

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 10, 2008

BLUE DIAMOND COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 2004-220-R
	:	Citation No. 7542869; 05/07/2004
	:	
	:	Docket No. KENT 2004-221-R
SECRETARY OF LABOR,	:	Citation No. 7542870; 05/07/2004
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Calvery No. 80
Respondent	:	Mine ID 15-16349
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2005-31
Petitioner	:	A.C. No. 15-16349-39259
v.	:	
	:	
BLUE DIAMOND COAL COMPANY	:	MINE: Calvary No. 80
Respondent	:	

ORDER GRANTING MOTION FOR SUMMARY DECISION

Before: Judge Weisberger

This case arises out of a fatal accident that occurred on February 5, 2004, and the two resulting citations that were issued as a result of the fatality.¹ On July 11, 2008, Blue Diamond Coal Company (“Blue Diamond”) filed a Motion for Summary Decision (“Motion II”) in the above-captioned case. The Secretary of Labor (“Secretary”) filed her Response to Motion for Summary Decision on August 5, 2008.

Citation Number 7542869 alleges a violation of 30 C.F.R. § 77.1710(g), which requires that “[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: (g) Safety belts and lines where there is a danger of falling.” The citation states as follows:

¹ The balance of the facts are not relevant to the disposition of this motion, and are set forth in an order issued on August 10, 2007, denying Respondent’s Motion for Summary Decision (“Motion I”) filed January 4, 2006.

The maintenance supervisor, an employee of Chas Coal, Inc., failed to wear a safety belt or harness when on February 3, 2004, he was in the Simon Telelect aerial bucket The maintenance supervisor was thrown from the bucket from approximately 22 feet in height when the concrete imbedded wooden post he was pulling suddenly came out of the concrete floor releasing the deflected aerial boom. As a result the victim fell to his death

Citation Number 7542870 alleges a violation of 30 C.F.R. § 77.404(a), which provides that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The citation states as follows:

The Simon Telelect aerial bucket . . . was used improperly and for a purpose for which it was not designed. The maintenance supervisor, an employee of Chas Coal, Inc., while riding in the aerial bucket, attempted to use the upper boom on which the bucket is attached to pull a wooden post out of the concrete floor wherein it was embedded. The maintenance supervisor was pulling up and rotating the boom left and right to loosen and remove the post when the post came loose causing the boom to move violently throwing him out of the bucket. As a result the victim fell to his death

Under Commission Rule 67, 29 C.F.R. § 2700.67, summary decision may be granted if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and declarations, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. I find that Blue Diamond is entitled to summary decision in this case for the reasons set forth below.

Citation Number 7542870 / 30 C.F.R. § 77.404(a)

It is Blue Diamond’s position that there was not any violation of section 77.404(a) and, therefore, summary decision is appropriate, because MSHA has stipulated that the truck was in safe operating condition. The victim may have used the truck improperly, argues Blue Diamond, but improper use of equipment that was properly maintained does not constitute a violation of the section.

The Secretary counters that argument by asserting that the standard for finding a violation of section 77.404(a) is whether a reasonably prudent person, familiar with any facts peculiar to the mining industry, would recognize a hazard warranting corrective measures. The Secretary argues that under this standard, the facts demonstrate that the accident was the direct result of the victim’s use of the truck as a hoist – which is not the purpose for which the truck was designed – and that any reasonably prudent person with knowledge of the truck’s operation and design would know that this usage was potentially hazardous. As such, it is the Secretary’s contention that the issue is not whether the truck was safe for use as an elevated platform, the use for which

it was designed, but rather whether it was safe for use as a hoist, the use for which it was actually used.

Section 77.404(a) provides that machinery must be “maintained” in safe operating condition. This language is clear and unambiguous in its meaning, and as such, “effect must be given, if possible, to every word, clause, and sentence.” *Cannelton Industries, Inc.*, 26 FMSHRC 146, 149–50 (Mar. 2004) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.06, at 181 (6th ed. 2000)).

“Maintain” is defined as “to keep in a state of repair, efficiency, or validity: preserve from failure or decline.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), 1362 (2002 ed.). Given this clear definition, it is evident that the concept of “maintenance” is plainly distinct from the concept of “usage.” Therefore, the Secretary’s argument that “usage” should be implied into the meaning of section 77.404(a) is without merit. In addition, because the language and meaning of section 77.404(a) is clear and unambiguous, there is no need to apply the reasonably prudent person test. Therefore, because it is stipulated that the vehicle was in safe operating condition, it was in compliance with section 77.404(a). As such, Blue Diamond’s Motion for Summary Decision (Motion II) with regard to Citation Number 7542870 is granted.

Citation Number 7542869 / 30 C.F.R. § 77.1710(g)

Blue Diamond argues that summary decision is appropriate for disposition of Citation Number 7542869 because the language of section 77.1710(g) requires that the individual in question be an “employee” of the cited entity, and in the case at bar it is undisputed that the victim was not an employee of Blue Diamond. Blue Diamond advances the rule of *expressio unius est exclusio alterius* to support its position.

The principle of *expressio unius est exclusio alterius* dictates that “the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.” *Cannelton Industries, Inc.*, 26 FMSHRC at 158 (quoting *United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992)). Applying this principle to the case at bar, the classification of “employee,” as contained in 77.1710(g), is a specific classification pertaining to individuals who are employed at Blue Diamond. The usage of this specific classification precludes any implication that the statute intended to encompass any broader classification, and the Secretary has not asserted any contrary facts. Therefore, it must be found that there was no violation of section 77.1710(g), and Blue Diamond’s Motion for Summary Decision (Motion II) must be granted.

ORDER

It is **ORDERED** that Blue Diamond's Motion for Summary Decision (Motion II) is **GRANTED**. As such, Citation Number 7542869 and Citation Number 7542870 are vacated. The case is accordingly **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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