

CCASE:
JIM RESOURCES V. SOL (MSHA)
DDATE:
19870115
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JIM WALTER RESOURCES, INC.,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDING

Docket No. SE 87-29-R
Citation No. 2810754; 12/9/86

Bessie Mine

DECISION

Appearances: R. Stanley Morrow, Esq. and Harold D. Rice, Esq.,
Birmingham, Alabama, for Contestant;
William Lawson, Esq., Office of the Solicitor,
U.S. Department of Labor, Birmingham, Alabama
for Respondent.

Before: Judge Weisberger

Statement of the Case

Docket Number SE 87-29-R is a notice of contest filed by Jim Walter Resources, Incorporated on December 12, 1986 to review a Citation, issued December 9, 1986, and a underlying safeguard notice issued December 5, 1986 by an inspector of the Mine Safety and Health Administration under Section 104(a) of the Act.

In this citation December 19, 1986 was provided as the date that termination was due. Subsequently, this date was extended until January 19, 1987.

On December 12, 1986 Contestant filed a Motion For Expedited Proceedings. On December 12, 1986, this case was assigned to me by Chief Judge Paul Merlin. On December 12, 1986 in a conference call between Contestant, Respondent, and the undersigned it was agreed that trial for this matter be scheduled for January 5, 1987. By Notice of Hearing dated December 19, 1986 Contestant's Motion For Expedited Proceedings was granted and the matter was set for hearing in Birmingham, Alabama on January 5, 1987. The hearing was held as scheduled. Bill Pitts, Gerald Tuggle, James A. Jones, Stephen W. Vaughn, and Edward Scott testified for Respondent. Bobby Taylor testified for Contestant.

Applicable Statute and Regulations

Section 314(b) of the Act which also appears in 30 C.F.R. 75.1403 provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Notice to Provide Safeguards and Citation

The subject notice to provide safeguards dated December 5, 1986 provides as follows:

Present means of controlling the underground rail traffic is inadequate in that a person designated by the operator to give clearance was not provided nor blocked signals being used.

This is a notice to provide safeguard requiring all underground rail traffic to require clearance from a person so designated by the operator or block signals to be installed and maintained in an operative condition to provide clearance.

The subject citation, dated December 9, 1986, provides as follows:

The mine operator failed to comply with a notice to provide safeguard number 2810752 issued December 5, 1986 that required all underground rail traffic to require clearance from a person so designated by the operator or block signals to be installed and maintained in an operative condition to provide clearance. No plan nor work was presented to comply with the safeguard on the termination date due December 9, 1986 at 8 o'clock a.m.

Stipulations with Regard to Jurisdiction

The parties stipulated as follows:

1. The operator is the owner and operator of the subject mine.
2. The operator and the mine are subject to jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this case.
4. The MSHA Inspector who issued the subject citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

Findings of Fact and Discussion

In Contestant's Bessie Mine, aside from walking, the only way of transporting men and material from the entry to the various work area is by way of transportation vehicles such as jeeps, locomotives, or trip motors, all of which must travel along a single track. This track is used for transportation of vehicles going into and out of the mine. These transportation vehicles use the track during every shift. In order to prevent head-on collisions Contestant has furnished each transportation vehicle with a two-way telephone-radio which gets its power from a trolley line which is also used to power the vehicle. In general, according to the uncontradicted testimony of Inspector Gerald Tuggle, and Contestant's motorman James A. Jones who testified for Respondent, an operator when leaving a certain area, such as Header Number 3, would call to say that he is leaving Header Number 3 and going to Header Number 4. These calls are done in transit and the operator does not wait for any response.

According to the uncontradicted testimony of Inspector Tuggle and motorman Jones, the track in the Bessie Mine contains steep upgrades followed by steep downgrades especially throughout the Palos Shaft between Header Number 3 and Header Number 7. Indeed, the uncontradicted testimony of Tuggle and Jones establishes that the slope of the upgrades and downgrades are so steep, as to create numerous blind spots where vision is so limited that an operator of a vehicle at that point is unable to see a vehicle coming at him from the opposite direction and that in essence these conditions are "unique" to Bessie Mine (Tr. 106). Blind spots are also present in areas where the track leaves the belt and enters a S curve. Mr. Tuggle's uncontradicted testimony established that other mines may have upgrades and downgrades, but they are not as bad as in the Bessie Mine. Also, there are areas of the track that have rock dust, debris or sand which prevent a vehicle's wheels from fully touching the rail, thus eliminating a ground for the telephone-radio and causing static or interference. According to the uncontradicted testimony of Tuggle, sand is used "a lot" due to the hills and hollows of the track at Bessie Mine.

Contestant's only witness, Safety Inspector Bobby Taylor, stated that in his opinion the present telephone-radio system of preventing head-on collisions or collisions in blind spots is "not inadequate." In essence he said that in general in approaching blind spots one should slow down and operate at a speed which is consistent with track conditions. Although excessive speed might be a contributing factor to collisions, the

issue here is whether Contestant's telephone-radio system, when used while traveling at proper speed, resulted in any increased risk of collision.

Taylor testified that when approaching a blind spot it is possible to be warned by the lights of an oncoming vehicle. He testified that when the vehicle lights are not functioning one can see cap lights of the miners riding in the vehicle. On cross-examination Jones admitted that it is possible to see the light of a oncoming jeep before a collision. However, it can not be found that the risk inherent in approaching a blind spot, i.e., not knowing for certainty that there is not any vehicle beyond the blind spot, is minimized to any great degree by being able to see the light on the oncoming vehicle. There is no clear convincing evidence as to the distance which one can see and be warned by a light of the oncoming vehicle especially approaching the end of a blind area or going around an S curve at normal speed.

The balance of the evidence indicates that the present system of controlling traffic creates a risk of injury due to the specific conditions of the contour of the track of the Bessie Mine. Indeed, even Taylor indicated that the present system could work "with certain improvements" (Tr. 229). Considerable weight was accorded the testimony of Jones and Scott due to the extensive nature of their experience operating and riding vehicles along the track of Bessie Mine. In this connection it is noted that Jones has been a motorman for 6 years, and Scott worked as a motorman for 20 years and as a fire boss for 12 years. In essence, their testimony corroborates the opinion of Tuggle that under the present system whenever transportation enters a blind spot there is uncertainty in not knowing whether another vehicle is coming in the opposite direction or is stuck beyond the blind spot. Due to the fact that the responsibility of the operator of a vehicle along the track is only to indicate on the telephone-radio that he is leaving a point to go to another point, he can only be warned of a oncoming vehicle or a vehicle disabled in a blind spot if the second vehicle has communicated it is leaving a certain area and the first vehicle heard the transmission. The oncoming vehicle, similarly, will avoid risk of collision only if its telephone-radio received communication from the first vehicle as to its destination. However, the uncontradicted testimony of Tuggle was that material on the track, a condition peculiar to Bessie Mine, prevents a good ground for the telephone-radio and thus prevents adequate reception and transmission. Further, due to the numerous blind spots, caused by steep upgrades and downgrades of the track, and the fact that there is only a single track that carries traffic every shift, the risk of collision is quite high. Indeed, Contestant's witness Taylor testified that about once a week while traveling in a vehicle underground he has unexpectedly met a vehicle coming in the opposite direction and that the vehicle operator did not hear communications from Taylor's vehicle. Tuggle, Scott and Jones also testified to similar occurrences.

It is thus found that the present system, which allows a vehicle operator to proceed into a blind area without receiving positive clearance, increased the risk of collision. Section 304(b) of the Act which also appears at 30 C.F.R. 75.1403, in essence authorizes a Federal Mine Inspector to issue safeguards which in his judgment will "minimize hazards" with respect to transportation of men and materials. It is clear that the safeguard issued by Tuggle on December 5, 1986 falls within the purview of the above section. This safeguard requires underground rail traffic to require clearance from a person designated by the operator or in the alternative block signals are required. According to the uncontradicted testimony of Tuggle, under a dispatch system a vehicle operator must call the dispatcher before proceeding into a certain area. The operator can proceed into the area only after the dispatcher tells him the area is clear. In a Block System, according to the uncontradicted testimony of Scott and Tuggle, an operator of a vehicle upon entering an area turns on a traffic light. This light remains on until the operator clears the area and turns the light off.

Taylor testified that the present system is better than a dispatcher and as good or better than a Block System. He testified that in the 9 months that he worked at Bessie Mine, which has neither a Block System nor a dispatcher, there were no wrecks. In contrast, he said that at the Number 3 Mine which has a Block System and a dispatcher, in any 9 month period since 1973 there have been more wrecks. However, there were no records produced to provide evidence that the accidents at Number 3 Mine were caused solely by a malfunction of a dispatcher or Block System. They could have resulted from negligence or other causes. What is clear is that the present system creates a risk of injury and that the safeguard in the judgment of Tuggle will minimize the risk. This opinion in essence was corroborated by the testimony of Scott and Taylor. Considerable weight was placed on their testimony due to their extensive experience operating and riding on underground transportation vehicles especially at the Bessie Mine.

The traffic control systems required in the safeguard are clearly not fool proof. On cross-examination Tuggle indicated that there could be people who would not call a dispatcher as required, and Taylor indicated that a dispatcher might erroneously give clearance to two vehicles to enter the same area at the same time. It is clear that any system will not decrease the risk of injury if there is human error. There is no way to insure 100 per cent against human error. However, a dispatcher system used properly, will insure that a vehicle will not enter a blind spot unless it has positive clearance from a dispatcher. This will minimize the hazard of collision inherent in the present system.

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Taylor indicated that with the Block System there is a continuous problem of lights going out. More weight was placed on the testimony of Scott due to his 20 years experience operating and traveling underground vehicles in mines with a Block System in his job as fire boss. It was his testimony that although block lights could go out, these are one of the first items a fire boss inspects. It is concluded that a Block System, which is maintained, will thus minimize risk of collision in blind spots, as under that system a vehicle would not enter an area containing a blind spot if the light is lit. Accordingly, the hazards of the present system will be minimized.

At the hearing no evidence was presented to rebut statements in the December 9, 1986 Citation and testimony of Tuggle that safeguard 2810752 has not been complied with.

Based on all of the above, it is concluded that the safeguard of December 5, 1986 was properly issued. The Contestant has failed to comply with the safeguard issued on December 5, 1986. As such, the citation (2810054) of December 9, 1986 was properly issued.

At the hearing counsel for both parties presented opening arguments. At the conclusion of the hearing counsel for both parties presented proposed findings of facts and posthearing arguments. In reaching my decision I have considered all these.

At the hearing the parties additional stipulations were offered as follows:

1. The history of the company with regard to violations is average.
2. Imposition of a penalty will have no effect on the ability of the operator to continue in business.
3. The size of the operator is medium.
4. The negligence of the operator, in the violation referred to in citation 2810054 is low.
5. The gravity of the violation contain in citation 2810054 with regard to the likelihood of an accident or injury was as testified to by Tuggle.
6. The violation referred to in citation 2810054 was not abated on the representation of counsel. This is not considered to be a lack of good faith.

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ORDER

It is ORDERED that the Contest, filed on December 12, 1986, contesting citation 2810054, be DISMISSED.

Avram Weisberger
Administrative Law Judge