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MSHA V. PEABODY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 12, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. KENT 86-94-R
KENT 86-95-R
PEABODY COAL COMPANY KENT 87-154

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), the issue presented is whether Commission Administrative Law Judge William Fauver erred in determining that Peabody Coal Company ("Peabody") violated 30 C.F.R. § 75.1710-1 by not equipping certain mobile bridge carriers ("MBC") with cabs or canopies. 9 FMSHRC 945 (May 1987)(ALJ).1/ On the bases that follow,

1/ 30 C.F.R. § 75.1710-1, which implements the statutory cab and canopy standard, 30 U.S.C. § 877(j), requires installation of cabs or canopies on "self-propelled electric face equipment."

Section 75.1710-1(a) states in pertinent part:

Canopies or cabs; self-propelled electric face equipment; installation requirements.

[A]ll self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine ... shall, in accordance with the schedule of time specified in paragraphs (a)(1.1, (2.), (3), (4)., (5), and (6) of this section, be equipped with substantially constructed canopies or cabs, located

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we conclude that the judge's finding of violation is supported by substantial evidence and is legally correct in result. Accordingly, we affirm.

Peabody owns and operates the Camp No. 11 Mine, a large underground coal mine located near Morganfield, Kentucky. The mine is part of a complex employing 1,000 people and producing 4.1 million tons of coal annually. In three of the mine's five operating sections, coal is mined using continuous mining machines and shuttle cars. In the other two operating sections, a "continuous haulage system" is used. Coal is loaded directly from the continuous miner onto a series of haulage belts contained in a mobile haulage system, eliminating the need for shuttle cars. This mining process results in offset crosscuts at angles of approximately 60 degrees. 2/

When the continuous haulage system is in use, coal cut by the continuous mining machine is dumped from the machine's tailpiece onto the first piggyback conveyor, where an electrically powered conveyor belt transports the coal along the piggyback's conveyor and onto the first MBC. The MBC contains an electrically powered conveyor belt that transports the coal to the second piggyback conveyor. The coal subsequently passes to the second MBC and then to the third piggyback conveyor. From the third piggyback conveyor, the coal is transferred by a dolly to the panel conveyor belt and is transported out of the mine. The continuous miner, piggyback conveyors, and MBCs are equipped with slot devices through which pins are inserted to hook the components together. These components may be connected and disconnected, and are usually disconnected and moved between mining cycles. Each MBC is equipped with an electric motor that drives its conveyor belt and another electric motor that moves the MBCs forward and backward on caterpillar tracks. The movement of the MBCs allows the continuous haulage system to adjust to the movement of the continuous mining machine without disrupting transportation of the coal. Each MBC is approximately 30 feet long and is operated by a miner using controls located approximately 20 feet from the MBC's inby end (the end nearer the face). The chief duty of the operator of the first MBC is to keep the piggyback conveyor aligned with the tailpiece of the continuous miner in order to assure the proper movement of the mined coal. Since 1978, MBCs without protective cabs or canopies have been used as components of the continuous haulage system at the mine and, prior to the issuance of the citations in question in 1986, had not been cited as being in violation of section 75.1710-1.

and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls. ...

2/ A "crosscut" is a passageway or opening driven between and across mining entries for ventilation and haulage purposes. Bureau of Mines, U.S. Dept. of the Interior, Dictionary of Mining, Mineral, and Related Terms 280 (1968) ("DMMRT").

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On March 3, 1986, James Hackney, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected the No. 6 section of the mine, a continuous haulage system section. He observed the two MBCs being operated without protective cabs or canopies. Hackney issued to Peabody a citation pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 75.1710-1. On March 5, 1986, he inspected another continuous haulage system in the mine's No. 1 section, where he observed the first MBC in the system being operated without a cab or canopy. Hackney issued to Peabody another section 104(a) citation alleging a violation of section 75.1710-1. Peabody contested the citations and the Secretary's proposed penalty assessments for the alleged violations. Before Judge Fauver, the parties agreed that the cited MBCs were not equipped with cabs or canopies at the times of citation and that the MBCs were self-propelled electrical equipment.

The judge, stating that an MBC is self-propelled and electrically operated, regarded the controlling issue to be whether an MBC was electric face equipment. 9 FMSHRC at 947. The judge noted that the cab/canopy regulation does not contain a definition of the equipment to which it applies. In agreement with the parties: mutual position at the hearing (Tr. 14-16), however, he found that the "permissibility" definition contained in 30 C.F.R. § 75.2(i) supplied "a practical line of demarcation." Id. 3/ That section provides in relevant part that equipment permissibility within the context of "electric face equipment" pertains to "all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine...." Viewing face equipment as equipment used in or in by the last open crosscut, the judge focused on the meaning of "last open crosscut," a term not defined in the Mine Act or the Secretary's regulations. 9 FMSHRC at 948. In construing that term, the judge rejected the testimony of

3/ 30 C.F.R. § 75.2(i) repeats section 318(i) of the Mine Act, 30 U.S.C. § 878(i), and states in part:

"Permissible" as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which,

including, but not limited to, associated electrical equipment, components, and accessories are designed, constructed, and installed in accordance with 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....

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Peabody's witness, Mine Superintendent Charles Jernigan, that the last open crosscut is the area between, but not including any portion of, the mine entries. 9 FMSHRC at 948. Instead, the judge found "reliable and accurate" the testimony of MSHA's Assistant District Manager David Whitcomb, that the last open crosscut is the last open, continuous line along which the air ventilating a working section circulates. 9 FMSHRC 945. 4/ Based on Whitcomb's testimony, the judge found: "The last open crosscut ... [is] defined by the flow of air across the section, [and] includes not only the openings between the entries but across the intersections and that part of an entry inby an intersection to the point of the next intersection inby. That is, the last open crosscut follows the air flow across the entries of the working section." 9 FMSHRC at 946. Applying this description to the evidence, the judge determined that the operator's compartment of the first MBC enters the last open crosscut during mining operations. 9 FMSHRC at 949. The judge held that "since the first MBC operator's compartment enters the last open crosscut, it is required to have a cab or canopy under [section] 75.1710-1." Id. The judge rejected the Secretary's argument that the continuous haulage system is a "single unit," and that application of the standard to the first MBC in the unit therefore brings the second MBC in the system within the reach of the standard. 9 FMSHRC at 949. The judge stated: The test of applying ... [section 75.1710-1] is whether the equipment operator's compartment is subject to being used in or inby the last open crosscut. It would stretch the standard too far to hold that the second MBC [in the continuous haulage system], which is far removed from the last open crosscut, should be considered "face equipment" solely because the front part of the continuous haulage system is in or inby the last open crosscut.

Id.

The judge assessed token civil penalties of \$1.00 for each

violation, noting that "the cases involve a novel haulage system that raises a question of first impression," and that Peabody had made a good faith test of its interpretation of section 75.1710-1 as applied to the continuous haulage system. 9 FMSHRC at 949. We granted Peabody's petition for discretionary review, which asserts essentially that the judge erred in his description of last open crosscut and, hence, in holding that the first MBC in each continuous haulage system is subject to the cited standard. We also directed for review an issue raised by the Secretary -- whether the judge erred in

4/ "Working section" (often referred to as "section") means a working area of a coal mine, from a loading point to and including a working face. See 30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2(g)(3); DMMRT 979. (See n.7 infra for the definition of "working face.")

~8

concluding that the continuous haulage system should not be viewed as a single unit for purposes of applying section 75.1710-1. While neither the statutory cab/canopy standard nor section 75.1710-1 contains a definition of the equipment that it covers, we conclude that, as the parties agree and as the judge found, section 75.2(i)(n. 3 supra) affords a "practical line of demarcation." That Provision, in defining "permissible" as applied to "electric face equipment," describes the latter class of equipment as "electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine...." (Emphasis added.) 5/ The key question thus becomes the application of the term "last open crosscut" to the mining configuration used by Peabody.

Although "last open crosscut" is not defined in the Mine Act or the Secretary's regulations, the Act and regulations contain repeated references to the term.6/ As noted, a "crosscut" is a passageway or opening driven across entries for ventilation and haulage purposes. In general, the last open crosscut thus refers to the last (most inby) open passageway between entries in a working section of a coal mine.7/ The last open crosscut "is an area rather than a point or line...." Henry Clay Mining Co., 3 IBMA 360, 361 (1974). Under the facts presented, the judge determined that the specific boundaries of this area are demarcated by the air flow across the developing entries of a working section and include the crosscuts (openings) between entries, the contiguous intersections of the entries and crosscuts, and those portions of the entries inby such intersections. We conclude that this description, considered from a general standpoint and as applied to the

5/ A standard definition of "face equipment" similarly provides in relevant part:

Face equipment is mobile ... mining equipment having electric motors ... normally ... operated inby the last open crosscut in an entry or room. DMMRT supra, at 407.

6/ See, e.g., section 303 of the Act, 30 U.S.C. § 863, and 30 C.F.R. § 75.301 et seq. (ventilation requirements), and section 305 of the Act, 30 U.S.C. § 865, and 30 C.F.R. § 75.501 et seq. (permissibility requirements for electrical equipment). (These statutory provisions, including their references to last open crosscut, were carried over from the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977).)

7/ "Working face" is "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle...." 30 U.S.C § 878(g)(1); 30 C.F.R. § 75.2(g)(1). See also DMMRT 407, 1244 (definitions of "face" and "working face"). The area inby the last open crosscut (i.e., between the last open crosscut and the working face) is referred to as the "working place." 30 U.S.C. § 878(g)(2); 30 C.F.R. § 75.2(g)(2).

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mining configuration in question, comports with commonly accepted mining terminology and is supported by substantial evidence of record.^{8/}

MSHA's witness Whitcomb stated that the last open crosscut is "the last continuous line the air passes through going across the [run] from one side of the entry to the other."^{9/} Whitcomb described the boundary at which the last open crosscut begins as the location of the check or back-up curtains, adding that "anything inby that location would have to be maintained permissible." Tr. 274, 276.^{10/} Peabody's witness Jernigan did not dispute Whitcomb's views regarding the outer boundary of the last open crosscut area. However, Jernigan indicated on direct examination that the last open crosscut includes only the crosscuts, i.e., the passageways roughly parallel to the working face, but not the intersections of crosscuts and mine entries, or any portion of mine entries. Tr. 163-166, 198-200. As the judge stated, however, this interpretation is illogical because it makes the area inby the last open crosscut "the middle of a solid block of coal." ⁹ FMSHRC at 948. As Jernigan himself agreed on cross-examination, the last open crosscut is "where the air travels through on the intake and exhaust system." Tr. 163. Entries and intersections of crosscuts and entries are ventilated by air travelling through the intake and exhaust system. Indeed, the air must travel through those areas in order to pass along the crosscuts adjacent to the face.

The interpretation offered by Whitcomb and accepted by the judge

8/ We recognize that in any given coal mine, the mining methodology used may uniquely determine the last open crosscut. Thus, we must leave to future cases any descriptive refinements necessitated by other particular mining configurations.

9/ With respect to this portion of Whitcomb's testimony, the judge noted:

Although the court reporter transcribed the word "drum" at this point, I find that Mr. Whitcomb actually said "run" and the reporter made an error in transcription. "Run" as used by Mr. Whitcomb refers to the distance from the Number 1 to the Number 5 entries, that is, the full expanse of the coal faces being developed....

9 FMSHRC at 948 n.1.

10/ Check curtains, used to provide ventilation to the working faces, are overlapping strips of heavy, fire-resistant material serving as temporary stoppings and positioned to hold the air flow along face areas. See DMMRT at 292 (definition of "curtain"): see also S. Cassidy (ed.), *Elements of Practical Coal Mining* 212-213, 220 (1973). 30 C.F.R. § 75.302(b)(2) states that check curtains required under the mine's approved ventilation plan "shall be so installed to minimize air leakage and permit traffic to pass through without adversely affecting ventilation."

~10

is fully consistent with the use of the term in other portions of the Mine Act and the Secretary's mandatory standards. For example, 30 C.F.R. § 75.301, which repeats section 303(b) of the Act, 30 U.S.C. § 863(b), requires in part that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute." It would be absurd to require maintenance of 9,000 cubic feet of air per minute only in those crosscuts when the hazards alleviated by providing the required ventilation are also present in the intersections of those crosscuts and entries. In like manner, the permissibility requirements of 30 C.F.R. § 75.500, et seq., based on 30 U.S.C. § 865, apply to specified electrical equipment located in or taken in by the last open crosscut.

Thus, we conclude that an MBC is "self-propelled electric face equipment" within the meaning of the cited standard if it is taken into the last open crosscut as described herein. Substantial evidence supports the judge's finding that the first MBCs were so used at Peabody's mine.

Using exhibits depicting the location of the continuous haulage system during mining operations, Whitcomb testified that given the length of the pillars and of the continuous haulage system units, the first MBC operator's compartment entered the last open crosscut. Tr. 252-69; Exhs. G-10, 11, & 12; R-11 & 12. Whitcomb's testimony is consistent with the exhibits depicting the continuous haulage system as used in the mine. In addition, the MSHA inspector who issued the contested citations testified without dispute that he had observed the operators of the first MBCs in the last open crosscut, and his explanation of what constitutes the last open crosscut was consistent with Whitcomb's description of that area and with the definition adopted by the judge. Tr. 32, 36. In light of this evidence, we conclude that the Judge properly held that Peabody violated section 75.1710-1 by using the cited first MBCs in the continuous haulage systems without cabs or canopies.

Although we agree with the judge that Peabody violated section 75.1710-1, we reject his premise that the violations were established only because "the first MBC operator's compartment enter[ed] the last open crosscut." 9 FMSHRC at 949 (emphasis added). Given the continually changing dynamics of a working section, determining compliance with section 75.1710-1 based on the precise location of the operator's compartment invites confusion in both compliance and enforcement. Once any portion of an MBC enters an area inby the last open crosscut, it is properly classified as face equipment requiring a cab or canopy. The judge also concluded that the second MBC in the continuous haulage system of the No. 1 section was not subject to section 75.1710-1. He observed that it "would stretch the standard too far to hold that the second MBC, which is far removed from the last open crosscut, should be considered face-equipment solely because the front part of the continuous haulage system is in or inby the last open crosscut." 9 FMSHRC at 949. Although we granted the Secretary's request for review

~11

of the judge's conclusion in this regard, the Secretary has not further argued the issue in her brief on review. To the contrary, the Secretary now asserts that the second MBC is subject to the standard if it is used in the first MBC position. S. Br. 10 & n.4. Given these facts, we find it unnecessary to decide whether the lack of a cab or canopy on the second MBC in the No. 1 section violated section 75.1710-1. Finally, we reject Peabody's argument that the Secretary was estopped from citing the continuous haulage system because the system had not been cited previously. See, e.g., *Emery Mining Corp. v. Secretary*, 744 F.2d 1411, 1416 (10th Cir.

1984); Kinz Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981).
On the foregoing bases, we affirm the judge's decision.