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SOL (MSHA) V. UNITED STATES 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

v.

UNITED STATES STEEL MINING
COMPANY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. PENN 83-143
A.C. No. 36-05018-03518

Docket No. PENN 83-154
A.C. No. 36-05018-03520

Docket No. PENN 83-223
A.C. No. 36-05018-03527

Cumberland Mine

Docket No. PENN 83-219
A.C. No. 36-00970-03525

Maple Creek No. 1 Mine

Docket No. PENN 83-226
A.C. No. 36-03425-03536

Docket No. PENN 83-246
A.C. No. 36-03425-03538

Maple Creek No. 2 Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,
for U.S. Steel Mining Company, Respondent.

Before: Judge Merlin

These cases are petitions 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 alleged violations of the mandatory safety standards.

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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. The briefs have been received and reviewed.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7-8):

1. U.S. Steel Mining Company, Inc. is the owner and operator of the Maple Creek No. 1 Mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The presiding administrative law judge has jurisdiction over these proceedings.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary.
5. The subject citations were properly served on the operator.
6. Copies of the citations may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of the statements asserted therein.
7. Imposition of penalties will not affect the operator's ability to continue in business.
8. The alleged violations were abated in a timely fashion.
9. The operator's prior history is average.
10. The operator's size is large.

PENN 83-219

Citation No. 2103177

Section 75.701-5 of the mandatory standards provides:

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The attachment of grounding wires to a mine track or other ground power conductor will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

The subject citation describes the condition as follows:

The frame ground for the metallic switch box supplying power to the car spotter and return ground to signal lights at loading ramp in 8 flat 56 room section were connected to the ground (rail) with one clamp. Both were energized.

There is no dispute that the condition described by the inspector existed. Nor does it appear from the testimony that the operator contests that the condition constituted a violation. In any event, it is clear that a violation existed and I so find.

The danger created by the violation was that the metallic switch box could become energized. The current was 550 watts which is enough to electrocute an individual. However, for this to happen both wires would have to come out of the clamp but still remain connected together, which was unlikely. The most likely occurrence would be a break in the electrical circuit shutting off the equipment. Probability was therefore not high. On balance, I find the violation was moderately serious.

The two wires were intentionally put together, but the Solicitor produced no evidence bearing on whether such acts properly could be attributed to the operator under the tests adopted by the Commission. Southern Ohio Coal Company, 4 FMSHRC 1459 (1982); Nacco Mining Company, 3 FMSHRC 848 (1981). The inspector observed the violation when he was walking by; on this basis, I find the operator was negligent.

In light of the foregoing and on the basis of the stipulation relating to the other statutory criteria, a penalty of \$70 is assessed.

PENN 83-246

Citation 2106427

Section 75.701-5 of the mandatory standards provides:

The attachment of grounding wires to a mine track or other grounded power conductor

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will be approved if separate clamps, suitable for such purpose, are used and installed to provide a solid connection.

The subject citation describes the condition as follows:

The electrical and the frame ground wires for the No. 49 water pump located in the 8 Flat 6 Rm. Section MMV 011 were connected to the same clamp where it connected to the mine track.

This is the same type of situation as was present in the preceding citation. Two wires from the water pump were improperly attached to the same clamp. I conclude that a violation existed. Given the danger of electrical shock, the violation was serious.

I also conclude the operator was negligent. The condition existed on a prior shift but the supervisor in charge elected to have it fixed on the following shift.

In light of the foregoing and on the basis of the other statutory criteria, a penalty of \$70 is assessed.

Citation 2106428

MSHA vacated this citation and the Solicitor's motion to dismiss the penalty petition with respect to it was granted from the bench.

PENN 83-143

Citation 2011673

Section 75.326 of the mandatory standards provides:

In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate

active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

The subject citation describes the condition as follows:

The belt air ventilating the belt conveyor entry of the 13 Butt West 5 face South (007) was being used to ventilate the active working places on the 13 Butt West 5 Face South (007) Section. Approximately 12,500 cfm of air was measured traveling up the Belt Entry over the Belt feeder and into the Section. The Section foreman is Robert Hall, Supervised by Charles Zabrosky, mine foreman.

The operator admitted the existence of a violation (Tr. 92). Belt air traveling up to the working faces created the danger that if there was a fire on the belt, smoke-filled air would travel inby to where the miners were working, contributing to lung problems and creating difficulties in escaping to fresh air. Accordingly, I conclude the violation was serious. I accept the inspector's evaluation that someone in authority should have known of this condition. The operator was negligent.

However, the record does not contain sufficient evidence to support the finding of significant and substantial. The inspector did not know the definition of "significant and substantial" under governing Commission decisions (Tr. 61-62). He stated that the violation was significant and

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substantial because contaminated air coming up the belt " * * * would happen if it was never abated, or never corrected, at some time maybe in our lifetime, that this could possibly happen * * *" (Tr. 63). It is disturbing that at this late date, an inspector is ignorant of the proper definition of the statutory terms he is supposed to enforce. The Solicitor should not call witnesses without preparation.

A penalty of \$85 is assessed.

PENN 83-154

Citation 2014207

Section 75.316 of the mandatory standards provides:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

The subject citation describes the condition as follows:

Only 9 sprays out of a total of 16 water sprays (7 not working) was operating [sic] on the Jay 17 CM Set No. 2085 which was cutting and loading coal in the No. 5 entry 24 to 25x cut in the 121 Mains West Sec 001. The approved methane and dust control plan requires water spray systems to be maintained at 75% efficiency.

The operator admitted that seven sprays were not working out of a required total of sixteen and that this constituted a violation of its methane and dust control plan (Tr. 125, 126). This condition would increase the amount of

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respirable dust in the air and contribute to the existence of lung disease. Certain sprays that were not working ("C" on Exhibit M-5) were particularly significant in controlling dust at the time the violation was cited because of where the continuous miner was cutting coal (Tr. 138-139). Accordingly, I find the violation was serious. I accept the operator's evidence that the sprays had been working at the beginning of the shift, but I also accept the inspector's testimony that the fact they were not operating was obvious. I conclude that negligence was minimal.

There remains for determination whether the violation was significant and substantial. Dust samples were far better than required. Under such circumstances, I do not believe there was a reasonable likelihood that the increased dust created by the inoperable sprays would result in a reasonably serious injury or illness. I recognize that I have concluded the violation was serious but a violation can have a measure of gravity without meeting the criteria for significant and substantial.

A penalty of \$65 is assessed.

PENN 83-223

Citation 2103294

Section 75.1105 of the mandatory standards provides:

Underground transformer stations, battery charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

The subject citation describes the condition as follows:

The Section belt load center #214 located in the 110 crosscut in the 133 Butt West Section was not properly vented to the return in that the air movement over the load center was toward the intake fresh air.

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The inspector testified that he sprinkled rock dust in the air over the power center and that the dust flowed over the top of the power center up towards the section instead of going out into the return air course (Tr. 145, 146). I accept the inspector's testimony and based upon it conclude that there was a violation of the cited standard. I also accept the inspector's testimony that if there was a fire, smoke would go up to the section where people were working (Tr. 147). I find the violation was serious because the smoke could impede escape and is dangerous to health. Finally, I accept the inspector's conclusion that because he did not know how long the violation existed, negligence was low (Tr. 149).

The record does not contain sufficient evidence to support a finding of significant and substantial. This inspector also did not appear to know what the definition of "significant and substantial" is under Commission decisions. He stated that the violation was "reasonably likely" because "there's always a possibility [of fire] in any piece of electrical equipment" (Tr. 150). The fact that something is always possible does not create a reasonable likelihood. Moreover, the inspector did not analyze or explain what was reasonably likely in the manner required by the Commission decisions. It is disturbing to have those charged with the enforcement of the Act show such confusion about elementary terms and fundamental concepts. The Solicitor should not call such witnesses and attempt to rely on their testimony unless he prepares them sufficiently.

A penalty of \$126 is assessed.

Citation 2103296

Section 75.503 of the mandatory standards provides:

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

The subject citation describes the condition as follows:

The S & S battery operated scoop was not maintained in permissible [sic] condition and being operated in the 133 Butt West Section. All battery cover lids were loose and not fastened down properly.

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The inspector testified that the lid covers for the batteries of the scoop and for the battery boxes themselves had corresponding tongues with holes in them on the back and front (Tr. 177). The tongues came on the covers and boxes from the manufacturer. The inspector believed that the standard required that when the covers slid on, the operator should insert some sort of locking device like a bolt through the hole fastening the lid to the box.

The Solicitor argued that section 75.503 which requires that equipment be maintained in permissible condition must be read in conjunction with section 75.2 and 18.44(c). Section 75.2(i) provides that permissible as applied to electrical face equipment means all electrically operated equipment taken into or used by inby the last open crosscut of an entry or room of any coal mine the electrical parts of which including, but not limited to, associated electrical equipment, components and accessories, are designed, constructed, and installed in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or a mine fire. Section 18.44(c) of Part 18, 30 C.F.R. 18.44(c), dealing with manufacturers' specifications for approved electrically operated equipment, provides that battery-box covers shall be provided with a means for securing them in closed position.

Assuming that the Solicitor's position regarding section 18.44(c) is correct, I still cannot find a violation. The inspector described how a 2" lip went all around the cover so that the cover slid down over the battery box like a lid on a can or jar (Tr. 194). The inspector agreed that because of the lip, the cover would have to jump up 2 inches before it would slide (Tr. 194). The cover weighs 50 to 100 pounds (Tr. 210-211). In addition, there were tongues on the back of each battery box which stuck out through holes in the cover when the cover was put on (Tr. 201-204). The inspector agreed here too, that this device would secure the cover if the scoop were moving forward (Tr. 206-207). Finally, the battery covers overlapped and interlocked in the center (Tr. 201). I conclude that each of the foregoing devices constituted a means for securing the battery box covers in a closed position within the meaning of section 18.44(c). As section 18.44(c) presently stands, it is sufficiently general to encompass the circumstances presented here. I will not read into the mandatory standards a specificity which they plainly do not have. If the Secretary wants the battery boxes secured in a particular way, it would be a simple enough matter for him to change the regulations to so provide. Judge Melick reached the same conclusion in a case involving the same operator and the Solicitor did not appeal. U.S. Steel Mining Co., FMSHRC Docket No. PENN 82-305, Slip Op. (January 30, 1984).

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In light of the foregoing, Citation 2103296 is Vacated.

Citation 2103297

A violation of section 75.503 is alleged here also. The only difference is that in this case, the inspector testified that the locks (or tongues) were actually broken off so there was no means of fastening the covers down (Tr. 197). However, the inspector was unable to specify which fasteners were broken, stating that at least four lugs were broken (1 more or less on both ends) (Tr. 197). Clearly, the inspector did not remember which lugs or tongues were missing. This evidence is too vague to support the citation of a violation. In any event, the missing lugs or tongues appear to relate only to the one device which would require a bolt to be put through the tongues of the battery box and the cover. In this case there is nothing to indicate that the securing devices described in Citation 2103296 were not present here also.

Accordingly, Citation 2103297 is Vacated.

Citation 2103300, Citation 2104061, Citation 2104063, Citation 2104064

The parties agreed that the decision in Citation 2103296 would govern the results in these citations.

Accordingly, these citations are Vacated.

PENN 83-226

Citation 2104311, Citation 2105301

In an off-the-record conference, the Solicitor advised that MSHA had agreed to vacate these citations and I approved a withdrawal of the penalty petition with respect to them.

Order

In light of the foregoing, it is Ordered that within 30 days from the date of this decision, the operator pay \$416 in penalties apportioned as follows:

Citation No. 2011673	\$	85
Citation No. 2014207		65
Citation No. 2106427		70
Citation No. 2103177		70
Citation No. 2103294		126

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It is further Ordered that Citation Nos. 2103296, 2103297, 2103300, 2104061, 2104063, 2104064, 2104311, 2105301, and 2106428 be Vacated.

Paul Merlin
Chief Administrative Law Judge