FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 18, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-209
Petitioner	:	A.C. No. 46-08939-63450
v.	:	
	:	
ARCH OF WEST VIRGINIA,	:	Guyan
Respondent	:	

ORDER DENYING MOTIONS FOR SUMMARY DECISION

BACKGROUND

This civil penalty proceeding involves the application of mandatory safety standard 30 C.F.R. § 77.404(a) to off-the-road (OTR) tires on haulage trucks. The standard states that "mobile 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." On May 9, 2005, Jerry Robertson, an inspector from the Secretary of Labor's Mine Safety and Health Administration (MSHA), issued three citations to Arch of West Virginia (Arch) asserting that the company violated section 77.404(a) by failing to maintain haulage truck tires in safe operating condition. The citations charge that one tire on each of three cited trucks was "worn to the 4th steel belt". Subsequently, the Secretary petitioned for the assessment of civil penalties for the alleged violations. Arch denied it violated the standard, and the matter was assigned to me for hearing and decision.

THE MOTIONS

The parties have filed cross motions for summary decision. Arch argues that in issuing the citations, MSHA has imposed a new enforcement policy for section 77.404(a), one about which Arch did not have fair notice. According to Arch, under that policy an MSHA inspector who examines tires on OTR heavy equipment, must cite a violation of section 77.404(a), "[i]f the first two protective plies of [OTR] tires . . . are worn through". Resp. Mot. 3 (*citing* Exh. 4 (Robertson Deposition 18)). In Arch's view, because "the enforcement standard MSHA applied has never been expressed by the agency", the three citations must be vacated. *Id*.

The Secretary argues that she is the one entitled to summary decision. She asserts Arch was aware of the requirements for compliance with section 77.404(a), but none the less clearly violated the standard. Because the three tires were unsafe, they should have been removed from service, and they were not.

ARCH'S MOTION IN MORE DETAIL

In the motion Arch gives its version of what happened at its mine during the May 9 inspection and its view of the background against which the inspection took place. According to Arch, on May 9, Robertson inspected 25 to 30 pieces of heavy equipment. Each piece of equipment had four to six tires. Of the 100 to 180 tires inspected, Robertson found three in violation of section 77.404(a). Resp. Mot. 8. At the time of the inspection Arch had in place an OTC tire maintenance/inspection program that involved four levels of inspection and maintenance. *Id.* 5-7. According to Dennis Stilley, Arch's Maintenance Planner, under the program a tire was taken out of service when "a tire [was] worn into the steel belts" and/or when a tire "exhibit[ed] sidewall cuts [or] smooth tread". *Id*. 7 (*citing* Stilley Deposition 48-51). Arch states when its Manager of Maintenance, John Metzger, had doubts about whether a tire was safe, he would "contact the representative of the tire's manufacturer, and ask him to come to the mine and examine the tire to made recommendations as to whether the tire [could] be safely used." *Id*. 8 (*citing* Metzger Dep. 19-20). During his contacts with manufacturers' representatives, Metzger never was told about an out-of-service criteria as it related to the wear on OTR tires, nor had he ever heard any of the representatives express knowledge of a "two belts and out" standard for tire removal and replacement. *Id.*8. In addition, when Robertson wrote the citations he did not mention of the "two belts and out" standard, nor did he ask Metzger about Arch's tire inspection/maintenance program. Resp. Mot. 9-10.

Arch also notes that Robertson stated that he did not measure the tread depth of the cited tires. Rather, he visually inspected the tires and counted the number of belts that were worn on each tire. Resp. Mot. 11 (*citing* Robertson Dep. 70-71). His only concern was whether belts one and two are worn through, and he did not think about anything else when considering whether the tires should be removed from service. *Id.* (*citing* Robertson Dep. 95).

Arch argues that MSHA is required to "publish standards that are ascertainable to the regulated community and give 'fair notice' of the agency's interpretation of those regulations." Resp. Mot. 12 (*citing Alan Lee Good, an ind. d.b.a. Good Constr.*, 23 FMSHRC 995 (September 2001)). Arch asserts that the standard itself provides no notice of the "two belts and out" removal criteria, that Robertson provided no notice, and that MSHA's Program Policy Memorandum (PPM) and other MSHA publications do not mention the criteria. It also asserts there were no prior citations issued at the mine for violations of the criteria. *Id.* 13-14. Indeed, according to Arch, the first time it learned of the criteria was when Robertson referred to it during his deposition. *Id.* 14.

Arch states that the question of fair notice must be decided on the basis of application of a "reasonably prudent person test", to whit, whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." Resp. Br. 16 (*citing Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (July 1990)); *BPH Materials Int'l Inc.*, 18 FMSHRC 1342, 1345 (October 1996)).

Arch argues it had a "reasonable and safe tire program in place" and that it "reasonably relied upon [its] criteria for OTR tires, *i.e.*, when the first steel belt is visible, the maintenance personnel schedule for tire replacement and continue to watch and inspect the tire until replacement." Id. 17, 19.

Finally, Arch asserts it reasonably relied on "established safety standards for OTR tires" and mine specific safety factors such as the fact that its roads were graded daily to reduce tire wear. *Id.* 20-23. Arch also cites the report of its expert, James K. Sprague, a vice president of Packer Engineering, Inc., in which Sprague expresses his opinion that the tires were safe. *Id.* 26-28.

THE SECRETARY'S MOTION IN MORE DETAIL

The Secretary asserts that Robertson cited the subject tires because he was concerned about blowouts and their potential to cause injury to drivers and nearby miners. Pet. Resp. 5. The Secretary references the opinion of her expert, James Angel, a mechanical engineer with MSHA's Approval and Certification Center, that OTR tires with worn steel belts are more likely to fail by rupture than by slow leak. *Id.* 13 *citing* Angel Dep. 42-43, 54).

Two of the tires were made by Michelin and one was made by Bridgestone. "To ensure that the construction and safety features of [OTR] tires were consistent with his understanding", Robertson called the Michelin representative "and explained that four belts had been breached and [Robertson] wanted to know when the tires should be taken out of service." *Id.* 4 (*citing* Robertson Dep. 34). According to the Secretary, the representative told Robertson "that a tire should be removed from service when the top two belts were worn through." *Id.* Although Arch had notice of the unsafe condition of the tires through reports made to mine management by miners, mine management, as represented by Metzger, did not think that tires worn to the fourth of the six belts were unsafe. *Id. 6-7* (*Citing* Metzger Dep. 52, 80).

In the Secretary's view, Arch either knew or should have known better. The Secretary points to the deposition of Jack Warnock, an employee of Bridgestone, who stated that once the structure belts of OTR tires are exposed, the tires should be removed from service. Pet. Resp. 9 (*citing* Warnock Tr. 28). According to Warnock, this is the tire removal criteria of the Rubber Manufacturers Association, and it is a criteria that it is recognized by "all of the tire industry". *Id.* Further, the Secretary notes Warnock's assertion that in 2004 and 2005 he conducted courses on tire safety at which the removal criteria for tires was discussed and that Arch representatives attended the courses. *Id.*

RULING ON THE MOTIONS

The controlling question is whether or not Arch violated section 77.404(a). Resolution of the question is fact driven and, as the parties recognize, must be determined within a framework of legal principles that have long been known and applied. These principles establish that section

77.404(a) imposes upon an operator two duties: (1) to maintain equipment (in this case, the cited tires) in safe operation condition; and (2) to remove unsafe equipment from service immediately. *Peabody Coal Company*, 1 FMSHRC 1494, 1495 (October 1979). As the parties also recognize, "[d]erogation of either duty violates the regulation". *Id.* The question of whether the cited equipment was in unsafe operating condition is resolved on the basis of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including facts peculiar to the mining industry and the mine, would have recognized a hazard warranting corrective action. *see Alabama By-Products Corp*., 4 FMSHRC 2128, 2129 (December 1982).

Applying these principles, the specific issue before me is whether, on May 9, 2006, the cited tires were not "maintained in safe operating condition" (30 C.F.R. 77.404(a)) because, as stated on each citation, they were "worn to the 4th steel belt." The parties have gone to great lengths to present conflicting arguments on the issue. However, they have not stipulated to a single fact, and the issue cannot be resolved without factual findings. While I take it as a given that the tires are "equipment" within the meaning of the standard, it is not clear the parties agree the subject tires were in the condition described by the inspector on the citations. Nor is it clear they agree regarding the conditions under which the subject tires were used and/or reasonably could have been expected to be used. Because there is a component of tire safety that is relative to their conditions of use, such factual matters may be relevant when determining whether the tries were unsafe.

Moreover, the Secretary bears the burden of proof, and it will be important for me to hear the testimony of Inspector Robertson as to why he believed the particular tires were not in safe operating condition. It also will be important to hear the testimony of the parties' witnesses as to whether, given the condition of the tires as found by the inspector, the tires were in fact in unsafe condition and whether a reasonably prudent operator would have known this. All such testimony will, of course, be subject to cross examination, which means there will be a complete record upon which to determine the ultimate issue.

Counsels should note in this regard that even if the testimony reveals Robertson issued the citations as the result of his rote application of the "two belts and out" rule and even if Arch did not have notice of MSHA's adoption and application of the rule, this will not resolve the issue. An inspector may issue a citation for an invalid or wrong reason, and the citation still may be sustained if the facts establish a violation. Here the citations may be sustained if the testimony establishes the tires were in fact in unsafe operating condition and Arch either knew or should have known it. In other words, the validity of the citations rests not on Robertson's motives, but on the facts and whether they show that a reasonably prudent operator familiar with the circumstances under which the particular citations were issued, including facts peculiar to the mine involved, would have concluded the cited tires were unsafe and would have removed them from service.

A conclusion on this issue is best based on testimony that has been refined and sharpened through cross examination and that has been subjected to credibility determinations. For these reasons, the motions are **DENIED**. The hearing scheduled to begin at 8:30 a.m. on August 17, 2006, will go forward as planned.

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Administrative Law Judge
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