

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 2, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. WEVA 96-115
Petitioner : A. C. No. 46-01816-03939
v. :
 : Gary No. 50 Mine
U.S. STEEL MINING CO., INC., :
Respondent :
:

DECISION

Appearances: Ira L. Lee, Conference and Litigation
Representative, U.S. Department of Labor, Mine
Safety and Health Administration, Mount Hope,
West Virginia, for the Petitioner;
Gary R. Kelly, Esq., United States Steel
Corporation, for the Respondent.

Before: Judge Feldman

This matter was heard in Beckley, West Virginia, on August 20, 1996. The parties' posthearing proposed findings of fact and conclusions of law, and reply briefs have been considered in the disposition of this proceeding. This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent corporation pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a civil penalty of \$220.00 for an alleged unsafe condition on the respondent's Long-Airdox feeder in violation of the mandatory safety standard in section 75.1725(a), 30 C.F.R. § 75.1725(a). This mandatory standard provides:

Mobile and stationary equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Preliminary Findings of Fact

The pertinent facts surrounding the alleged violation are not in dispute. This case concerns a feeder manufactured by the Long-Airdox Corporation (Long-Airdox). Shuttle cars dump coal on the feeder conveyor which carries the coal to a crusher where large lumps of coal are broken into smaller pieces. The coal is discharged out the other end of the crusher onto a beltline that transports the coal to the surface. There are three-quarter inch continuous link chains welded into brackets in front of the crusher assembly. These chains are designed to prevent large piles of coal from jamming the receiving section of the crusher. These chains would not prevent the extremities of an individual who had stumbled on the energized conveyor from contacting the crusher.

A fatal accident occurred in early 1977 involving a Long-Airdox feeder when a feeder operator was dragged into the crusher as he attempted to cross over the moving conveyor. As a result of this accident, beginning in 1982, the Long-Airdox Corporation modified the design of its feeders to include emergency stop controls. The Long-Airdox emergency stop control is a cord, hung at approximately shoulder level across the conveyor, that is connected to a stop switch located on the side of the feeder. The purpose of this cord is to enable someone in the feeder hopper area to de-energize the machine if it became energized while he was in this crusher area.

Despite Long-Airdox's safety modification, coal operators routinely remove the emergency stop controls before placing feeders in service to eliminate production delays associated with nuisance tripping of the stop control during the coal loading process. In this regard, at the time of Sylvester's February 5, 1996, inspection, seven feeders were in service at the respondent's No. 50 Mine. Most, if not all, of these feeders were placed in service after Long-Airdox modified its feeders to include emergency stop controls. With the exception of the cited feeder which had the emergency stop control partially removed, none of the other feeders were equipped with emergency stop controls.

The Mine Safety and Health Administration (MSHA) policy concerning whether the removal of emergency stop controls on feeders is a violation of section 75.1725(a) is inconsistent. MSHA Inspector John B. Sylvester, Jr., testified that MSHA

inspectors in District Three interpret section 75.1725(a) as requiring feeders to be equipped with emergency stop controls¹. By contrast, District Four inspectors do not require emergency stop controls under section 75.1725(a)². The respondent's No. 50 Mine is located in District Four.

On February 5, 1996, Sylvestor issued Citation No. 3580959. The citation alleged the respondent was not maintaining its Long-Airdox feeder (Serial No. 54-2070), located in the north section of its No. 50 Mine, in safe operating condition in violation of section 75.1725(a) because the emergency stop control cord installed by the manufacturer had been removed. Sylvestor issued the citation because he observed the emergency pull cord was wrapped around the switch box on the right hand side of the feeder and that the power source leading from the switch box to the electrical panel had been removed. At the time the citation was issued, Sylvestor was aware that none of the respondent's other feeders had emergency stop cords. However, no other feeders were cited under section 75.1725(a). Sylvestor did not consider these to be in violation because the emergency stop cords and switches had been removed entirely. Although Sylvestor expressed reservations over the wisdom of removing the emergency stop cords, he testified that, under the District Four interpretation of section 75.1725(a), on the date of his inspection, he did not consider these feeders to be "unsafe". (Tr. 68-69).

Ultimate Findings and Conclusions

The issue in this case is whether the respondent's removal of an emergency stop cord on the cited feeder, by wrapping the cord around a switch on the side of the feeder and disconnecting the switch, renders the feeder "unsafe" in violation of section 75.1725(a). It is well settled that MSHA is not estopped from citing a violation simply because the violation was overlooked during prior inspections. King Knob Coal Company, Inc., 3 FMSHRC 1417, 1421-22 (June 1981). Throughout this proceeding, however,

¹MSHA District Three has jurisdiction in northern West Virginia, Pennsylvania and Maryland.

²MSHA District Four has jurisdiction in southern West Virginia and Virginia.

the Secretary has "admit[ted] that the cited regulation, 30 C.F.R. § 75.1725(a), established no mandatory requirement that a factory installed safety device be kept on equipment put in service." See Sec. Reply Br. at p.4. Therefore, the Secretary concedes MSHA's failure to cite feeders without emergency stop cords was a conscious decision rather than an oversight. The Secretary is consequently not entitled to the anti-estoppel protection expressed in the Commission's King Knob decision.

Although the Secretary admits, perhaps ill-advisedly, that the complete removal of the emergency stop control cord and switch from the feeder is not prohibited, he argues, for reasons not made clear in this proceeding, that the partial removal of the emergency cord is unsafe under section 75.1725(a). The Commission has held that equipment is "unsafe" under section 75.1725(a) when a "reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982).

Given the position taken by the Secretary, permissible corrective action in this case under the Alabama By-Products standard would include complete removal of the emergency stop cord and switch. Such removal is reasonably prudent if there is a reasonable concern over ill-fated reliance on a non-functioning cord. However, in this instance there is no evidence that anyone would rely on the emergency cord given its out of service condition and out of reach location at the side of the feeder. Absent a reliance related hazard, the Secretary is left in the unenviable position of citing the respondent for an "unsafe" dismantled and inoperative safety cord that the Secretary concedes is not required in the first place. Somehow, I miss the point.

Consequently, I am unconvinced, based on the arguments made by the Secretary in this case, that a reasonably prudent person would recognize that the cited feeder was unsafe under section 75.1725(a). Accordingly, Citation No. 3580959 must be vacated.

As a final note, the decision to vacate this citation is based on the Secretary's troubling position in this case. While the removal of a safety device installed by the manufacturer without any equally effective safety alternative may constitute prima facie evidence of unsafe equipment, as the trier of fact, I cannot consider arguments that have not been raised. Common sense, however, suggests that MSHA should rethink its position³.

ORDER

In view of the above, Citation No. 3580959 **IS VACATED** and this matter **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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/mca

³As a result of the subject citation issued by Sylvester, the Mine Safety Agency of the State of West Virginia issued citations requiring the respondent to reinstall emergency stop cords on their Long-Airdox feeders. (Tr. 193).