

CCASE:  
SOL (MSHA) v. NATIONAL KING COAL  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
THE FEDERAL BUILDING  
ROOM 280, 1244 SPEER BOULEVARD  
DENVER, CO 80204

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

CIVIL PENALTY PROCEEDING

Docket No. WEST 89-365  
A.C. No. 05-00266-03556

v.

King Coal Mine

NATIONAL KING COAL, INC.,  
RESPONDENT

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Tom Bird, National King Coal, Inc., Durango,  
Colorado,  
for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The Secretary charges National King Coal, Inc. (National), the operator of an underground coal mine, with a 104(a) significant and substantial violation of 30 C.F.R. 75.606.

National filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Durango, Colorado. Oral and documentary evidence was introduced. Both parties have filed post-hearing briefs, which I have considered along with the entire record in making this decision.

STIPULATIONS

At the hearing, the parties entered the following stipulations into the record, which I accept.

1. National is engaged in the mining and selling of coal in the United States, and its mining operations affect interstate commerce.

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2. National is the owner and operator of King Coal Mine, MSHA I.D. No. 05-0026-03556.

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

4. The administrative law judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary, upon an agent of respondent, on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

7. The proposed penalty will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violation.

9. National is a small mine operator with 111,651 tons of production in 1988.

10. The certified copy of the MSHA assessed violations history, marked as Exhibit P-1, accurately reflects the history of this mine for the two years prior to the date of the citation.

11. If a violation of the requirements of 30 C.F.R. 75.606 is found, the violation is properly designated "significant and substantial."

12. If a violation of 30 C.F.R. 75.606 is found, the appropriate civil penalty under 110(i) of the Act for the violation is \$168.00.

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Cosme F. Gutierrez, the Federal Mine Inspector who issued the citation charging a violation of 30 C.F.R. 75.606, testified as to his experience and qualifications as a mine inspector.

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He has conducted inspections of the King Coal Mine once or twice a year since his transfer from West Virginia in 1984. His inspection includes the entire mine and take approximately two or three weeks to complete. The mine is an underground seam, approximately 4.5 to 5.5 feet thick. The mine has two sectors, generally, consisting of 001 and 002 sections.

On March 23 both, Federal mine inspectors Cosme Gutierrez and David L. Head were inspecting the King Coal Mine. Mr. Gutierrez was making a regular inspection. About 7:20 a.m., Inspector Gutierrez went underground and walked to the third east section which is the 001 section. He proceeded into the third entry where the continuous mine machine was operating and took an air reading. He then stood back away from the continuous miner to observe a mining cycle.

As aptly stated in Respondent's post-hearing brief, "in a typical continuous mining machine section of a coal mine there are several pieces of equipment. These are: the continuous mining machine that cuts coal from the working face, two shuttle cars (rubber-tired coal haulage vehicles) that move the cut coal from the tail-boom of the continuous mining machine outby to the feeder-breaker, and the feeder-breaker which is a stationary piece of equipment that feeds cut coal hauled by the shuttle car onto the conveyor belt system for transport out of the mine."

Inspector Gutierrez testified that he observed the mining cycle as he stood in the intersection between three and four entry. The power kicked off the miner and he saw Mr. Willie Lucero, the face boss and section foreman, go over to Tom Bird, the mine superintendent and tell him that the power kicked off the continuous miner because a shuttle car ran over the miner's trailing cable and damaged it. At the time he overheard this conversation, he was standing about 30 feet from the site of where the incident occurred.

After overhearing the section foreman tell the mine superintendent that the shuttle car ran over the miner's trailing cable, Inspector Gutierrez proceeded to walk the 30 feet to the site of the damaged trailing cable which was in the number three entry by the last open crosscut. Inspector Gutierrez saw the miner's trailing cable lying in the roadway where the shuttle car traveled back and forth. The cable was lying in the roadway three or four feet from the rib. Mr. Gutierrez knelt down and examined the trailing cable. The trailing cable was approximately two inches in diameter. The outer rubber covering had tire marks indented on it which, he observed, were the same type of tire marks that would have been made by the shuttle car that was still

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setting approximately 10 feet back from the miner. Mr. Gutierrez testified that, once the shuttle car ran over the cable and the power shut off the miner, the shuttle car backed off about ten feet from the miner. At the time, the shuttle car was the only piece of equipment in the entry other than the continuous miner.

Inspector Gutierrez testified that he knew the cable had been damaged because the breakers in the power center had tripped or shut off, and he saw "tire marks and indentations in the slightly depressed rubber cable." He testified the miner's trailing cable was not adequately protected because it was in the roadway where the shuttle cars could run over it. He explained that "once you but a cable where it can be run over, there is no longer protection.(1/ FOOTNOTE)

Inspector Gutierrez stated that he observed the trailing cable being repaired and the damage he observed was not in an old pre-existing splice. He told the Superintendent Bird that he was going to issue a citation.

David L. Head has been a federal mine inspector for 14 years, specializing in electrical inspections. On March 23, 1989, Inspector Head, as well as Inspector Gutierrez, was making a regular inspection in the King Coal Mine. At the time the trailing cable power to the continuous miner "kicked off," Inspector Head stated he was in the second entry a short distance away from where Inspector Gutierrez was standing. He could see Inspector Gutierrez. He was only 25 to 30 feet from where he could see into the face area of entry number three. He also overheard the conversation in which the face boss Willie Lucero came to the mine superintendent Bird and told him "that the shuttle car had damaged the cable" and that the power to the miner had tripped." At the time Inspector Head overheard this conversation, he was 30 feet from the spot where the face boss Willie Lucero and the operator of the continuous miner Shane Hurst talked to the mine superintendent and told him that the shuttle car ran over the miner's trailing cable.

Inspector Head testified that mobile equipment was moving with high frequency through the area where the incident occurred. He stated that, in his opinion, a trailing cable in the roadway in the area was not adequately protected and that it was very probable that it could be run over by mobile equipment.

Neither Inspector actually saw the shuttle car run over the miner's trailing cable. Neither saw any splice in the miner's trailing cable. The only witness called by Respondent was Mr. Tom Bird, the mine superintendent. His testimony conflicts with that given by Inspectors Gutierrez and Head. He testified that, when the power "kicked off" the continuous miner, he was at a distant point in entry number two, several hundred feet away from the continuous miner and that Inspector Gutierrez was with him. Mr. Bird stated that, when the power kicked off the continuous miner, the only two employees in that area near the face of the number three entry were the face boss Mr. Willie Lucero and the operator of the miner Mr. Shane Hurst. The face boss, along with the miner's operator, came to him and told him that they needed an electrician to repair the trailing cable. Mr. Bird testified that, when he asked why the "power kicked off," the face boss replied he "thought somebody had run over it with a shuttle car." Mr. Bird stated that they proceeded towards the miner. Mr. Bird, however, did not go directly to the miner. He testified, "I went back to the power center. I unplugged the cable, locked it, tagged it out. . . . I don't recall if anyone was with me then or not. . . . Then I proceeded back to the miner." He stated that, when he got to the miner, there was no shuttle car behind the miner.

Mr. Bird recalled that "somebody that was there" said smoke came out of a splice in the cable located about three feet behind the miner. When the splice in the cable was opened, he found the "black and red conductors (inside the cable) had rubbed together, causing a short-circuit, causing a considerable amount of damage inside the splice." It was Mr. Bird's theory that, as the miner was advancing, "pulling the cable taut" it caused the cable to break down.

Inspector Gutierrez early in the hearing explained that the miner's helper "normally" handles the continuous miner's trailing cable, frequently kicking it or moving it by hand to the rib, out of the way of the mobile equipment traversing the area. Mr. Gutierrez stated that it was the cable helper's job to continually move the cable "out of way" and the cable hadn't been moved out of the way in this case. Mr. Bird testified, "Generally, we don't use a cable helper," and that there was no helper or cable man at the time the power in the trailing cable of the miner "kicked off."

DISCUSSION

30 C.F.R. 75.606 provides as follows:

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

The focus of this standard is to require operators to take appropriate steps to ensure the protection of trailing cables from damage by mobile equipment. The Secretary is correct in asserting that it does not have to prove that a cable was in fact damaged by a piece of mobile equipment in order to sustain a finding of a violation of section 30 C.F.R. 75.606. See, Secretary of Labor (MSHA) v. United States Steel Mining Company, Inc., 6 FMSHRC 155.157 (January 1984). In that case, a violation of 30 C.F.R. 75.606 was found even though the cable was not damaged, but had been lying out in the roadway three feet from the rib and was found therefore to not have been adequately protected.

The Secretary is also correct in asserting that there is no requirement that the Inspector be an eye witness to an event in order to issue a 104(a) citation for a violation arising out of that event. The language of 104(a) requires the Inspector to issue a citation when "upon inspection or investigation" the Inspector "believes that an operator of a coal mine or other mine. . . has violated the Act. . . ." (emphasis added). Emerald Mines Co. v. Federal Mine Safety and Health Review Commission, 863 F.2d 51, 54 (D.C. Cir. 1988). In the case at bar, Inspector Gutierrez investigated the situation and reasonably concluded that there was a violation of 30 C.F.R. 75.606.

I credit the testimony of Inspectors Gutierrez and Head. Based upon their credible testimony summarized above, I find and conclude that trailing cable of the continuous miner was not adequately protected to prevent damage by mobile equipment. Thus there was a violation of the cited mandatory safety standard.

Even though there was no eye witness who saw the shuttle car run over the cable, the evidence presented established that it was more probable than not that the shuttle car ran over the trailing cable while it lay in the roadway and damaged it. Thus, a preponderance of the evidence presented established the violation of the cited safety standard.

Even assuming the face boss and the operator of the continuous miner said they "thought" or "assumed" the shuttle car ran over the cable, it appears (aside from the testimony of the two

federal coal mine inspectors, one of whom saw tire marks on the trailing cable), the very fact that Respondent's face boss and its operator of the continuous miner "thought" that the shuttle car ran over the cable is indicative of the fact that they were aware that the trailing cable was lying in the roadway where it at least could be damaged by a shuttle car. The face boss, the operator of the miner, and the shuttle car operator were the only employees of the Respondent in the general area when the cable was damaged. None of these employees were called to testify. Respondent instead relied on hearsay statements as to what its face boss said and thought. On the other hand, the testimony of the mine inspector as to what they heard the face boss or section foreman tell the mine Superintendent was admissible hearsay even in a court of law where stricter rules of evidence are followed.

As previously stated, I credit the testimony of the two mine inspectors and on the basis of their testimony find there was a violation of the cited safety standard.

The evidence and the stipulations clearly established that the violation was significant and substantial and that, taking into consideration the statutory criteria in section 110(i) of the Act, the Secretary's proposed \$168 penalty is an appropriate penalty for this violation.

ORDER

1. Citation No. 3412632, alleging a violation of 30 C.F.R. 75.606, including its finding that the violation was significant and substantial, is AFFIRMED.

2. A civil penalty of \$168 is ASSESSED for this violation.

3. The Respondent is directed to pay \$168 to the Secretary of Labor within 30 days of the date of this decision, as a civil penalty for the violation found herein.

August F. Cetti  
Administrative Law Judge

1/ pg. 36 FOOTNOTE:

1. A shuttle car is a piece of rubber-tired mobile equipment with a truck-like bed that is loaded with coal by the continuous miner. The shuttle car travels back and forth hauling the cut coal from where it is loaded by the continuous miner to a dump site. The shuttle car weighs approximately 15 to 20 tons and has a load capacity of about seven tons. (Tr. 27).