench (Tr. 50).

Respondent's Evidence

Buck Woodward, Tracy Northington, Alan Cook, Don Holt, Rick Contratto and Joe Johnson testified for respondent.

At the Black Mesa mine respondent uses a multiple seam mining process for its five seams of coal (Tr. 70-72). The company uses a color coding system to differentiate between its coal seams (Tr. 71). These seams are respectively designated, from the surface down, as green, blue, red, bottom red, and yellow (Tr. 71, Exhibit F).

The coal bench is the area where the dragline and other pieces of mining equipment are located. The highwall is the face left by the dragline and the stripping equipment (Tr. 71; for a cross section view see Exhibit B).

Black Mesa uses a Marion 8750 dragline to first cut a keyway or ditch (Tr. 71-73). A drill crew then drills through the

overburden to the first coal seam (Tr. 73). The dragline removes the drilled and shot overburden by depositing it in an area that has already been mined (for an illustration of the pit configuration see Exhibit C).

The pit highwall results when the overburden is removed. The removal of the overburden also exposes the coal seam which is, in turn, drilled and shot. Shovels and other equipment load the coal onto trucks (for an illustration of the coal loading operation see Exhibit D).

The mining sequence continues as the dragline removes the coal. Drilling, shooting, and loading activities follow behind the dragline (Tr. 74). The dragline, using the wide radius of its shovel, spoils the overburden and later the parting (FOOTNOTE 1) into a pit where the coal has already been removed (Tr. 74).

In the J1-N6 pit the bench is 130 feet wide. Respondent tries to maintain that distance but it narrows slightly at the bottom coal seam (Tr. 15).

As a result of this citation MSHA requires a berm when the topmost (green) coal seam is exposed. The berm must be installed prior to any shooting. The berm is approximately six feet high and sixteen and one half feet wide at the base (Tr. 77). This berm must later be pushed off so the crews can shoot the coal beneath it.

MSHA also requires a third berm on the parting between the second and third seams (blue and green seams). This berm must, in its turn, be pushed off so the drilling crews can fragment the area beneath it. The dragline, in turn, removes the parting (Tr. 79).

The construction and removal of the berms continues as the mining progresses. The progression is both downward as the coal seams are exposed and removed and laterally as the dragline, shooters, and auxiliary equipment remove the coal or the parting (Tr. 79-80). In this mining progression 12 berms must be constructed and removed (Tr. 80).

The pit, designated as J1-N6, is the working pit of an active surface coal mine. Haulage trucks and loader crews are actively engaged in the coal removal. The haulage trucks, 16 feet 8 inches wide, primarily drive down the middle of the bench,

or a bit to the highwall side (Tr. 82). In the pit there is one direction of traffic. Once the trucks reach the ramp they go out of the pit area until they reach a permanent haulage road. The trucks then travel to a preparation site (Tr. 88).

In the opinion of respondent's engineer an active pit area is not a roadway. One reason is that the area changes daily. Haul roads at mines are designed to certain specifications and they take into consideration the speed of vehicles using them. Also the drainage of a haul road is a factor to be evaluated (Tr. 82, 83).

Respondent uses track type and a rubber tired dozer to emplace its berms. When necessary dump trucks haul in material to construct the berms. (Tr. 81).

Berms, such as MSHA requires here, are not required at any other mine in the west (Tr. 84).

In the opinion of respondent's engineer a berm in place here would not have prevented the accident. Yazzie was entering the coal shot area and his duties would have required that he level the area (Tr. 84).

Respondent's industrial engineer conducted a time and motion study relating to the installation and removal of berms (Tr. 97). A videotape (Exhibit U) shows the building of a berm with respondent's Clark 380 rubber tired dozer (Tr. 98-100). The front portion of the dozer goes out over the edge of the bench when building and even more so when removing the berms (Tr. 98-102). In building a six foot high berm the average dozer cycle (FOOTNOTE 2) is .47 minutes.

Normally berms are built during the third shift, from midnight until 8 a.m. (Tr. 101). Northington has monitored over 4000 dozer cycles.

When berms must be built at the edge of parting seams then material must be hauled in to construct the berms since there is no loose material available. Respondent estimates that, on an annual basis, it has hauled in 150,000 yards of material, about 2,000 truck loads, to build such berms (Tr. 104).

In removing the berms the dozer operator, whose vision is blocked by his equipment, goes right to the edge. Some operators have stated this was unsafe (Tr. 105).

Trucks in the pit never operate closer than within 80 to 100 feet of the edge of the bench (Tr. 106).

Respondent submitted a time and motion study comparing the "before and after" exposure of its men and equipment in abating this citation. All calculations were made on an annual basis (Tr. 107, Exhibits V, W, X).

Before the issuance of this citation respondent's activities resulted in its miners and equipment being exposed to the hazard of being within 20 feet of the parting ditch edge for 1,085.8 hours. This exposure was primarily the time required to drill in the 20 foot zone next to the edge of the ditch. This exposure is still incurred because it is still necessary to drill and remove the coal in the 20 foot zone (Tr. 108). But the exposure in this zone is now increased to 1,880.6 hours. This 73 percent increase results from the construction and removal of the berms now required by MSHA (Tr. 109, Exhibit X).

Before the berms were required the only dozer exposure to the ditch edge occurred during the cleaning of the coal. This was for 40.48 hours (Tr. 109, Exhibit W). As a result of abating the citation the exposure is now 831.5 hours, an increase of 1954 percent.

In removing the coal, respondent's rubber tired dozer cuts a 14 foot swath and approaches the edge 7,619 times (Tr. 109, Exhibit V). Since respondent is now building and removing berms there are 103,451 cycles to the ditch edge, an increase of 1,612 percent (Tr. 109-110, Exhibit V). Respondent has constructed 58 miles of berms to abate this citation (Tr. 115, 116).

Respondent puts berms on active haul roads where there is vehicular traffic traveling "at a good speed" (Tr. 125).

In the opinion of mine superintendent Joe Johnson the standard does not apply to the working area of the pit. The company is constantly mining this area. MSHA has never previously cited respondent for failure to have berms in an active pit area. But the company has been cited due to an eroded berm on a haul road (Tr. 151, 154, 155).

Don Holt, respondent's safety director for its mines in Kentucky and Ohio, is familiar with MSHA regulations 1605(k). In Holt's opinion the purpose of the regulation is to provide a guide on a haul road to keep vehicles within a confined area. Further, in Holt's opinion, the section does not apply to the working pit of surface mines (Tr. 132-134).

In the mines in the eastern portions of the United States

the working pits are 45 to 80 feet wide. It would practically shut down such mines if MSHA requires berms as it does here. MSHA does not now require berms in other active working pits. (Tr. 136, 137).

Discussion

Respondent's post trial brief asserts that the term "elevated roadway" does not include active work areas within the pit of a surface mine; that MSHA's reliance on its policy memorandum and its Surface Inspection Manual are misplaced; that there are profound differences between a roadway and a working pit bench; that as defined by a recognized treaties and a Bureau of Mines report a pit bench is not a roadway; that the failure to enforce this regulation elsewhere points out its vagueness and lack of clarity, that the Penn Allegh doctrine is not controlling; that all of respondent's witnesses and a time study confirm the extent of an additional hazard created by MSHA's erroneous interpretation of the regulation; that the emplacement of a berm would not have prevented Yazzie's accident; that MSHA failed to present the inspector who wrote the citation and failed to offer the citation in evidence; that MSHA's interpretation would shut down the surface coal mines in the United States.

The post trial briefs filed in this case do not cite the Commission decision of El Paso Rock Quarries, Inc., 4 FMSHRC 35 (1981). In El Paso Rock the Commission considered whether a violation of a berm standard occurred. The Commission held that a "bench" (FOOTNOTE 3) in a quarry is an "elevated roadway" within the meaning of the standard. In El Paso Rock the bench where the trucks operated were 40 feet above a lower bench. Berms were required.

The standard in contest here, 30 C.F.R. 77.1605(k), applies to surface coal mines, including open pit and auger mines" 30 C.F.R. 77.1. The standard in El Paso Rock, 30 C.F.R.

55.9-22, was applicable to metal and non-metallic open pi mines, 30 C.F.R. 55.1. But since the wording in each standard is exactly the same I consider El Paso Rock to be binding precedent.

Respondent initially asserts that the berm regulation does not encompass an active work area within the pit of a surface mine. In its rationale respondent cites the testimony of MSHA's only witness, William Denning. Respondent argues that his testimony is vague and inconclusive. It cites his testimony that a coal bench seam is a roadway "because the same type of equipment that used the bench also used the haulage system in the mine" (Tr. 22-24). Then respondent cites Denning's cross examination where he admits that "elevated roadway" is not defined in 30 C.F.R. Part 77 (Tr. 61). And in arriving at his conclusion the inspector relies on the Inspection Manual and MSHA's policy statement (Tr. 61, Exhibits P7, P8).

Respondent may argue that the evidence is inconclusive but basically the evidence is uncontroverted. Respondent's haulage trucks operated on the coal seam bench. The bench was 30 feet above the adjacent keyway. There were no berms. The foregoing were the circumstances prohibited in El Paso Rock. There appears to be no difference between a coal bench and a quarry bench.

Respondent contends that the MSHA Surface Inspection Manual and the policy statement (P7 and P8) are not binding on the Commission. I agree. Further, I do not rely on those exhibits. The documents fail to define a roadway. They assume a roadway exists; therefore, when it does, it must be bermed. For example, the inspection manual states that 1605(k) applies to ... "an elevated haulage road"; "Elevated roadways ... are roadways", "the width of a haulage road." Further, the policy statement indicates 1605(k) applies to "all elevated roadways." For example, "Berms ... are required on ... elevated roadways .... elevated roadways with two exposed banks", etc.

Respondent argues that the berm regulation does not apply because of the profound differences between a coal bench and a roadway. The most striking difference is that coal is removed from the coal pit. The removal is daily, even hourly (Tr. 155). All of the equipment including draglines, dozers, trucks and the like are engaged in this task (Tr. 82-83). Obviously, coal is not extracted from a haul road (Tr. 39).

MSHA's witness Denning indicated that the nature of the traffic is one of the factors to be considered before issuing a citation in this "gray area" (Tr. 35, 36, 54). One of the traffic features revolves on the speed of the equipment: In the pit the vehicles do not travel much more than five miles per hour. But a haul truck on a level road could reach 30 to 40 miles per hour. (Tr. 35, 36, 54). Respondent's evidence, confirmed by MSHA's

witness Denning, establishes that the Mudd Series on Surface Mining defines a haul road as "a road built to carry heavily loaded trucks at a good speed" (Tr. 37). Respondent contends that this obviously excludes a coal bench. Further, the type and character of the traffic is substantially different. The draglines, the loaders, the dozers, and the haul trucks are essentially congregated in the pit. The nature of this traffic in the pit is, by virtue of its continuing activities, substantially different from the traffic on the haul road.

The evidence here shows that the bench was 130 to 140 feet wide (Tr. 20, 116). The inspector assumed "the haulage truck drove down the middle of the coal seam" (Tr. 48). On this basis the 18 foot wide haul-trucks would be no closer than 65 to 70 feet from the edge of the bench (Tr. 46, 47). Or, as the inspector stated, "If traveling down the middle the trucks would be 60 feet from the edge" (Tr. 46, 47). In short, on the facts no vehicles were closer than 60 feet of the edge of the bench.

On the foregoing facts, I would rule that the coal bench is not a roadway and I would vacate the citation. But the mandate in El Paso Rock is explicit: "Under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of section 56.9-22", 3 FMSHRC at 36.

The El Paso Rock case was originally heard by Commission Judge Charles C. Moore, Jr., 1 FMSHRC 2046 (1979). The trial judge's decision does not indicate how close El Paso's trucks were operated to the edge of the bench. However, I lack the authority to carve an exception to the Commission decision.

Respondent in its brief cites a report published by the Bureau of Mines stating "Barriers should be used only in areas such as a very heavily, traveled, permit haul road." (Tr. 63-64). MSHA's witness only identified this as a statement in a book. On this minimal authentication I give such evidence zero weight.

In support of its argument that the regulation is vague and lacks clarity respondent cites the failure of MSHA to previously enforce the regulation at this site and elsewhere as to a coal seam bench.

The foregoing position is basically a plea in estoppel. But it is well established that estoppel does not apply against the federal government. King Knob Coal Company, 3 FMSHRC 1417, 1421.

Respondent argues that its time study (witness Northington) and its video tape (Exhibit U) are not offered to prove that MSHA's enforcement of 77.1605(k) diminishes safety or causes a greater hazard. But it argues that if MSHA interprets the regulation in such a way that dangers are increased then that

interpretation is not correct. In short, respondent agrees that berms on an elevated roadway increase safety. But a coal bench is not a roadway and if MSHA interprets it to be so then MSHA is wrong because there is a clear increase in danger. It is axiomatic that the greater the exposure to the hazard, the more likely an accident. Respondent's uncontroverted evidence clearly establishes that the placement of berms can be hazardous (Tr. 143). Further, the type of berms MSHA requires here (some 58 miles) are transient. Their duration can be as short as three hours (Tr. 144). But a berm on a bona fide elevated roadway is not so transient (Tr. 83).

The Commission in El Paso Rock did not consider the factors respondent now raises. But to reiterate, I lack the authority to overturn the Commission's clear directive. Further, while respondent's videotape and supporting testimony were generally admissible it was basically a revisit to the diminution of safety, or as it is sometimes called, the greater hazard doctrine. Respondent argues that Penn Allegh, 3 FMSHRC 1392, 1399 is not controlling because the case dealt with explicit cabs and canopies regulations. But here, the parties are arguing over a relatively vague standard.

I disagree. Respondent's evidence seek to invoke the diminution of safety, or the greater hazard doctrine. In Penn Allegh the Commission refused to approve such an attempt to short circuit the Act. The Commission observed that when those situations exist where the application of the standard diminishes, rather than enhances, miners' safety the operator may petition the Secretary of Labor for relief from the application of the standard. The Act provides a set procedure for granting or denying the relief sought. Penn Allegh at 1397. There are detailed regulations governing the processing of such petitions, 30 C.F.R. Part 44.

In sum, respondent's evidence seeking to establish the diminution of safety, or greater hazard doctrine, is rejected.

Respondent asserts that even if a berm had been emplaced it would not have prevented Yazzie's accident. It is claimed that no one knows what caused Yazzie to veer off course and he would probably have trammed right through a berm in any event. Since a coal shot had heaved the area the previous berm (had there been one) would have been removed for the drilling and shooting sequence. Further, Yazzie would have been the first dozer operator in the area (Tr. 147).

It is certainly reasonable to infer that a proper berm would not have prevented Yazzie's accident. But a nexus is not required between an accident and the violation of a standard. The presence of a berm might well have served to warn Yazzie of the presence of the keyway.

Respondent's arguments that MSHA failed to offer as a witness the inspector who wrote the citation and further failed to offer the citation itself in evidence lack merit. Inspector Denning testified as to the issuance of the citation (Tr. 28). He further wrote Exhibit P1, an extensive report of this fatality. In Exhibit P1 MSHA entered its finding as follows: "A berm was not provided on the elevated outer back of the haulage road in pit 001-0 from ramp C for a distance of about 600 feet along the Blue seam coal bench, a violation of Section 77.1605(K), 30 CFR." Respondent's arguments seek to elevate form over substance.

Respondent's claim that MSHA's interpretation would shut down the surface coal mine operations in the United States is rejected.

Respondent has obviously not shut down its surface coal mine operation at the Black Mesa Mine in Navajo County, Arizona. Respondent's evidence and argument that the mines in the eastern part of the United States would be shut down must await the detailed evidence in such a case. In short, I decline to rule on a hypothetical situation.

For the above stated reasons, I conclude that Citation 2006837 should be affirmed.

Citation 2006838

In this citation the Secretary of Labor seeks a civil penalty of $241 because respondent's employee Yazzie failed to wear a seat belt thereby violating the mandatory standard published at 30 C.F.R. 77.1710(i) which provides:

> 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) Seat belts in a vehicle where there is a danger of overturning and where roll protection is provided.

Issue

The issue is whether respondent violated the seat belt regulation.

Summary of the Evidence

MSHA's evidence shows that Yazzie was not wearing a seat belt at the time of the accident (Tr. 28, Exhibit P1). MSHA, in its written report, concluded the failure to wear the seat belt in the vehicle was a contributing factor to Yazzie's death (Exhibit P1).

Respondent's mine superintendent indicated that the company requires that seat belts be worn. The workers are informed of this requirement through task training, annual retraining, individual contacts and general discussion (Tr. 153).

If an employee is caught not wearing a seat belt he is given a warning. If it occurs again he receives a written warning (Tr. 153).

Respondent's safety manager and pit boss confirmed the superintendent's testimony. Further, he indicated that the company reinstalls seat belts if they are damaged or removed (Tr. 117, 120, 121, 129, 147). Equipment operators have been disciplined for failing to wear seat belts (Tr. 130, 148, 149). The discipline graduates to suspension or discharge (Tr. 130).

Discussion

The Secretary, in his post trial brief, is aware of the Commission decision in Southwestern Illinois Coal Corporation, 5 FMSHRC 1672, (October 1983). But the Secretary claims the majority decision violates the long line of strict liability cases imposed by the Act. Further, the Secretary argues that the minority view is more persuasive. The Secretary's contentions are rejected. I am obliged to follow the majority view in Southwestern Illinois.

The Secretary further argues that the respondent has not satisfied the criteria in North American Coal Company, 3 IBMA 93, cited in Southwestern Illinois. The Secretary's argument is this: pit boss Contratto had never given a written seat belt warning to anyone and he was unable to present actual examples of a warning. I agree the evidence shows that Contratto himself had never gave an employee a written disciplinary notice for failing to wear a seat belt (Tr. 148, 149). But the Secretary misconstrues the evidence in the transcript at 149, 150. Contratto testified that there have been written disciplinary actions. But he hadn't brought notices to the hearing (Tr. 148-150). On this record Johnson and Cook establish that respondent was diligent in the enforcement of its seat belt regulation (Tr. 120, 121, 129, 130, 153, 154). Southwestern Illinois criticized the operator because the wearing of belts was delegated to the discretion of each employee. This is not the situation here. Witnesses Contratto, Johnson and Cook establish that the respondent was diligent in its enforcement of the seat belt regulation.

I further note that no facts indicated that the company knew Yazzie had his seat belt off at the time of the accident, if, in fact, it was off. (Tr. 29).

I reject the Secretary's arguments.

For the foregoing reasons Citation 2006838 and all penalties therefor should be vacated.

Civil Penalty

The Secretary seeks a civil penalty of $2,000 for the berm violation.

Section 110(i) of the Act, codified at 30 U.S.C. 820(i), requires the Commission in penalty assessments to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance.

The parties stipulated that respondent, a large operator, has a moderate history. Further, the imposition of a civil penalty would not affect its ability to continue in business (Tr. 5). Respondent was negligent. The gravity is high when one considers the possibility of a 31 foot fall into a keyway. But on the other hand, I cannot hold the absence of berms necessarily contributed to Yazzie's accident and resulting death. To the operator's credit is its demonstrated good faith in rapidly abating the citation.

The Commission file does not contain the Secretary's special assessment narrative but on balance I conclude that a penalty of $750 is appropriate.

The Solicitor and respondent's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues in the case. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated the mandatory standard published at 30 C.F.R. 77.1605(k) and an appropriate penalty therefor is $750.

3. Respondent did not violate the mandatory standard published at 30 C.F.R. 77.1710(i), and all proposed penalties therefor should be vacated.

ORDER

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

1. Citation 2006837 is affirmed and a penalty of $750 is assessed.

2. Citation 2006838 and all proposed penalty therefor are vacated.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 Parting is the interburden between coal seams.

~FOOTNOTE_TWO

2 A cycle is the elapsed time from when the dozer starts forward, reverses its motion, and again starts forward (Tr. 99, 100).

~FOOTNOTE_THREE

3 In El Paso the Commission, in footnote 7, stated:

The term "bench" is in part defined by a A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968), as:

A ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a continuous bank of bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in an open-pit mine or quarry.