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EMERY MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EMERY MINING CORPORATION,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. WEST 86-101-R
Order No. 2835373; 3/20/86

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

Docket No. WEST 86-102-R
Order No. 2835374; 3/20/86
Deer Creek Mine

DECISION

Appearances: Timothy Biddle, Esq. and Susan Chetlin, Esq.,
Crowell & Moring, Washington, D.C.,
for Contestant;
Edward J. Fitch, IV, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Morris

This is a consolidated contest proceeding initiated by
contestant pursuant to Section 105(d) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act).

In WEST 86-101-R Emery contested a 104(d)(1) order. The
order, number 2835373, charges respondent with violating 30
C.F.R. 75.1003(a). The order reads as follows:

The trolley cut-out switches in 3rd West at the
following locations were not guarded where persons
normally work or are required to cross under to throw
the switch handles: 3rd West switch, bottom of 3rd West
hill, top of 3rd West hill, underground shop switch,
"B" North, between 30 & 31 crosscut, "C" North, 3rd
South switch, 3rd West North drive. There are some
cut-out switches that are guarded in this entry. This
condition was known by the company.

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In WEST 86Ä102-R Emery similarly contested a Section 104(d)(1) order, number 2835374, which reads as follows:

The energized trolley line was not guarded at the cut-out switches where men normally work or are required to cross under to work or throw the switch handles at the following locations in 1st South; numbers 53, 63, 69, 74, and 78 crosscuts. This condition was known by the company to exist.

The standard allegedly violated, 75.1003, in its entirety, provides as follows:

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

After notice to the parties, a hearing on the merits took place in Denver, Colorado on July 29, 1986.
Stipulation

The parties stipulated that if the Secretary prevails on the issue of whether a violation occurred and on the issue of unwarrantability then the citation as issued is procedurally correct. Further, it was stipulated that exhibits of each party were authentic (Tr. 6, 7). It was also agreed that the handles on all of the switches (FOOTNOTE 1) were insulated (Tr. 57).

Issue

The issue focuses on the applicability of the regulation to blade switches on trolley wires.

Summary of the Evidence

The evidence is essentially uncontroverted.

William Ponceroff, a person experienced in mining, has been the supervisor of the MSHA Orangeville, Utah office since January 1986 (Tr. 12-15). His experience has included six months' dealing with trolley haulages (Tr. 15).

In February 1986 he accompanied MSHA Inspector Jones to Emery's Deer Creek Mine. While inspecting with Jones and Gary Christensen, the company representative, he observed a line switch that had been thrown but wasn't guarded. The inspector indicated they are regularly used because the rock dust car moves in and out of this area (Tr. 15, 16). A miner's hand is close to the wire when he reaches up to pull the switch. Christensen felt the switch didn't have to be guarded (Tr. 17). On leaving the mine into Main West, Ponceroff observed two switches. One was guarded and one was not (Tr. 17). Track problems included missing and loose bolts as well as gaps in the track (Tr. 18).

On February 27 Ponceroff discussed the blade switch guarding with Dixon Peacock, the company's Deer Creek representative. Ponceroff indicated that belt shovelers and supply people were operating along the track without a temporary guard (Tr. 19). At any time their vehicle could get off the track. If this occurred miners could only deenergize the trolley wire by throwing the blade switches. The miners could also contact the wire with a shovel handle or a scale bar. In some places portions of a miner's body could come in contact with the wire (Tr. 20). Since they didn't provide a temporary guard, the switches would be regularly used because miners could only perform their duties by pulling a line switch (Tr. 20). Ponceroff also observed miners unloading timbers under a trolley wire without deenergizing the wire (Tr. 21).

Dixon Peacock indicated he didn't know anything about using an MSHA approved temporary guard (Tr. 21). Emery was not cited when this condition was first observed in order to give the company time to install guards. Ponceroff made it clear that MSHA would enforce the regulation (Tr. 22).

To some extent Ponceroff's interpretation of the regulations is stricter than that of his predecessor. The company has cooperated with MSHA at the Wilberg and Cottonwood mines (Tr. 23 - 25).

Ponceroff agreed that on the February 14 inspection he observed miners working under the trolley wire where the blade switches were guarded (Tr. 28). In the inspector's view some of the line switches were installed in such a fashion that miners would have to pass under the trolley wire to throw them. This is because the handle was on the rib side of the switch (Tr. 29). All of the blade switches had to be guarded because miners were removing longwall shields and face equipment. In addition, they were required in areas where work was being done with scale bars and when timbers were installed on the rib side of the wire (Tr. 29 & 31). In the inspector's opinion it would constitute regularly working or passing under within the meaning of the regulation if the switch had to be thrown. The regulation does not require guards for all of the trolley lines (Tr. 30, 31).

The potential for derailment in this mine was great (Tr. 32). In the event of a derailment the line switch would be regularly used. Every switch, whether facing the rib or track side, should be covered along the main line because of the condition of the track (Tr. 33).

Between February 27 and March 30, Ponceroff did not receive any objections to his directive (Tr. 35).

The inspector believed that every blade switch would be used in the course of the life of the mine (Tr. 36). Some would be used more than others (Tr. 36). If a miner leaves an area where there is no actual mining he would normally use the switch to cut off the power (Tr. 36).

Photographs of an unguarded and a guarded line switch were received in evidence (Tr. 37, 42, 43; Ex. C1, C2, C3). If a miner reaches for the switch a guard prevents his hand from contacting the energized trolley wire (Tr. 37 & 39). In pulling the switch handle a miner's forearm would be above and within five or six inches of the energized trolley wire (Tr. 39, 41). This constitutes a significant shock or electrocution risk (Tr. 42).

If the blade switch is in place, normally energy flows in the energized line (Tr. 40). If the switch is disconnected then normally there is power to only one side of the switch (Tr. 41).

Vern Boston is an MSHA inspector at the Orangeville, Utah office (Tr. 46). At a staff meeting in March 1986, Boston was advised by his supervisor, Bill Ponceroff, that the blade switches on the trolley had to be guarded. The supervisor explained that there was exposure to hazards because they were regularly used (Tr. 46). Mr. Ponceroff also indicated to Boston that the company officials were correcting the condition (Tr. 47).

On entering the mine, Inspector Boston observed that no guards had been installed on any of the line switches on 1st South or 3rd West. In addition, no guards had been installed along the trolley lines (Tr. 48). The company indicated they were working to install the guards but the inspector saw no evidence to support this view. The inspector decided to issue a closure order when he counted the 14 unguarded switches. However, some were guarded (Tr. 49).

Mr. Peacock, without further explanation, only stated that the company was working to install the guards (Tr. 50). The inspector considered the company lacked due diligence because they were aware of the condition and permitted it to exist (Tr. 52).

The inspector discussed the situation with Dave Lauriski, a company safety director (Tr. 52).

In Boston's opinion blade switches would be used in the normal course of mining activity. These activities would include any belt maintenance, as well as greasing, shoveling spills and installing timbers (Tr. 55). In addition, he considered a derailment to be a regular occurrence (Tr. 68). In the inspector's opinion the violative condition constituted a significant hazard with a potential for shock (Tr. 57).

Inspector Boston felt that every blade switch should be guarded (Tr. 57). The very act of throwing the switch requires men to pass underneath the trolley wire (Tr. 58).

Inspector Boston issued order number 2835373 (contested in WEST 86Ä101-R) and order number 2835374 (contested in WEST 86Ä102-R) (Tr. 48; Govt. Ex. 1, 2, 3).

Dixon Peacock identified himself as the senior safety engineer for the company (Tr. 69, 70). He assists management in making the mine more productive as well as safe (Tr. 70).

On February 27, 1986, Peacock and Ponceroff discussed the guarding of all switches. Peacock discussed it with his immediate supervisor who felt no violation existed because the situation did not constitute "regular passage" (Tr. 71, 72). No further discussions took place with Mr. Ponceroff.

Peacock was later advised by Dick Jones and Ken Callihan that they were going to make a concentrated effort to install the switches (Tr. 72, 73, 78). The workers corrected 13 to 18 switches. It takes about an hour to install a guard (Tr. 74). There are about 50 to 65 switches in the mine (Tr. 74).

Approximately 600 employees work in the mine (Tr. 75).

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The company tries to comply with the MSHA inspectors (Tr. 76).

Dominic William Oliveto, called as a witness by Emery, identified himself as the maintenance superintendent for the Deer Creek Mine (Tr. 81). The 50 blade switches in the mine disconnect the power in by or out by the switch or isolate the power at the beginning of each branch circuit (Tr. 82, 83).

A certified electrician, trained in electrical work and wearing protective gloves, throws these switches (Tr. 83, 85). All of the electrical equipment is inspected weekly (Tr. 83, 84). In most cases the electricity flows in both directions in the lines (Tr. 84).

Title 30, Section 75.509 provides that only a qualified person can work on energized equipment (Tr. 84). Other miners are instructed not to contact the wire. However, they are instructed to handle emergency situations; in addition, they are directed to cross under where ever the trolley is guarded (Tr. 86, 87).

Prior to March 20, 1986, the switches were guarded at the man trip and material stations. In addition, guards were used whenever the switch happened to be in front of a belt crossover or in a crosscut with a mandoor through it. These are regularly travelled areas (Tr. 94).

During the blitz electrical inspection of April 1985 no mention was made about guarding switches unless they were travelled under (Tr. 96).

Mr. Boston stated he wrote the citation because he had to cross under the switch to throw it on or off. Oliveto objected because it would prevent you from driving the trolley through it because the pull has to ride on it from the bottom (Tr. 97). Oliveto described the hazards involved in connection with some of the power guarding (Tr. 99).

One hand is used to throw an unguarded switch (Tr. 100).

Oliveto wasn't advised about the situation until after the citations were written on March 20 (Tr. 102).

No temporary guards have been used at the mine (Tr. 102). Section 310(d) of the Act requires temporary guards where trackmen and other persons work in proximity to trolley wires or trolley feeder wires (Tr. 103). When working on the track, the trolley wires are isolated by throwing one or two blade switches (Tr. 103).

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Blade switches are required at various locations and intervals (Tr. 103, 104).

There were two methods available to guard the blade switches (Tr. 106). A various number of electricians are assigned to tracks and belt lines (Tr. 108).

The mine normally operates three shifts a day for a five-day week (Tr. 113).

Derailing is not uncommon but it is not a daily occurrence (Tr. 118).

Between February 27 and March 7 the blade switch problem was discussed with the mine foreman (Tr. 119, 120).

Discussion

Emery asserts that Section 75.1003(a) does not apply to blade switches because the regulation does not specifically mention switches. In the alternative, Emery states that the Secretary has failed to establish the applicability of the regulation in this factual setting.

Emery's threshold contention lacks merit. The relevant portion of the regulation requires that "trolley wires . . . shall be guarded" under certain circumstances. The evidence establishes the trolley wires enter the cut-off switch at each side. By pulling the switch handle a miner can deenergize the trolley line (inby or outby depending on the flow of electricity). The switch is accordingly an integral unit of the trolley wire. In sum, the switch is merely a conduit through which the trolley wire passes. Accordingly, the switches are a part of the trolley wires. They They must be guarded at those locations mandated in the regulation. Specifically, these are the locations stated in paragraphs (a), (b) and (c) of Section 75.1003.

Emery in this case was cited for violating paragraph (a) which requires guarding "where men are required to work or pass regularly under the wires."

The Secretary has failed to offer any evidence to establish the violation. In WEST 86Ä101-R the Secretary's order encompassed nine specific locations. In WEST 86Ä102-R the order encompassed five specific locations.

There is no persuasive evidence that miners either worked or were required to pass regularly under the trolley wires at the locations cited in the orders. Inspector Boston testified there were no guards on any of the line switches on 1st South or 3rd West. But a mere lack of guards does not constitute a violation of the regulation.

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Inspector Boston also described circumstances where the normal course of mining would require the use of switches. However, the regulation requires evidence of where miners either worked under or passed regularly under the trolley wires. The Secretary also contends that merely throwing the blade switch constitutes regularly passing under. In addition, the Secretary's representatives believe each switch would at some time or other be thrown. The Secretary seeks to stretch the regulation beyond its plain meaning. To support the Secretary's view would mean that "pass regularly" includes circumstances where miners merely occasionally cross under a trolley wire. If this were so the regulation would require that every trolley wire be insulated its entire length. There is no such requirement.

There is no allegation here that Emery left its trolley wires unguarded at critical locations and there is no evidence that Emery's miners worked around or regularly passed under the switches cited in these cases. To like effect see Southern Ohio Coal Co., 1 FMSHRC 1642 (1979) (Koutras, J.).

I agree with the case law cited in the Secretary's brief that the Act and its regulations should be liberally construed to achieve its purposes. But I cannot rewrite this regulation to read that "all trolley wires must be guarded adequately at all cut-out switches".

Briefs

Counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent did not violate 30 C.F.R. 75.1003(a).

