CCASE:
SOL (MSHA) v. PITTSBURG & MIDWAY COAL MINING
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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
v.
PITTSBURG & MIDWAY COAL
MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 90-104
A.C. No. 29-00096-03536

McKinley Mine

DECISION

Appearances: Mary Witherow, Esq., Margaret Terry, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;

Ray D. Gardner, Esq., John Paul, Esq., The Pittsburg & Midway Coal Mining Co., Englewood, Colorado, for Respondent.

Before: Judge Lasher

This is one of nine dockets which were consolidated for hearing, eight of which were either fully or partially settled after commencement of the hearing. The settlements were approved from the bench on the record.

This docket involves 10 Citations. Petitioner agrees that one Citation should be vacated and Respondent agrees to pay in full Petitioner's administrative level penalty assessment for eight of the Citations. The settlement as to these nine Citations--involving either payment in full of the proposed penalty or vacation of the citation--is reflected in the Order, infra. The remaining Citation, No. 3413368, was fully litigated at the hearing in Albuquerque, New Mexico, on February 12, 1991, and my decision with regard thereto follows:

Preliminary Matters

Based on stipulations (Tr. 29-30, 35), there is no issue as to the Commission's jurisdiction to adjudicate this matter and I also find that Respondent at material times conducted a large coal mining operation (surface) at its McKinley Mine (Tr. 108), that it had approximately 90 mine safety violations during the

two-year period preceding the occurrence of the instant violation in January 1990, that its ability to continue in business will not be jeopardized by payment of a penalty for this violation, and that it proceeded in good faith after notification by MSHA of the subject violation to promptly abate the same. Thus, the remaining mandatory penalty considerations are "negligence" and "gravity." Further, if the "Significant and Substantial" designation is not sustained by evidence, such will also be considered in the factual mosaic underpinning an appropriate penalty determination.

Citation No. 3413368

The condition cited as a violation of 30 C.F.R. 77.502 by MSHA electrical inspector David L. Head on January 11, 1990, is as follows:

> The 16/3 type S.O. Power feeder to the lights on top in the back of dragline #2 was located in the walkway. The A.C. voltage is 300 volts to each light. The S.O. cable was not protected from mechanical damage. Dragline #1 in #2 pit.

30 C.F.R. 77.502, entitled "Electric equipment; examination, testing, and maintenance," provides:

> Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examination shall be kept.

The issues litigated relate primarily to whether the alleged violation occurred, and if so, whether it was significant and substantial. The testimony relating to this Citation appears in the transcript at pages 100-148.

Based on the reliable and substantial evidence in the record, the following findings are made:

1. The conditions existing on January 11, 1990, were those described in the Citation. Inspector Head, in his testimony, described the conditions he observed as follows:

> Upon going to the top of the dragline (Footnote 1) and traveling to the back of the dragline, (Footnote 2) I observed an SO-type cable laying in the walkway in service to a 300-watt lumination system. The cable on the bushing that entered into the lighting system had been pulled out to where there was no strain relief. The cable laying in the walkway had been damaged somewhat by sunlight or breakdown of the outer rubber jacket to the SO cable. (Tr. 109).

2. Although the Inspector's testimony mentioned cable damage, the Citation itself did not specifically allege damage to the cable. (Tr. 117). The Inspector explained the discrepancy saying, "That's probably in my notes." (Tr. 117). His notes were not produced or introduced in corroboration, however. Respondent's electrical supervisor, Floyd Bowman, who examined the cable shortly after the Citation was issued (Tr. 128), denied that the cable was damaged. (Tr. 129). This is borne out to some degree by the photos which Mr. Bowman indicated showed the same "wires" as were there when the Citation was issued. (Tr. 130). In all the circumstances, I am unable to conclude that the cable was in damaged condition on the date the citation was issued, particularly since such was not specifically alleged in the Citation. With this exception, however, the violation is found to have occurred. (Tr. 109-112, 114). Since cable damage was a factor the inspector considered in determining gravity--and presumably whether the violation was significant and substantial--such will be taken into consideration in penalty detemination.

3. Various employees had but occasional duties in the area where the violative conditions existed and they would have been exposed to hazard only infrequently. (Tr. 114, 119, 124, 131, 138-139).

4. The hazards created by the violation as above delineated would be electrocution, electrical shock or burn, tripping and falling over the side and off the top of the dragline and tripping and pulling the cable out of the enclosure where it terminated in the light fixture. (Tr. 110-111, 114). (Footnote 3)

5. The hazards created by the violation contributed "a measure of danger to safety" as that term is employed in Secretary v. Mathies Coal Company, 6 FMSHRC 1 (January 1984).

6. An injury from occurrence of an accident resulting from the hazard would be of a reasonably serious nature.

7. It was not reasonably likely, however, that the hazard contributed to by the violation would result in any injury.

a. There was no evidence that any prior incidents, accidents, or injuries had occurred as a result of the violative conditions.

b. With respect to the hazard of an employee's tripping and falling over the side of the 80-foot high dragline, there was a waist-high railing installed in the subject area. (Tr. 119, 121-122).

c. Employees did not commonly or regularly travel or perform work in the area. Rather, they did so infrequently. (Tr. 119, 131, 132, 138).

d. The evidence overall establishes no more than a remote possibility that an injury might have occurred.

8. Based on the above findings, it is concluded that this violation was not significant and substantial.

9. The violative conditions were visible and obvious and the violation is found to have resulted from a moderate degree of negligence.

10. Although not a significant and substantial violation, the violation is nevertheless found to be serious in view of the potential, however remote, for fatal or serious injuries to the various employees who were occasionally exposed.

In view of the elimination of the significant and substantial classification of the violation, a penalty of $150 is found appropriate and is here assessed.

ORDER

1. Citation No. 3413368 is MODIFIED to delete the "Significant and Substantial" designation thereon and to change the "Gravity" designation in paragraph 10 A thereof from "Reasonably likely" to "Unlikely," and is otherwise AFFIRMED.

2. Citation No. 3413370 dated January 24, 1990 is VACATED.

3. Respondent (pursuant to the settlement agreement at hearing or as otherwise asessed hereinabove) SHALL PAY to the Secretary of Labor within 30 days from the issuance date of this decision the following penalties totaling $1,012.

Citation No.	AMOUNT
3413452	$20
3413453	20
3413455	20
3413456	371
3413457	20
3413458	20
3413459	371
3413460	20
3413368	150
TOTAL	$1,012

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. A dragline is a piece of equipment approximately 80-100 feet high by 80-100 feet long by 80-100 feet wide. (Tr. 110).

2. Pertinent areas of the dragline involved in this matter are depicted in three photos taken by Respondent's witness, Supervisory electrical engineer Floyd Bowman, one week before the hearing and over one year after the Citation was issued. (Tr. 129). See Exhibits R-6, 7, and 8. (Tr. 120-122).

3. The "tripping over the cable" hazard is determined to exist whether or not the area traveled by employees performing duties on the top of the dragline is designated as a "travelway"

as contended by Petitioner or an "access" (Tr. 131) as described
by Respondent.