

CCASE:
SOL (MSHA) V. PITTSBURG & MIDWAY COAL MINING
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November 17, 1993

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
: v. : Docket No. CENT 91-197-A
: :
PITTSBURG & MIDWAY COAL MINING :
COMPANY :

BEFORE: Holen, Chairman; Backley, Doyle, 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 Pittsburg & Midway Coal Mining Company ("P&M") violated 30 C.F.R. 77.410(a)(1990)(Footnote 1) and, if so, whether the violation was significant and substantial in nature ("S&S").(Footnote 2) Administrative Law Judge John J. Morris found that P&M violated section 77.410(a) and that the violation was S&S. 14 FMSHRC 1941 (November 1992)(ALJ). The Commission granted P&M's petition for

1 Section 77.410(a) requires, as pertinent:

(a) Mobile equipment such as front-end loaders, forklifts, tractors and graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that--

(1) Gives an audible alarm when the equipment is put in reverse;

2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety and health hazard...."

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discretionary review, which challenges both these findings.(Footnote 3) For the reasons that follow, we vacate the judge's decision and remand for further proceedings.

I.

Factual and Procedural Background

On February 25, 1991, Inspector Donald Jordan of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected P&M's York Canyon surface mine in Colfax County, New Mexico. Jordan inspected an explosives supply truck around which miners were working. Jordan determined that the audible alarm, which sounds when the truck is in reverse (the "backup alarm"), was not working. As a result, Jordan issued a citation to P&M under section 104(a) of the Mine Act, 30 U.S.C. 814(a), charging P&M with a violation of section 77.410(a). Jordan designated the violation S&S.

Because he found that the truck had an inoperative backup alarm, the judge affirmed the citation. 14 FMSHRC at 1945. He also found the violation to be S&S because miners work in close proximity to the truck and because a truck backing into a miner would cause reasonably serious injuries or a fatality. Id.

II.

Disposition

P&M argues that, because the vehicle is a pickup truck, a backup alarm is not required if there is an unobstructed rear view and here the judge found a relatively clear rear view. See 14 FMSHRC at 1945. In challenging the judge's S&S finding, P&M asserts that the judge erred in failing to address whether the violation presented a reasonable likelihood of injury and in failing to address how the relatively clear rear view would bear upon the risk of injury.

The Secretary concedes that, because the judge applied an outdated standard, the case should be remanded for further analysis. The Secretary argues, however, that, because the truck did not have an unobstructed rear view, P&M violated the standard and the violation was S&S.

We agree that the standard applied by the judge was not in effect when the citation was issued. See 14 FMSHRC at 1944 n.2; 30 C.F.R. 77.410 (1988). Effective September 18, 1989, an exception was provided to the backup alarm requirement for "pickup trucks with an unobstructed rear view." 54 Fed. Reg. 30515, 30517 (July 20, 1989).

3 In his decision, the judge ruled on two other citations issued to P&M. Because the citations were issued in different areas of the mine, involved different facts, and alleged dissimilar violations of the Secretary's safety standards, we have issued a separate decision for each citation.

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Because the judge relied upon an outdated standard, he did not determine whether the exception provided in section 77.410(a) should be applied. We remand this case to the judge for that determination. If the judge finds that P&M violated the standard, he should determine whether the violation was S&S and assess an appropriate civil penalty.

III.

Conclusion

For the foregoing reasons, we vacate that part of the judge's decision in which he found that P&M violated section 77.410(a) and that the violation was S&S. We remand this case for further proceedings consistent with this decision.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner