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ROCHESTER & PITTSBURG COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROCHESTER & PITTSBURGH COAL COMPANY CONTESTANT	CONTEST PROCEEDINGS Docket No. PENN 88-309-R Citation No. 2889075; 8/24/88
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 88-310-R Citation No. 2889167; 9/6/88 Greenwich Collieries No. 2 Mine Mine ID 36-02404

DECISION

Appearances: Joseph A. Yuhas, Esq., Rochester & Pittsburgh Coal, Ebensburg, Pennsylvania, for the Contestant; B. Anne Gwynn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Cases

In these proceedings, Rochester & Pittsburgh Coal Company (Contestant) seeks to contest two section 104(a) Citations issued on August 24, 1988, and September 6, 1988, respectively. Pursuant to notice, the cases were heard in Ebensburg, Pennsylvania on July 26, 1989. Nevin Davis testified for the Secretary (Respondent). Contestant did not adduce any testimony. Contestant indicated however, that if the citation was sustained, the penalties proposed by the Secretary are "appropriate" (TR. 8).

Respondent filed a posthearing brief on October 3, 1989, and Petitioner filed Proposed Findings and Fact and a Memorandum on October 4, 1989.

Stipulations

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. Safeguard Number 2885431 was properly served by a duly authorized representative of the Secretary of Labor upon agents of the Rochester and Pittsburgh Coal Company on the day, time and place stated therein.

5. Safeguard Number 2885431 had not been vacated or withdrawn at the time citation numbers 2889075 and 2889167 were issued.

6. Citation Numbers 2889075 and 2889167 were properly served by a duly authorized representative of the Secretary of Labor upon agents at the Rochester and Pittsburgh Coal Company on the days, times and places stated therein.

7. The Respondent demonstrated good faith in the abatement of the citation.

8. The assessment of the civil penalty in this proceeding will not affect Respondent's ability to continue in business.

9. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the facts that, (a) the Respondent companies annual production tonnage is $10,554,743, and (b) that the Greenwich Collieries Number Two Mine's annual production tonnage is $1,195,419.

10. Greenwich Number Two Mine was assessed 881 violations over 1,224 inspection days during the 24 months preceding the issuance of Citation Number 2889075; and 911 violations over 1,228 inspection days during the 24 months preceding the issuance of Citation Number 2889167.

Findings of Fact and Conclusions of Law

Nevin Davis, an MSHA Inspector, testified that while at Contestant's Greenwich Collieries No. 2 Mine on May 16, 1988, he observed two of Contestant's employees unloading metal pipes from an elevator in the South Portal. He described the pipes as being approximately 2 inches in diameter and between 2 - 4 feet in length. He said that there were approximately four or five pipes, and that he also observed two "cylindrical" objects on the floor of the elevator that were approximately 1 foot to 1 and 1 1/2 feet high (Tr. 22). He said he testified that ". . . these have been known" (Tr. 23) to speed up or slow down,

thus, in his opinion, creating a hazard of the pipes moving, flying, and striking anyone riding in the elevator. In essence, he said that, considering the size and weight of the pipes, they created a serious hazard to persons present in the elevator. He opined that if the pipes were to strike an employee, there could be "any type of injury," including broken bones or open wounds. He indicated that the elevator in question was not being used as a "man trip" which he defined as a regularly scheduled trip transporting miners at a set time at the beginning or end of a shift. According to Davis, in essence, he was guided by a memorandum dated May 8, 1978, from Donald W. Huntley, District Manager Coal Mine Safety and Health, which stated that "In accordance with the procedure for expansion of provisions under section 75.1403 . . . the following list of provisions should be enforced: No persons shall ride on a cage or elevator with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices." (Government Exhibit 1).

Davis indicated that on May 18, 1988, he issued a safeguard, pursuant to the above memorandum, in which he recited what he observed on May 16, 1988, and which requires ". . . that no person shall be transported on any cages or elevators with equipment, supplies, or other materials. This does not prohibit the carrying of small hand tools, surveying instruments, or technical devices." (Government Exhibit 2).

On August 24, 1988, Davis returned to the No. 2 Mine for a spot inspection and observed a miner exiting the same elevator he had observed on May 16. He said that a miner was riding in the elevator with a metal type portable dolly made out of pipe approximately 2 feet high, and which tapered to the bottom having a dimension of approximately 1 foot by 18 inches to 2 feet. He said that the dolly is designed to be pushed. Davis said that "If the elevator speeds up or slows down suddenly" (Tr. 31) the dolly could strike an employee. He described this event as being likely to occur and said that it could cause injuries to an employee such as broken bones or bruises. In view of the presence of an employee, he described the condition as serious, and presenting the same hazard as the one observed by him on May 16. Accordingly, he issued a citation, alleging, in essence, a violation of the safeguard previously issued on May 18.

On September 6, 1988, Davis returned to the No. 2 Mine and again observed a miner exiting the South Portal elevator with a metal type dolly which he described as the same one that he had observed on August 24, 1988. He again issued a section 104(a) Citation alleging a violation of the safeguard previously issued on May 18, 1988.

The Contestant did not dispute the conditions observed by Davis on May 16, August 24, or September 6, 1988. Contestant, however, challenges the underlying safeguard issued on May 18, 1988, on the ground that it addresses hazards that exist in all mines with elevators. Contestant also argues that the safeguard is not valid as it is insufficiently specific. In contrast, Respondent argues that the underlying safeguard although not being mine-unique was mine-specific.

The Commission in Secretary v. Southern Ohio Coal Co., 10 FMSHRC 963 at 967 (August 1988), noted that the Court of Appeals of the District of Columbia Circuit in Zeigler Coal Co. v. Kleppe, 536 F2d 389 (D.C. Cir. 1976) ". . . has recognized proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans." The Commission in Southern Ohio, supra, at 967 further analyzed Zeigler as follows:

> [T]he court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also, Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370 72 (September 1985) (Carbon County II).

In Southern Ohio, supra, the Commission did not resolve the question of whether a defense to a safeguard may be based on its being generally applicable, as it found that there was no evidence of whether the safeguard was general or mine-specific. Specifically, the Commission in Southern Ohio, supra, at 965 indicated that no evidence was presented as to the circumstances under which the safeguard was issued or the "specific reasons" why the safeguard was imposed at the subject mine. In the case at bar, Davis, who issued the original safeguard, did not indicate that there was any specific reason why the safeguard was issued for the elevator at Mine No. 2. The terms of the Huntley Memorandum (Government Exhibit 1) which led Davis to issue the safeguard, and the terms of the safeguard itself, relate to conditions that are applicable to all elevators and are not unique to

the elevators at Mine No. 2. According to Davis, the riding compartment of the elevator at Mine No. 2 is basically the same, aside from its dimensions, as the elevators found in other mines he inspects. Although the conditions that gave rise to the safeguard, i.e., men riding an elevator that also contained pipes, might be considered hazardous, there is no evidence that this condition is unique to Mine No. 2, or is occasioned by equipment peculiar to Mine No. 2.

I find that generally, in allocating the burden of proof, one factor taken into account is which Party has the best knowledge of the particular disputed facts (Lindahl v. Office of Personnel Management, 776 F.2d 276 (Fed. Cir. 1985)). The burden is not placed upon a Party to establish facts particularly within the knowledge of its adversary. In this connection, it appears that Respondent would have particular knowledge as to the circumstances under which the safeguard was issued, and the existence or need of similar safeguards at other mines (See, Southern Ohio, supra, at 967-968). In addition, it has been held that, generally, MSHA has the burden of putting forth a prima facie case of a violation (Miller Mining Co., Inc. v. Federal Mine Safety and Health Review Commission, 713 F.2d 487 (9th Cir 1983) See also, Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 39 (7th Cir. 1975)). As such, it had the burden of establishing all elements of the citation including the validity of the underlying safeguard.

I thus conclude, based on all the above, that Petitioner has failed to establish that the safeguard in issue was mine-specific to the subject mine. As such, based on the rationale of Zeigler, supra, that applies with equal force to the case at bar, I conclude that because it has not been established that the safeguard was mine-specific, it therefore is invalid as it was not promulgated pursuant to the rule-making procedures of section 314(b) of the Act. (See Beth Energy Mines, Inc., 11 FMSHRC 942 (Judge Melick 1989), Southern Ohio Coal Co., 10 FMSHRC 1564 (Judge Weisberger 1989.)) Accordingly, I find that the Citations herein should be dismissed, inasmuch as they were predicated upon an invalid safeguard.

ORDER

It is ORDERED that the Notices of Contest, Docket Nos. PENN 88-309-R and PENN 88-310-R, are SUSTAINED.

Avram Weisberger
Administrative Law Judge