

CCASE:
PONTIKI COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

PONTIKI COAL CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 91-97-R
	:	Citation No. 3516447;
	:	11/14/90
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Pontiki No. 2 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 15-09571
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-305
Petitioner	:	A.C. No. 15-09571-03604
	:	
v.	:	Pontiki No. 2 Mine
	:	
PONTIKI COAL CORPORATION,	:	
Respondent	:	
	:	

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee;
Timothy M. Biddle, Esq., Crowell & Moring,
Washington, DC;
Susan E. Chetlin, Esq., Pontiki Coal Corporation,
Lexington, Kentucky.

Before: Judge Weisberger

At issue in this consolidated notice of contest and civil penalty proceeding are the validity of an Order issued under Section 107(a) of the Federal Mine Safety and Health Act of 1977, ("the Act,") and a Citation alleging a violation of 30 C.F.R. 75.1725(c). Pursuant to notice, a hearing was held in Huntington, West Virginia on August 11, 1992. At the hearing, Harold Yates testified for the Secretary (Petitioner). The Operator (Respondent) did not call any witness on its behalf.

Findings of Fact and Discussion

In the main, the relevant facts have been stipulated to by the Parties, and I accept these stipulations. These stipulations are as follows:

1. Pontiki is the owner and operator of the Pontiki No. 2 Mine, located approximately 15 miles from Inez, Kentucky.
2. At the relevant times, Pontiki and the Pontiki No. 2 Mine were subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Act").
3. The Administrative Law Judge has jurisdiction over these proceedings pursuant to 105 of the Act.
4. Inspector Harold L. Yates, who issued 107(a) Order No. 3516447 and 104(a) Citation No. 3516448, is an authorized representative of the Secretary.
5. The Order and Citation were properly served upon an agent of Pontiki at the Pontiki No. 2 Mine on November 14, 1990, at 8:00 a.m., and 8:10 a.m., respectively.
6. The Pontiki No. 2 Mine mines coal in the Pond Creek coal seam using Joy continuous mining machines operated by remote control. Shuttle cars carry the coal from the continuous mining machine to the mine's belt conveyor system which carries the coal out of the mine.
7. On November 12, 1990, Pontiki mined coal on two sections underground and employed 81 people.
8. On November 12, 1990, the day shift crew for the 002-0 section arrived on the section at approximately 8:10 a.m., as the third shift maintenance crew was leaving.
9. The third shift maintenance crew informed the section foreman of malfunctions on one of the Joy 14-10 CM continuous mining machines; the machine would only tram in slow speed and the water sprays would not operate by remote control.
10. The section foreman assigned two electricians -- Argel Bowen and Russell Maynard, Jr. -- to repair the continuous miner.
11. The continuous miner was moved into an intersection for repairs.
12. Bowen repaired the tram controls while Maynard went to repair a shuttle car cable.
13. After Maynard repaired the shuttle car cable, he informed the section foreman that he would repair the solenoid valves controlling the water sprays. These valves were located on the off operator side of the continuous miner.
14. Maynard prepared to troubleshoot the problem with the solenoid valves by cleaning coal off of the solenoid valve covers.
15. At the same time, two miners and the section

foreman walked to the front of the continuous miner to inspect the cutting drum for worn bits.

16. As the section foreman walked by the continuous miner, he observed Maynard sitting on top of the continuous miner in front of the operator's deck. Maynard asked the section foreman to hand him the remote control box and then move the switch in the operator's deck to the remote position.

17. Section 75.509 requires that electric equipment be deenergized when repairs are being made, "except when necessary for trouble shooting or testing." 30 C.F.R.

75.509. See also 30 C.F.R. 75.1725(c). Maynard had to first troubleshoot the solenoid valves before he could repair them.

18. When troubleshooting malfunctions on continuous mining machines, it is standard practice for mechanics and electricians at Pontiki to switch the miner controls to remote and to keep the remote control box with them at all times. This precaution is necessary to prevent another person from accidentally operating the machine with the remote control or from the operator's deck while troubleshooting is taking place.

19. Since Maynard had the remote box with him, the section foreman asked Maynard if he could bump (rotate slightly) the cutting head, so the head could be inspected for worn bits. The cutting head on the Joy 14-10 CM continuous miner must be bumped with the power on, because the ripper/veyor chain connected to the ripper head makes it impossible to bump the head manually.

20. Maynard told the section foreman that he would rotate the cutting head using the remote control box, but he inadvertently activated the conveyor chain instead of rotating the cutting head.

21. The activated conveyor chain pulled Maynard from his work position and trapped him beneath the conveyor chain guard, resulting in fatal injuries.

22. MSHA conducted an investigation, which was concluded on November 13, 1990.

23. Two days after the accident occurred, MSHA issued imminent danger Order No. 3516447 which is at issue in this proceeding. Copies of the Order and subsequent modifications are attached to Pontiki's Application for Review.

24. MSHA also issued 104(a) Citation Nos. 3516448 and 3516449.

25. Citation No. 3516448, at issue here, alleged a violation of 75.1725(c), as follows:

Evidence obtained during a fatal accident investigation revealed that Russell Maynard Jr. placed himself in the conveyor boom of an energized JOY 14-10 continuous miner on the

002-0 working section while working on the water spray system. The electrician had with him the operative remote control unit for the miner. This citation is a contributing factor to imminent danger order #32516447 dated 11-14-90. Therefore no abatement time is set.

26. Citation No. 3516449 also alleged a violation of 75.1725(c) as follows:

Evidence obtained during a fatal accident investigation revealed that three men were setting bits on the cutting head of an energized JOY 14-10 continuous miner on the 002-0 working section. The electrician victim was in the conveyor boom area of the miner and had the operative remote control unit with him. This condition is a contributing factor to the issuance of the imminent danger order #3516447 dated 11-14-90. Therefore no abatement time is set.

27. On December 11, 1990, Citation No. 3516449 was vacated for the following reasons:

This violation is being vacated for the following reason(s).

Evidence obtained during a safety and health conference reveals bits were not being set in the 14-10 continuous miner head on the 002 working section. At the time of the fatal accident three men were observing the cutting head of the continuous miner to determine if bits were needed while the victim was rotating (bumping) the cutting head.

I. Violation of 30 C.F.R. 75.1725(c)

The parties stipulated that on November 12, 1990, an electrician Russell Maynard, Jr., was sitting on top of a continuous miner, and had in his possession a remote control box switched to the remote position. Maynard was to trouble shoot the solenoid valves controlling the water sprays before he could repair them. At the same time, two miners and the section foreman walked to the front of the miner to inspect the cutting drum for worn bits. The foreman asked Maynard to bump the cutting head so it could be inspected for worn bits. Maynard inadvertently activated the conveyor chain instead of rotating the cutting head, and was caught by the conveyor chain and trapped beneath the chain guard. He received a fatal injury.

MSHA Inspector Harold Yates issued a citation alleging a violation of 30 C.F.R. 75.1725(c) in that Maynard "...placed himself in the conveyor boom of an energized joy 14-10 continuous miner on the 002-0 working section while working on the water

spray system. The electrician had with him the operative remote control unit for the miner."

In essence, as pertinent, Section 75.1725(c), supra, provides as follows: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

Petitioner apparently concedes that there was no violation for Maynard to be located on top of the mining machine with the power on trouble shooting the solenoid valves. However, Petitioner argues that when Maynard activated the controls "as part of the Act of changing bits on the cutting head" (emphasis added), a violation of Section 75.1725(c) supra occurred.

Considering the record as a whole, I do not find support for Petitioner's position that there was herein a violation of Section 1725(c) supra. In essence, the Citation at issue sets forth two assertions as the bases for a violation herein of Section 1725(c) supra. The Citation alleges that (1) Maynard was placed in the boom of the energized miner while working on the water spray system and (2) that he had with him the remote control unit for the miner. Neither of these activities are prohibited by the clear language of Section 75.1725(c) supra. Indeed, as pointed out by Respondent, Yates conceded on cross-examination that, in essence, neither of these activities violates a regulatory standard.

In his direct testimony, Yates asserted that the basis for the violation was the fact that Maynard was on the miner when he attempted to bump the miner head by remote control. In essence, Section 75.1725(c), provides that, in making repairs or maintenance, power must be off, and the machinery is to be blocked against motion. As correctly pointed out by Respondent, Section 75.1725, supra, contains no requirement concerning a person's position while repairs are being made.

The Commission has noted that the purpose of Section 75.1725(c) is to prevent "to the greatest extent possible", accidents in the use of equipment and that "the manifest intent of the regulation is to restrict repair of machinery while the power is on." (Arch of Kentucky, Inc., 13 FMSHRC 753, 756 (1991)). However, in evaluating the scope to be accorded the language of a regulatory standard, the Commission, in Southern Ohio Coal Co., 14 FMSHRC 978 (June 1992), reiterated its test of whether the regulation gives a reasonably prudent person notice that it prohibits the cited conduct. Section 75.1725(c) supra, does not give any notice that it prohibits persons from being on energized miners with remote control equipment. Its plain language expressly sets forth requirements for blocking and turning off power to machinery, but does not contain any words

that could reasonably be interpreted as governing a person's position vis a vis a piece of equipment that is being repaired or maintained.

Therefore for the all the above reasons I conclude that it has not been established that there was a violation herein of Section 75.1725(c) as alleged in the citation at issue. Therefore, the citation must be dismissed.

II. The Validity of the Section 107(a) Withdrawal Order.

As a consequence of the fatal accident which had occurred on November 12, 1990, MSHA Inspector Harold L. Yates issued a Section 107(a) withdrawal order two days later on November 14, 1990. It appears to be the position of Petitioner, that the Section 107(a) order was properly issued because the underlying hazard remained. In this connection, Petitioner refers to the parties' stipulation that it was standard practice for mechanics and electricians at Pontiki to switch the miner controls to remote, and to keep the remote control box with them at all times. Hence, it is Petitioner's argument that the underlying hazard remained in that "there was clearly a very definite chance for this tragic occurrence to be duplicated." In support thereof, Petitioner also refers to the fact that the abatement of the Section 107(a) order at issue indicates that Pontiki's employees were "retrained on the use of a remote control unit and work while trouble shooting, and that this retraining eliminated the hazard which had remained present." I find Petitioner's arguments to be without merit for the reasons that follow.

The Order at issue alleges the existence of an "imminent danger", as per section 107(a) of the Act. Section(3)(j) of the Act defines an imminent danger as "...the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Utah Power and Light Co., 13 FMSRHC 1617 (1991) the Commission reviewed the Legislative History of this definition, and concluded as follows: "Thus the hazard to be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of miners." (13 FMSHRC supra at 1621). (Emphasis added)

The Commission rejected an interpretation of the imminent danger provision of the Act which includes "...any hazard that has the potential to cause a serious accident at some future time... ." (Utah Power and Light, supra. at 1622). The Commission future explained its holding as follows:

To support a finding of imminent danger, the inspector must find that the hazardous condition has a

reasonable potential to cause death or serious injury within a short period of time. An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners". (Utah Power and Light supra, at 1622.)

In the instant case, when the Section 107(a) Order was issued two days after the accident no one was working on the miner in question, and, according to Yates, it was "sitting by itself" (Tr. 52). Yates testified that the reason that he issued the order was that "the same accident could happen again if they [the miners] were not retrained in performing this type of work" (Tr. 36). However, there is no indication in the record that the lack of retraining had a reasonable potential to cause a serious injury "within a short period of time" (c.f., Utah Power and Light, supra at 1622). To the contrary, when Yates was asked on cross-examination, "But you will agree with me, we don't have any issue over the fact that there was nothing happening at that time [when the Order was issued] which caused you to issue the order," Tr.52 (emphasis added), the inspector replied, "There was no action being done, the mine[r] was sitting by itself."

In addition, on direct examination, the inspector testified that the reason he issued the Order was that "the same accident could happen again if [the miners] were not retrained in performing this type work." Tr.36 (emphasis added). Absent from the inspector's description, however, is any reference to the immediacy of the potential harm. Rather the inspector issued the Order because he "thought it might occur sometime in the future that somebody would have that same set of circumstances and do the same thing." Tr. 51-52 (emphasis added).

Although there was a chance for the fatal occurrence to be duplicated, as argued by Petitioner, I find this not sufficient to sustain an imminent danger order, under the rationale of Utah Power and Light, supra.

I conclude that it has not been established that when Yates issued the Section 107(a) order there was any condition constituting an imminent danger. Accordingly, the order at issue is to be vacated.

ORDER

It is hereby ORDERED that Docket No. KENT 92-305 be DISMISSED. It is further ordered that the Notice of Contest, Docket No. KENT 91-97-R, be sustained. It is further ordered that Order No. 3516447 and Citation No. 3516448 be DISMISSED.

Avram Weisberger
Administrative Law Judge

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