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SOL (MSHA) V. GATEWAY 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. PENN 85-260 A.C. No. 36-00906-03584
v.	Gateway Mine
GATEWAY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
George S. Brooks, Esq., Lexington, Kentucky, for Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary initially had charged the Gateway Coal Company with five (5) violations of the mandatory safety standards. However, prior to the commencement of taking testimony in this case, the Secretary vacated 104(a) Citation Nos. 2398789 and 2398784 and also withdrew the civil penalty assessment concerning Citation No. 2397333. I approved the vacation and withdrawal of the above three (3) citations on the record.

The remaining two alleged violations were tried before me at a scheduled hearing on April 23, 1986, at Pittsburgh, Pennsylvania.

The general issues before me are whether the company has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation(s).

Since the respondent readily admits the regulatory violations of 30 C.F.R. 75.1725(a) alleged in Citation No. 2399220 (GXÄ1) and 30 C.F.R. 75.1403 alleged in Citation

No. 2397217 (GXÄ2), the specific issues before me for resolution concerning these violations are whether they are "significant and substantial" (S & S) violations and what the proper penalty should be.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7Ä8):

1. The Gateway Mine is owned and operated by the Gateway Coal Company.

2. The Gateway Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The undersigned administrative law judge has jurisdiction over these proceedings.

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor, upon an agent of the respondent, at the dates, times, and places stated in the citations, and may be admitted into evidence for the purpose of establishing their issuance, but not necessarily for the truthfulness or relevance, or any of the statements contained therein.

5. The assessment of the civil penalties in this proceeding will not affect the respondent's ability to stay in business.

6. The appropriateness of the penalties, if any, to the size of the coal operator's business should be based on the fact that the Gateway Mine's annual production tonnage, as of the time of the issuance of the citations, was nine hundred and sixty-one thousand, one hundred and sixty-six (961,166).

7. The respondent demonstrated ordinary good faith in attaining compliance after the issuance of each citation.

8. The Gateway Mine was issued three hundred and thirty seven (337) citations in the twenty-four months immediately preceding the issuance of these citations involved in this case.

9. The parties stipulate to the authenticity of the exhibits to be entered.

Discussion and Analysis

Section 104(a) Citation No. 2399220 was issued to the operator because a personnel carrier (jeep) that was equipped with a dead man switch had that switch wired into the "closed" position. It had in effect been rendered inoperative. This is a violation of 30 C.F.R. 75.1725(a) and is admitted by the operator.

Section 104(a) Citation No. 2397217 was issued to the company because another personnel carrier (jeep) did not have the required reflectors on one side. The company had previously been issued a notice to provide safeguards requiring that all self-propelled personnel carriers (jeeps) be equipped with reflectors on both ends and both sides (GXÄ4). This is a violation of 30 C.F.R. 75.1403 and again is readily admitted by the operator.

Inspector Francis E. Wehr testified that he issued 104(a) Citation No. 2397217 on February 1, 1985, during an inspection of the Gateway Mine. In his opinion, since the jeep was missing reflectors on the tight side, the hazard created was that if it was coming on to a piece of track haulage at a particular angle and if an oncoming piece of equipment was coming, there could be a collision and individuals could be injured. He assessed the likelihood of such an event occurring as "reasonably likely" and he would expect injuries ranging from bruises to broken bones as a result of the collision. He therefore assessed this violation as a "significant and substantial" (S & S) one.

During cross-examination of Inspector Wehr, Citation No. 2397139, which was originally a notice to provide safeguards, was introduced (RXÄ1). This document was issued to the Gateway Coal Company on January 4, 1985, by Inspector Wehr because he had observed a jeep being operated without any reflectors at all, on either ends or sides. On this occasion, the inspector did not mark the "S & S" box. His first explanation of that was that he made a mistake, that it should have been marked "S & S." He later amended his response to state that this document had originally been issued as a safeguard under section 314(b) of the Act and when issuing a safeguard you are not concerned with the criteria for determining whether a violation would be "significant and substantial." However, I note that he also stated that the penalty criteria do not apply when issuing a safeguard. That for purposes of issuing a safeguard, whether there would be an injury, the likelihood of that injury or what the negligence would be are not considered. Yet, when he issued Citation No. 2397139, as a

notice to provide safeguards, he checked the boxes for "low" negligence, "no likelihood" of occurrence and "no lost workdays" as the type of injury that would result from occurrence of the event.

As it turns out, this citation should not have been issued as a safeguard at all because a safeguard for the same thing had previously been issued by Inspector Light on May 29, 1984 (GXÄ4). Inspector Light issued Citation No. 2253769 as a safeguard and likewise did not mark the "S & S" box. He did, however, mark the penalty criteria. He checked the boxes for "none" pertaining to negligence, "unlikely" occurrence and "lost workdays or restricted duty" as type of injury.

When it was subsequently discovered that there was an existing safeguard issued concerning jeep reflectors, Inspector Wehr modified Citation No. 2397139 from a safeguard to a 104(a) citation on January 23, 1985. However, even though he concedes he could have, he did not at that time modify this citation to reflect an "S & S" violation.

Although Inspector Wehr testified on direct that the lack of a reflector on the tight side of the jeep would be reasonably likely to cause an accident, it is apparent to me that he changed his mind sometime between issuing Citation No. 2397139 on January 4, 1985, and February 1, 1985, when he issued the citation at bar. Further, he has no knowledge of any statistics concerning accidents caused by missing reflectors nor was he able to cite a single example of an accident caused by a missing reflector. This last observation also applies to the opinion testimony of the two miner witnesses concerning gravity.

The Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981) set out the test for determining whether a violation, in the words of the statute, " . . . could significantly and substantially contribute to the cause and effect . . . of a mine safety or health hazard." Such a violation, the Commission held, is one where there exists " . . . a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

Later, in Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of "significant and substantial" in four steps. The first step was whether a violation occurred. In this case that much is admitted by the respondent. The second step is whether the violation contributed a measure of danger to a discrete safety hazard.

Relying on the testimony of the inspector and the two miner witnesses, I conclude that there was a discrete safety hazard and the violation did contribute some additional measure of danger. The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury, and the fourth step is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. I think we would all agree that if a collision accident occurred involving two of these jeeps, traveling at anything more than a minimal rate of speed that injuries of a reasonably serious nature would likely occur. Therefore, the ultimate issue is whether the absence of reflectors on the jeep would be reasonably likely to cause such an accident. At the hearing, and within the four corners of the citation at bar, Inspector Wehr was of the opinion that such an occurrence was "reasonably likely." However, less than a month before, in the same mine, for the same violation, involving the same type of vehicle, he was of the opinion that there was "no likelihood" of such an occurrence (RXÄ1). Therefore, I conclude that the respondent has effectively impeached the inspector by his own prior inconsistent statement on the ultimate issue of this case. Further, a second inspector, Mr. Light, also had occasion to write a safeguard for this identical violation of the same standard, in the same mine and involving the same type of equipment (GXÄ4). His opinion was that the occurrence of the event against which the cited standard is directed was "unlikely." Additionally, I note that an inspector could change his mind over a period of time about the seriousness of a particular regulatory violation but here there is less than a month between Inspector Wehr's "writings" on this identical subject and in any case, there is no evidence in this record of any empirical substantiation of his current opinion that this violation was "S & S." I therefore conclude that the cited violation was non "S & S."

Turning now to the matter of the inoperative dead man switch cited in 104(a) Citation No. 2399220, the issue is once again whether this admitted violation is a "significant and substantial" one.

I have some problem with what I perceive to be an inconsistent position taken by the Secretary with regard to the importance of the dead man switch as a safety item on jeeps used in the mines. To begin with, the Act directs

the Secretary of Labor to develop mandatory safety standards to protect the nation's miners. The Secretary, in his wisdom, has so far not seen fit to require the installation of dead man switches on personnel carriers. Therefore, the inoperative dead man switch complained of herein was not required to be installed on the jeep to begin with, and could in fact have been completely removed by the operator at any time. The only violation herein involved leaving the switch on the jeep in an inoperable condition.

In this one case, the Secretary takes the position that this is a "significant and substantial" violation of the mandatory standards "reasonably likely" to cause a "fatal" injury. Yet, at the same time, the Secretary admits that the dead man switch is not a required piece of equipment on this jeep and in fact other jeeps are operating without one in the same mine, apparently with the Secretary's blessing.

I conclude that if it truly is a "significant and substantial" safety hazard to operate a personnel carrier with an inoperable dead man switch, the Secretary, by regulation, would require such a switch in the first instance.

At the hearing, the Secretary's counsel argued that a jeep that has an inoperable dead man switch is not the equivalent of a jeep without such a switch at all, because of the potential for reliance on the availability of the switch and the assumption that it works. A case for this position possibly could be made. However, the evidence adduced at the hearing was to the effect that the only accident that any witness could recall involving a throttle sticking open was on a vehicle that didn't have a dead man switch installed, and therefore was presumably not in violation of anything. The only other evidence on the significance of this violation was an opinion which was not factually supported in the record.

The test is whether this violation has a reasonable likelihood of resulting in serious injury. I do not find any evidentiary support for that in this record and therefore I do not find that the violation was "significant and substantial." Mathies Coal Company, supra.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and considering the criteria contained in section 110(i) of the Act, respondent is assessed a civil penalty in the

amount of $20 for section 104(a) Citation No. 2397217, issued on February 1, 1985, for a violation of 30 C.F.R. 75.1403 and $20 for section 104(a) Citation No. 2399220, issued on March 19, 1985, for a violation of 30 C.F.R. 75.1725(a).

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $40 within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

Roy J. Maurer
Administrative Law Judge