CCASE:
MSHA V. A.H. SMITH STONE
DDATE: 19830128
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 28, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VA 81-51-M

A. H. SMITH STONE COMPANY

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981), and involves the interpretation and application of 30 C.F.R. $ 56.4-35. The cited standard provides:

> Mandatory. Before any heat is applied to pipelines or containers which have contained flammable or combustible substances, they shall be drained, ventilated, thoroughly cleaned of residual substances and filled with either an inert gas or, where compatible, filled with water.

The administrative law judge concluded that A. H. Smith Stone Company ("Smith") violated the standard and assessed a $1,000 penalty. 1/ For the following reasons, we affirm the judge's decision.

On November 24, 1980, an accident occurred at Smith's Culpeper, Virginia crushed stone operation, when a miner attempted to cut with a welding torch a used 55-gallon oil drum. The drum exploded and the employee was critically injured. After an investigation of the accident, MSHA issued a citation charging a violation of the standard for a failure to have the drum purged of flammable substances before heat was applied to it.

Used drums that had contained flammable substances, such as fuel oil, lubricants, or antifreeze, were customarily stored at Smith's Culpeper plant behind a company trailer. The used drums were returnable for credit towards purchase of full barrels, and were picked up at the plant for that purpose by the distributor. Some drums were kept at the plant for re-use as trash barrels or as storage drums for fuel or lubricants. When a drum was to be reused as a trash receptacle, Smith would have its employees cut off the drum top with a torch on company

_____

1/ The judge's decision is reported at 3 FMSHRC 2927 (December 1981)(ALJ).

premises. Smith also had a practice of giving used drums to employees upon request for their personal use. 3 FMSHRC at 2931-32; Tr. 55-56, 85-86. The used drums at the Culpeper plant were not drained, ventilated, cleaned, or filled with inert gas or water before being put behind the trailer, and were stored with their plugs in place. 2/ On the day of the accident, the miner in question asked the plant superintendent for a used 55-gallon oil drum. Although it appears that the employee did not explain the reason for his request, the superintendent assumed that he wanted the drum for his personal use. 3 FMSHRC at 2931-32; Tr. 83-86. 3/ The superintendent gave the employee permission to take the drum. The employee then obtained from a fellow miner a torch for cutting the drum, but he did not remove the plug or purge the drum before using the torch. The drum exploded when he applied the torch to it and he received fatal injuries. A subsequent investigation revealed that a residue of petroleum distillate inside the drum had been ignited by the heat of the torch.

The judge based his conclusion that Smith violated section 56.4-35 on the evidence that "[the employee] applied a torch to a container which had contained combustible or flammable oil without draining, ventilating, and cleaning the barrel." 3 FMSHRC at 2932. In assessing the penalty, the judge also determined that Smith was negligent. The judge found that Smith knew or should have known that it was possible the miner would cut the oil drum on company premises. 3 FMSHRC at 2933. The judge emphasized that Smith permitted its employees to take used drums for personal use, and also at times instructed employees to cut drums on company property for such company uses as making trash barrels. Id. The judge concluded that "[w]hile [Smith] did attempt to instruct the employees as to the proper procedure for purging drums, management could have been more diligent in its attempts to insure that all drums were properly ventilated and cleaned." Id.

On review Smith, proceeding pro se, commingles liability and negligence arguments. Smith does not deny that the miner cut the drum without first purging it. The operator contends, however, that it is neither liable nor negligent in connection with the incident because it had previously instructed the employee in proper purging procedures, did not specifically authorize him to cut the drum on company premises, and could not have foreseen that he would do so. We are not persuaded.

2/ The plant superintendent testified that the plugs were not pulled (a procedure that would have allowed some ventilation of the drums) because the distributor had requested that the plugs not be removed on

drums being returned for credit.

3/ Testimony at the hearing indicated that the miner intended to use the drum at his home as a receptacle for draining oil. Tr. 38, 56-57.

Concerning the question of liability for a violation, the

~15

standard's purging requirements are stated in mandatory terms: Before heat is applied to a container that has held flammable substances, the container "shall be" purged of those substances in the manner prescribed. There is no dispute that on mine premises Smith's employee applied heat to a container that had contained a flammable substance without first purging the container. Smith's various arguments that it should escape liability because the miner's actions were unauthorized and careless cannot be squared with either the broad and mandatory language of the standard or the liability without fault structure of the Mine Act. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1462-64 (August 1982). See also Sewell Coal Co. v. FMSHRC, 686 F.2d 1066, 1071 (4th Cir. 1982); Allied Products Co. v. FMSHRC, 666 F.2d 890, 893-94 (5th Cir. 1982). We therefore affirm the judge s conclusion that a violation of the standard occurred.

Regarding negligence, section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. $ 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs. The fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. Southern Ohio Coal Co., 4 FMSHRC at 1463-64. See also Nacco Mining Co., 3 FMSHRC at 848, 850-51 (April 1981)(construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation). In light of these general principles, we affirm the judge's conclusion that the employee's conduct was foreseeable and that Smith did not meet its duty of care under the circumstances.

An employee's cutting of a used drum with a torch at Smith's mining operation was not an uncommon occurrence. Smith's employees performed that task to make barrels for storing or burning trash at the plant. The employee in question had previously cut drums on company premises for such business purposes, and that function was part of his job description. 3 FMSRHC at 2931; Tr. 76, 83, 85-86. As the judge found, Smith was also "liberal" in allowing its employees to take used

drums for their own use (3 FMSHRC at 2932), and the same employee had been given drums in the past for his personal use. Tr. 55-56, 85. Cutting used drums to make receptacles was a common use of the drums. We thus affirm the judge's finding that on the day of the accident it was reasonably foreseeable that the employee might cut the drum on company property.

The used drum taken by the employee had not been purged nor had its plug been removed. A plugged, unpurged drum that has contained a flammable substance is a highly dangerous instrumentality given an ignition source and the consequent possibility of an explosion if heat is applied. An operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with that danger. Accordingly, it is incumbent upon an operator to maintain proper control over a dangerous instrumentality like an unpurged oil drum.

~16

The judge found that in the past Smith had orally instructed its employees in the proper procedures for purging a used drum before cutting it to make a trash barrel. We conclude, however, that Smith's reliance on past oral instructions when it allowed the employee to take the unpurged oil drum did not amount to proper control of that dangerous instrumentality. There are a number of potentially appropriate precautions that an operator in Smith's position could have taken to maintain control over unpurged drums. For example, Smith could have marked unpurged drums, "purge before cutting"; it could have posted at the.storage area a warning sign reminding employees of appropriate purging procedures; cutting could have been permitted only under proper supervision in designated areas. The record does not show that Smith took any such precautions. Indeed, the superintendent did not repeat company instructions on purging when he let the employee take the unpurged drum even though, as we have concluded, it was foreseeable that the employee might cut it with a torch on company premises. 4/ Thus, we agree in result with the judge that Smith was negligent in not discharging an appropriate duty of care under the circumstances of this case. In reaching this conclusion, however, we do not endorse the judge's reasoning that an operator in Smith's position should have purged all containers that held flammable substances before storing them. Although this may indeed be a safe practice to follow, the standard only requires purging before heat is applied. Thus, in this case Smith's duty of care could have been met by something more than mere reliance on past oral instruction, but less than the across-the-board purging procedure suggested by the judge. 5/

4/ Although the superintendent denied authorizing the employee to cut the drum on company property, he did not forbid any cutting and, indeed, testified that he would have given permission for cutting had the employee requested it. 3 FMSHRC at 2933; Tr. 87. This testimony reveals a managerial disposition to allow cutting for personal purposes and underscores our conclusion that insufficient care was taken when personal use of the drum was approved.

5/ We also reject two additional arguments posed by Smith. Smith complains that the transcript of the hearing was not made available to it. At the hearing, however, the judge specifically stated in response to Smith's request that transcripts could be obtained from the reporter. Tr. 133. Smith also complains of the Secretary's change of position from not pleading negligence to alleging negligence just before the trial. Smith fails to show how this pre-trial change of theory was prejudicial to it. Smith was informed prior to trial that the Secretary would attempt to prove negligence on the basis of new evidence. Tr. 8-9. A shifting of legal theories based on evidence revealed through discovery or other sources after the initial pleadings is certainly not
(Footnote continued)

For the foregoing reasons, we affirm the judge's decision.

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

---

fn. 5/ continued
uncommon. The Secretary orally sought a continuance to prepare his negligence claim, and Smith did not oppose the motion. Tr. 8-12. Smith did not specifically explain to the judge how it would be legally prejudiced by the change of theory, did not state that it would need extra time to prepare any additional defense, and did not attempt to show bad faith or dilatory motive on the Secretary's part. Tr. 8-15. Finally, at no time during the administrative hearing did Smith object to the introduction of this evidence on the grounds that it was outside the scope of the pleadings. We find Smith's conduct tantamount to consent to trial of the negligence issue. See in general, Mineral Industries and Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1293-94 (5th Cir. 1981).

Distribution

Anna Wolgast, Esq.

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Wheeler Green, Safety Director
A. H. Smith Stone
Branchville, Maryland 20740
Administrative Law Judge George Koutras
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041