

CCASE:
SOL (MSHA) V. BENNETT TRUCKING
DDATE:
19900517
TTEXT:

~1038

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-29
A. C. No. 15-12602-03505 V1A

v.

Preparation Plant

BENNETT TRUCKING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-34
A. C. No. 15-12602-03503 Q7G

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

Preparation Plant

v.

B & S TRUCKING COMPANY,
RESPONDENT

DECISION

Appearance: G. Elaine Smith, Esq., Office of the Solicitor,
U. S. Department of Labor, Nashville, Tennessee,
for the Secretary;
Susan C. Lawson, Esq., Forester, Buttermore, Turner,
& Lawson, P.S.C., Harlan, Kentucky, for
the Respondent.

Before: Judge Weisberger

Statement of the Case

In these Civil Penalty Proceedings, the Secretary (Petitioner) seeks civil penalties for alleged violation of the Operator (Respondent) of 30 C.F.R. 77.1710(i). Pursuant to notice, a Hearing was held in Johnson City, Tennessee, on March 28, 1990. At the commencement of the Hearing, Petitioner made a Motion for Summary Judgment, but indicated that she would proceed with the Hearing. A decision was reserved on the Motion. Jim Allen Tankersly testified for Petitioner. At the conclusion of the Petitioner's case, Respondent made a Motion for Judgment. After hearing arguments from both Parties on the Motion, a decision granting Respondent's Motion, was announced orally from the Bench. In light of this decision, Petitioner's Motion for Summary Judgment is denied.

Kent 90-29

1. Bennett Trucking Company is a Kentucky corporation which contracts with companies producing coal for resale in Interstate Commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges pursuant to 3(d) of the Act.

2. Bennett Trucking Company contracts with Manalapan Mining Company, Inc., which operates a processing plant in Harlan County, Kentucky, to perform coal hauling to, from, and within said processing plant. As of August 1989, the processing plant produced approximately 1.1 million tons of coal annually.

3. James Bennett is, and was in August 1989, a partner in Bennett Trucking Company.

4. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163935 at the preparation plant, pursuant to 104(a) of the Federal Mine Safety and Health Act of 1977 citing Bennett Trucking Company for a violation of 30 C.F.R. 77.1710(i) because the Mack Coal Truck, vehicle number DM811SX, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

5. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163936 at the preparation plant, pursuant to 104(a) of the Act, citing Bennett Trucking Company for violation of 30 C.F.R. 77.1710(i) because the Mack Coal Truck, vehicle number DM 5855X306607, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

6. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163937 at the preparation plant, pursuant to 104(a) of the Act, citing Bennett Trucking Company for violation of 30 C.F.R. 77.1710(i) because the seat belt buckle on one side of the Mack Coal Truck, vehicle number DM6115zx5621, owned by Bennett Trucking Company and used to haul coal at the preparation plant, had been broken off.

7. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163938 at the preparation plant, pursuant to 104(a) of the Act, citing Bennett Trucking Company for violation of 30 C.F.R. 77.1710(i) because the Mack Coal Truck, company number 2, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

~1040

8. On August 29, 1989, MSHA Inspector Johnnie Smith issued Citation No. 3168465 at the preparation plant, pursuant to 104(a) of the Act, citing Bennett Trucking Company for a violation of 30 C.F.R. 77.1710(i) because the Mack Haul Truck, serial number DM115X6641, owned by Bennett Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts on the operator's side.

9. None of the trucks in question are vehicles required to have "rollover protective structures" (ROPS) pursuant to 30 C.F.R. 77.403a, and none of the trucks in question are equipped, or were equipped in August 1989, with ROPS.

10. The determining factor in deciding whether the trucks in question are vehicles required to be equipped with seat belts pursuant to 30 C.F.R. 77.1710(i) is whether or not "roll protection," as that term is defined at 30 C.F.R. 77.2(w), is provided, and was provided in August 1989, for said trucks.

11. Each of the trucks in question is equipped, and was equipped in August 1989, with a cantilevered "cab-shield," or apron which is attached to the truck bed and extends over the cab from the truck bed, except when the bed is being unloaded.

12. Each of the five citations listed above were terminated on September 8, 1989, after seat belts were provided for each of the trucks in question.

13. The penalty assessment of \$50 for each of the citations listed above (Nos. 3163935, 3163936, 3163937, 3163938, and 3168465), for a total assessment of \$250, would have negligible effect on the ability of Bennett Trucking Company to continue in business.

KENT 90-34

1. B & S Trucking Company is a Kentucky corporation which contracts with companies producing coal for resale in Interstate Commerce, and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges pursuant to 3(d) of the Act.

2. B & S Trucking Company contracts with Manalapan Mining Company, Inc., which operates a processing plant in Harlan County, Kentucky, to perform coal hauling to, from, and within said processing plant. As of August 1989, the processing plant produced approximately 1.1 million tons of coal annually.

3. Ray Ellis is, and was in August 1989, a surface foreman for Manalapan Mining.

~1041

4. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163931 at the preparation plant, pursuant to 104(a) of the Act, citing B & S Trucking Company for a violation of 30 C.F.R. 1710(i) because the Mack Coal Truck, vehicle number IM2B128C4CA008967, owned by B & S Trucking Company and used for hauling and dumping at the preparation plant, was not equipped with seat belts.

5. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163932 at the preparation plant, pursuant to 104(a) of the Act, citing B & S Trucking Company for violation of 30 C.F.R. 1710(i) because the Mack Coal Truck, vehicle number IM2B238C4DA009196, owned by B & S Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

6. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation No. 3163933 at the preparation plant, pursuant to 104(a) of the Act, citing B & S Trucking Company for violation of 30 C.F.R. 1710(i) because the Mack Coal Truck, vehicle number 424DM611SX, owned by B & S Trucking Company and used to haul coal at the preparation plant, was not equipped with seat belts.

7. On August 9, 1989, MSHA Inspector Jimmy A. Tankersly issued Citation N. 3163934 at the preparation plant, pursuant to 104(a) of the Act, citing B & S Trucking Company for violation of 30 C.F.R. 1710(i) because the Mack Coal Truck, vehicle number IM2B128C5DA009191, owned by B & S Trucking Company and used to haul coal to the preparation plant, was not equipped with seat belts.

8. None of the trucks in question are vehicles required to have "rollover protection structures" (ROPS) pursuant to 30 C.F.R. 77.403a, and none of the trucks in question are equipped, or were equipped in August 1989, with ROPS.

9. The determining factor in deciding whether the trucks in question are vehicles required to be equipped with seat belts, pursuant to 30 C.F.R. 77.1710(i), is whether or not "roll protection," as that term is defined at 30 C.F.R. 77.2(w), is provided, and was provided in August 1989, for said trucks.

10. Each of the trucks in question is equipped, and was equipped in August 1989, with a cantilevered "cab-shield," or apron which is attached to the truck bed and extends over the cab from the truck bed, except when the bed is being unloaded.

11. Each of the four citations listed above were terminated on August 29, 1989, after seat belts were provided for each of the trucks in question.

12. The penalty assessment of \$42 for each of the citations listed above (Nos. 3163931, 3163932, 3163933, and 3163934), for a total assessment of \$168, would have negligible effect on the ability of B & S Trucking Company to continue in business.

~1042

Testimony

Jimmy Allen Tankersly, an MSHA Inspector, testified that he issued Citation 3163935 to Respondent, alleging a violation of 30 C.F.R. 1710(i), in that its coal trucks did not have seat belts. He indicated that the violation was significant and substantial in that if the trucks would overturn, it was reasonably likely the drivers would be injured, possibly fatally. He indicated that the Respondent was negligent in that it should have known that the pertinent regulation requires seat belts in the trucks in question. He opined that the cab shields on the trucks do provide protection and can possibly keep the cab from being crushed in the event of the truck turning over. He indicated that the cab shield is on the truck except when it dumps coal. According to Tankersly, when the trucks are dumping coal, they are moving at about 5 miles an hour or less. In essence, Counsel for Petitioner indicated that Tankersly's testimony with regard to Citation 3163935 is applicable to all the Citations issued in these cases.

Discussion and Conclusion of Law

At the conclusion of Petitioner's case, Respondent made a Motion for Judgment in its favor. After hearing argument from both Counsel, the following Bench Decision was rendered (with minor corrections of a non substantive nature):

I have heard argument and have evaluated the evidence and the testimony, and I have read the pertinent regulations. I find that the Motion was well made and the Secretary has not established her case.

The reasons are as follows: the regulation that is at issue, 30 C.F.R. 77.1710(i), requires two elements; first of all it requires a danger of overturning and it also requires that roll protection be provided.

With regard to the first element the Secretary must establish that there is a danger of overturning. I find specifically that the Secretary did not establish a danger of overturning. The evidence from the inspector, Mr. Tankersly, indicated that should a vehicle overturn, there would likely be an injury to a person in the vehicle. This statement falls short of establishing that there was any danger of the vehicle overturning. On that basis alone, I grant the Motion.¹

~1043

I also note that with regard to the second element of section 77.7109(i), it also must be established that roll protection was provided. That term is defined in 30 C.F.R. 77.100(w) as meaning a "framework, safety canopy, or similar protection for the operator when equipment overturns."

The term "similar protection" modifies the terms immediately preceding it, namely "framework" or "safety canopy." The item referred to as a cab shield, as depicted in Respondent's Exhibits 1 to 8, (specifically in Respondent's Exhibits 1, 7, and 4), is clearly not a portion of the cab. It is a portion of another element of the truck, which is raised when dumping coal. Certainly, when it is raised, there is a gap between this item referred to as a cab shield, and the truck itself. Thus I can not see that it's been established that the item referred to as a shield is protection similar to a framework or a safety canopy.

For these reasons, and primarily for the reason that I previously stated, i.e., that it has not been established that there has been any danger of the subject trucks overturning, I grant the Motion. Accordingly, the citations that have been issued herein, shall be dismissed.

ORDER

It is ORDERED that Citation Numbers 3163935, 3163931, 3163932, 3163936, 3163937, 3163938, 3168465, 3163933, and 3163934 be DISMISSED.

Avram Weisberger
Administrative Law Judge

AA

FOOTNOTES START HERE

1. See, Turner Brothers, Inc., 6 FMSHRC 1219 (May 1984) (Not cited in the Bench Decision). In Turner Brothers, supra, Judge Koutras held that section 77.1710(i) does not require seat belts for all vehicles, and that an inspector citing a violation thereunder must first make a finding that there is a danger of overturning before requiring the seat belts be installed on ROPS equipment vehicles.