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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

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

v.

THE PITTSBURG & MIDWAY COAL
MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 91-54
A.C. No. 29-00096-3548

McKinley Mine

DECISION

Appearances: Ernest Burford, Esq., Office of the Solicitor, U.S.
Department of Labor, Dallas, Texas,
for Petitioner;
John W. Paul, Esq., Englewood, Colorado,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties 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 Pittsburg & Midway Coal Mining Company (P&M), the operator of the McKinley Mine, with two 104(a), non S&S, violations of mandatory regulatory standards found in 30 C.F.R. 45.48 and 77.904.

The operator filed a timely answer contesting the alleged violations and the appropriateness of the proposed penalties.

Pursuant to notice, an evidentiary hearing on the merits was held before me, along with other cases involving the same parties and attorneys.

Stipulations

At the hearing, the parties agreed on the following stipulations:

1. P&M 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. P&M is the owner and operator of the McKinley Mine, MSHA ID No. 29-00096.

3. P&M 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 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 penalties will not affect Respondent's ability to remain in business.

8. The operator demonstrated good faith in timely abating the alleged violations.

9. P&M is a large operator of a coal mine for penalty assessment purposes. It's McKinley Mine is a large surface mine producing four to five tons of coal each year.

10. The certified copy of the MSHA assessed violations history filed in Docket No. CENT 91-106 reflects the history of this mine.

Citation No. 3584164

This citation charges Respondent with a 104(a) violation of 30 C.F.R. 45.4(b). The citation reads as follows:

The production-operator could not produce the information required by paragraph (a) of this section for each independent contractor of this mine, namely General Electric ISE, this contractor was providing electrical service on contract work at the No. 4 dragline.

The cited safety standard reads as follows:

45.4 Independent contractor register.

(b) Each production-operator shall maintain in writing at the mine the information required by paragraph (a) of this section for each independent contractor at the mine. The production-operator shall make this information available to any authorized representative of the Secretary upon request.

The information which the operator is required to maintain in writing and make available to the inspector is set forth in Section 45.4(a) which in part reads as follows:

- (1) The independent contractor's trade name, business address and business telephone number;
- (2) A description of the nature of the work to be performed by the independent contractor and where at the mine the work is to be performed;
- (3) The independent contractor's MSHA identification number, if any; and
- (4) The independent contractor's address of record for service of citations, or other documents involving the independent contractor.

Conflicting testimony was presented at the hearing as to what information the operator maintained and made available to the inspector and as to when the information was made available.

After the lunch break, the parties stated on the record that they had conferred and reached a proposed settlement of Citation No. 3584164 with an agreed penalty of \$20.

On the basis of the evidence presented at the hearing and on the representation of counsel, I approved the settlement from the bench and I hereby reaffirm my approval of the settlement deposition of this citation.

Citation No. 3584192

This citation charges Respondent with a 104(a) non S&S violation of 30 C.F.R. 77.904.

The citation reads as follows:

The circuit breaker supplying electrical power to the South East warehouse door was not labeled to show in fact that this circuit supplied electrical power to the South East door. This circuit breaker was energized when this condition was observed. Two of three warehouse personnel could not readily identify the control circuit when question[ed], they had to look at the circuit and trace it to the door motor. (Emphasis added).

The cited safety standard reads as follows:

77.904 Identification of circuit breakers.

Circuit breakers shall be labeled to show which circuits they control unless identification can be made readily by location. (Emphasis added).

The cited device in question was a disconnect switch in the electrical circuit between a molded-box circuit breaker and a motor for an overhead warehouse door. The undisputed evidence established that this device, cited and referred to in the citation as a "circuit breaker," was not a circuit breaker. The evidence clearly established that it was a fused "disconnect switch."

Petitioner argues that although the specific language of 30 C.F.R. 77.904 does not mention the term "disconnecting device" the statute should be interpreted to include such devices. Petitioner argues that both devices have the same fundamental function.

The regulations do not define the term "circuit breaker." The term "circuit breaker" is defined in A Dictionary of Mining, Mineral, and related Terms 210, U.S. Department of the Interior (1968), as follows:

Circuit breaker. a. An overload protective device installed in the positive circuit to interrupt the flow of electric current when it becomes excessive or merely exceeds predetermined value. b. A switch that automatically interrupts an electric circuit under an infrequent abnormal condition (as overload). Webster 3d.

A dictionary of Mining, Mineral, and Related Terms 1111, U.S. Department of the Interior (1968), defines a disconnect "switch," insofar as relevant here, as follows:

A mechanical device for opening and closing an electric circuit;

It is undisputed that the circuit at issue was a low or medium voltage circuit (Tr. 32). Section 77.904 refers only to "circuit breakers" on low or medium voltage circuits, and does not mention disconnecting devices.

The corresponding provision dealing with high-voltage circuits (Subpart I of Part 77, Title 30) clearly shows that the two phrases are to be used independently:

77.809 - Identification of circuit breakers and disconnecting switches.

Circuit breakers and disconnecting switches shall be labeled to show which units they control, unless identification can be made readily by location.

Thus, the Secretary when promulgating a safety standard for high voltage currents specifically included references to both "circuit breakers" and "disconnecting switches" but when addressing low and medium voltage circuits specifies only "circuit breakers". A term carefully employed in one place in the regulation and excluded in another should not be implied where excluded. *KCMC, Inc. v. FCC*, 600 F.2d 546 (5th Cir. 1979); *Diamond Roofing Co. v. OSHRC*, supra; *Koch Refining Co. v. United States Dept. of Energy*, 504 F. Supp. 593 (D. Minn. 1980), aff'd, 658 F.2d 799 (Temp. Emer. Ct. App. 1981).

A question that naturally comes to mind is whether there is a rational reason for the Secretary to specifically require labeling of disconnecting switches in high voltage lines but not in medium or low voltage circuit. The Respondent's expert explained that one reason for this distinction is that a servicing electrician can use a voltmeter to check low and medium voltage circuits, but that a voltmeter cannot be used on high voltage lines. (Tr. 72). Thus, there is a reason for requiring specific labeling of both circuit breakers and disconnecting switches in servicing high voltage circuits.

Respondent in denying any violation of 30 C.F.R. 77.904 summarizes its position as follows:

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A. As a factual matter, the electrical circuit controlled by this disconnect switch was readily identifiable by location and it is sufficient that a worker be able to identify the circuit by observation.

B. For purposes of both the regulatory scheme and common usage among electricians, this Switching Mechanism is a "disconnecting device." A disconnecting device serves a different purpose than a circuit breaker, and is distinguishable in practical application.

C. The plain language of Section 77.904 does not require identification of disconnecting devices on low and medium voltage circuits.

D. The plain words of the Secretary's regulation (77.904) are clear and unambiguous; i.e., the standard applies solely to "circuit breakers." Any extension of the standard so as to apply the labeling requirement to disconnecting devices constitutes substantive rule-making without following rule-making procedures.

E. Even if the regulation is susceptible to various meanings, and the Secretary's characterization is merely interpretative, the Respondent had no notice of the Secretary's position.

I find merit in Respondent's contention that as a factual matter identification of the circuit that the disconnect switch controlled could readily be made by location and thus comes within the exception to the labeling requirement specifically stated in the cited safety standard.

Respondent in its post-hearing brief states its position in part as follows:

- I. As a factual matter, the electrical circuit controlled by the Switching Mechanism was readily identifiable by location. It is sufficient that a worker be able to identify the circuit by observation.

Whether or not the Switching Mechanism might be held to be a "circuit breaker," the scene depicted in Respondent's Exhibit 1-B (a large photograph of the disconnect switch and the conduit from the switch to the motor that raises and lowers the warehouse door) clearly shows that the

circuit controlled by the Switching Mechanism (designated by an arrow in the photograph) can be readily identifiable by observation. Even without reaching the legal issue of whether the Switching Mechanism is a "circuit breaker," this fact should be dispositive of the case.

The Inspector's narrative report contained in the citation suggests that all workers must be able to readily identify the controlled circuit upon questioning, without observing the apparatus. In effect, the inspector imposes the safety standard as if it were a test question posed in a closed-book exam. He concedes that the workers could, in fact, trace the circuit to the door motor by looking at the circuit (Citation; Tr. 36). Thus, the face of the citation itself negates any violation of the standard.

Upon cross-examination, the Inspector further conceded that he could see what circuit was controlled by the Switching Mechanism (Tr. 35). He acknowledged that he had based the existence of the violation on the negative responses offered by two of three workers in the area (Tr. 17). The Secretary did not call those individuals to testify as to the extent of their knowledge or inability to identify the circuit (with or without visual observation).

The Secretary has not provided any legal basis or rationale to support its contention that a worker should be able to "identify" the circuit without actually looking at it. Such a novel interpretation constitutes substantive rule-making without adhering to procedural guidelines, as more fully discussed below. The photograph of the scene, and the inspector's own admissions, establish that the circuit controlled by the Switching Mechanism could be readily identified by location. Therefore, no violation has been shown by the evidence.

- II. For purposes of both the regulatory scheme and common usage among electricians, this Switching Mechanism is a "disconnecting device." A disconnecting device serves a different purpose than a circuit breaker, and is distinguishable in practical application.

In addressing the remaining legal issues in this case, an understanding of the function and purpose of the Switching Mechanism is necessary. Much attention was devoted at the hearing to the definition of a "circuit breaker" and of a "disconnecting device"; however, the key points are quite straight-forward.

The terms "circuit breaker" and "disconnecting device" have very different meanings to an electrician. The ordinary and common meaning of words should be applied in the application of regulations, unless such words are defined otherwise. *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113 (10th Cir. 1977); *Whelan v. United States*, 529 F.2d 1000 (Ct.Cl. 1976). The Respondent's electrical expert established that a "circuit breaker" is a device that automatically provides overcurrent, short circuit, and ground fault protection to the circuit (Tr. 75, 76). A "disconnecting device" enables the servicing electrician to manually deenergize the circuit and visually confirm its disconnection (Tr. 69, 77). Since the electrician can actually see that the electrical line has been physically separated, he or she may then safely proceed with servicing.

It is helpful, then, to distinguish between the respective purposes of a circuit breaker and a disconnecting device. The former affords automatic, unattended protection against electrical faults. The latter enables visually verifiable safe access to the service point of the circuit beyond the disconnecting device. The Respondent agrees that a single apparatus could serve both purposes if so equipped; however, the circuit breaker in use on the circuit in question was a molded-box circuit breaker which did not enable internal inspection; therefore, a separate disconnecting device was required (Tr. 67, 81).

Without a focus on the differing purposes of the two devices, the analysis becomes unnecessarily confused. A disconnecting device can be "fused" or "unfused" by the simple addition of a fuse in the device. Such a fuse adds an additional measure of automatic protection, along with the separate circuit breaker which, in this case, was located on a different floor (Tr. 67, 69, 70). The Secretary argues that by the addition of a fuse, this Switching Mechanism duplicates some of the same functions as a circuit breaker and therefore should be labeled in the same manner as a circuit breaker. This position would have merit if the addition of the fuse introduced some safety hazard or altered the essential purpose of the disconnecting device.

The Secretary's attempt to equate a circuit breaker and a disconnecting device is faulty in several respects. First, the inspector misunderstands the purpose of a disconnecting device; he believes that the device is used to provide emergency shut-off (Tr. 15). However, the Respondent's electrical expert testified that the purpose of the device is to enable visual verification of deenergizing prior to maintenance. The record establishes that the actual on/off switch (which controlled movement of the door) was near-by (Tr. 46, 72).

Even the Secretary's own regulations regarding disconnecting devices emphasize the "visual" evidence of disconnection rather than the need for immediate or emergency disconnection:

77.903 - Disconnecting Devices. Disconnecting devices shall be installed in circuits supplying power to portable or mobile equipment and shall provide visual evidence that the power is disconnected.

The inspector confuses purpose with function. Even with the addition of a fuse, the primary purpose of a disconnecting device remains the same; to enable visual confirmation of a manual

disconnection. The addition of a safety feature (i.e., a fuse that functions similar to a circuit breaker) should not convert an otherwise acceptable apparatus into a safety hazard); this is simply illogical. The Secretary is in the anomalous position of arguing that the addition of a safety feature reduces the safety of the workers. Florence Mining Co., 11 FMSHRC 747 (1989). The Secretary is advocating a legal position that would encourage compliance by removal of a safety feature.

The Secretary offered no expert testimony to refute the common usage of the two terms among electricians, but instead relies upon the legalistic interpretative argument that the phrase "disconnecting device" is interchangeable with "circuit breaker" due to the addition of a fuse. Her case is premised on the description of "circuit breaker" in the 1968 National Electrical Code in Article ("NEC") Section 100 (Tr. 78), which is defined therein to include devices which open and close circuits by both automatic and nonautomatic means. By applying that definition directly to Section 77.904 the Secretary reasons that the phrase "circuit breaker" is all-encompassing.

The substance of the then-current NEC is incorporated into the Secretary's regulations depending on the date that the equipment is installed if after 1971. 30 C.F.R. 77.516 (1990). Since the NEC is incorporated by reference, the provisions of the full electrical codes, as revised over the years, are available for the Commission's review in deciding this case.

All editions of the NEC since 1975 have included the foregoing definition of "circuit breaker," but have elaborated on that definition for circuits carrying over 600 volts (a low voltage under 30 C.F.R. 77.2(s) (1990) means up to 660 volts):

Switching Devices:

Circuit Breaker: A switching device capable of making, carrying, and breaking currents under normal circuit conditions, and also making, carrying for a specified time, and breaking currents under specified abnormal circuit conditions, such as those of short circuit.

* * * * *

Disconnecting (or Isolating) Switch (Disconnecter, Isolator): A mechanical switching device used for isolating a circuit or equipment from a source power.

Disconnecting Means: A device, group of devices, or other mean whereby the conductors of a circuit can be disconnected from their source of supply.

Thus, all editions of the NEC for the past fifteen years have made the definitional distinction between a circuit breaker and a disconnecting switch.

Whether the Commission relies on the 1968 version of the NEC or later editions, caution must be taken in literally applying NEC terminology in the context of the MSHA regulations. Respondent agrees that an ordinary circuit breaker includes both manual and automatic energy interruption features. But the Secretary's regulations provide for an additional feature of visual confirmation of disconnection, a provision that the NEC does not require (Tr. 76). The molded-box circuit breakers commonly in use do not permit visual inspection of the internal blades (Tr. 81). This added purpose was not contemplated by the NEC and therefore the NEC definition cannot be freely applied to the Secretary's regulation.

Even though the substance of the then-current NEC is incorporated into the Secretary's regulations, it does not follow that terminology and definitions are directly interchangeable.

The Secretary's regulations clearly apply the phrases "circuit breaker" and "disconnecting device" separately. She cannot simply construe the existing regulations to mean what she may have intended but did not adequately express. *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976).

* * * * *

IV. The plain words of the Secretary's regulation (77.904) are clear and unambiguous; i.e., the standard applies solely to circuit breakers. Any extension of the standard so as to apply the labelling requirement to disconnecting devices constitutes substantive rule-making without following rule-making procedures. The Secretary offers an alternative argument that whether or not the disconnecting device contains a fuse, the same standard provided for high voltage circuits (77.809) should be applied to low and medium voltage circuits. The inspector offered his opinion that any device which enabled disconnection should be labeled (Tr. 34).

The Secretary relies on the following citation from the 1968 NEC, 110.22 (Tr. 79):

Each disconnection means required by this code for motors and appliances and each service meter or branch circuit at the point where it originates shall be legibly marked to indicate a purpose is evident. (Emphasis added).

If this standard were read without the emphasized language, it would indeed appear to require identification of all disconnecting switches (unless, of course, readily identifiable by location), just as the Inspector has applied 77.904. But as the Respondent's expert pointed out in uncontroverted testimony, the reference to "at the point where it originates" means at the circuit breaker; the Switching Mechanism in question here was not

at the point where the circuit originated (Tr. 69, 70, 80). This is no different than the Secretary's own regulation 77.904, and adds nothing to this analysis.

A rule as envisioned by the Inspector might well be appropriately adopted by the Secretary under the rule of law set out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Yet, a plain reading of the two provisions (one dealing with high voltage and one dealing with medium/low voltage) leads to the conclusion that the Secretary has not yet done so. If she intends to impose a new and substantive obligation upon operators, she must follow appropriate rule-making procedures. *Drummond Co.*, 13 FMSHRC 339 (1991).

In determining whether the actions of the Secretary must comply with rule-making procedures, the courts differentiate between interpretive and substantive actions. Here, the Secretary is attempting to enforce a new and substantive obligation upon Respondent. *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). V. Even if the regulation is susceptible to various meanings, and the Secretary's characterization is merely interpretative, the Respondent had no notice of the Secretary's position.

If the application and construction of the regulatory language is considered to be interpretive rather than substantive in this case, Respondent and all operators must be afforded fair notice of the Secretary's "interpretation." *Phelps Dodge Corp. v. FMSHRC*, supra. Respondent has been unable to locate any notice of the Secretary's interpretation of "disconnecting switch" in her Program Policy Manual, Program Policy Letters, or previous published enforcement actions.

The enforcement of an interpretation rule which imposes a new and affirmative duty upon an operator without at least giving notice to the industry violates the basic notions of due process.

Conclusions

As previously stated, Respondent's Exhibit 1-B, a large photograph of the work site in question, clearly shows the disconnect switch in question and the circuit it controls. It shows the conduit coming out of the switch box in question and going up the wall to the motor which raises and lowers the warehouse door. On the basis of Respondent's Exhibit 1-B and the testimony presented at the hearing, I find that irrespective of whether or not the disconnect switch is a "circuit breaker" within the meaning of 30 C.F.R. 77.904 that identification of the circuit that the disconnect switch controlled can readily be made by mere observation of the location of the disconnect switch and the conduit leading out of it going up the wall to the motor.

Assuming, for the purpose of argument, that the switch in question is a "circuit breaker" within the meaning of 30 C.F.R. 77.904, I find it falls within the standard's specific exception that labeling is not required where "identification can be made readily by location." Citation No. 3584192 is vacated.

ORDER

On the basis of the foregoing findings and conclusions.

It is ordered as follows:

1. Citation No. 3584164, citing a violation of 30 C.F.R. 45.4(b) is AFFIRMED and a penalty of \$20 is ASSESSED.

2. Citation No. 3584192, citing an alleged violation of 30 C.F.R. 77.904 is VACATED and its related proposed penalty is set aside.

3. Respondent is ORDERED TO PAY to the Secretary of Labor a civil penalty in the sum of \$20 within thirty (30) days of the date of this Decision and, upon receipt of payment, this matter is DISMISSED.

August F. Cetti
Administrative Law Judge