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MSHA V. KAISER STEEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 3, 1981
MINING ENFORCEMENT AND SAFETY
ADMINISTRATION (MESA), Docket No. DENV 75-163-P
Petitioner

v.

IBMA 77-3

KAISER STEEL CORPORATION,
Respondent)

DECISION

This appeal was pending before the Interior Department Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961. Kaiser Steel Corporation (Kaiser) has appealed from a decision assessing a civil penalty of \$6,000.00 against it for a violation of 30 CFR § 75.509. 1/ We have reviewed the record, briefs, and the proceedings below, and affirm the judge's decision. The contentions advanced on this appeal were presented below, and in our view properly disposed of by the judge.

This case was initiated under the Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801 et seq. (1976)(amended 1977)[the 1969 Act]) following the death of miner Gary J. Nichols, fatally injured on February 27, 1973 while changing shearing wheel bits on the shearing machine in Kaiser's Sunnyside No. 1 Mine. When the shearing machine unexpectedly started up, the victim was crushed under the shearing wheel before the power could be shut off and the wheel stopped. On appeal Kaiser directs us to three main issues, the first of which is whether this regulation can be properly applied to a bit changing operation.

1/Section 75.509 provides: All power circuit and electric equipment shall be deenergized before work is done on such circuits and equipment except when necessary for trouble shooting or testing.

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Kaiser maintains that 75.509, a statutory standard, 2/ is solely designed to prevent electrical hazards to miners working on electrically powered equipment, but was not intended to regulate mechanical maintenance such as bit changing. It notes that 30 CFR

75.510 and 75.511 are also taken verbatim from section 305(f) of the 1969 Act,^{3/} and that this series of statutorily derived regulations are directed toward the performance of electrical work, not the mechanical procedure of bit changing. We agree with the analysis of the judge below, however, and find that these regulations are not so restricted.

2/ Section 305(f) provides: All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing. In addition, energized trolley wires may be repaired only by a person trained to perform electrical work and to maintain electrical equipment and the operator of such mine shall require that such person wear approved and tested insulated shoes and wireman's gloves. No electrical work shall be performed on low-, medium-, or high voltage distribution circuits or equipment, except by a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who performed such work, except that, in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

3/ 30 CFR 75.510 and 30 CFR 75.511 provide:

30 CFR 75.510 - Energized trolley wires may be repaired only by a person trained to perform electrical work and to maintain electrical equipment and the operator of a mine shall require that such person wear approved and tested insulated shoes and wireman's gloves.

30 CFR 75.511 No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that, in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them, or, if such persons are unavailable, by persons authorized by the operator or his agent.

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Kaiser points to the adoption four days before this accident of a new regulation (30 CFR 75.1725) which better covers the function of bit changing.^{4/} In August 1973, six months after this fatal accident, Petitioner's Manual ^{5/} was changed to reflect adoption of this new regulation, and that bit changing was now under 75.1725, not 75.509. Accordingly, Kaiser avers that the only connection between 75.509 and bit changing is a result of the strained interpretation in MESA's (September 1972) Safety Inspection Manual.^{6/}

However, the relevant Manual language under both 75.1725 and 75.509 is identical. Further, Kaiser concedes that "this standard (75.1725) by itself, still does not expressly regulate this procedure." As Kaiser--correctly--notes the Manual is in any event not to be given the force of law, since not promulgated as if it were a regulation under the Act. We have no quarrel with this contention, although the implication that MESA is bound by the Manual, even though the operator is not, is not persuasive, especially since no reliance on the Manual is claimed by the operator. See *Kaiser Steel*, 3 IBMA 489 (498)(1974). However, neither 30 CFR 75.509 nor 30 CFR 75.1725 make reference to bit changing, and no reason appears from the language of either why one is to be preferred to the other in the regulating of this mining function. See also *Bell Coal Company, Inc.*, 5 IBMA 155 (1975), and the judge's discussion thereof below at pages 7 and 8.

Parsing the language of Section 305 of the Act lends further support to this statutory regulation's applicability in this case. Indeed, Section 305 (which is headed "Electrical - General") regulates (e.g.) "handheld electric drills, blower and exhaust fans, electric pumps, and other low horsepower electric face equipment." This would appear intended to enumerate more inclusively the electric equipment to be regulated by this section of the Act, rather than to restrict its application to only more conventionally 'electrical' equipment, as urged by Kaiser.

4/ 30 CFR 75.1725(c) and 75.1725(d) provide:

75.1725(c) - Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

75.1725(d) - Machinery shall not be lubricated manually while in motion unless equipped with extended fittings or cups.

5/ United States Department of the Interior, Bureau of Mines, Coal Mine Safety Inspection Manual for Underground Mines.

6/ The Manual provided: Opening a circuit breaker which is installed on the machine and which opens all power conductors entering the machine shall be accepted as compliance with this section for lubrication or changing bits. [Exhibit P-7].

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To hold that this machine, powered by both a 950 volt operating circuit and a 120 volt control circuit, is not electric equipment, would permit maintenance to be performed on this shearing machine--and undoubtedly a great many other electrically powered mining machines--without requiring that these be deenergized, despite all parties' agreement that maintaining power to the machine here involved during bit changing would be unsafe.7/

For, as was noted below:

"As pointed out by MESA, section 75.509 by its terms, refers to "electric equipment" as well as power circuits". It does not unduly strain the regulatory language to classify a shearing machine powered by a 950-volt trailing cable as a piece of electrical equipment."

As the judge, and for similar reasons, we have little, if any, difficulty applying 30 CFR 75.509 to this bit changing operation. It is also asserted that "shall be deenergized" in 30 C.F.R. 75.509 is ambiguous since the standard fails to define deenergize, and the circumstances under which equipment is to be deenergized. We reject this argument; on this record it is clear that deenergize was understood by the miners, including two of Kaiser's own employeewitnesses. And see the judge's decision, pages 9-12.

Kaiser next contends that even if 30 CFR 75.509 is found to be applicable, a question exists as whether there was sufficient evidence presented to establish a violation of the standard.

The analysis of the judge below in our view simply and correctly summarizes the record. The evidence adduced at the hearing showed that turning off the power disconnect switch on the machine was (at that time) considered sufficient compliance with the standard.

However, Kaiser suggests that the accident could have resulted from the operator "jogging" or "goosing" the wheel by turning on the power disconnect switch, rather than the power disconnect switch being on during the (entire) course of the bit changing operation.

7/ As to the disagreement as to how deenergization is to be accomplished, more specifically the point at which the power is to be disconnected, see *infra*, page 5.

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The parties agree that there was power going to the shearing machine wheel at the time of the accident, the machine was in gear, and that rotation of that wheel killed miner Nichols while he was engaged in changing bits on the machine. Whether or not one agrees with Kaiser's view of the manner in which or place where this machine is to be deenergized,^{8/} it is indisputable that power was coming to the machine, more precisely to the shearing wheel, at the time the miner was killed. We therefore hold that the judge below correctly found that there was sufficient evidence that the machine was not deenergized within the meaning of the regulation, and that the standard was accordingly violated.

As the judge found:

"The evidence demonstrates (1) that there was an established procedure known to the operator for ensuring that the shearing machine not start up

during the bit changing procedure, and (2) that the accident under consideration here would not have occurred unless the procedure was violated."

There is substantial record evidence in support of that finding.

Nor was any testimony adduced which indicated that the machine itself was in any way defective; indeed, the post-accident investigation found no defects, either electrical or mechanical.

Finally, we find that the judge's decision was based on reliable, probative and substantial evidence, contrary to the contention of Appellant.

Kaiser has asserted that two out-of-court statements, admitted into evidence at the hearing but thereafter rejected by the judge as a basis for any findings, actually played a key role in leading the judge below to his decision. Scrutiny of that decision reveals no support for this contention

Appellant also raises objection to the Petitioner's accident investigation report prepared by the inspectors who largely conducted the post-accident investigation. It is sufficient to note that this report (Exhibit P 3) was received into evidence without objection by Kaiser, and provides ample support for the decision rendered.

8/If the power had been disconnected externally, by disconnecting the cable at the headgate outside the machine, obviously there would have been no power to either the 120 volt control or 950 volt circuits.

However, the nature of the occurrence in this instance make it clear that there was power coming both through the control circuit on the machine--even if arguably in conformity with procedure approved by both MESA and Kaiser--and to the 950 volt circuit (which is activated only by and after the control circuit is energized). Whether this was inadvertent or not, without this power the wheel would not have rotated, and the miner would not have died. Nor, we note parenthetically, was any testimony presented as to why the shearing machine was not moved clear of the mine face, roof or walls before bit changing was begun.

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In summary, we find that 30 CFR 75.509 is applicable to these facts, that there was an established procedure, known to the operator, for insuring that the shearing machine not start-up during the bit changing procedure, and that the accident under consideration here could not have occurred unless that procedure was violated. Kaiser's own witnesses testified to the effect that the power was on and the clutch engaged at the time of the accident and death of miner Nichols.

We further find that the judge, having determined that a violation of this mandatory statutory standard occurred, complied with section 109(a) of the Act in analyzing the factors required to be considered

in determining the amount which he assessed as a penalty.
The decision of the administrative law judge is affirmed.

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