

CCASE:
SOL (MSHA) V. OLD BEN COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 93-154
Petitioner	:	A.C. No. 11-00589-03879
v.	:	
	:	Mine No. 24
	:	
OLD BEN COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for Petitioner; Thomas L. Clarke, Esq., Fairview Heights, Illinois, for Respondent.

Before: Judge Amchan

Statement of the Case

On January 5, 1993, Michael Woodrome conducted an MSHA inspection of Respondent's number 24 mine in Franklin county, Illinois. Mr. Woodrome, who is an electrical specialist, came to the mine primarily to inspect two diesel-powered S&S scoops that Respondent used only in intake or neutral air to haul supplies (Tr. 12 - 15, 87).(Footnote 1) One of these scoops had caught fire at the mine in December 1992 (Tr. 12).

After looking at the fire-damaged scoop, designated number 4 by Respondent, Inspector Woodrome proceeded to a wash station where the other diesel-powered scoop, designated number 15 by Respondent, was being cleaned (Tr. 20, 87). While examining the operator's panel, he noticed that a spad, a nail-like device (Exh. R-3) used to hang ventilation curtains, had been bolted onto the panel (Tr. 21, Exh R-4). The spad was positioned so that it depressed the Murphy switch, a device that automatically shuts off the engine of the scoop when the engine temperature

¹The scoops had originally been battery-operated but were rebuilt and converted to diesel-power in 1990. Respondent does not allow these scoops to operate in return air. Two other scoops, which are battery-operated "permissible" vehicles, operate at the working face and in return air.

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exceeds 205 degrees Fahrenheit, when the oil pressure drops below 20 psi, or when the scoop's fire suppression system is activated (Tr. 16 - 17, 92 - 99, Exh. R-1, R-4).

Inspector Woodrome issued Respondent Citation No. 3536978, pursuant to section 104(d)(1) of the Act (Exh. G-1). The citation alleges a violation of 30 C.F.R. 75.1725(a) which provides:

Mobile 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 violation was alleged to be "significant and substantial" and, due to the "unwarrantable failure" of Respondent to comply with the regulation. A \$4,400 civil penalty was proposed by MSHA.

The inspector believes that by continuously running the scoop with the Murphy switch depressed, Respondent is creating a fire hazard (Tr. 17 - 18). If the engine is allowed to operate in an overheated condition, Woodrome believes, the engine surface may ignite coal dust or other combustible materials.

MSHA is also concerned that if a fire starts on the scoop due to some other reason, the continued operation of the engine will make the fire worse and interfere with firefighting efforts. This concern arises because the continued revolution of the engine fan blades may, in some circumstances, draw air over the fire (Tr. 118, 168).

Respondent submits that the Murphy switch is designed to protect the engine and is not intended to protect employees (Tr. 105, 159, 166). If an engine runs for an appreciable period in an overheated condition, its metal parts may stick together, ruining the engine (Tr. 161 - 162). The purpose of the Murphy switch is to prevent damage that would require spending approximately \$5,000 to replace the scoop's diesel engine (Tr. 166).

Old Ben states that it relies primarily on an automatic fire suppression system to protect employees from fire. It argues that the hazard posed by MSHA, fire caused by the engine igniting combustible materials at 300-400 degrees is inconsequential

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given the fact that the exhaust manifold on the scoop reaches temperatures of 900-1000 degrees during the normal operation of the scoop (Tr. 100, 162).(Footnote 2)

Moreover, Respondent notes that there is no MSHA regulation requiring a Murphy switch (Tr. 37). Thus, all the hazards postulated by the inspector would exist on a scoop which had never been equipped with such a switch. MSHA concedes that a scoop which had never been equipped with a Murphy switch would not be in violation of section 75.1725(a) (Tr. 37, 46 - 52). The essence of the Secretary's case is that if a piece of equipment has a safety device, the mine operator must maintain that device in operating condition, even if the device is not required (Tr. 26).

Analysis

MSHA's witnesses indicated that they might write a safeguard requiring a diesel powered scoop to be equipped with a Murphy switch (Tr. 48 - 51). However, it is clear that the rationale of the instant citation was the apparently intentional and long-term bypassing of the switch on scoop number 15 (Tr. 34, 53).

The major difficulty with the Secretary's case is its admission that this scoop can operate without violating section 75.1725(a) if a Murphy switch had never been installed (Tr. 46). The undersigned can envision a situation in which bypassing a safety device which is not legally required would constitute an unsafe condition. For example, if the device is one which a machine operator is likely to rely upon, it may be dangerous to operate a machine with a nonfunctional safety device, even if it would not be unsafe to operate the machine if it never was equipped with the device.

In the instant case, however, there is nothing that indicates that an operator would behave any differently on the assumption that the Murphy switch was operative than if the scoop

2Since the fire on scoop number 4, Respondent has taken a number of steps to reduce the fire hazard on its diesel-powered scoops. Most importantly, it raised the muffler, so that it would be less likely to become coated with combustible material. It also increased the capacity of its fire suppression chemicals, added an additional spray nozzle for the fire suppression system, reinforced the fuel lines, and installed a shut-off valve which prevents fuel from exiting the tank once the ignition is turned off (Tr. 128, 136-37).

The fire suppression system on scoop #4 was inadequate to put out the fire that occurred on December 28, 1992. The operator had to summon other employees who used fire extinguishers to put out the fire (Tr. 108-111).

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had never been equipped with such a switch. Therefore, I cannot find an unsafe condition on the basis that the Murphy switch was bypassed.

Even if I were to regard the instant citation as evidence of a change in MSHA policy that 30 C.F.R. 75.1725(a) requires all diesel-powered scoops to be equipped with a Murphy switch, I would vacate the citation. In order to find that a general standard such as section 75.1725(a) requires a Murphy switch, I would have to conclude that a reasonably prudent person familiar with the factual circumstances surrounding that allegedly hazardous condition would recognize a hazard warranting corrective action Alabama Byproducts Corp. 4 FMSHRC 2128 (December 1982).

In the instant case, I conclude that a reasonably prudent person familiar with the operation of a diesel-powered scoop in intake and neutral air in an underground coal mine would not necessarily recognize that it is dangerous to employees to operate the scoop without a Murphy switch, or with the Murphy switch depressed. In so doing, I do not discredit the opinions of Inspector Woodrome, or MSHA's Dennis Ferlich. However, I conclude, on the basis of the testimony of Respondent's witnesses, Kirby Smith, the maintenance supervisor at Mine 24, and Keith Whitlow, territory manager for the distributor of the diesel engines, that a reasonably prudent person might not conclude that it was unsafe to miners to operate such a scoop.

In the terms used in Alabama Byproducts Corp., it is clear that a reasonably prudent person would recognize the need for corrective action if they were aware of a Murphy switch which was being by-passed on a long-term basis. However, based on this record the Secretary has not established that a reasonably prudent person would recognize that such condition poses a hazard to employees, as opposed to merely putting the equipment at risk. Given the legitimate difference of opinion on this matter, I believe that if MSHA wants to require the Murphy switch, or make it a violation of the Act to bypass the switch, it must do so through notice and comment rulemaking.

ORDER

Citation No. 3536978 is hereby vacated and this case is dismissed.

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Arthur J. Amchan
Administrative Law Judge
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