FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 14, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 93-182 A.C. No. 48-00086-03526
v.	:	
PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	Kemmerer

DECISION

Appearances: Kristi Floyd, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Ray D. Gardner, 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 Respondent, the operator of Kemmerer Mine, with three violations of mine safety standards.

The operator filed a timely answer contesting each of the alleged violations and the amount of the proposed penalties. The issues raised at the hearing were whether the operator violated the safety standard as alleged in the citations and, if so, whether or not each of the violations was significant and substantial and the appropriate penalty for each violation.

STIPULATIONS

The Secretary of Labor and the Respondent at the hearing entered into the record the following stipulations:

1. Respondent is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of the Kemmerer Mine, MSHA I.D. No. 48-00086.

3. Respondent 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 places 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 continue in business.

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

9. Respondent is a large mine operator with 17,520,572 tons of production in 1992.

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 citations.

Citation No. 3243029

This citation charges the operator with the violation of 30 C.F.R. ' 77.1104 which provides as follows:

> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

The citation reads as follows:

> Combustible material[,] hydraulic oil and coal dust was allowed to accumulate on the hydraulic unit of the car pusher located at the Elkol tipple. The material created a fire hazard.

It is undisputed that combustible materials including coal dust and hydraulic oil were allowed to accumulate on the hydraulic pump which drives the pump of the rail car mover located at the Elkol tipple. The inspector testified that the depth or thickness of the accumulated combustible material varied from 1/16 of an inch to 1/2 inch and covered the entire hydraulic unit. Evidence was presented that miners had been observed smoking in the tipple area and that there were electric lights and conduits in the area.

On the basis of the evidence presented I concluded that combustible materials were allowed to accumulate where they "can" create a fire hazard. The violation of the safety standard in question was established.

The citation designates the violation S&S. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co. 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ... , the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; ... (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. See also Austin Power, Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). The Commission has held that the third element of the Mathies formula "requires that

the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis in original).

The Secretary has the burden of proof. On evaluating the evidence presented by each party, I find the preponderance of the evidence does not establish the third element of the Mathies formula. Accordingly, I delete the S&S designation. The citation as modified is affirmed.

The operator was negligent in allowing the combustible material to accumulate on the hydraulic pump. On consideration of this and all other factors set forth in ' 110(i) of the Act, including Respondent's prompt good faith abatement of the violation, I find a penalty of $100 is appropriate.

Citation No. 3243027

This citation alleges a 104(a) S&S violation of 30 C.F.R. ' 77.1600(c) which provides as follows:

> (c) Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers.

The subject haul road is used to haul material from the gravel pit and to haul gravel from the storage area to other parts of the mine where gravel was used to repair roads and as a cover to help prevent slippage of vehicles on ice. Scrapers used the road in question to haul gravel to various locations. All mine equipment on occasion used the road, including garbage trucks and gravel trucks. The vehicles using the road varied in width from 11 to approximately 24 feet. It is undisputed the road in question was 35 feet wide, was "C" shaped, and had a gradual grade.

The inspector was concerned that since there were no warning signs, two vehicles entering the "C" shaped curve in the road from opposite directions might collide upon entering the curve at the same time. There could be inadequate side clearance depending, of course, on the width of the vehicles involved. Under these facts I find that a caution sign was needed to insure the safety of the workers.

It was Respondent's position that except for haul trucks and coal shovels, all the equipment could safely pass in opposite directions. Respondent presented evidence that coal shovels are such large machines that during the few instances they use the road, Respondent excludes all other equipment. Evidence was also presented that when haul trucks are using the road, Respondent restricted travel to a unilateral traffic pattern.

Everything considered, I agree with Respondent's assertion that the likelihood of an accident is too remote to support a "significant and substantial finding". The preponderance of the evidence does not establish the third factor of the Mathies formula. The citation is modified to delete the S&S designation and as so modified is affirmed.

The violation was timely abated by posting a caution sign. On consideration of the statutory criteria in ' 110(i) of the Act, I find a civil penalty of $100 is appropriate for this violation.

Citation No. 3243026

This citation charges Respondent with the violation of 30 C.F.R. ' 77.400 subsection (a) which provides as follows:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

It is well settled that in order to establish a prima facie case of a violation of ' 77.400(a), Secretary must prove: (1) that cited machine part is one specifically listed in the standard or is "similar" to those listed; (2) that the part was not guarded; and (3) that unguarded part "may be contacted by persons" and "may cause injury to persons."

With respect to item (1) that the cited machine part must be one specifically listed in the standard or similar to those specifically listed, I find on review and evaluation of the evidence presented in this case that the preponderance of the credible probative evidence presented fails to establish that the return belt rollers (idlers) in question are "similar" to the machine parts that are specifically listed in subsection (a) of the safety standard.

I credit the testimony of Mr. Dovey, Respondent's safety and training manager, who testified that the bottom rollers in question are not similar to head pulleys, takeup pulleys or tail pulleys because the bottom rollers in question are not driving mechanisms for the belt line. Mr. Dovey testified that all the bottom rollers in question do is let the belt roll across the top of these rollers. They do not apply power or pressure to the belt line. For this reason I believe they are significantly dissimilar from the machine parts listed in the safety standard.

The drawing entered into evidence by Petitioner as Exhibit G-3 depicts a "bend pulley" which unlike a bottom roller, is designed to "apply pressure to the belt line" and "to keep tension on [the] belt." (Tr. 164). Although bend pulleys are not expressly listed in 30 C.F.R. ' 77.400(a) they are similar to "take-up" pulleys which are listed since they both apply pressure to the belt line. It is undisputed that both the take-up pulleys, the bend pulleys in this case were well guarded. (Ex. 4-A).

Subsection (c) of 30 C.F.R. ' 77.400 specifically spells out the requirements for guarding components of conveyor systems. That subsection specifically covers guards at conveyor-drive, conveyor head, and conveyor tail-pulley and makes no reference or mention of "similar" machine parts of the conveyor system. In the present case it is undisputed that the tail pulley, head pulley, takeup pulley and the bend pulleys of the conveyor system in question were all properly and adequately guarded.

In Rochester & Pittsburgh Coal Company 10 FMSHRC 1576 (Noovember 1988) the inspector issued a citation alleging a violation of an identically worded standard, 30 C.F.R. ' 75.1722(a). The inspector issued the citation because of his concern the miner might be caught between an unguarded bottom roller and the moving conveyor belt. Judge Melick vacated the citation stating the moving belt was not a "similar" exposed moving machine part of the safety standard. The Secretary appealed the decision on other grounds. The Commission in its decision on reconsideration noted and left undisturbed the Administrative Law Judge's finding and decision vacating the citation because the machine part was not similar. Rochester & Pittsburgh Coal Company 11 FMSHRC 2159 at 2161 (November 1989).

In Secretary of Labor v. Mathies Coal Co., 5 FMSHRC 300 (1983), the Commission observed that this regulatory standard applies to the specific machine parts listed and to other exposed moving machine parts similar to those listed. The Commission quoted the definition of the word "similar" as "1) having characteristics in common; very much alike... 2) alike in substance

or essentials... ." citing Webster's Third New International Dictionary at p. 2120 (unabridged 1971).

Although the return rollers in question have the common characteristic of motion it is not "very much alike", or "alike in substance or essentials" nor is it similar in function.

In the Mathies supra the Commission reversed the judge and at page 301 stated:

> On review, the Secretary argues that the purpose of section 75.1722(a) is to "protect miners from injury caused by moving machinery," and that the elevator cage is subject to the standard "because it is an 'exposed, moving machine part which may be contacted by persons and which may cause injury.'" Sec. br. at 5. He (Solicitor) like the judge, interprets the standard to cover not only the listed machine parts but all machine parts that are exposed and moving. Sec. br. at 5-6. We disagree. We find that such an interpretation ignores the grammar of the standard and makes the list of items covered surplusage.

A standard must give an operator fair warning of the conduct it prohibits or requires and should provide "a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." The Commission in Mathies supra quoted the observation of the Fifth Circuit in a case arising under the Occupational Safety and Health Act of 1970, 29 U.S.C. ' 651 et seq. (1976) as follows:

> The [Secretary] contend[s] that the regulation should be liberally construed to give broad coverage because of the intent of Congress to provide safe and healthful working conditions for employees. An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a

The wording of Section 75.1722(a) and 77.400(a) are identical.

> reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents ... .
>
> If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.... We recognize that OSHA was enacted by Congress for the purpose stated by [the Secretary]. Nonetheless, the Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated.
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> Diamond Roofing Co. v. OSHRC & Secretary of Labor, 528 F.2d 645, 649 (1976)(citations omitted). Accord, Phelps Dodge Corp. v. FMSHRC & Secretary of Labor, 681 F2d 1189, 1193 (9th Cir. 1982).

The FMSHRC then stated:

> As we have previously acknowledged, "Many standards must be 'simple and brief in order to be broadly adaptable to myriad circumstances'". Alabama By-Products Corp., 4 FMSHRC 2128, 2130 (December 1982), quoting Kerr-McGee Corp. 3 FMSHRC 2496, 2497 (November 1981). However, even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue was prohibited by the standard. Alabama By-Products Corp., supra; U.S. Steel Corp., FMSHRC Docket No. KENT 81-136 (January 27, 1983).

I find that the standard in question under facts in this case does not give the operator fair warning that guarding of the bottom rollers in question is required and for this reason the citation is vacated.

ORDER

Citation Nos. 3243029 and 3243027 are **AFFIRMED** as modified, Citation No. 3243026 is **VACATED**. Pittsburg & Midway Coal Mining

Company shall pay a civil penalty of $200 for the violations alleged in Citation Nos. 3243029 and 3243027 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge

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