

CCASE:

MSHA V. SOLAR FUEL

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

June 23, 1981

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),

v.

Docket No. PENN 79-142

SOLAR FUEL COMPANY

#### DECISION

This penalty proceeding arises under section 110 of the 1977 Mine Act, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge issued a summary decision in which he concluded that Solar Fuel Company had not violated 30 CFR 75.503 1/ and vacated two section 75.503 citations against it. 2/ On August 1, 1980, the Commission directed review on its own motion. The issue before the Commission is whether electric face equipment stipulated to be in nonpermissible condition and intended for use inby the last open mine crosscut, was in violation of section 75.503 when located outby the last open crosscut.

The parties stipulated to the following facts. On May 3, 1979, an MSHA inspector issued a citation charging Solar with a violation of section 75.503. The citation stated that a continuous mining machine, located outby the last open crosscut, was not in permissible condition. The machine was not in use when cited. The following day, May 4, the inspector issued another citation again charging Solar with a violation of section 75.503. The citation stated that a roof bolting machine, located in the same working area outby the last open crosscut and also not in use at the time, was not in permissible condition. The mine section where the cited equipment was located was being prepared for mining operations scheduled to begin shortly after each citation was issued. Solar intended to use both pieces of equipment inby the last open crosscut while performing these operations. Shortly after each citation was issued, the cited defects were corrected. On both days, coal was produced in the mine section in question after each citation was issued.

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1/ Section 75.503 provides:

The operator of each coal mine shall maintain in permissible

condition all electric face equipment required by §§75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

Section 75.503 is based on section 305(a)(3) of the 1977 Mine Act, which reads:

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by this subsection to be permissible which is taken into or used inby the last open crosscut of any such mine.

An identical statutory provision with the same section number was contained in the 1969 Coal Act

2/ The summary decision was issued on July 3, 1980. 2 FMSHRC 1732. ~1385

The judge emphasized that the Secretary had not alleged "that the electric face equipment involved in the ... citations was taken into or used inby she last open crosscut." 2 FMSHRC at 1737. The judge rejected the Secretary's argument that Solar's admitted intention to take the equipment inby the last open crosscut was sufficient to prove a violation. He stated that the Secretary's position "ignores the plain language of section 75.503 which requires that the equipment be electric face equipment 'which is taken into or used inby the last open crosscut.'" Id. at 1735-1736. He concluded that to prove a section 75.503 violation, the Secretary must demonstrate that an operator did not maintain in permissible condition equipment which "was 'taken into or used inby the last open crosscut'" (emphasis added). Id. at 1736. He found that the Secretary had not carried his burden because the equipment was cited outby the crosscut. 3/ We reverse. The judge's holding cannot be squared with the plain language and stated purpose of the relevant statutory and regulatory provisions.

The judge's construction renders the verbs, "is taken and [is] used," as tantamount to "has been or was taken/used." As the Secretary argues, this approach misconstrues the grammar of these provisions. The verbs in question are in the present tense of the passive voice, third person singular. Among other things, the present tense denotes continuing or habitual action as well as action which always occurs or will occur. Thus, from a grammatical standpoint, the proper meaning of these provisions is "equipment which is taken or used inby the last open crosscut," connoting past, present, and future conduct. In turn, this means that equipment habitually used or intended for use inby must be maintained in permissible condition and may be cited regardless of whether it is located inby or outby when inspected. The emphasis is not on where equipment is located at the time of inspection, but simply whether it is equipment which is taken or used inby.

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3/ In reaching his conclusion, the judge relied on section 318(i) of the 1977 Mine Act, which defines "permissible" condition as regards electric face equipment. The judge stated:

I find nothing [in] the legislative history which would support the position of [the Secretary]. On the contrary, section 318(i) of the Act provides in pertinent part:

"'Permissible' as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry...." In order to support [the Secretary's] position I would have to find that the language "taken into or used inby the last open crosscut" as used in this regulation is redundant. Nowhere in the Act or regulations is there a requirement that a mine operator maintain electrical face equipment in permissible condition if it is "intended" to be taken into or used inby the last open crosscut.... [2 FMSHRC at 1736.] ~1386

The judge ignored the expressly stated purpose of these provisions. While he did rely on the "permissibility" definition in section 318(i) of the 1977 Mine Act (2 FMSHRC at 1736), he did not cite the crucial explanation for requiring "permissibility" in the first instance:

"[P]ermissible" as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which ... are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment.... [Emphasis added.]

Identical language is contained in 30 CFR 75.2(i). Although sections 318(i) and 75.2(i) define permissibility in terms of design, construction, and installation of electric face equipment, section 305(a)(3) of the 1977 Mine Act and section 75.503 require that the equipment be maintained in such "permissible" condition. We think that the conclusion is inescapable that the equipment be so maintained for precisely the same reason--to assure against mine accidents. The purpose of "assuring [against] mine explosion or mine fire" militates against any interpretation of "is taken into or used inby" which would lessen that assurance. Plainly, the judge's interpretation does not further the purpose of assurance.

Furthermore, the judge's interpretation would lead to unacceptable results. It would allow an operator the opportunity to operate

impermissible electric face equipment inby the last open crosscut prior to a mine inspection, move it outby during the inspection, and then return it to the face once the mine inspector had left the premises. To adopt the judge's holding in light of those prospects would, we believe, derogate from Congressional intent by creating a formalistic loophole in the 1977 Mine Act and implementing regulations. Cf. *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843, 844 (1981); *Paramont Mining Co.*, 2 FMSHRC 2476, 2477 (1980)(rejecting similarly formalistic constructions of analogous regulations). For the foregoing reasons, we reverse the judge's decision and interpret 30 CFR 75.503 to apply not only to equipment which has been taken inby the last open crosscut when inspected, but also to equipment which is intended to be or is habitually taken or used inby, even if it is inspected while located outby. Accordingly, this case is remanded for disposition consistent with this decision.

~1387

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