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SOL (MSHA) V. PITTSBURG 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

v.

PITTSBURG & MIDWAY COAL
MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 82-1
A.C. No. 29-00096-03011

Docket No. CENT 82-2
A.C. No. 29-00096-03012

McKinley Strip Mine

DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Petitioner;
John A. Bachmann, Esq., The Gulf Companies,
Denver, Colorado,
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), arose as a result of an inspection of respondent's coal mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability under the Act.

After notice to the parties, a hearing on the merits was held in Gallup, New Mexico on October 19, 1983.

The parties waived the right to file post trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

CENT 82-1
Citation 826733

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 77.1302 J, which provides as follows:

77.1302 Vehicles used to transport explosives. (j)
When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicles shall be blocked securely against rolling.

MSHA's evidence shows that on July 7, 1981 Federal Inspector Lawrence Rivera issued this citation when he observed a parked truck; it lacked chocks to prevent it from rolling. The truck, which carried explosives, was located in the pit area (Transcript at pages 12, 13; Exhibit P3). The truck would have to be moved that day (Tr. 14-15).

Two miners were affected by this hazard which could cause a fatality. The possibility of an accident was remote as the truck was parked in a small dip in a coal seam (Tr. 13, 14, 52-53). Chocks were brought in and placed to secure the vehicle (Tr. 15).

Discussion

The facts establish a violation of the regulation. Respondent's witness Gary D. Cope agreed that the vehicle did not have chocks (Tr. 136, 137).

The evidence shows the truck was parked in a dip. Accordingly, it was not likely to move in any event. The foregoing evidence relates to issues of gravity and negligence. These are factors to be considered in assessing a civil penalty.

Citation 826734

This citation alleges respondent violated 30 C.F.R. 77.1110, a performance standard. It provides:

77.1110 Examination and maintenance of firefighting equipment. Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

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Inspector Rivera issued this citation when he observed that the hose and nozzle were missing on a fire extinguisher (Tr. 16, 17; P4). One worker was exposed to the hazard caused by this condition on the company's pickup truck (Tr. 18).

The condition was abated by installing usable equipment (Tr. 19).

Respondent's witness Cope produced photographs of the 5BC Chemical type fire extinguishers installed on the company's pickup trucks (Tr. 104, 105; Exhibit D4). Respondent's photographs also show the performance of the extinguisher. It is suitable for the use intended (Tr. 110-116; D4 thru D7).

The manufacturer's specifications do not provide a hose for this particular extinguisher. The hand operated unit directs the flow of its contents through a short one inch nozzle at the discharge point.

Discussion

The cited regulation requires that firefighting equipment shall be maintained in a usable and operative condition. Many extinguishers are equipped with a hose together with an attached nozzle. However, even though these extinguishers were not so equipped, they are, nevertheless, in a usable and operative mode. Hence, respondent did not violate the regulation.

For these reasons this citation should be vacated.

Citation 826737

This citation alleges a violation of 30 C.F.R. 77.1110, cited in the previous citation.

The inspector issued this citation because the hose and nozzle were missing on the extinguisher. The equipment was on truck number 121. The cited vehicle was different from the one previously cited. Respondent abated the citation by installing usable equipment (Tr. 20, 21; P5).

Respondent's evidence indicates that the same type of equipment existed as discussed in connection with the prior citation (Tr. 104-105, 109, 113-114).

Discussion

This citation should be vacated for the same reasons discussed in connection with Citation 826734.

Citation 826741

This citation alleges a violation of 30 C.F.R. 77.1109(c)(1) which provides:

(c)(1) Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

Inspector Rivera issued this citation when he observed a forklift without a fire extinguisher (Tr. 22, 23; P6). The forklift was observed when it was approaching the shop. At that point it was about 600 feet away from the shop (Tr. 23-24; P10).

One or two miners were affected by the hazard arising from the lack of a fire extinguisher (Tr. 25-26). An extinguisher was installed to abate this condition (Tr. 26-27).

Respondent's evidence indicates its forklift remains in the area of a single structure which consists of the shop, warehouse and office building (Tr. 139). The forklift normally will go 75 feet to the open air storage. Then it will travel about 50 feet to the fuel dock. In addition, it will encompass 100 feet to the other end of the oil dock (Tr. 139). These areas all have firefighting equipment (Tr. 139, 140).

Discussion

Respondent considers the forklifts are used in connection with warehouse and open air storage. Therefore, they constitute "auxiliary equipment" (Tr. 103, 104). Section 77.1109(c)(3) refers to auxiliary equipment in the following terms:

(3) Auxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher.

A single credibility issue arises in connection with this citation. Inspector Rivera indicated that he observed the forklift when it was about 600 feet from the shop (Tr. 23-24). On the other hand, respondent's witness Cope testified as to the general area. He indicated it would not have been possible for

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the forklift to have been 600 feet from the shop and still remain on a paved area (Tr. 101-102).

I credit respondent's evidence. Witness Cope would be more familiar with the area where the forklift operates. In addition, it is apparent from his testimony that Inspector Rivera was unsure of the location of the forklift in relation to the shop area when he observed it (Tr. 23, 24).

The principal issue then evolves into whether a forklift is "mobile" or "auxiliary" equipment. If the latter no fire extinguisher is required.

I conclude that a forklift constitutes mobile equipment. This conclusion rests on several facts. First of all, a forklift is "capable of moving" and it thus meets the definition of being "mobile", Webster's New Collegiate Dictionary, 732, (1979). In addition, Section 77.1109(c)(1) describes certain types of mobile equipment whereas Section 77.1109(c)(3) describes certain types of auxiliary equipment. I find that a forklift is more akin to the equipment the standard describes as "mobile" than to the equipment described as "auxiliary".

The citation should be affirmed.

Citation 826744

This citation alleges a violation of 30 C.F.R. 77.604 which provides:

77.604 Protection of trailing cables.
Trailing cables shall be adequately protected to prevent damage by mobile equipment.

Inspector Rivera wrote this citation when he recognized eight tire marks (crossing and returning), on a 23,900 volt cable (Tr. 28; P7). The cable, in an obvious location alongside the roadway, supplied power to a dragline (Tr. 28, 29).

A rupture of the cable could shock a person. In addition, an explosion could occur. Severe burns, electrical shock and possibly a fatality could result from this condition (Tr. 28-30). The condition was abated when the miners were instructed to avoid the cable (Tr. 31).

Respondent's witness agreed there were eight tire marks on the cable (Tr. 122). The top soil had not been removed; the soil was sandy and soft (Tr. 123).

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The cables themselves are protected with GFI ground fault interrupters. This safeguard causes the power to trip out if a cable failure occurs (Tr. 126).

The company did not know who had run over these cables. In the past, the company has disciplined two or three employees for driving over its cables (Tr. 134-135).

Discussion

This regulation requires that trailing cables shall be adequately protected to prevent damage. In the instant case it is unrefuted that the cable was lying on the ground and it had been run over by mobile equipment (Tr. 75). Adequate protection would include barricading the area, burying the cables or suspending the cables overhead (Tr. 87).

In his closing argument respondent's counsel relies on C.F. & I. Steel Corporation, 3 FMSHRC 2168, (1981). In the cited case Judge John A. Carlson vacated a citation involving an alleged violation of the same standard. Judge Carlson ruled in his case that he was more persuaded by respondent's inferences than those urged by the government, 3 FMSHRC at 2169.

The case relied on by respondent is not controlling. On the contrary, in this case, I am persuaded by Inspector Rivera's testimony. An explosion could be caused by the sharp material under the surface of the cable. It had obviously been run over by a vehicle (Tr. 28-29). In addition, Inspector Rivera has a considerable background as an MSHA coal mine inspector. This experience causes me to accept his opinion of the hazard involved (Tr. 7, 8; P2).

The citation should be affirmed.

Citation 826745

This citation alleges a violation of 30 C.F.R. 77.204 which provides:

77.204 Openings in surface installations; safeguards.
Openings in surface installations through which men or material may fall shall be protected by railings, barriers, or covers or other protective devices.

Inspector Rivera issued Citation 826745 because the operator failed to provide a railing at the opening of a loading dock.

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The dock, adjacent to the warehouse, is 20 feet long and 4 feet deep (Tr. 33, 34; P8, P11). A worker or equipment could fall to the concrete below (Tr. 34).

One worker was affected by this hazard (Tr. 37).

The condition was abated when a broken hook was replaced by welding it at one side (Tr. 38). The operator of the forklift requested some type of protection here for this condition (Tr. 67).

In Inspector Rivera's opinion the opening here is in a vertical surface. It is similar to a door opening (Tr. 69-70).

Discussion

In support of its motion to dismiss respondent relies on State ex. rel. City Iron Works v. Ind. Com., 368 N.E.2d 291, (1977).

In the cited case a worker fell from the edge of a roof. The Appellate Court decision construes three sections of the Ohio Code of Specific Safety. The requirements of the Ohio Code are considerably narrower than the scope of 30 C.F.R. Section 77. Accordingly, City Iron Works is not controlling.

In this case the Secretary's regulation, 30 C.F.R. 77.200, defines the scope of surface installations. It requires an operator to maintain all mine structures, enclosures or other facilities in good repair to prevent accidents and injuries. The general description of a surface installation in Section 77.200 is sufficiently broad to include respondent's loading dock. On the facts here it is established that miners could fall from the dock if a protective chain was not used to provide a warning or prevent a fall. In addition, a chain had been furnished across this opening before this citation was issued. Inspector Rivera observed that a hook on one side had broken off. The condition was abated by rewelding the hook (Tr. 35, 38).

The citation should be affirmed.

CENT 82-2
Citation 826746

This citation alleges a violation of 30 C.F.R. 77.604, relating to protecting trailing cables, cited, supra.

Inspector Rivera wrote this citation when he saw tire marks from where a pickup had run over a cable. The pickup, adjacent to the cable, had identical tire treads (Tr. 40). This was at a different location than the previous citation (Tr. 39, 40).

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The cable, carrying 23,900 volts, involves an electrical shock hazard (Tr. 41). Men in the pickup as well as men moving the cable would be affected by such a hazard (Tr. 41).

The condition was obvious because it was adjacent to the road. The hazard was abated by installing a berm between the road and the cable (Tr. 43). According to the inspector, the mine superintendent knew the condition existed (Tr. 44-45).

Discussion

The uncontroverted facts establish a violation of the regulation. The citation should be affirmed.

CIVIL PENALTIES

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. 820(i).

In considering the statutory criteria I find that the operator has a minimal adverse history. Five violations were assessed between August 8, 1979 and January 10, 1980 (Exhibit P1). The penalties, as proposed, are appropriate in relation to the large size of the operator (Tr. 9). In those citations where I find a violation I also find that the operator was negligent because the violative conditions were open and obvious. As previously discussed the gravity and negligence concerning Citation 826733 are overstated and the penalty should be reduced. The gravity of the remaining citations is apparent on the facts. In favor of the operator is its good faith in rapidly abating the defective conditions.

On balance, I deem the following penalties to be appropriate:

CENT 82-1

Citation	Proposed Assessment	Disposition
826733	\$170	\$ 85
826734	66	Vacate
826737	72	Vacate
826741	84	84
826744	180	180
826745	122	122

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CENT 82-2

Citation	Proposed Assessment	Disposition
826746	\$78	\$78

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

In CENT 82-1

1. The following citations are affirmed and a civil penalty is assessed as indicated:

Citation	Penalty
826733	\$85.00
826741	84.00
826744	180.00
826745	122.00

In CENT 82-2

826746	\$78.00
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2. The following citations and all penalties therefor are vacated.

In CENT 82-1

Citation 826734
Citation 826737

John J. Morris
Administrative Law Judge