FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 14 1986

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-46-R
	:	Citation No. 2703324; 10-16-85
	:	Docket No. WEVA 86-98-R
	:	Citation No. 2703528; l-13-86
v.	:	Docket No. WEVA 86-104-R
	:	Citation No. 2704403; l-22-86
	:	Docket No. WEVA 86-105-R.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 2704404; l-22-86
	:	Docket No. WEVA 86-106-R
	:	Citation No. 2704405; 1-22-86
	:	Docket No. WEVA 86-107-R
	:	Citation No. 2704406; l-22-86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 86-51
	:	A.C. No. 46-03805-03688
	:	Docket No. WEVA 86-133
	:	A.C. No. 46-03805-03707
	:	Docket No. WEVA 86-134
	:	A.C. No. 46-03805-03708
v.	:	
	:	Docket No. WEVA 86-199
	:	A.C. No. 46-03805-03712
SOUTHERN OHIO COAL COMPANY, Respondent	:	Martinka No. 1 Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Respondent/Petitioner;
David A. Laing, Esq., and Mark S. Stemm, Esq., Southern-Ohio Coal Company, Columbus, OH, for Contestant/Respondent

Before: Judge Fauver

These consolidated proceedings are contests filed by Southern Ohio Coal Company, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., to review six citations issued by the Secretary of Labor, and petitions by the Secretary, under section 110(i) of the Act, for civil penalties for the violations alleged in the six citations.

The basic issue is whether water pumps specified in the citations are "permanent pumps" within the meaning of 30 C.F.R. § 75.1105.. If they are permanent pumps, the safety standard requires that they be contained in fireproof housing and that they be air-vented into a return entry of the mine. It is acknowledged that they were not so housed and vented at the time the citations were issued. Other issues raised are:

1. Whether the reference to "permanent pumps" in 30 C.F.R. § 75.1105 is unconstitutionally vague.

2. Whether MSHA's actions with respect to the interpretation and enforcement of 30 C.F.R. § 75.1105 have denied SOCCO due process.

3. Whether the water pump violations, if any, were "significant and substantial" within the meaning of § 104(d) of the Act.

Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, reliable and probative evidence establishes the following:

FINDINGS OF FACT

1. Citation No. 2703324 was issued October 16, 1985, when MSHA Inspector John Paul Phillips observed that the air current used to ventilate a booster pump was not vented directly into the return. The pump was a 20 Horsepower T & T fresh water pump located at the No. 9 stopping inby. The pump was reasonably expected to be in this location at least one year.

2. Citation No. 2703528 was issued January 13, 1986, when Inspector Phillips observed that a gathering pump was not housed in a fireproof enclosure or area with the air current coursed directly into the return. The pump was a 10 Horsepower T & T 250 volt direct current pump located at No. 9 stopping in the track heading of the No. 13 left section. The pump had been in this location about a year and a half.

3. Citation No. 2704403 was issued January 22, 1986, when he observed that a booster pump was not housed in a fireproof structure and the air current used to ventilate the pump was not coursed directly into the return. The pump was a 20 Horsepower T & T fresh water pump located at No. 6 stopping. The pump had been in this location at least one year.

4. Citation No. 2704404 was issued January 22, 1986, when he observed that a gathering pump was not housed in a fireproof structure with the air current coursed directly into the return. The pump was a 10 Horsepower T & T direct current pump located at No. 50 Block, 1 East Track. The pump had been in this location for about three to five years.

5. Citation No. 2704405 was issued January 22, 1986, when he observed a gathering pump not installed in a fireproof area with the air current vented directly into the return. The pump was a 10 Horsepower T & T direct current pump located at the No. 9 stopping in the No. 3 Butt Section. The pump had been in this location at least one year.

6. Citation No. 2704406 was issued January 22, 1986, when he observed a gathering pump not housed in a fireproof 'structure with the air current vented directly into the return. The pump was a 10 Horsepower T & T pump located at No. 21 stopping in the No. 3 Butt Section. The pump had been in this location for at least one year.

7. None of the pumps cited was in a working section. Nor did the pumps advance with any working section.

8. Given the length of time at each location, and each pump's function and expected use, long-term installation and use of each pump were clearly established by the evidence.

Booster Pumps

9. The function of a booster pump is to boost the water pressure at the working faces in the working sections inby the pump. There are 10 booster pumps in the mine. At the time of hearing, all were located in the track haulage entry outby the working sections. Booster pumps generally stay in the same location until the sections served by them are driven up and pulled back on retreat. They are usually in the same place at least one year.

Gathering Pumps

10. The function of a gathering (or "dewatering") pump is to pump water from local swags along the track or in the intake entry, and discharge the water into the main reservoir or into a main sump area. There are 39 gathering pumps at the mine. At the time of hearing, each was located in the track entry, outby the working sections. A gathering pump usually stays in the same place until an inby section is driven up and the longwall goes in and retreats to the area where the pump is located: then the pump is moved. They usually stay in the same place for at least one year.

DISCUSSION WITH FURTHER FINDINGS

The essential facts are not in dispute. Inspector John Paul Phillips, an electrical inspector out of MSHA's Morgantown, West Virginia, District Office, began an electrical inspection at Martinka in October, 1985. Inspector Phillips issued six § 104(a) citations for violations of 30 C.F.R. § 1105 between October 16, 1985, and January 22, 1986.

Inspector Phillips issued Citation Nos. 2703324 and 2704403 when he observed that two 20 Horsepower fresh water "booster" pumps were not housed in fireproof structures and the air currents used to ventilate the pumps were not coursed directly into the return. Citation Nos. 270328, 2704404, 2704405, and 2704406 were issued when he observed that four 10 Horsepower "gathering" pumps were not housed in fireproof structures and air currents ventilating the pumps were not coursed directly into the return. None of the pumps involved in these citations was located in a working section. Nor did any of the pumps advance with any working section.

Regular inspections of the Martinka Mine are performed by MSHA inspectors out of the Subdistrict Office in Fairmont, West Virginia, which operates under the direction of the Morgantown District Office. After several of the citations involved here were issued, it became apparent that a difference in policy existed between the District and the Subdistrict Offices regarding the citation of permanent pumps for a violation of § 1105. At least one inspector from the Fairmont Office, Charles Thomas, who was the regular inspector at Martinka, operated under a "visibility standard" in citing permanent pumps for § 1105 violations. Under this approach, pumps located in frequently traveled areas or in track haulage entries were not cited for violations of § 1105. Permanent pumps in more isolated areas were cited.

Inspector Thomas' approach was at odds with District and National Office policy, which subjects all pumps to § 1105 requirements if they meet the definition of a "permanent" electrical installation as contained in the following part of MSHA's Underground Inspection Manual p. II-471 (March 9, 1978):

POLICY

A permanent electrical installation is electric equipment that is expected to remain in place for a relatively long or indefinite period of time.

Consequently, the following electric equipment should be considered permanently installed:

> All rectifiers, transformers, high-voltage switchgear and battery chargers which are not located on and advanced with the working section; rotary converters; motor-generator sets; belt drivers; compressors; pumps (except those excluded below) and other similar units of electric equipment.

The following electric equipment should not be considered permanently installed:

> Electric equipment which is located on and advanced with the working section, self-propelled electric equipment, portable pumps and portable rock dusters which are regularly moved from one location in the mine to another, and similar electric equipment. (Emphasis supplied.)

All of the cited pumps meet the Manual definition of a permanent installation. They were not located in working sections and did not advance with working sections. They did not regularly move from one location in the mine to another. When installed they were expected to remain in place for a relatively long or indefinite period.

The citations allege a violation of 30 C.F.R. § 75.1105, which is a verbatim restatement of § 311(c) of the Act:

> 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 fire-proof construction. (Emphasis supplied.)

The term "permanent pump" is not specifically defined in the Act or Regulation. Section 311(c) of the Act and § 1105 of the Regulations were contained in the earlier Act of 1969. Permanent pumps were not specifically defined there either. Neither legislative history nor case law is helpful on the issue of what constitutes a permanent pump. It is clear, however, that the purpose of § 1105 is to protect miners-against fire and smoke inhalation. It is part of a larger section dealing with fire protection in coal mines. This purpose coupled with the broad language of the standard leads to the conclusion that the standard is meant to have a broad reach to effectuate the purposes of the standard and the Act.

MSHA has interpreted the term "permanent pump" to mean a pump that is expected to remain in place for a relatively long or indefinite period of time. This definition is contained in the MSHA Underground Manual quoted above. The Manual has been in effect since its publication in March 1978.

Respondent contends that.use of the term "permanent pump" in the standard is unconstitutionally vague and overbroad. In order to be constitutional, a standard must not be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109 (1972).

A standard is not unenforceably vague if a reasonably prudent person familiar with the mining industry and protective purposes of the standard would recognize the hazardous condition which the standard seeks to prevent. Secretary v. Ozark-Mahoning Co., 3 FMSHRC 2117, 2118 (1986); Secretary v. U.S. Steel, 3 FMSHRC 1550, 1533 (1984). "Broadness is not always a fatal defect in a safety and health standard." Secretary v. Alabama By-Products Corp., 2 FMSHRC 1918, 1920 (1982) Many standards must be drafted in general terms "to be broadly adaptable to myrad circumstances" in a mine. Secretary v. Kerr-McGee Corp., 2 FMSHRC 1492, 1493 (1981).

In two cases involving a safety belt standard, the Commission rejected the operators' arguments that 30 C.F.R. § 55.15-5 was unconstitutionally vague and ambiguous, Secretary v. U.S Steel, 3 FMSHARC 1550 (1984); Secretary V. Great Western Electric, 2 FMSHRC 2121 (1983). That standard requires that safety belts and lines be worn by miners where there is a "danger of falling." The operators objected on the grounds that the standard's phrase "danger of falling" was too vague and ambiguous to enable an operator to define all situations where belts and lines must be worn. The Commission ruled, however, that application of a broad standard to particular factual situations did not offend due. process. Sufficient clarity may be provided if an alleged violation is judged by a test of what actions would have been taken under the same or similar circumstances by a

reasonably prudent person familiar with the mining industry, relevant facts, and protective purpose of the standard. 3 FMSHRC at 1553; 2 FMSHRC at 2122. The Commission noted that the specific purpose of § 57.15-5 is the prevention of falls. It ruled that by requiring positive means of protection whenever any danger of falling exists, the standard reasonably achieved its purpose of protecting all miners. Applying this rationale to the instant cases, I conclude that it is reasonable to apply § 75.1105 to a booster or gathering pump expected to remain in place for a long or an indefinite period outby a working section or sections.

Respondent further argues that the Manual definition of "permanent" violates the Administrative Procedure Act (5 U.S.C. § 553.). Section 101(a) of the 1977 Mine Act (30 U.S.C. § 811(a)) requires all rules concerning mandatory health or safety standards to be promulgated in accordance with § 553 of the A.P.A. Further, § 101(a)(2) requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation. Therefore, there would be a violation of the A.P.A. if the Manual policy were more than an interpretation or general statement of policy. However, I find that the Manual definition is a general policy statement of MSHA's interpretation of "permanent." It is not subject to the A.P.A.'s notice and comment requirements.

Respondent also contends that the conflicting enforcement policies of MSHA's District (Morgantown) and Subdistrict (Fairmont) Offices will result in a denial of due process if MSHA is permitted to charge a violation in these cases.

It is clear from the record that it is MSHA's official policy to follow the Manual definition of permanent electrical installations in determining whether a particular pump is "permanent." This approach is followed by the Morgantown District Office, as stated by Inspector John Paul Phillips and Electrical Supervisor Mike Hall. In addition, Gene Fuller, Safety Specialist from the MSHA National Office, testified that this is a nationwide enforcement policy.

The fact that the Subdistrict Office in Fairmont may have had a less stringent enforcement policy for some period does not estop the Secretary from enforcing the Manual definition in these cases. Respondent has had a copy of the 1978 Manual for many years. It was put on notice by Inspector Phillips' discussion and subsequent citations in September, 1985, that the Manual definition would be enforced at Respondent's mine. The citations at issue in these cases were issued a month after such notice by Inspector Phillips.

The policy previously applied by the Fairmont Subdistrict Office was unauthorized and was contrary to national policy as shown by the Manual, which provides that "The guidelines in this chapter supersede all previous instructions as of February 1, 1978, relating to the same subject category." The situation was corrected by the District manager upon learning of the conflict. All subdistrict supervisors and personnel have been brought into line with National Office policy.

In Secretary of Labor v. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1422 (1981), the Commission stated:

> . ..[An] estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act. See El Paso Rock Quarries, Inc., 3 FMSHRC 35, 38-39 (1981). Such a defense is really a claim that although a violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as the confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the penalty....

Even in those cases where the courts have recognized an estoppel defense, it has been held that estoppel does not apply "if the government's misconduct [does not] threaten to work serious injustice and if the public's interest would...be unduly damaged by the imposition of estoppel." King Knob, 3 FMSHRC at 1422, quoting United States v. Lazy F.C. Ranch, 481 F.2d, 985, 989 (9th Cir. 1973). In view of the availability of penalty mitigation as an avenue of equitable relief, finding an operator liable would not work such a "profound and unconscionable injury" that estoppel should be invoked. King Knob, 3 FMSHRC at 1422.

In order to be considered a "significant and substantial" violation, it must be found that:

> . ..based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

Under this test, a "significant and substantial" finding turns on whether a reasonable likelihood of harm exists due to the violation. The inspector issued the citations when he observed that the pumps were not housed in fireproof structures with the air currents vented directly into the return. All six pumps were in working order and had energized circuits at the time the condition was cited. The inspector testified that any of the equipment could wear out, motors could fail or short circuit. Events of this nature could happen with electrical equipment after any length of time. He stated that if a pump got hot, it could ignite the coal or any combustible materials around it. He also stated that in his opinion, "even smoke from insulation in the pump, when they fail, could ignite or cause fumes that would be harmful to employees" (Tr. 30).

MSHA Electrical Supervisor Hall also testified as to similar hazards presented by failing to house and vent the pumps.

The Commission emphasized in National Gypsum that the inspector's "independent judgment is an important element in making 'significant and substantial' findings, which should not be circumvented." 3 FMSHRC at 825-826. The inspector's conclusions in this case were based on his observations of unhoused and unvented pumps and the number of employees who would have been affected by fire or smoke moving into the working sections. The inspector made a careful assessment of the conditions he observed and concluded that the hazard was reasonably foreseeable or reasonably likely. I credit his expert opinion on these matters, and find that the violations were "significant and substantial" within the meaning of section 104(d) of the Act.

In assessing civil penalties, I give substantial weight to the confusion created by MSHA's inconsistent enforcement policies at its Morgantown District and Fairmont Subdistrict Offices. I find this to be a substantial mitigation of the violations, and conclude that a civil penalty of $10 for each violation is appropriate.

CONCLUSIONS OF LAW

1. The Commission's administrative law judge has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.1105 as alleged in Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704405, and 2704406.

3. Respondent is ASSESSED a civil penalty of $10 for each of the above six violations.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citations Nos. 2703324, 2703528, 2704403, 2704404, 2704405, and 2704406 are AFFIRMED.

2. Respondent shall pay the above civil penalties in the total amount of $60 within 30 days of this decision.

William Fauver
William Fauver
Administrative Law Judge

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