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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. CENT 89-47
A.C. No. 32-00044-03511

v.

Indian Head Mine

BELLAIRE CORPORATION,
RESPONDENT

DECISION

Before: Judge Cetti

This case is before me upon a petition of assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act". The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the Respondent, Bellaire Corporation (Bellaire), as operator of the Indian Head Mine with the violation of 30 C.F.R. 77.1605(k) and 30 C.F.R. 77.1103(a).

Respondent filed a timely answer contesting the violations. With respect to Citation No. 2930426, Respondent denies Petitioner's allegation that a violation occurred and contests the citation on the grounds that the safety cans referred to in the citation were "identified" within the meaning of 30 C.F.R. 77.1103(a), and on the grounds that the citation constitutes an unlawful retroactive application by Petitioner of a change in policy with respect to the interpretation of 30 C.F.R. 77.1103(a).

With respect to Citation No. 2930427, Respondent denies Petitioner's allegation that a violation occurred and contests the Citation on the grounds that it constitutes an unlawful retroactive application by Petitioner of a change in policy with respect to the interpretation of 30 C.F.R. 77.1605(k).

Citation No. 2934026 alleging a significant and substantial violation of 30 C.F.R. 77.1103(a) and Citation No. 2930427, were issued by federal mine Inspector Sass based on his AAA inspection of Bellaire's Indian Head Mine. Petitioner filed a proposal for penalty in the sum of \$363 for Citation Nos. 2930426 and 2930427.

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Citation No. 2930427 - VACATED

On August 7, 1989, petitioner filed a motion for leave to vacate Citation No. 2930427 and withdraw its related \$206 proposed penalty based upon its determination that the citation was issued in error. The motion is GRANTED. Citation No. 2930427 and its related proposed penalty are vacated.

Citation No. 2930426

The remaining Citation No. 2930426, by agreement of the parties, is now submitted for decision without hearing on stipulated facts, affidavits, exhibits, and supporting briefs. The primary issue is whether the five-gallon cans containing a flammable liquid (gasoline) referred to in Citation No. 2930426 were "properly identified" as that term is used in 30 C.F.R. 77.1103(a).

Stipulations of Facts not in Dispute

1. Bellaire Corporation ("Bellaire") is engaged in mining and selling of lignite in the United States and its mining operations affect interstate commerce.

2. Bellaire is the owner and operator of Indian Head Mine, MSHA I.D. No. 32-00044-03511.

3. Bellaire is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. Citation No. 2930426 (the "Citation"), a true and correct copy of which is in evidence as Exhibit 1, was properly served by a duly authorized representative of the Secretary upon an agent of Bellaire on the date and place stated therein and is admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The proposed penalty will not affect Bellaire's ability to continue business.

7. Bellaire demonstrated good faith in abating the violation.

8. Bellaire is a large mine operator with approximately 1,100,000 tons of production in 1988.

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9. Bellaire has never had any accidents or injuries involving color coded safety cans used to store flammable liquids.

10. September 12, 1988, was the first time that Richard Sass, who issued the Citation, inspected the Indian Head Mine.

11. The safety cans described in the Citation (the "Safety Cans") were all of the five-gallon size, were approximately 12 in number and were all colored red. One of the Safety Cans was labeled "Kerosene" and was empty. All of the other Safety Cans were empty or contained gasoline. All of the Safety Cans complied with Bellaire's Policy on Uniform Color Coding of Safety Cans.

12. All of the Safety Cans were located in the "fuel farm" area at the Indian Head Mine. The fuel farm is approximately 45 ft. x 105 ft. in size; contains gasoline, diesel fuel and oil storage tanks, as well as gasoline and diesel fuel pumps; and is surrounded by a dike approximately two feet high which cannot be crossed by vehicles, as required by state law. A true and correct drawing depicting the fuel farm area at the time of the Citation was issued is attached hereto as Exhibit 2. All of the Safety Cans were inside the dike surrounding the fuel farm and were located within twenty (20) feet of the gas pump. "NO SMOKING", "FLAMMABLE" and "KEEP OPEN FLAMES AWAY" signs were posted at the fuel farm when the Citation was issued. No ignition sources were present.

13. The flammable liquids in the Safety Cans were stored in accordance with all applicable standards of the National Fire Protection Association.

14. There are no factual issues in dispute. The only legal issue in dispute is whether the use of color coding to identify safety cans containing flammable liquids violates 30 C.F.R. 77.1103(a).

15. No hearing is necessary in order for the Administrative Law Judge to decide the legal issue presented by this case.

16. If the Administrative Law Judge finds in favor of Petitioner on the alleged violation of 30 C.F.R. 77.1103(a), Respondent agrees that the violation would be significant and substantial and that the amount of penalty, as proposed by the Secretary of Labor, would be appropriate.

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17. The certified copy of the MSHA Assessed Violations History (Joint Ex. J-1) accurately reflects the history of Bellaire Corporation's Indian Head mine for the two years prior to the date of Citation No. 2930426.

18. The safety cans cited in Citation No. 2930426 were not labeled in writing or lettering of any kind which named the contents of the cans.

19. The safety can labeled "kerosene," which is referred to in Stipulation No. 11, was properly identified and is not covered by Citation No. 2930426.

The Record

The record before me, in addition to the stipulated facts set forth above, includes (1) Bellaire's Policy on Uniform Color Coding of Safety Cans (Ex. 1); (2) a diagram of the fuel farm at the Indian Head Mine (Ex. 2); (3) the affidavit of Inspector Richard Sass (the "Sass Affid.") filed by Petitioner, (4) the affidavit of Robert L. Benson, general superintendent of the Indian Head Mine, the "Benson Affid.") filed by the Respondent, and; (5) the printout of the Respondent's prior history of violations at the Indian Head Mine during the two years prior to the issuance of Citation No. 2930426 (Ex. J).

DISCUSSION

30 C.F.R. 77.1103(a) provides:

Flammable liquids shall be stored in accordance with the standards of the National Fire Protection Association. Small quantities of flammable liquids drawn from storage shall be kept in properly identified safety cans. (Emphasis added).

Citation No. 2930426 describes the alleged violation as follows:

Safety cans, containing a flammable liquid (gasoline), were observed [sic] by the fueling area that were not properly identified with a lable [sic] to show the contents of the cans. This condition creates a hazard of an explosion or fire. (Emphasis added).

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On page 1 of her "Memorandum Brief in Support of Proposal for Penalty, Petitioner states that the sole issue for decision is whether the red safety cans containing gasoline observed at the mine's fuel farm were properly "labeled." That is not the issue. The issue is whether the cans containing gasoline were properly "identified." The cited safety standard expressly requires only "proper identification," not "proper labeling."

The parties now stipulate that there are no factual issues in dispute and that the only legal issue in dispute is whether the use of color coding to identify safety cans containing flammable liquids violates 30 C.F.R. 77.1103(a).1

The key term in the cited regulation is "properly identified." Respondent contends that the regulation permits the use of color coding to identify safety cans containing flammable liquids. The Petitioner, on the other hand, contends that labeling is the only proper means of identification.² The term "properly identified" is not defined in the regulations at Title 30 of the Code of Federal Regulations, and neither party has cited any cases on point.

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It is well established that in construing a statute or regulation, one must first look to the plain language of the provision. *Secretary of Labor v. Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578 (1984); *Secretary of Labor v. Puerto Rican Cement Company, Inc.*, 4 FMSHRC 997, 998 (1982).

The relevant meaning of "identify" is, "to establish the identity of." Webster's Ninth New Collegiate Dictionary (1986) p. 597. It is generally accepted that identity can be established through means other than labeling.

If the Secretary had meant to require labeling in 30 C.F.R. 77.1103(a), she could have easily done so as she did in 30 C.F.R. 57.4402. That regulation deals with storage of flammable liquids in underground metal and nonmetal mines and provides:

Safety cans. Small quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents.

The fact that both regulations deal with the same subject matter (storage of flammable liquids) and that the Secretary expressly required labeling in one instance but not in the other is a clear indication that the Secretary did not intend to require labeling in 30 C.F.R. 77.1103(a).3

Even if the Secretary did intend to require labeling under 30 C.F.R. 77.1103(a), she did not adequately express her intent, and as the Court in *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission*, 681 F.2d 1189, 1193 (9th Cir. 1982) observed:

If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.

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I concluded that the proper construction of 30 C.F.R. 77.1103(a) is that an operator may use any reasonable means of establishing for its employees the identity of flammable liquids stored in safety cans.

The Secretary already has recognized that color coding is a proper means of identification. In 30 C.F.R. 77.1710-1 and 30 C.F.R. 75.1720-1 the Secretary has required the use of distinctively colored hard hats to identify new miners.⁴ Thus, I am hard pressed to give credence to the Secretary's assertion that color coding is not a proper means of identification. Her argument is not persuasive.

It has not been demonstrated that Respondent's color coding system failed to establish for employees at the Indian Head Mine the identity of flammable liquids stored in safety cans. Respondent issued a written policy covering its color coding system. The policy was posted at ten locations at Respondent's mine. All employees were instructed on the policy when it was implemented, and all new employees are instructed on the policy as part of their initial training and orientation. In addition, "FLAMMABLE," "NO SMOKING" and "KEEP OPEN FLAMES AWAY" signs were posted in the fuel farm area at the mine where the safety cans in issue were located. Respondent has not had any accidents involving safety cans used to store flammable liquids since implementing its color coding policy on April 16, 1982. It appears from the record that Respondent's color coding policy works.

The Secretary argues that the safety cans in issue were not properly identified, because the identity of the contents

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was not "readily apparent" to visitors like Mr. Sass who were not familiar with the Respondent's color coding system.⁵ This argument necessarily assumes that federal mine inspectors and other visitors lack common sense and, if left unattended, will without permission experiment or tamper with things at a coal mine. This argument is not persuasive and, if applied to the entire mining operation, would lead to a host of absurd results. The purpose of the Federal Mine Safety and Health Act, as set forth in Congressional findings and declaration of purpose, 30 U.S.C. 801, is to protect miners, which Respondent's color coding system with its training and posting requirements certainly does. The argument that the identity of the contents of the safety cans was not readily apparent to Mr. Sass is not persuasive and certainly is not dispositive of the issue.

If the Secretary truly believes that the identification required by 30 C.F.R. 77.1103(a) should be done specifically by labeling and no other method, she should so modify the regulation in accordance with Section 101(a) of the Mine Act, which requires all rules concerning mandatory health or safety standards to be promulgated in accordance with section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. 553. Further, section 101(a)(2) of the Act, 30 U.S.C. 811(a)(2), requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation (emphasis added).

Based upon the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Citation No. 2950426 is vacated and its related proposed penalty is set aside.

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2. In accordance with Petitioner's motion Citation No. 2930427 is vacated and its related proposed penalty set aside.

August F. Cetti
Administrative Law Judge

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FOOTNOTES START HERE

1. The parties have stipulated that the safety cans cited were in accordance with all applicable standards of the National Fire Protection Association. (Stip. #13).

2. The Secretary has not published or distributed to mine operators any document which interpret 30 C.F.R. 77.1103(a) to require the use of labeling, and prior to the issuance of Citation No. 2930426, the Secretary never advised Respondent that color coding was unacceptable. [Benson Affid. %57 3.B. and 3.C.]

In his Affidavit, Inspector Sass states that it has always been MSHA's policy to require labeling under 30 C.F.R. 7.1103(a), but it clearly appears no such written policy exists. Furthermore, the fact that Respondent utilized its color coding system for almost six and one-half years without being cited and was inspected by MSHA many times during this period tends to demonstrate that no such policy existed at least in MSHA's District 9.

3. Significantly, in 30 C.F.R. 56.20012, the Secretary also expressly required labeling of toxic materials. That regulation provides:

Labeling of toxic materials: Toxic materials used in conjunction with or discarded from mining and milling of a product shall be plainly marked or labeled so as to positively identify the nature of the hazard and the protective action required.

4. 30 C.F.R. 77.1710-1 provides:

Hard hats or hard caps distinctively different in color from those worn by experienced miners shall be worn at all times by each newly employed, inexperienced miner when working in or around a mine or plant for at least one year from the date of his initial employment as a miner or until he has been qualified or certified as a miner by the State in which he is employed.

5. Mr. Sass had never inspected the Indian Head Mine prior to the date he wrote Citation No. 2930426. (Stip. #10).