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SOL (MSHA) V. MOUNTAIN COAL
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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. WEST 90-262 A.C. No. 05-03672-03591
v.	Mt. Gunnison No. 1 Mine
MOUNTAIN COAL COMPANY, (SUCCESSOR TO WEST ELK COAL COMPANY, INCORPORATED), RESPONDENT	

DECISION

Appearances: Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
David M. Arnolds, Esq., ARCO, Denver, Colorado, for Respondent.

Before: Judge Cetti

This case is before me on petition for civil penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), charging the Mountain Coal Co. with violating 30 C.F.R. 75.503(a) a mandatory regulatory standard and proposing a civil penalty for the alleged violation. Pursuant to notice, the case was heard on the merits before me at Glenwood Springs, Colorado. Helpful post-hearing briefs were filed by both parties which I have considered along with the entire record in making this decision.

The Regulation

The regulation cited reads as follows:

> 30 C.F.R. 75.503, Permissible Electrical Face Equipment; Maintenance
>
> The operator of each coal mine shall maintain in permissible condition all electrical face equipment required by 75.500, 75.501 and 75.504 to be permissible which is taken into or used inby the last open cross-cut of any such mine.

The Citation

The citation issued to Respondent states the following:

> The jeffrey-type ram-car R-9 serial number 38297 and approval number 31-35-5 operating in the 2W 1N/002-0 section was not maintained in a permissible condition in that there was a .005 opening between the flame arrestor unit and exhaust1 unit when checked.

ISSUES

1. Whether a preponderance of the evidence established facts that constitute a violation of 30 C.F.R. 75.503.

2. If the cited violation is established, was it a "significant and substantial" violation.

3. If a violation is established, what is the appropriate penalty.

STIPULATIONS

The parties stipulated (Joint Exhibit 1) as follows:

1. West Elk Coal Company, Inc.,2 is engaged in the mining and selling of coal in the United States, and its mining opera-ations affect interstate commerce.

2. West Elk Coal Company, Inc., is the owner and operator of the Mount Gunnison #1 Mine, MSHA I.D. No. 05-03672.

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

2. West Elk Coal Company, Inc., is the owner and operator of the Mount Gunnison #1 Mine, MSHA I.D. No. 05-03672.

3. West Elk Coal Company, Inc., 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. The subject citations were 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 their 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 the truth of the matters asserted therein.

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

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

9. West Elk Coal Company, Inc., is a large operator of a coal mine with 564,850 tons of production in 1989.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

DISCUSSION

Section 75.503 states "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 which is taken into or used inby the last open crosscut of any such mine." According to the plain language of this standard, a violation of Section 75.503 is established where 1) there is a piece of electric face equipment; 2) the equipment is taken into or used inby the last crosscut; and 3) the equipment is not maintained in permissible condition.

In this case, there is no dispute that this citation involved a piece of electrical face equipment being used in the working section inby the last open crosscut. During a regular inspection, Inspector Cosme Gutierrez examined a Jeffrey ram-car (a piece of hauling equipment with electrical components and a diesel-powered engine) used to haul fresh coal being cut by a miner from the working face. (Tr. 23-24). Gutierrez explained that the ram-car is considered both a diesel and an electrical piece of face equipment. (Tr. 25). The ram-car had been located at the working face inby the last open crosscut before it was removed outby the active section about four or five crosscuts for inspection purposes. (Tr. 23, 40). The primary issue in this case is whether this ram-car was being maintained in a permissible condition.

Permissibility requirements for electrical equipment are contained in Part 18 C.F.R. and for diesel-powered equipment in Part 36 C.F.R. Jerry Taylor, the highly qualified expert and engineering coordinator for District 9, explained permissibility and the permissibility requirements for this ram-car. Mr. Taylor testified that "permissibility means that the whole machine, when properly maintained, will not ignite a methane air mixture and/or coal dust and/or cause a fire of combustibles because of an energy source contained within one of their explosion-proof compartments." (Tr. 117). As defined in Part 18.2, "permissible equipment" means "a completely assembled electrical machine or accessory for which a formal approval has been issued as authorized" by MSHA. Part 36, states that diesel-powered equipment must comply with the requirements of Part 36 and have a certificate of approval to this effect issued. The Jeffrey ram-car in question was subject to the MSHA approval process and, pursuant to the permissibility requirements, Jeffrey Mining Machinery Division developed a specific permissibility checklist for the type of ram-car in question for MSHA's review. (Ex. P-3). Mr. Taylor explained the MSHA approval and certification process in relation to this type of ram-car. (Tr. 113-115). In general, MSHA reviews the design and performance of the equipment to insure that, when functioning as designed, the equipment will be explosion proof within the confines of a methane air mixture.

The flame arrestor assembly unit is an enclosed component attached to the air intake side of the engine. It is designed to prevent a flame from the engine escaping to the outside mine atmosphere at the face. (Tr. 24). The flame arrestor consists of a flat disc shaped wire mesh screen through which all air in the engine intake system must pass in order to enter the engine. The flame arrestor cools any flame from the engine before the flame reaches the outside air where it could cause an ignition of combustible material.

The flat disc shaped wire mesh (flame arrestor) is encircled with a flat 1.95 inch wide solid metal flange or collar that keeps the wire screen disc in place.

The flame arrestor collar or flange is sandwiched between two other flat circular metal flanges and the three flanges are tightly bolted by six bolts. The flange on the engine side being referred to as the "inby flange", and the flange on the outside air side being referred to as the "outby flange". (Ex. P-2).

To check the flame arrestor, the inspector used "feeler gauges"--flat metal pieces of varying thicknesses used to measure any openings. (Tr. 28). He used the .005 thick gauge inserting it in between the outby flange and the flame arrestor flange. Inspector Gutierrez was able to insert a .005" gauge in some limited depth over some limited width at the interface of the flame arrestor flange and the outby flange. Upon questioning by the Court, Inspector Gutierrez explained that the gauge penetrated "about" an inch and that an inch was not sufficient to get down to the enclosed area where the flame arrestor (the wire screen mesh disc) was held in place. (Tr. 51-52).

There was no evidence that the inspector made or even attempted to make an accurate objective measurement of the depth of the feeler gauge penetration.

Respondent's Position and Evidence

Respondent, at the hearing, presented pertinent evidence to support its position which it stated upon opening of the record as follows:

> First of all that there was no violation of 30 C.F.R. 75.503 because the ram-car at issue was in a permissible condition. The gap that Inspector Gutierrez found did not penetrate all the way down to the flame arrestor itself and therefore allowed no pathway for a flame, if there were one, to escape to the atmosphere. In addition, even if there was a violation, West Elk objects to the S&S designation because (for several reasons) there was no reasonable likelihood that any injury would occur as the result of the gap. It was not likely that the engine would backfire or cause any flame that could cause an ignition. Secondly, the loca-

> tion of the gap was on the outside or upward side of the flame arrestor, and so there was no way that a flame could escape through that gap. Thirdly, there are very low levels of methane or coal dust in this mine, as will be demonstrated by the record, and therefore, even if there was flame that escaped, it would be very unlikely there would be any ignition. (Tr. 11-12).

It was clear from the testimony presented that Inspector Gutierrez was able to insert the .005" feeler gauge only to a limited depth and that he failed to measure that depth. When questioned as to the depth, he was able to penetrate the feeler gauge on the outby side of the flame arrestor flange, the best the inspector could do was give an estimate "about an inch."

Robert Morgan, the Section Mechanic responsible for the ram-car and who was with Inspector Gutierrez during the inspection, testified that he watched Inspector Gutierrez check the flame arrestor with the .005 feeler gauge. He saw him insert the feeler gauge on the outby, or fresh air side of the flame arrestor flange. (Tr. 160). The gauge went in only approximately 3/8 to 1/2 inch. Inspector Gutierrez marked the gauge with a felt pen to mark the depth of the penetration and showed the mark to Mr. Morgan and Mr. Walker. (Tr. 178-179, 199). Before abating the condition, Mr. Morgan checked the gap in question with his own feeler gauge, using a .004" thick gauge. The .004 gauge penetrated only the same distance as Inspector Gutierrez' gauge did, which was 3/8 to 1/2 inch. (Tr. 175).

Mr. Dewey Walker, Production Supervisor at the mine, was also present when Inspector Gutierrez checked the gap (Tr. 191-192). He testified that the gauge penetrated approximately 1/2" (Tr. 193), and that circumferentially the gap was approximately the width of the feeler gauge. (Tr. 193).

Inspector Gutierrez testified that the cause of the gap was that the bolts were loose. He based this conclusion on the fact that he saw Mr. Morgan tightening the bolts. (Tr. 34). Inspector Gutierrez said that it took Mr. Morgan approximately 20 minutes to abate the citation because it took him about 10 minutes to find the proper wrench to do the tightening and about 10 minutes to do the actual tightening. (Tr. 51). Inspector Gutierrez also speculated that the flame arrestor could move back and forth, thereby switching the gap from the outby side to the inby side and vice versa. (Tr. 55). He testified he did not attempt to move the flame arrestor back and forth so did not know that it

could move. He assumed that it could move because he found a .005" gap rather than the maximum of .004" gap on the outby side. (Tr. 55).

The inspector's conclusion that the bolts holding the flame arrestor unit flanges together were loose was based simply on the fact he saw Mr. Morgan tightening the bolts and assumed that Mr. Morgan abated the condition by doing nothing more than tightening three bolts. Inspector Gutierrez stated this as follows:

> Q. I believe you testified on redirect that you noticed loose bolts after checking a gap. In fact three bolts were loose; is that correct?
>
> A. They tightened three bolts. That showed me that they were loose. I didn't wiggle them. When they tightened them, they tightened the three bolts.
>
> Q. So you are assuming, or concluding, if you will--
>
> A. Concluding
>
> Q. --that the bolts were loose because you saw him tighten them.
>
> A. Exactly. (Tr. 98).

Mr. Morgan testified on the contrary that the bolts were not loose and that he was not able to tighten them at all. (Tr. 168). Mr. Morgan tried to tighten the two bolts that were on either side of the opening, and he couldn't tighten them. Therefore, he loosened all of the bolts enough to get a flat file in between the two surfaces to clean them. He concluded that because it was just a small gap there must be something in there, either a burr on the metal or some foreign object, so he filed it, tightened the bolts back up and checked the gap. (Tr. 166-167).

Mr. Walker, who was present there the entire time, confirmed that Mr. Morgan attempted to tighten the bolts and could not tighten them, so he loosened them up, did some filing on the inside and then tightened the bolts back up. (Tr. 192).

With respect to the width of the flame arrestor flange, the distance from the outer edge of the flame arrestor collar or flange to the flame arrestor itself is approximately 2 inches, as testified to by Inspector Gutierrez. (Tr. 72). Mr. Taylor, MSHA's expert witness and the Engineering Coordinator of MSHA's

District 9, estimated the distance to be just under 2 inches. (Tr. 141). When he was recalled to the stand by the Court to make an accurate objective measurement, he determined that the width of the flame arrestor flange was 1.95 inches.

Further Discussion and Findings

Respondent has the burden of proving by a preponderance of the evidence that there was a violation of the cited safety standard 30 C.F.R. 75.503. This section does not define what constitutes permissibility. However, the Court and the parties were fortunate to have the assistance and testimony of an experienced and highly qualified expert, Mr. Jerry Taylor, Engineering Coordinator for Coal Mine Safety and Health District 9.3

Mr. Taylor testified that for the flame arrestor unit, the maximum gap allowed is defined in 30 C.F.R. Part 18, specifically in the Table at 18.31 entitled "Enclosures-Joints and Fastenings." (Tr. 182). That chart, according to Mr. Taylor, shows that a flame path of a maximum of .004" must be maintained for at least 1 inch in distance from the flame arrestor (outer edge of the wire mesh disc) to the outside of the flame arrestor flange. (Tr. 125-126). Consequently, in order for there to be a violation of 75.503, the flame arrestor unit must have had less than 1" in depth between the flame arrestor flange and the outby flange that was .004 of an inch or less in gap. As stated by the permissibility expert, Mr. Taylor, the requirement of the safety standard in question "is that the flame path be at least an inch wide--not less than an inch wide, and that the gap be not greater than .004." Put another way, in this case there would have been a violation only if a gap greater than .004" extended more than .95 of an inch in depth measured from the outer circumference edge of the flame arrestor flange since the flange was 1.95 inches wide.

The preponderance of the evidence did not establish that there was a violation. As discussed above, the actual distance from the opening for the flame arrestor and the outside edge of the flame arrestor flange was 1.95" , as measured very precisely by Mr. Taylor. (Tr. 208). There is no precise measurement as to how far Inspector Gutierrez inserted the metal gauge. The best the inspector could do was to estimate it to be "about" an inch. (Tr. 30, 51, 59). Messrs. Morgan and Walker testified, however, that the gauge penetrated only about 3/8" to 1/2" . (Tr. 161,

193). They were fairly confident about this estimate because Inspector Gutierrez had marked the feeler gauge with a felt tip pen and showed Messrs. Morgan and Walker how far the gauge had penetrated. (Tr. 160-161, 199). Further, Mr. Morgan checked the gap himself with his .004" feeler gauge and his gauge would go in no more than 1/2" . (Tr. 161-162).

The preponderance of the evidence established that the gauge penetrated substantially less than .95 of an inch and, therefore, the flame arrestor unit was in compliance with 75.18.31 and was permissible under 75.503. Even if Inspector Gutierrez's testimony were to be accepted completely and that of Messrs Morgan and Walker rejected, the government would have failed to carry its burden of proof. Inspector Gutierrez merely estimated that the gauge penetrated "about" an inch, and Mr. Taylor measured the pertinent distance on the flange as being 1.95 inches. Therefore, the Petitioner failed to carry its burden of proof that Mountain Coal Company did not maintain the gap between the flanges at .004" or less for a distance of at least 1" . The citation should be vacated.

On observing the demeanor of the three witnesses who testified as to the depth of the penetration of the feeler gauge, I find the testimony of each of the witnesses credible in the sense that each of these witnesses was giving his best estimate or "guesstimate" as to the depth of penetration from 3/8 inch to "about an inch". The Petitioner has the burden of proof. The best evidence it could offer on the depth of penetration was "about an inch". The weakness of Petitioner's case lies in the fact that the inspector failed to make an accurate measurement or any objective measurement at all in a situation where 1/20th of an inch could make the difference between a violation or no violation. Without a measurement "about an inch" means possibly a little under 1" or a little over 1" . This evidence is insufficient for Petitioner to carry its burden of proof, particularly under the facts of this case where we have credible testimony from two eye witnesses who estimated the depth of penetration to be 3/8 to 1/2 of an inch.

Again on the question as to whether the bolts were loose and simply needed tightening to abate the problem, the testimony of all three witnesses as to what they observed was credible. The conclusion of the inspector differed from the other two witnesses but was based on his limited observation of what was needed to close whatever gap existed. Certainly Mr. Morgan who closed the gap was the witness in the best position to observe and testify what he had to do to close the gap. The testimony of the inspector as to the tightening of the bolts was not necessarily inconsistent with the testimony of Mr. Morgan and Mr. Walker that

Morgan had to loosen the bolts and use a file before he could tighten the bolts.

I was impressed with Mr. Taylor's expertise in the field of permissibility. However, his conclusion that there was a violation was based upon two assumed facts that the preponderance of the evidence failed to establish. Mr. Taylor's opinion was based upon the assumption that the .005 feeler gauge penetrated into the gap a depth of one inch and that these were loose bolts that only needed to be tightened. The preponderance of the evidence presented failed to establish either of these assumptions as fact. The Petitioner failed to carry its burden of proof. Citation No. 3413334 should be vacated.

ORDER

Citation No. 3413334 is vacated and this case is DISMISSED.

August F. Cetti
Administrative Law Judge

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FOOTNOTES START HERE

1. Inspector Gutierrez on cross-examination admitted the citation was in error in stating "exhaust" unit in describing the location of the feeler gauge penetration in question. The correct location was between the "air intake" unit and the flame arrestor unit. (Tr. 13).

2. Now Mountain Coal Company, successor by merger to West Elk Coal Company, Inc., and Beaver Creek Coal Company.

3. Mr. Taylor has a Bachelor of Science degree in Mechanical Engineering and in his present position coordinates all of the engineering functions in District 9.