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MSHA V. CONSOL PENNSYLVANIA COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 7, 1989

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 89-111
A.C. No. 36-07230-03557

v.

Bailey Mine

CONSOL PENNSYLVANIA COAL
COMPANY,
Respondent

DECISION

Appearances: Nanci A. Hoover, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Michael R. Peelish, Esq., Consol Pennsylvania Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty for an alleged violation filed by the Secretary of Labor against Consol Pennsylvania Coal Company, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820. An evidentiary nearing was held on July 11, 1989. The parties have filed post-hearing briefs.

Citation No. 3083738 dated January 4, 1989, charges a violation of 30 C.F.R. 75.1100-2(e)(2) for the following condition or practice:

> "A fire extinguisher and 240 lb of rock dust was not provided for an electrically operated water pump located 100 feet outby the face of the No. 1 return entry in the 5 B Section."

30 C.F.R. 75.1100-2 provides in pertinent part as follows:

> 75.1100-2 Quantity and location of firefighting equipment.
>
> (a) working sections. (1) Each working section of coal mines producing 300 tons or

more per shift shall be provided with two portable fire extinguishers and 240 pounds of rock dust in bags or other suitable containers; waterlines shall extend to each section loading point and be equipped with enough fire nose to reach each working face unless the section loading point is provided with one of the following:

(i) Two portable water cars; or

(ii) Two portable chemical cars; or

(iii) One portable water car or one portable chemical car, and either (a) a portable foam-generating machine or (b) a portable high-pressure rock-dusting machine fitted with at least 250 feet of hose and supplied with at least 60 sacks of rock dust.

* * * *

(b) Belt conveyors. In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose with fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

(c) Haulage tracks. (1) In mines producing 300 tons of coal or more per shift waterlines shall be installed parallel to all haulage tracks using mechanized equipment in the track or adjacent entry and shall extend to the loading point of each working section. Waterlines shall be equipped with outlet valves at intervals of not more than 500 feet, and 500 feet of firehose with fittings suitable for connection with such waterlines shall be provided at strategic locations. Two portable water cars, readily available, may be used in lieu of waterlines prescribed under this paragraph.

(d) Transportation. Each track or off-track locomotive, self-propelled man-trip car, or personnel carrier shall be equipped with one portable tire extinguisher.

(e) Electrical installations. (1) Two portable fire extinguishers or one extinguisher having at least twice the minimum capacity specified for a portable fire extinguisher in 75.1100-1(e) shall be provided at each permanent electrical installation.

(2) One portable fire extinguisher and 240 pounds or rock oust shall be provided at each temporary electrical installation.

At the prehearing conference counsel for both parties agreed to several stipulations which were placed on the record at the hearing held the next day. These stipulations are as follows:

(1) The operator is the owner and operator of the Bailey Mine located in Washington, Pennsylvania;

(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 over this case pursuant to Section 105 of the Act;

(4) In the two-year period prior to May 27, 1989, the mine had no known violations of the standard contested in this case;

(5) The size of the operator is reflected by the following data:

(i) The mine employs approximately 370 underground and service employees;

(ii) Annual production is approximately 4,659,479 tons;

(iii) The operator operates 33 mines;

(iv) The annual production of all the operator's mines is approximately 49,776,000 tons.

(6) The alleged violation was abated within the required time period;

(7) Imposition of a penalty herein will not affect the operator's ability to continue in business;

(8) The pump in issue was a temporary electrical installation within the meaning of the mandatory standard;

(9) Firefighting equipment at the load center satisfied the requirement of Section 75.1100-2(a), which is not at issue in this case.

The pertinent facts are as follows: The cited pump was in a return entry several hundred feet inby the load center ("A" on Joint Exh. 1, or, 11-12). This location was on the working section but the pump was not within sight of the load center (Tr. 33, 71). The pump received its power from the load center and was used to pump water from the section which had water but was not especially wet (Tr. 73-75). No firefighting equipment was located ac the pump (Tr. 18). The pump was energized (Tr. 17).

It is the operator's position that because the firefighting equipment at the load center satisfied the requirements for such equipment on the working section and because the pump was on the working section, there was no violation. The operator argues that having met its obligations under subparagraph (a) of 75.1100-2 which sets forth the firefighting equipment required on the working section, it need do no more. The Secretary, on the other hand, maintains that although the operator has satisfied subparagraph (a), it must also provide the firefighting equipment specified by subparagraph (e) for temporary electrical installations.

I conclude the Secretary's position is correct. The parties have agreed that the pump is a temporary electrical installation within the meaning of the mandatory standard. Stipulation No. 8 1/. Moreover, the stipulation accords with general practice and usage. Thus the term "temporary installation" is defined as:

> An installation made for a limited time only, generally in the area between the loading point and the working face, but also in other locations where portable or mobile equipment is installed for a limited time.

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1/ Much of the operator's brief appears at odds with this stipulation, into which it freely entered. The stipulation is binding in this case.

> A temporary installation is limited to a period of six months. BuMines Coal-Mine Inspectors' Manual, June 1966, pt. 3-18e, p. 53.

Dictionary of Mining Terms, U.S. Bureau of Mines (1969), p. 1127.

The various subparagraphs of 75.1100-2 set forth requirements for firefighting equipment by location and type of machinery. In absence or evidence to the contrary, I believe the health and safety purposes of the Act are best served by insisting that every requirement of the standard applicable by its terms to a given situation, be fulfilled. The operator's witnesses agreed that except for subparagraph (a) other subparagraphs of 75.1100-2 should be read together in cumulative fashion. Thus the mine foreman testified that if a pump such as the one in this case were located in the belt entry, it would have to satisfy not only subparagraph (b) regarding firefighting equipment in a belt entry, but also subparagraph (e) with respect to temporary electrical installations (Tr. 74-75). He also stated the same would be true with respect to a pump in a haulageway that is governed by subparagraph (c) (Tr. 74-75). The operator's foreman asserted that the dual requirements could be imposed on temporary pumps in belt entries and haulageways because such pumps might be further away from firefighting equipment than they would be on a working section. I do not find this argument persuasive. The foreman himself admitted that a temporary pump on a working section could be several hundred feet from the firefighting equipment required by subparagraph (a) (Tr. 78). Moreover, once certain subparagraphs of 75.1100-2 are read and applied together where is no basis in th wording or structure or the mandatory standard to make an exception for subparagraph (a) so that where it applies, nothing else does.

The MSHA Policy Manual is not binding but in appropriate instances it may serve as a guide in interpreting a mandatory standard. U.S. Steel, 10 FMSHRC 1138 (1988), U.S. Steel, 5 FMSHRC 3 (1983), Alabama By-Products, 4 FMSHRC 2128 (1982). However, the 1988 Manual, is of no use here. The manual states that a permanent electrical installation referred to in section (i) of subparagraph (e) is electric equipment expected to remain in place for a relatively long or indefinite period or time. Items of electric equipment considered permanent are listed and those pieces which should not be considered permanently installed are also identified. However, the manual does not define or specify what equipment qualifies as a temporary electrical installation under section (ii). The fact that something should not be considered a permanent electrical installation does not mean it thereby becomes a temporary installation. It may be neither. I agree with the inspector's testimony that certain types of equipment under ordinary circumstances do not qualify as

installations (Tr. 45). In any event, the parties have agreed that the cited pump was a temporary electrical installation. In addition, the manual provides that firefighting equipment required for welding under subparagraph (g) of 75.1100-2 may be satisfied by the equipment required by subparagraph (a) for the working section. (Solicitor's Brief p. 8). The manual gives no rationale for the exemption it allows under (g). Neither the Solicitor nor operator's counsel makes mention of the fact that prior to 1978 the manual allowed the same exemption for temporary installations under (e) as for welding under (g). Since the mandatory standard is the same under the 1977 Act as it was under the 1969 Act, the reason for the manual change regarding subparagraph (e) is not apparent. In this respect also the manual is deficient. However, as set forth above, the decision in this case is based upon a schematic interpretation of the mandatory standard.

In light of the foregoing, I conclude there was a violation.

The evidence shows that the absence of the required firefighting equipment created the danger an individual could be overcome by smoke or electrical shock (Tr. 20-21). However, on the day in question methane was within permissible limits and nothing was wrong with the pump (Tr. 23, 32, 41). Therefore, I conclude gravity was only moderate.

The Commission has set forth specific criteria for establishing whether or not a violation is significant and substantial. Cement Division, National Gypsum Co., 3 FMSHRC 872 (1981), Mathis Coal Co., 6 FMSHRC 1 (1984). As set forth above, the violation presented a discrete safety hazard, but the evidence does not show a reasonable likelihood the hazard would result in injury. The inspector first testified that an injury could happen or was a possibility (Tr. 20, 22). When pressed about "reasonable likelihood" the inspector's subsequent statement that it was reasonably likely, is unconvincing since he premised that conclusion upon methane which he admitted was not at dangerous levels, upon a defect in the pump when there was no defect, and upon dust concerning which there was no testimony (Tr. 22-24). In light of the foregoing, I conclude the violation was not significant and substantial.

The inspector admitted that he had not previously discussed the need for firefighting equipment at temporary pumps with the mine foreman or the operator's safety supervisor (Tr. 91). The inspector said he had called to safety people who traveled with him (Tr. 91). In the prior two years no citations had been issued for this type of violation. Although MSHA is not in any way estopped, these circumstances do affect the degree of fault. I conclude negligence was minimal.

The post hearing responses have been reviewed. To the extent they are inconsistent with this decision they are rejected.

A penalty of $50 is assessed.

ORDER

It is hereby ORDERED that the operator pay $50 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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