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MSHA V. WESTMORELAND COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 30, 1991

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

v. Docket No. VA 90-28

WESTMORELAND COAL COMPANY

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION
BY THE COMMISSION:

This civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act or "Act"), involves a citation issued to Westmoreland Coal Co. ("Westmoreland") by the Secretary of Labor ("Secretary") for a violation of 30 C.F.R. 75.1003, a mandatory safety standard applicable to trolley wires in underground coal mines. Commission Administrative Law Judge Avram Weisberger determined that Westmoreland violated the standard and that the violation was significant and substantial in nature. 12 FMSHRC 1782 (September 1990)(AIJ). The Commission granted Westmoreland's petition for discretionary review. For the reasons that follow, we reverse the judge's decision and vacate the citation.

I.

Factual and Procedural Background

Westmoreland owns and operates the Bullitt Mine, an underground coal mine in Wise County, Virginia. The mine uses longwall mining systems for the extraction of coal, belt conveyors for coal handling, and a trolley rail system for the transportation of personnel and supplies. The trolley system, which is the subject of this contest, is comprised of three components: a narrow gauge track line, the rails of which are 44 inches apart; a 300-volt

trolley wire, which is suspended from the roof, runs parallel and to the right of the track line, and provides power to the rail cars through a conductor called a pole or harp; and the rail cars themselves, which include mantrips for the transportation of miners. Jt. Exh. 1; Tr. 21.23, 44, 66; 12 FMSHRC at 1783.

The area of the mine giving rise to this dispute is the intersection of the West Mains Entry and the Four Left Entry. The West Mains Entry contains the main trolley line and a belt conveyor, which run parallel to each other. The Four Left Entry is one of four entries that service the Four Left Section, a longwall section located approximately 300 feet in by the intersection in question. 12 FMSHRC at 1783-84.

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At the intersection of the two entries, a spur line of the trolley system branches off to the left from the West Mains trolley line and heads into the Four Left Entry for a distance of about 50 feet. This spur line is used to convey mantrips into the mouth of the Four Left Entry and also serves as a parking area for rail cars that have to be diverted from the West Mains track. Just as the spur line branches off from the West Mains Line, it passes underneath the West Mains No. 3 belt conveyor line. Tr. 27, 38.

The West Mains Entry is 22 feet wide and the Four Left Entry is 20 feet wide. The height of both entries ranges from 5 to 5.5 feet. The West Mains belt conveyor is 4 feet wide and clearance under the belt is also 4 feet. The distance from the trolley wire to the roof from which it is suspended ranges from 1.5 to 2 feet. At the point where the Four Left Entry spur line intersects the West Mains belt conveyor, both the trolley wire and the track pass beneath the belt. Tr. 19,20, 23; Jt. Exh. No. 2.

At the time that the disputed citation was issued, no work was being done in the intersection, but a crew consisting of three or four miners and a foreman was engaged in dismantling the longwall system in the Four Left Section, 300 feet inby the intersection. Tr. 30.

On January 17, 1990, MSHA inspector Gary Jessee was conducting a section 103(i) spot inspection (required for mines with excessive quantities of methane). He was accompanied by Westmoreland's assistant general mine foreman, John York. Tr. 14. Upon arriving at the intersection of the West Mains Entry and the Four Left Entry, he found that the guard installed around the trolley wire where it passed under the West Mains belt conveyor had come loose so that one end was still attached and the other end was resting on the mine floor.

Inspector Jessee issued to Westmoreland a citation alleging a violation of 30 C.F.R. 75.1003. The citation reads as follows:

1/ 30 C.F.R. 75.1003 provides:

Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:

- (a) At all points where men are required to work or pass regularly under the wires;
- (b) On both sides of all doors and stoppings; and
- (c) At man-trip stations.

The Secretary or his authorized representatives shall specify other conditions where trolley wires and trolley feeder wires shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and

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The energized trolley wire was not mechanically guarded at the mouth of the 4 left section track heading where wire crosses under the West Mains No. 3 conveyor belt.

The citation was timely abated by reattaching the loose end of the guard. On January 25, 1990, Inspector Jessee issued the following modification to the citation:

Citation No. 3352277 is modified to show the additional information in the body of the citation, distances of the energized trolley wire from the two bottom rollers, West Mains No. 3 conveyor belt was 11.5, 2nd roller in by was 8.5 inches, approximate distance from conveyor belt to wire was 4.5 inches, and from support ropes (steel cables) and belt structures, distance was approximately 8.5 inches.

The citation was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. 814(a), was designated as significant and substantial in nature, and was characterized as being caused by Westmoreland's moderate negligence. The Secretary proposed a penalty of \$105, and a hearing on the merits was held on June 25, 1990.

In arriving at his decision, the judge framed the issue in these terms:

Jessee issued a Citation alleging violation of 30 C.F.R. 5.1003, which, as pertinent, provides that trolley wires ..." shall be guarded adequately: (a) at all points where the men are required to work or pass regularly under the wires...." Thus, in order for there to be found a violation herein it must be established that there existed an unguarded point at which men are either:
1. required to work; or 2. pass regularly under the wire.

12 FMSHRC at 1784.

The judge first noted that various weekly, pre-shift and belt examinations were conducted on foot in the area and that assistant general foreman Yorke had testified that two or three times a year miners would be assigned to clean up spillage on the West Mains side of the belt but were not required to go beneath the belt or under the unguarded wire. The judge went on to conclude that such evidence was "insufficient to establish that persons are required to work at a point under the unguarded wires." 12 FMSHRC at 1784 n.2.

other persons work in proximity to trolley wires
and trolley feeder wires.

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The judge then turned to the issue of whether miners were required to "pass regularly under the wire." The judge found that despite there being four access routes to the Four Left Section where the longwall was being dismantled, the Four Left Entry was the primary route from the area out of the mine and that travel from the Four Left Entry was generally by trolley-powered mantrip rather than by foot. 12 FMSHRC ac 1784.

The judge further found that the mantrip extended more than 1 foot on either side of the trolley tracks and that the trolley wire was 1.5 feet in a lateral direction beyond the track. The judge deduced that "there is support for the testimony of Jessee that a person sitting on the driver's side of the mantrip would be an inch from the unguarded energized wire." 12 FMSHRC at 1785.

Finally, the judge noted that Jessee had indicated that he had observed full mantrips in the area of the unguarded wire in question. Accordingly, the judge concluded that, when riding a mantrip to and from the Four Left Entry, "miners do regularly pass at a point where the trolley wire was unguarded, and as such, Respondent herein did violate Section 75.1003(a)." 12 FMSHRC at 1785. The judge went on to reject as unduly restrictive what he deemed to be Westmoreland's argument that the standard is not violated when miners in a mantrip (as opposed to miners on foot) pass under an unguarded trolley wire. 12 FMSHRC at 1785 n. 3.

Turning to the issue of whether the citation was significant and substantial, the judge held that, in light of his finding that persons sitting on the driver's side of the mantrip would be one inch from an unguarded wire energized at 300 volts, those persons would be exposed to the hazards of being burned or electrocuted. He further credited Jessee's testimony that persons riding in the inby end of the mantrip could come in contact with the wire by using jostled or thrown against it due to a sudden stop caused by a wreck or irregularities in the track. 12 FMSHRC 1785-86. Accordingly, he determined that the violation was significant and substantial in nature.

With respect to assessing a civil penalty, the judge, citing the Commission's decision in U.S. Steel Mining Company, Inc., 7 FMSHRC 865, 867 (June 1985), noted strong Congressional concerns with hazards posed by bare trolley wires and, accordingly, found a high level of gravity associated with the violation. 12 FMSHRC at 1786. Concerning the degree of negligence surrounding the violation, the judge found that the violation was readily noticeable but also noted that Yorke had testified that the guard had been in place the night before. He thus concluded that the violation resulted from Westmoreland's moderate negligence. In consideration of the above findings, and the order statutory assessment

criteria, the judge assessed a civil penalty of \$400. 12 FMSHRC at 1787.

II.

Disposition of Issues

On review, Westmoreland seeks reversal of the judge's decision on both procedural and substantive grounds. We address the procedural challenge first.

The operator contends that the citation should be vacated as invalid because it fails to charge with particularity a violation of section 75.1003, as required by section 104(a) of the Mine Act, 30 U.S.C. 814(a). Citing the Commission's decision in *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 510 (April 1989) ("Section 104(a) thus mandates that the operator be given fair notice in the citation of the violation it is required to correct"), Westmoreland contends that the citation and its modification address only the fact that the trolley wire was not guarded where it passed beneath the conveyor belt, but not whether miners regularly worked or passed under the unguarded wire at that location in violation of section 75.1003(s), as found by the judge.

The operator also argues that since the inspector cited section 75.1003 generally rather than the specific provision contained in section 75.1003(a), the citation must be vacated. Westmoreland contends that the Secretary is obliged to defend the citation as written, and that it was improper for the judge to rectify deficiencies in the original citation by allowing the hearing to proceed on the basis of a violation of section 75.1003(a) and in light of conditions not set forth in the citation or the modification thereto.

The Secretary responds by arguing that the citation on its face clearly sets forth the conditions constituting the violation. She further avers that at no time prior to, during or after the hearing did Westmoreland indicate that it did not understand the nature of the violation charged. The Secretary notes that in its post-hearing brief Westmoreland acknowledged that a violation of section 75.1003(a) was at issue when it stated, "the Secretary's arguments have lost sight of the issue in this case.. whether miners were required to work or pass regularly under the trolley wire in the area in question." *Sec. Br.* at 7. Citing section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. 823(d)(2)(A)(iii), the Secretary further contends that Westmoreland's arguments regarding a prejudicial lack of notice as to the violation charged were not presented to the judge and therefore cannot now be presented to the Commission without the judge's having had the opportunity to consider and rule on the issue.

It is clear from the record that counsel for Westmoreland made no

objection at trial with respect to the Secretary's or the judge's clarification of the charges against it. In the absence of such objection, it would appear that Westmoreland gave at least implied consent to what it now objects to as defects in the citations. Cf. Fed. R. Civ. P. 15(b). See *A.H. Smith Stone Co.*, 5 FMSHRC 13, 16 n. 5 (January 1983). Furthermore, the Secretary is correct in arguing that given the constraints on review in section 113(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass"), we

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cannot entertain Westmoreland's challenge to the underlying validity of the citation at this juncture.

Westmoreland also challenges the judge's decision on the grounds that certain material findings of fact relied upon by the judge in concluding that a violation occurred are clearly erroneous. Accordingly, the operator argues, the judge's findings are not supported by substantial evidence and his decision must be reversed.

Westmoreland points to the judge's finding on the basis of his reading of the evidence that "there is support for the testimony of Jessee that a person sitting on the driver's side of the mantrip would be an inch from the unguarded trolley wire." 12 FMSHRC at 1785. Westmoreland contends that there is no such testimony by Jessee or any other witness. Rather, Jessee testified that a person "sitting in the passenger side of the mantrip [would] [p]robably [be] a foot or less" from the trolley wire in the cited area or that the trolley wire was within "arm's reach" or "about a foot from somebody's head." Tr. 42.45; W. Br. at 9.

Westmoreland also argues that the judge's conclusion regarding the proximity of the trolley wire to persons sitting in the mantrip is contradicted by Jt. Exhs. 2, 3 and 4, which show that beneath the belt, the lateral distances between the trolley wire and the track on the trolley wire side ranged from 2 feet to 2 feet, 3.75 inches. Even allowing for Jessee's testimony and the judge's conclusion that the mantrip extended "more than a foot" on either side beyond the tracks, Westmoreland argues that the evidence does not support a finding that persons in a mantrip would be sitting "an inch from the trolley wire." 2/

Westmoreland further notes that the judge's finding of a violation was predicated on the presence of a fully loaded mantrip passing beneath the belt causing those persons seated on the trolley wire side of the mantrip (what the judge called the "driver's side" to be situated closer to the trolley wire. The operator contends however that the hazards of a fully loaded mantrip alleged by Jessee and accepted by the judge would obtain throughout the entire length of the trolley system, not just under the conveyor belt, since whatever differences exist between the trolley wire under the belt and the trolley wire elsewhere in the system involve vertical as opposed to horizontal clearances.

Westmoreland further argues that the judge misconstrued the standard in finding a violation under the factual circumstances presented. Noting that there is no material difference between the area cited and all areas where mantrips traverse the trolley system, Westmoreland asserts that the judge's decision would require the guarding of trolley wires throughout the mine,

particularly since he concluded that "when riding a mantrip, on the way to and from the Four Left entry from the West Mains entry, miners do regularly pass

2/ Westmoreland points out that the inspector's only testimony on the extent of the overhang of the mantrip beyond the track is as follows: "Probably, at least, a foot. It would be a foot on either side. It could be closer."
Tr. 121; W. Br. at 7 n. 7, 8.9.

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at a point where the trolley wire was unguarded, and as such, [Westmoreland] did violate section 75.1003(a)." W. Br. at 11.12.

With respect to Westmoreland's argument that substantial evidence does not support the judge's finding of violation, we conclude that the operator has established sufficient grounds to require reversal of the judge's decision.

Westmoreland is correct in asserting that there is no evidence in the record to support the judge's conclusion (which he attributed to the testimony of Inspector Jessee) that miners travelling in the mantrip would be one inch away from the unguarded trolley wire. In fact, Jessee testified that the distance was "about a foot" or "within an arm's reach" of the miners. Tr. 42-45. Moreover, the judge refers to miners on th "driver's side" of the mantrip as being closer to the trolley wire. Again, there is no testimony with respect to the "driver's side" of the vehicle, and Westmoreland points our in its brief that the driver sits in the middle of the mantrip. W. Br. at 8.

Most importantly, the judge's conclusion is directly at odds with Jt. Exhs. 2, 3, and 4. Jt. Exhs. 2 and 3 are engineer's drawings that portray the trolley wire in relation to both the conveyor belt and the rail on the trolley wire side of the Four Left spur line. They were prepared jointly and co-signed by representatives of both Westmoreland and the Secretary. Jt. Exh. 4 is an accompanying legend setting forth the various measurements taken at key locations in the cited area. The exhibits establish that the lateral distances between the trolley wire and the rail on the trolley wire side were widest where the trolley wire crossed beneath the belt and where the guard would have been installed (between 2 feet and 2 feet, 3.75 inches as opposed to between 1 foot, 6 inches and 1 foot, 11 inches at those locations where the guard would not have been installed).

On the other hand, the exhibits show that the vertical clearances between the trolley wire and the rail are lower at some locations under the belt than elsewhere (between 3 feet, 9.75 inches and 3 feet, 11.5 inches as opposed to 4 feet, 8.5 inches). However, Jt. Exh. 3 indicates that the vertical clearances at two points under the belt are virtually identical to another point away from the belt where the guard was not installed. 3/

The other factor that needs to be considered is the reduction in lateral clearance owing to the extension of the mantrip on either side of tracks. The judge found this overhang to be "more than a foot" but, as Westmoreland points out, his conclusion is based on very equivocal testimony by the inspector. ("Probably, at least a foot. It would be a foot on either side. It could be closer." Tr. 121). Unfortunately, Jt. Exhs. 2, 3 and 4

do not clear up this discrepancy. However, both parties agree on review that the overhang was approximately a foot. W. Br. at 7; Sec. Br. at 10. In any event, the trolley

3/ The various vertical measurements in Jt. Exh. No. 3 are not uniform in that some are taken between the trolley wire and the mine floor while others are taken between the trolley wire and the top of the rail.

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wire at the cited location was further away horizontally from the mantrip than it was at points where a guard was neither provided nor required by the inspector. Thus, the overhang of the mantrip, whatever its distance, would bring miners closer to the wire at those points along the trolley wire, identified in Jt. Exh. 2, where the guard would not have been provided or required.

The standard requires a guard where miners regularly pass under the trolley wire, i.e., where miners would break the plane created by the trolley wire and a parallel line running along the mine floor. While the evidence may show that miners passed close to the trolley wire when the mantrip travelled beneath the belt, it does not establish that they travelled under the wire. The stipulated drawings and measurements in Jt. Exhs. 2, 3, and 4 clearly indicate that the trolley wire ran slightly higher and to the side of the miners travelling in mantrips beneath the belt conveyor, a position not markedly different from other locations along the trolley system. 4/

We are mindful of the close clearances presented by the trolley system passing beneath the conveyor belt in the cited area and the potential hazards presented by a bare, energized trolley wire carrying 300 volts of current. As the record clearly indicates, however, those conditions arise throughout the trolley system in the Bullitt Mine. 30 C.F.R. 75.1003(a) explicitly applies to miners being required to travel under unguarded trolley wires, not in proximity to the unguarded trolley wires, as the Secretary argues. Here, the record shows that, although miners in the mantrips passed in proximity to the trolley wire, they did not travel under it within the meaning of the standard.

If the Secretary or her inspectors determine that certain clearances are insufficient to protect miners from contact with energized trolley wires, the standard provides a remedy:

"The Secretary or [her] authorized representatives shall specify other conditions where trolley wires ... shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and other persons work in proximity to trolley wires...."

4/ It would appear that the inspector was strongly influenced by his perception that "the clearance is vastly reduced from the main heading into that area by reason of the conveyor belt crossing over at that point." Tr. 42. However, as noted above, the vertical clearance under the belt

was he same as the vertical clearance under at least one other point outside he area covered by the dislodged guard.

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Since the evidence submitted jointly by the parties convincingly establishes that the miners in this case did not regularly pass under the trolley wire, Westmoreland did not violate subsection 75.1003(a) as the judge concluded. In view of this conclusion, we need not address the judge's significant and substantial findings. Accordingly, the judge's decision is reversed and the citation is vacated.

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