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JIM RESOURCES. V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judge

JIM WALTER RESOURCES, INC.,
CONTESTANT

ONTEST PROCEEDING

v.

Docket No. SE 87-35-R
Citation No. 2811378; 12/10/86

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

No. 7 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 Merlin

This case is a notice of contest filed by Jim Walter Resources, Inc., seeking review of a citation issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for a violation of 30 C.F.R. 75.503.

Citation No. 2811378, dated December 10, 1986, sets forth the condition, or practice in question, as follows:

"The #49 ram car located on the No. 8 section (008A0) was not maintained in a permissible condition in that the battery compartment, which contains 120 cells, had one cell "jumped out" or "bypassed" decreasing the nominal voltage of the batteries by 2 volts."

30 C.F.R. 75.503, which restates section 305(a)(3) of the Act, 30 U.S.C. 865(a)(3), provides as follows:

"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."

"Permissibility" is defined in 30 C.F.R. 75.2(i) as follows:

"Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a 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 mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on March 30, 1970, relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of 75.500 within the periods prescribed therein."

The maintenance requirements for electronic face equipment are found at 30 C.F.R. 75.506Å1(a) and provide, in pertinent part:

"electronic face equipment which meets the requirements for permissibility set forth in 75.506 will be considered to be in permissible condition only if it is maintained so as to meet the requirements for permissibility set forth in the Bureau of Mines schedule under which such electric face equipment was initially approved, or, if the equipment has been modified, it is maintained so as to meet the requirements of the schedule under which such modification was approved" (emphasis added).

30 C.F.R. 18.15 provides the procedures in which an operator must follow in order to modify any feature of approved or certified equipment. That section states:

"If an applicant desires to change any feature of approved equipment or a certified component, he shall first obtain MSHA's concurrence pursuant to the following procedure."

The parties agreed to the following stipulations: (1) the operator is the owner and the operator of the subject mine; (2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the administrative law judge has jurisdiction of this case; (4) the 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; (6) a copy of the subject citation at issue in this proceeding is authentic and may be admitted into evidence for purposes of establishing its issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein; (7) the operator admits that one cell on the battery of the ram car referred to in the subject citation was "jumped out" or "bypassed" (Tr. 5Ä6).

The instant matter is a notice of contest, but in order to avoid duplicative litigation the parties agreed to the following additional stipulations which would be relevant to a potential penalty case: (8) the operator's size is medium; (9) imposition of a penalty will not affect the operator's ability to continue in the business; (10) the alleged violation was abated in good faith; (11) the operator's history of prior violations is average for its size; (12) injury was unlikely (Tr. 7).

A letter dated February 27, 1987 to the Solicitor from Carol M. Boring, Chief, Electrical Power Systems Branch of the Mine Safety and Health Administration states, as follows:

"This is in reply to Mr. George D. Palmer's letter dated February 13, 1987 and our telecon of February 26, 1987."

"I am Chief of the Electrical Power Systems Branch, Division of Electrical Safety. This branch has the responsibility of approving electric motor driven equipment for use in gassy mines, under Part 18 of Title 30 Code of Federal Regulations. I have reviewed the records for Approval No. 2GÄ2275-10. This approval was issued for a Jeffrey Mining Machinery Division, Type 404 BatteryÄPowered RAMCAR. The RAMCAR is approved with 120

cells giving a total machine voltage of 240 volts." (Government Exhibit 2).

The facts of this case are not in dispute. The cited ram car is a piece of electrical face equipment which transports coal back and forth from the face to the feeder (Tr. 12). It was in service when the inspector cited it (Tr. 14). The ram car was originally approved as permissible by MSHA with 120 cells and a voltage of 240 (Tr. 16, 39-40, 57, 124; Government Exhibit 2). One cell on the ram car's battery had been bypassed or jumped out (Tr. 13-14, 16; Stipulation 7). The cell had been bypassed with a welded electrical connection (Tr. 54, 110, 132; Operator Exhibit 6). The effect of bypassing was to reduce the number of cells from 120 to 119 and decrease voltage from 240 to 238 (Tr. 24, 36, 62, 124). Bypassing one cell does not create a hazard and poses no immediate threat of injury (Tr. 64, 95; Stipulation 12). However, when multiple cells are bypassed, the temperature of the battery increases and at some point, heat could cause other cells to short out and create arcing or sparking (Tr. 67, 72, 74, 114-117).

I conclude a violation existed. The terms on which the ram car was initially approved as permissible are explicit: 120 cells and 240 volts. Bypassing is a deviation from the approved wiring diagram that cannot be allowed because there is no provision for it. As suggested at the hearing, it may be that through a field change modification submitted to MSHA, the operator can obtain permission to bypass a cell, but that inquiry is beyond the scope of these proceedings (Tr. 17). In *Mesa v. Amoco Steel Corporation*, (Docket No. HOPE 76X487-AP) dated May 9, 1977 (unpublished) Administrative Law Judge Broderick concluded:

"bridging cells in a battery-powered ram car used as face equipment substantially alters the characteristics of the equipment and therefore destroys its permissibility. I conclude that bridging cells in the battery compartment is a violation of 30 C.F.R. 75.503."

I agree with Judge Broderick and follow his decision.

The operator's argument that the battery can be separated from the ram car for purposes of permissibility, cannot be accepted. As all witnesses agreed, the battery is an integral part of the ram car (Tr. 16-17, 76, 78, 124). Further, the operator's assertion that the requirement of 240 volts can be disregarded because voltage decreases to 204 during the shift, also must be rejected. If the ram car begins the shift with less than 240 volts, it will decrease below 204 during the shift (Tr. 92-93). I accept the electrical inspector's testimony that during the shift the voltage should not go below 204 (Tr. 90-91).

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Admittedly, bypassing one cell is not serious. But gravity is not the test of whether a violation exists. Rather, it is one of the six criteria to be evaluated in determining the amount of civil penalty to be assessed. Care must be taken not to confuse the various concepts encountered when interpreting the Act. Indeed, acceptance of the operator's position would take enforcement of the Act down an uncertain road where a violation would originate at some imperceptible and undefined point. Thus, if bypassing one cell is allowed, what of two, six, ten, or twenty? Conceptually, and practically, such an approach cannot work.

The post-hearing briefs of the parties have been reviewed. To the extent they are inconsistent with this decision, they are rejected.

In light of the foregoing, it is ORDERED that the citation be AFFIRMED and that the operator's notice of contest be DISMISSED.

Paul Merlin
Chief Administrative Law Judge