

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

JUL 08 2016

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2011-1557
	:	KENT 2011-1558
v.	:	
	:	
KENTUCKY FUEL CORPORATION	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). Kentucky Fuel Corporation challenges a Judge’s decision affirming a citation charging a violation of 30 C.F.R. § 77.1606(c). Among other things, the Judge ruled that the citation was not duplicative of a citation charging a violation of 30 C.F.R. § 77.404(a) that the Judge had already upheld.¹ 36 FMSHRC 159 (Jan. 2014) (ALJ). For the reasons that follow, we reverse the Judge and conclude that in this instance the citation for the section 77.1606(c) violation was duplicative of the citation for the section 77.404(a) violation.

I.

Factual and Procedural Background

Kentucky Fuel operates the Beech Creek Surface Mine, a coal mine in Phelps, Kentucky. In April 2011, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) went there to investigate a complaint MSHA had received the previous day regarding the use of defective equipment. When the inspector was seen from a guard shack arriving at the mine, a call was made to a miner who had been operating a bulldozer

¹ Section 77.1606(c), which applies to loading and haulage equipment, provides that “[e]quipment defects affecting safety shall be corrected before the equipment is used.” Section 77.404(a) applies to “[m]obile and stationary machinery” and provides that such “equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

all morning to remove rock and dirt. The miner was instructed to take the dozer to a service area of the mine.

Consequently, the inspection of the dozer was conducted in the service area. The inspector then issued Citation No. 8258770, alleging 11 separate defects in the dozer. The citation was subsequently modified to allege a twelfth defect.

The first standard alleged to be violated was 30 C.F.R. § 77.404(a), the general equipment maintenance standard for surface coal mines. The inspector designated the violation as significant and substantial (“S&S”) and attributable to Kentucky Fuel’s unwarrantable failure and high negligence.² MSHA subsequently proposed a penalty of \$14,000 against Kentucky Fuel for this alleged violation.

The inspector also issued Citation No. 8258773, the one at issue on review, for a violation of section 77.1606(c). The citation largely relies on the section 77.404(a) violation for its narrative. It states that Kentucky Fuel “failed to correct equipment defects affecting safety prior to using the equipment. The operator of the Cat D0N dozer, Co. #1, has recorded numerous defects that needed to be corrected since 3-18-2011, and the operator failed to make any corrections.” Gov’t Ex. 7, at 1. The inspector alleged that a fatal injury from operating the dozer was highly likely to occur, that the violation was S&S, and that the negligence involved was high. MSHA later proposed a penalty of \$14,373.

Addressing the first alleged violation (of section 77.404(a)), the Judge found that, while Kentucky Fuel was disputing that some of the cited defects would affect the safe operation of the dozer, it did not deny that the dozer’s horn and backup alarm were not working, that its engine cover was missing, and that it was leaking oil. The Judge also found that the inspector’s review of Kentucky Fuel’s pre-operation inspection reports for the dozer that could be located indicated that the defects in the dozer had been noted going back to March 18. Consequently, the Judge affirmed the violation and the S&S, unwarrantable failure, and high negligence designations, and assessed an increased penalty of \$20,000. 36 FMSHRC at 163-64.³

The Judge also affirmed the second citation. She rejected Kentucky Fuel’s argument that a dozer is not covered by section 77.1606(c) because it cannot be considered to “load” or “haul”

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 any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

³ Pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), the Secretary of Labor had also sought to collect a \$3,000 penalty from Kentucky Fuel foreman Lloyd Keith Branham for the violation. The Judge declined to find Branham liable under section 110(c), concluding that there was insufficient evidence that he knew of the dozer’s defects. The Judge instead found that the mine superintendent at the time of the violation, but who soon thereafter left the mine, was collecting the incriminating inspection reports. 36 FMSHRC at 164-66.

material under definitions of those terms. She found a violation based on the fact of the uncorrected defects that supported the first citation, along with the evidence of the dozer's use by Kentucky Fuel. For that reason, she did not agree with Kentucky Fuel that the two citations are duplicative. She upheld the S&S and high negligence designations, and assessed a slightly increased penalty of \$15,000. *Id.* at 166-68.

II.

Disposition

Kentucky Fuel argues that the Judge erred in concluding that the citation for the section 77.1606(c) violation is not duplicative of the citation the operator received for violating section 77.404(a). The operator contends that the purpose of both standards is to prohibit the operation of equipment with defects.

The Secretary responds that section 77.404(a) imposes a maintenance obligation that was not met by Kentucky Fuel. The Secretary argues that the Judge was thus correct to recognize that section 77.1606(c), by prohibiting the operation of defective equipment, imposes an additional obligation that is not mentioned in section 77.404(a), and thus the two citations were not duplicative under the case law.

The Commission has held that citations or orders are not duplicative as long as the standards allegedly violated impose separate and distinct duties. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *see also Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1301 (11th Cir. 2014); *Spartan Mining Co.*, 30 FMSHRC 699, 716 (Aug. 2008); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993) (violations are not duplicative merely because they emanate from the same events); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981) (hole in fence around electrical power transformer and leaving fence gate unlocked constituted separate offenses). In reviewing whether standards impose separate duties, the Commission does not view standards in a vacuum. Rather, because the question is whether citations are duplicative, the standards are examined as they are being applied to the operator through the citations in question. *See Western Fuels-Utah*, 19 FMSHRC at 1004 & n.12.

Section 77.404(a) requires that any “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The citation issued to Kentucky Fuel for violating that standard recites the defects in the dozer, and states that the defective dozer was “being used at this mine site,” and “[m]anagement was well aware of the defects . . . since 3-18-2011[.]” but “made the decision and could not justify the continual operation of the dozer without correcting the defects. The operator has engaged in more tha[n] ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.” Gov’t Ex. 1, at 1-2.

Consequently, in affirming the violation, the Judge read the citation to allege that Kentucky Fuel had not only failed to maintain the dozer or remove it from service, as section 77.404(a) requires, but that the operator had also taken the further step of using the dozer in its defective condition. *See* 36 FMSHRC at 164 (“Further, the dozer was being operated on the day of the citation but was taken out of service as soon as the mine learned that an inspector was

nearing the site.”). The Judge then took the fact of that use into account in finding the violation to be attributable to the operator’s unwarrantable failure to comply with the Mine Act, and in assessing a penalty 33% higher than the Secretary had requested. *Id.* (“This violation is further aggravated by the fact that the dozer was being used earlier that day but taken out of service immediately when the inspector arrived on the property. For all of the reasons listed herein, I assess a penalty of \$20,000.00.”).

With regard to why Kentucky Fuel was cited in this instance for also violating section 77.1606(c), the more specific loading and haulage equipment standard, nothing in the record establishes any difference in how it was applied to Kentucky Fuel’s conduct. Section 77.1606 states in pertinent part that:

(a) Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

....

(c) Equipment defects affecting safety shall be corrected before the equipment is used.

Kentucky Fuel was cited for violating the standard because it “failed to correct equipment defects affecting safety prior to using the [dozer].” Gov’t Ex. 7, at 1. In seeking to have the section 77.1606(c) violation affirmed, the Secretary can point to no conduct by Kentucky Fuel in using the dozer that was not already considered by the Judge in finding a violation of section 77.404(a) and assessing a penalty for that violation. Consequently, under *Western Fuels-Utah*, the section 77.1606(c) citation is duplicative. *See* 19 FMSHRC at 1004 & n.12 (conduct governed by the two standards was the same given the facts of the two citations).

We note that MSHA recognizes the potential for duplicative citations to be written when section 77.404(a) is invoked. Its Program Policy Manual states that the section “should be used only where such condition is not covered by any other regulation.” PPM Vol. V, at 171 (Feb. 2003).

The Secretary argues that the differences in abatement between the two violations establish that the citations were nevertheless not duplicative. The section 77.404(a) citation was terminated four days after issuance when it was determined by MSHA that the defects in the dozer had been corrected. Tr. 73; Gov’t Ex. 1, at 4. The section 77.1606(c) violation was not terminated for another week. Tr. 79; Gov’t Ex. 7, at 2.

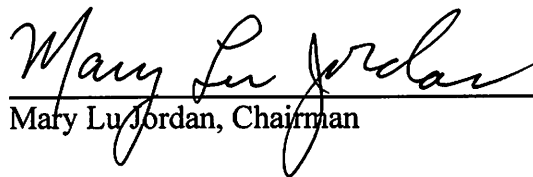
Termination of the latter violation, however, included MSHA’s ascertaining whether Kentucky Fuel was making repairs as identified from the pre-operation inspections it had conducted subsequent to the date of the original MSHA inspection. Moreover, the equipment MSHA was checking was not limited to the dozer, but rather extended to other equipment at the mine that had not been cited. Tr. 79. Given these circumstances, the differences in abatement do not rebut the duplicative nature of the two citations here.

Because we are reversing the Judge’s determination regarding the duplicative nature of two citations at issue here, we need not address Kentucky Fuel’s additional contention that the dozer, because it merely “pushe[d]” dirt or rock, does not qualify as either “loading” or “haulage” equipment to which section 77.1606 applies.

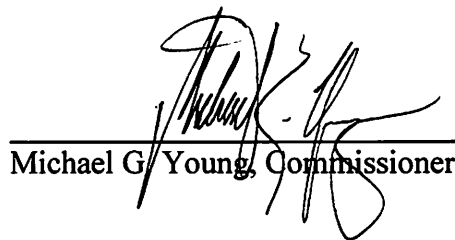
III.

Conclusion

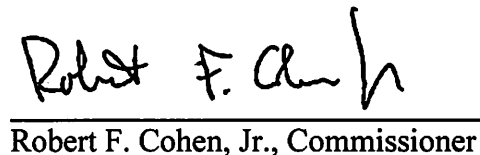
For the foregoing reasons, we reverse the Judge’s decision affirming Citation No. 8258773 for a violation of section 77.1606(c) and vacate the citation.



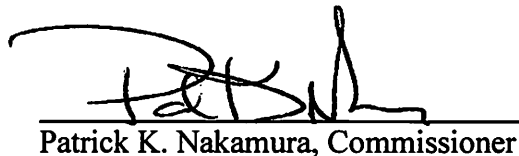
Mary Lu Jordan, Chairman



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner



William I. Althen, Commissioner

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