

CCASE:
MSHA V. SOUTHERN OHIO COAL
DDATE:
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TTEXT:
June 25, 1992
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. WEVA 90-141

SOUTHERN OHIO COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether Commission Administrative Law Judge James A. Broderick erred in finding that Southern Ohio Coal Co. ("SOCCO") violated 30 C.F.R.

□ 75.1725(c), a mandatory safety standard applicable to underground coal mines. The standard provides: "[r]epairs 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." Following an evidentiary hearing, Judge Broderick found that SOCCO had violated the standard because all affected miners working around a conveyor belt had not been informed that the belt, which previously had been locked-out, was going to be started. 12 FMSHRC 2503 (November 1990)(ALJ). For the reasons set forth below, we reverse the judge's decision.

I.

Factual and Procedural Background

SOCCO operates the Martinka No. 1 Mine, an underground coal mine located in Marion County, West Virginia. On May 5, 1989, an eight miner crew was extending an underground conveyor belt. The "belt move" in this instance involved extending the tailpiece of the conveyor belt one block (100 feet) toward the coal face in the north main section of the mine. The process involved, in part, tying-off the existing belt, moving the tail piece forward, adding additional belt, adding belt rails, and adding rollers. Before work began, Foreman Bill Laird and miner Sam Guido locked-out and tagged the belt
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at the main power source. The crew then added and spliced the belt and installed some of the top structure of the belt. The crew had not finished installing the bottom structure.

In order to more easily install the bottom rollers, approximately 30 feet of slack needed to be removed from the belt. Laird and one of the

miners, Mike Bowman, left the area of the tailpiece to go to the headgate, approximately 5000 feet away, in order to activate the take-up device, which is used to tighten or add tension to the belt. Another miner, John Giordano, travelled to an area 200 or 300 feet outby the tailpiece, to the Jabco, a switch controlling power to the belt.

Laird pulled the take-up device to remove the slack. When Laird discovered that the take-up device would not remove enough slack to adequately tension the belt, he called Foreman John Gowers, who was located at the tail, told him that the belt was going to be started, and asked him to make sure that everything was clear. Gowers called him back and stated that everything was clear. Tr. II 18-19.(Footnote 2) Gowers then told Dempsey McHenry to have Giordano turn on the Jabco. McHenry walked outby to Giordano and relayed Gowers' instructions, and Giordano turned on the Jabco. Gowers assumed that the other miners had overheard his conversation with McHenry. Tr. I 32; GExh. 2, p. 6. However, according to their testimony, crew members Guido, DeRosa and Renick knew Laird was going to pull the take-up device, but they did not know that Laird was going to start the belt.(Footnote 3) Renick depo. at 25-26; Tr. I 92, 97, 127.

Laird testified that before the belt was started, he "bumped" the belt at least twice. Tr. I 51-53; G-Exh. 2, p. 2.(Footnote 4) On his way back from the Jabco to the feeder, McHenry observed that the belt was "jumping up and down," at a location where "come-alongs" were still attached to the belt.(Footnote 5) The come-alongs were attached to the top of the belt at locations described as anywhere from 40 to 200 feet from the tailpiece. Tr. I 131; Giordano depo. at 16; Renick depo. at 12; McHenry depo. at 16. McHenry then walked back to the

1 The remainder of the crew consisted of Foreman John Gowers and miners Lou DeRosa, Dempsey McHenry, Frank Renick, Mike Bowman, and John Giordano.

2 The transcript of the evidentiary hearing is set forth in two volumes. Reference to the first volume is depicted as "Tr. I," while reference to the second is "Tr. II."

3 Laird testified, however, that before he went to the headgate, he told Guido that he would probably have to run the belt in order to take up the slack. Tr. II 9.

4 Bumping the belt involves jogging the belt, by turning it on and quickly turning it off.

5 A "come-along" is a mechanical, hand-operated winch that latches and pulls wire rope and was used by the crew to hold up the belt so that belt structure and rollers could be installed.

Jabco and turned off the belt so that the come-alongs could be removed. Tr. I 130; McHenry depo. at 20, 26-27; 12 FMSHRC at 2504. After the power to the belt was turned off, Laird again locked-out and tagged the power box because he knew that the crew still had to install bottom structure. Tr. II 23-24, 28.

Guido testified at the hearing that he had been sitting on the belt, unhooking a come-along that was three to five feet away from him. He further stated that the belt started as he was getting off, causing him to be thrown from the belt and injuring his knee. Tr. I 106, 108-10.(Footnote 6) He testified that he did not see the belt bump or feel it move at all. Tr. I 93. He also stated that there was no lighting except for cap lamps and that no one saw his injury.

On August 8, 1989, three months after this incident, James Young, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), went to the mine for an inspection and received a written request from union representatives to investigate the incident. Inspector Young interviewed Dewey Ice, as well as crew members Laird, Gowers, DeRosa, McHenry, and Renick. Inspector Young did not interview Guido because he had not yet returned to work.

Based upon his investigation, Inspector Young concluded that the belt had been started while still being worked on by miners who had not been informed that it was going to be started. Tr. I 17. Accordingly, he issued a section 104(a) citation alleging a significant and substantial ("S&S") violation of section 75.1725(c) stating:

Based on information obtained during an accident investigation, the safe work procedure involving tagging and locking out machinery, when workers are exposed to moving parts, was not in place.

Communication between the head drive and the tail piece was neglected to the point that, the drive was unlocked and the belt started without notifying the employees working on the belt at the tail that the belt flight was going to be started. Six to Eight employees were working in the area, four employees involved were not informed that the belt was to be started....

Citation No. 3118169.

6 Crew member Lou DeRosa testified that Guido told him that he was leaning over to get his gloves from the belt when it started, and this information had also been reported by Dewey Ice, SOCCO's accident prevention officer, on SOCCO's accident report form after a conversation between Ice and DeRosa. Tr. I 142; Tr. II 30-31; G-Exh. 4. In addition, other witnesses testified that they had not seen the come-along next to Guido, but only saw come-alongs

approximately 40 to 200 feet out by the tailpiece. Tr. I 136; Giordano depo. at 16; Renick depo. at 10-12.

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Inspector Young testified that he believed that SOCCO violated section 75.1725(c) because:

when you have people working at one area on this belt line and you have people working down 5,000 feet away, [and that] is where the power is disconnected or tagged out or locked out or whatever, if you don't tell these people up here that you're going to start that belt, ... the part about being locked and tagged out means absolutely nothing.

Tr. I 25. He stated that men working 5,000 feet away from the area of the "visible disconnect" would know that it is safe to work on equipment only if they were told so, and that he had no problem with running the belt to take out the slack as long as there was proper communication and the crew was in a safe position. Tr. I 59, 69.

The citation was terminated by Inspector Young when SOCCO planned "a safety talk at their meeting [in which] they were going to go over with the foremen about starting up procedures and this type of thing." Tr. I 59-60. In addition, the action to terminate is described on the citation form as, "[a]ll parties involved in the investigation, agreed upon the importance of proper communication between work sites, and the review of accidents at this mine site." Citation No. 3118169.

Following an evidentiary hearing, the judge found that SOCCO had violated section 75.1725(c) and that the violation was S&S. In reaching his finding of violation, the judge first determined that the activities involved in extending a belt constitute "maintenance" within the meaning of section 75.1725(c). 12 FMSHRC at 2505. The judge also stated:

The evidence ... is clear that neither Guido nor DeRosa were informed that foreman Laird was going to start the belt. Although motion of the belt is necessary to make adjustments, it obviously cannot safely be accomplished while the belt is being worked on. All the affected miners must be informed if a belt which has been locked out is going to be started up. This was not done here. I conclude that a violation of 30 C.F.R. • 75.1725(c) has been established.

12 FMSHRC at 2506.

The judge then found that "[m]aking repairs or adjustments on a belt while the belt is moving is a serious violation," and that the violation was properly designated as being S&S. Id. The judge assessed a civil penalty of \$300 against SOCCO, rather than the \$276 penalty proposed by the Secretary. 12 FMSHRC at 2507. The Commission subsequently granted SOCCO's petition

for discretionary review, in which SOCCO challenged only the judge's finding of violation, and we heard oral argument. On review, SOCCO notes preliminarily that there must be repair or maintenance being performed for there to be a ~982

violation; that, in any event, the standard has no notice requirement; and finally, if a notice requirement can be read into the standard, SOCCO's practice of "bumping" the belt satisfied the requirement. PDR at 2-3.

II.

Disposition of Issues

Under section 75.1725(c), power to machinery must remain off until repairs and maintenance are completed, unless power is necessary to make an adjustment. Not all tasks are covered by the standard; it applies only where repairs or maintenance are being performed. Here, it is undisputed that the crew was engaged in a belt move at the time the belt was started, and that the belt move had not been completed. Tr. I 24, 98; Tr. II 24, 28.

When determining whether SOCCO violated section 75.1725(c), the judge preliminarily considered whether "maintenance" was being performed while power

was turned on to the belt.(Footnote 7) The judge concluded that the work involved in extending the belt constituted maintenance within the meaning of the standard. 12 FMSHRC at 2505. In his finding of fact IV, the judge described the progress made in the belt move process and the work still to be completed.

12 FMSHRC at 2504. The judge found that "the action in extending the belt described in finding of fact IV constitutes maintenance on machinery as that term is used in [section] 75.1725(c)." 12 FMSHRC at 2505. The judge also found that extending the belt system involves "adding and adjusting activities which constitute maintenance." 12 FMSHRC at 2506.

On review, the Secretary focuses on Guido's and DeRosa's activities when the belt started and states that, at the time that power to the belt was turned on, Guido was working on the belt and DeRosa was working in close proximity to the belt. S. Br. at 7. In response, SOCCO argues that there is no basis for an allegation that maintenance work was being performed while the belt was in operation. Soc. Rep. Br. at 7.

We agree with the judge that the preliminary question is whether the belt move constitutes maintenance within the meaning of the standard. The judge first noted that the term "maintenance" is defined in the dictionary as "[t]he act of continuing, carrying on, preserving or retaining something . . . [t]he work of keeping something in proper condition." 12 FMSHRC at 2506 (citation omitted). He then turned to a thesaurus which listed as synonyms for maintenance: "1. preservation, upkeep, annual upkeep, keeping up; 2. continuance, continuity, extension, prolongation; perpetuation, persistence, perseveration, repetition." Id. (citation omitted). From this, the judge concluded that the belt move constituted maintenance because extending it

involved "adding and adjusting activities." Id.

We find that the judge's literal application of the word "extension" is

7 Neither party contends that "repairs" were involved in this case and the evidence is undisputed that the crew was not engaged in making repairs when power was returned to the belt. Tr. I 62-64. The judge's decision involves only the issue of "maintenance."

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out of context with the essence of the term maintenance. That essence, as the dictionary indicated, is that maintenance means "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep [p]roper care, repair, and keeping in good order [t]he upkeep, or preserving the condition of property to be operated." See Webster's Third New International Dictionary, Unabridged 1362 (1971); A Dictionary of Mining, Mineral, and Related Terms 675 (1968); and Black's Law Dictionary 859 (5th ed. 1979).

The record reveals that the belt move was not designed to prevent the belt from lapsing from its existing condition or to keep the belt in good repair but, rather, to increase its usefulness to SOCCO. Inspector Young acknowledged that no work was performed on May 7, 1989, to keep the belt in the same condition that it was in the day before, that no "deteriorating condition" was being "upgrad[ed]," and that the belt would run without adding additional length to it. Tr. I 64. Inspector Young explained that the belt haulage system runs coal to the tailpiece and, as the face advances, the tail piece would be "farther than the haulage would allow," if the belt were not also advanced.(Footnote 8) Tr. I 20.

By adding new structure to extend the belt, SOCCO's miners were not engaged in the upkeep, preservation or maintenance of the existing belt. The evidence reveals that the belt move did not preserve the ability of the existing belt to convey material. The belt was not in need of upkeep. Instead, the belt move was an improvement of the belt system, extending it and shortening the distance between the belt's feeder and the working face.

Accordingly, we reverse the judge's holding that the belt move engaged in by SOCCO constituted maintenance within the meaning of the standard.

Even if we were to assume for the sake of argument that the belt move constituted maintenance, we would reverse the judge's decision because his holding regarding warning requirements for conveyor belt start-ups is erroneous as a matter of law. While we share the judge's concern that adequate warning be given before a conveyor belt is started in order to assure the safety of miners, we find no indication that section 75.1725(c) requires such warning.

The Commission has consistently recognized that a safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Lanham Coal Co., Inc., 13 FMSHRC 1341, 1343 (September 1991)(citations omitted). The Commission

further explained that:

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably

8 Typically, a shuttle car or ram car hauls coal from the working face to a "feeder," which is located at the tail of the belt. The coal is dumped onto the feeder, which feeds coal onto the tail of the conveyor belt. Tr. I 74.

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prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted).

Section 75.1725(c) does not give a reasonably prudent person notice that it prohibits the cited conduct. The plain language of section 75.1725(c) expressly sets forth requirements for blocking and turning off power to machinery, but does not set forth any requirements regarding communication to miners before power is returned. Indeed, Inspector Young testified that the section "doesn't read that you must tell somebody [that the belt] is going to start." Tr. I 59. Instead, he explained that "the general law is to make sure that when people are working on [a belt], it's not going to start." Id. We conclude that a reasonably prudent person would not have known that the standard requires that miners be alerted before power is returned to machinery in underground coal mines.(Footnote 9)

It is significant that the Secretary has set forth in 30 C.F.R. Parts 56, 57 and 77 specific requirements for providing adequate warning before conveyor belts are started for every type of mine except underground coal mines. See 30 C.F.R. • 56.14201, 57.14201, 77.1607(bb).(Footnote 10) While Parts 56, 57 and 77 also provide blocking and locking out requirements for other types of mines similar or identical to those set forth in section 75.1725(c), the Secretary does not rely upon those standards to provide warnings applicable to

9 Even if we were to assume that the standard requires such warning, a reasonably prudent person might not have known that bumping the belt, apparently a common practice in underground coal mines, is not considered an adequate warning by the Secretary. In fact, Inspector Young considered bumping a belt to be a warning, and stated that a belt is normally bumped to alert miners that it might be started. Tr. I 52.

10 For example, 30 C.F.R. • 56.14201, entitled "Conveyor start-up warnings,"

provides:

(a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

(b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

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starting conveyor belts. See 30 C.F.R. • 56.14105, 57.14105, 77.404(c).

The specific start-up warnings required by the standards for other types of mines cannot be read into the general language of section 75.1725(c), applicable to underground coal mines. To do so, as urged by the Secretary, would not meet the test set forth in *Lanham Coal Co., Inc.*, 13 FMSHRC at 1343, nor serve the interests of safety. As the court stated in *Dravo Corp. v.*

OSHR, 613 F.2d 1227, 1232 (3rd Cir. 1980):

To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the ... safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them.

Id., quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649-50 (5th Cir. 1976).

For the reasons discussed above, we conclude that the judge erred, in finding that the belt move in which SOCCO was engaged constituted maintenance within the meaning of section 75.1725(c), and in finding that the standard requires warning to affected miners before a previously locked-out belt is started.

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III.

Conclusion

For the reasons set forth above, we reverse the judge's decision and vacate the citation.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner