

CCASE:  
MSHA V. WESTERN STEEL  
DDATE:  
19830329  
TTEXT:  
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
March 29, 1983  
SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v. Docket No. WEST 81-132-RM

WESTERN STEEL  
CORPORATION

#### DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation and application of 30 C.F.R. § 57.4-33, a fire prevention standard for metal and nonmetal underground mines. The standard provides: "Mandatory. Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used." 1/ On the grounds explained

---

1/ MSHA has been in the process of reviewing its metal and nonmetal standards. On December 27, 1982, MSHA released preproposal draft revisions of the metal/nonmetal fire prevention and control standards. These draft revisions would combine the fire prevention and control standards of 30 C.F.R. Parts 55, 56, and 57, into a new Part 58. One of the preproposal drafts, section 58.4-65(G), if ultimately promulgated, would revise section 57.4-33, the standard involved in this case. Section 58-4-65(G) (draft) provides:

Valves on oxygen and acetylene tanks shall be kept closed when--

- (a) the tanks are moved;
- (b) the system is left unattended; or
- (c) the task is completed.

An accompanying note states:

[.4-33] When valves on storage cylinders are open, the connecting hoses are extensions of storage cylinders. Without close attention, the hoses could become damaged and release gases, creating a flammable atmosphere. The standard has been revised to clarify when valves must be closed to prevent this hazard.

As is plain from a facial comparison, there are significant differences in the texts of the present standard, section 57.4-33,

and the draft revision. Our decision in this case is based upon the standard in existence at the time of the citation, section 57.4-33.

~311

below, we affirm the administrative law judge's decision vacating a citation issued against Western Steel Corporation for an alleged violation of the standard. 2/

The facts are largely undisputed. At the time of the citation, Western was installing a dust control system in an underground mine in Wyoming. In the course of this work, Western employees were using an oxyacetylene torch welder to make brackets for a new air duct. The torch welder operator would first cut appropriate pieces of angle iron and then weld the pieces into place to form the brackets. The torch head consisted of a burner, to which were attached hoses that led to two gas tanks, one containing oxygen, the other acetylene. The tanks were located in a cage over the headframe about 50-70 feet from the mine entrance. These gases could be shut off by turning valves located either at the tanks or at the burner.

On December 3, 1980, the day of the citation, the torch head was in an underground tunnel at a worksite approximately 30-40 feet from the tunnel entrance. The torch hose ran for a distance of 100 feet through the tunnel and out the entrance to the oxygen and acetylene tanks located on the surface. The Western iron worker who was operating the torch welder on December 3d turned on both sets of gas valves at the tanks and at the burner when he arrived at the worksite about 8:00 a.m. He then cut angle iron in the tunnel until he depleted his supply. At that point, around 10:15 a.m., he turned off the burner gas valve and left the tunnel worksite to get more angle iron from a stockpile on the surface about 50 feet from the tunnel entrance. At that location, long pieces of angle iron were kept on a table. The stockpile was about 50-60 feet from the gas tanks. The employee did not pass the tanks on his way to the stockpile, and did not turn off the valves at the gas tanks.

Upon reaching the table, the employee noticed another torch. He decided to cut usable lengths of iron at the table instead of taking a large piece back to the worksite and cutting it there. Shortly after the employee left the tunnel, an MSHA inspector arrived at the mine. The inspector noticed the gas tank valves open and followed the hoses down into the tunnel to inspect the torch head. He found the torch head valves turned off and the burner tip cold. The inspector returned to the surface and turned off the valves at the gas tanks. Then about 10:35 a.m., he spoke with the welder operator, who was still at the table. It appears that the employee was just about to return to the tunnel worksite with the iron he had cut at the table. Tr. 10, 31-32, 54-55. After discussing the matter with the employee and others in the area, the inspector issued the citation.

---

2/ The judge's decision is reported at 3 FMSHRC 2666 (November 1981) (ALJ). When the citation was issued, Western was performing work for FMC Corporation at an FMC mine. FMC was the original contestant in the proceeding, and Western was substituted as contestant without objection. The judge subsequently dismissed the case as against FMC Corporation and amended the caption to reflect the substitution. 3 FMSHRC at 2666.

~312

The judge vacated the citation. He concluded that while the welder operator was away from the tunnel obtaining more angle iron for his work the contents of the oxygen and acetylene tanks were "being used" within the meaning of the standard, and, therefore, the tank valves did not need to be closed. However, the judge rejected an interpretation of the standard that would allow a miner to be absent for "a substantial period of time" from an oxyacetylene torch welder without closing the tank valves. 3 FMSHRC at 2669. In essence, the judge adopted a two-Part test for analyzing alleged violations of the standard: (1) a temporal test that if welding equipment were left unattended for a "substantial period of time," the tank contents would be deemed "not being used" and the tank valves would have to be closed; and (2) a job-related test that tank valves could be left open for a non-substantial period of time while the torch welder operator was engaged in an activity related to the cutting or welding operation. 3 FMSHRC at 2668. Applying these criteria to the facts, the judge determined that the employee's cutting additional pieces of angle iron on the surface was an activity connected with the cutting and welding in the tunnel, and that his 20-minute absence from the torch head was not a substantial period of time. 3 FMSHRC at 2668-69. On review the Secretary argues that if a welder operator leaves the immediate area of a welding operation for "any length of time," the tank contents cease to be in use and therefore the tank valves must be closed. The Secretary would, however, permit the welder operator to cease cutting or welding temporarily without turning off the tank valves so long as he "remains in the area of the torch, hose, and tanks attending to the welding activities commonly associated with his immediate job." We are persuaded only in part by the Secretary's approach.

Before construing the standard we examine the evidence in this case, which indicates that cutting and welding tasks are often, if not typically, performed in an intermittent manner. Tr. 19-20, 24-25, 46-47. For example, as this case illustrates, it is common practice to use a torch welder to cut metal and then weld the metal in place. In making the transition, the operator must turn off the torch head, adjust it to allow for welding, and then turn it back on. In

addition, the gas tanks may be located for safety purposes some considerable distance from the burner head. Tr. 19-20, 24-25. Given that the distance between torch and tanks may be substantial (not only in terms of distance but also in terms of difficult terrain separating tanks and torch), it follows obviously that some measure of time must elapse for one person to shut off the torch valves and then proceed to the place where the tanks are stored. Further, in some circumstances the tanks may be stored, for safety reasons, in a place not easily and readily accessible. We note that the MSHA inspector who issued the citation testified that if the gas tanks were not located in the immediate vicinity of the torch, the operator could leave the torch for brief periods of time (under 10 minutes in duration in the inspector's opinion) without being required to turn off the gas tanks. Tr. 46-47, 49. In view of the foregoing

~313

considerations, it is not surprising that all parties agree that requiring the tank valves to be closed every time a burner is temporarily laid aside and turned off during the performance of a task would be very impractical and an unreasonable construction of the standard. 3/

Thus we come to interpretation of a standard aimed at promoting safety for an essential welding operation within an underground mine. Absolute safety would require prohibition of hoses carrying oxygen and acetylene into a mine. Neither the Mine Act nor the regulatory standard at issue here imposes that prohibition. Instead, we confront a brief, generalized standard which, in contemplation of practicalities, requires interpretation for reasonable application in varying circumstances. The standard refers only to an "in use" criterion. As contrasted with MSHA's preproposal draft revision (n. 1 supra), the standard does not include an "attendance" test.

The basis of the Secretary's argument on review appears to be concern for the possibility that the gas hoses could leak or be ruptured accidentally, while the tank valves are open, thereby causing release of the oxygen and acetylene with the further possibility of ignition or explosion within the mine. Clearly, avoidance of a disaster of that nature is the concern of Congress, the Secretary, the Commission, mine operators and, especially, miners. As the facts in this case show, the tanks were located on the surface about 100 feet from the torch head in the mine. For one person to traverse such distance, with no unusual obstacles, would require a few minutes -- perhaps 3 minutes and maybe more if the traverse were difficult. Consequently, even in the best of circumstances, instant communications between the torch site and the tank site would seem to be the proper means of adhering exactly to the mandate implicit in the Secretary's argument. But the standard makes no reference to such

communication.

Similarly, if the laying of hoses from oxygen and acetylene tanks located outside a mine to connect with a torch head inside a mine inherently represents a dangerous hazard, then it would seem plausible that the standard should have required a protective cover or sheathing for the hoses. This protective requirement, however, does not appear in the standard, which simply requires that the tank valves be closed "when the contents are not being used."

---

3/ We note too that the relevant OSHA fire prevention standard for the construction industry, 29 C.F.R. § 1926.352(g), also promulgated by the Secretary of Labor, recognizes the intermittent nature of torch welding tasks and permits the torch to be laid aside temporarily without tank valve closure. That standard provides in part:

For the elimination of possible fire in enclosed spaces as a result of gas escaping through leaking or improperly closed torch valves, the gas supply to the torch shall be positively shut off at some point outside the enclosed space whenever the torch is not to be used or whenever the torch is left unattended for a substantial period of time, such as during the lunch period.

(Emphasis added.)

~314

It must have been contemplated in the drafting of the standard that some reasonable lapse of time be permitted between cutting and welding with the torch and closing of the tank valves. And, indeed, as we noted above, the Secretary would permit the welder operator to cease cutting or welding without closing the tank valves so long as he "remains in the area of the torch, hose, and tanks attending to the welding activities commonly associated with his immediate job." The OSHA construction standard would similarly allow intermittent laying aside of the burner without tank valve closure for non-substantial periods of time.

We must interpret the standard involved in this case as it is written, and will not attempt at this time to essay a rule that would cover all situations of intermittent cutting and welding during the performance of a task. We conclude, for purposes of deciding this case, that an oxyacetylene torch welder being used for a task may ordinarily be laid aside without tank valve closure for reasons immediately related to the performance of that task and for a temporary period of time not inconsistent with the continuous performance of the task. We agree with the judge and the Secretary, however, that at some point such temporary laying aside during the performance of the specific task shades into a status of "not being used" within the meaning of the standard and

does require tank valve closure. The presence of unusual risks or special circumstances may also require tank valve closure. In the absence of detailed guidelines in the standard itself, alleged violations of this standard must be evaluated on the basis of all the circumstances in each case. 4/ If the Secretary wishes to have a more detailed regulation incorporating such factors as attendance, two-way communications, protective sheathing for hoses, and specific temporal criteria, he is authorized under the Mine Act to revise the standard. As we have already noted, he is presently in the process of considering revisions to the standard.

Our dissenting colleague argues that our interpretation engrafts new "exceptions" onto the standard. We respectfully disagree.

This case requires us to construe the meaning of the key phrase, "not being used." "Use" has a temporal meaning because tasks extend over time. "Use" itself in this context refers to performance of work. Our "temporal" and "task-related" criteria are therefore natural constructions of the words in issue. Our interpretation is also consistent with the evidence showing the intermittent nature of torch welding tasks and with general safety considerations in this field, as evidenced by the Secretary's OSHA construction standard mentioned above. It appears to us that the differences between the Secretary's arguments in this case and our decision are differences of degree, not kind.

---

4/ This case does not require us to, and we do not, decide whether a temporary laying aside of the torch welder for other work-related reasons or for such purposes as coffee breaks, trips to the lavatory, or the like, would require a different approach.

~315

Applying the foregoing principles to this case, we affirm the judge's vacation of the citation. On the morning of the citation, the torch welder was being used to make brackets. When the welder operator went to the mine surface, that task had not been finished. The purpose of his trip was certainly task-related--to obtain additional angle iron for completion of the job. The angle iron was in stockpile located about 50 feet from the tunnel entrance and about 50-60 feet from the oxygen and acetylene tanks in the cage over the headframe. He did not pass the gas tanks, and could not see them from the stockpile. Tr. 11, 13. By happenstance, a torch was available at the stockpile site, so he used that torch to cut iron needed at the worksite, thereby apparently spending a few minutes more than was intended when he left the worksite. He was ready to return to the torch head after an absence estimated to be of no more than 20 minutes. This approximate 20-minute absence from the torch head was of temporary duration and directly related

to the continuous performance of the specific welding task. The Secretary did not prove the existence of any special or unusual circumstances that would otherwise have required turning off the tank valves. Given these circumstances, we conclude that substantial evidence supports the judge's conclusion that the oxygen and acetylene were in use within the meaning of the standard and that the welder operator's relatively brief absence from the torch head to obtain materials for his on-going work did not create a non-use situation.

On the bases explained above, we affirm the judge's decision.

~316

Commissioner Lawson dissenting:

The majority has not only created its own interstices in this case, but by fiat added to the standard and created confusion and ambiguity. It is both unnecessary and undesirable to add temporal and vocational exceptions to what is, after all, an uncomplicated standard with a clear purpose.

That standard, under the rubric "Fire Prevention and Control" requires that "Valves on oxygen and acetylene tanks shall be kept closed when the contents are not being used." Webster's New Third International Dictionary (Unabridged) (1971) defines "use" as: "the act or practice of using something; to put into action or service; putting to service of a thing; to employ; to expend or consume by putting to use." Here the contents of these tanks were indisputably being used prior to the miner abandoning his underground work site to travel to the surface, and were not being used until the miner returned to the tunnel, and his underground job site.

Stated otherwise, if this miner had not returned to this torch welder no further consumption of the contents of these tanks would have taken place, and the tank valves were required to have been closed upon his departure. It is beyond dispute that tanks with open valves are more dangerous than those with closed valves. It is admittedly not difficult, nor even inconvenient (Tr. 12), to manually shut off these valves.

The statute--and the standard promulgated thereunder--was enacted to prevent mine disasters and death and injury to miners. Section 2(e). Secretary v. Old Ben Coal Co., 1 FMSHRC 1954, 1956-57 (1979). It is self-evident that permitting two separate, hundred foot lengths of rubber hoses (Tr. 8, 28), filled with oxygen and acetylene, to remain unattended (Tr. 13, 16, 22) along an underground mine floor subject to mine traffic (Tr. 33), connected to tanks full of these same flammable gases, is to invite disaster. 1/ Nor is the possibility of leaks from these hoses merely speculative. The miner witness of this operator testified

to several prior occurrences, including ones where a "... piece of iron has fallen and sliced the hose." (Tr. 21, 22).

---

1/ Acetylene, used in manufacturing explosives, is a "brilliant ... illuminating gas," which "[w]hen combined with oxygen ... burns to produce an intensely hot flame and hence ... is used principally in welding and metal-cutting flame torches." Dictionary of Mining, Mineral and Related Terms. Department of Interior, U. S. Bureau of Mines (1968). Another dictionary defines acetylene as: "A colorless, highly flammable or explosive gas...." American Heritage Dictionary of the English Language New Collegiate Ed., at 10 (1968).

Acetylene has an odor (Tr. 52) (Operator's Brief, p. 9) as contrasted with methane which has none (Tr. 51), and is admittedly highly combustible (Tr. 25). The hazards associated with the use of these tanks are well recognized elsewhere in 30 C.F.R. 57.4 and its subsections.

~317

"Use" of the torch, the tool in this case, necessarily included the consumption of the oxygen and acetylene in the burning or cutting function being performed. The burning or cutting in this case requires human control, involvement and observation of the equipment, both to perform the work, and to prevent malfunction or accident. The standard contemplates that meaningful attention be given this burning operation because of the inherent dangers. (Tr. 25-27).

When the miner using the torch leaves the work site, the equipment is not being used, nor observed, nor are the contents of the tank being consumed. The language of the standard permits no exception to the requirement that the valves must be turned off at the tank. Indeed, even the miner operating the torch here conceded that he had "... been instructed (by this operator) if I am going to be gone an unreasonable length of time and too far away, that we do turn our bottles off and bleed the lines." (Tr. 15). Testimony was also presented that the likelihood of a leak being detected is greater if there were an employee attending the tanks. (Tr. 50-52).

The confusion reflected in the majority's opinion is even more vividly revealed by the operator's own witness, Supervisor Powers, who testified that: "...in use means you're actually using the torch. That means you actually have it running." (Tr. 32, 58-59).

As the majority notes, the facts in this case are "largely undisputed." Slip op. at 2. From those facts, however, the majority has determined that a miner engaged in operating an underground torch welder, who both ceases to operate that welder, and leaves the job site, in this instance for at least twenty minutes, is still using the contents of the tanks involved. 2/

Beyond the obvious--the contents of the oxygen and acetylene tanks were not being used or consumed during the miner's absence--the majority's opinion fails to provide any guidance to either the mine operator or the Secretary as to what will or will not henceforth be deemed a violation of the standard. Comments on possible revisions of the standard, or how it might have been written, may be commendable but fail to address the case before us. Nor is any precedent cited by the majority in support of its opinion.

"A temporary period of time" may be superficially comfortable--if awkward--language but hardly withstands critical analysis. Slip op. at 5. The majority not only fails to define "temporary", but its addition to the standard is not explained by reference to either the Act, its legislative history, or precedent. Twenty minutes, at a minimum, is now clearly established as a permissible period of time. No upper limit on "temporary" is enunciated; presumably the establishment of such will henceforth depend on the imagination and inventiveness of counsel, of whose ingenuity I have no doubt.

---

2/ The majority errs in asserting that the MSHA inspector who issued the citation approved the torch operator's absence for "under ten minutes" without being required to turn off the gas tanks. (Tr. 46, 47). Slip op. at 3. Nor is there any record evidence of "difficult terrain" or "traverse" difficulties. Slip op. at 3, 4.

~318

The judge's vitiation of the standard by his declaration that "...I am not convinced that Warner's actions created any hazard because that condition will always exist whenever the lines are in use.", 3 FMSHRC 2668 (Nov. 1981) (ALJ), begs the question, as does the majority's approval of the judge's holding. 3/ If that be so, then it must follow that any absence, for any reason and for any length of time, is permissible.

The Secretary's pending attempt to revise the standard also fails to address the situation presented, since neither "system", "task", nor "unattended" are defined.

Even less persuasive is the majority's attempt to additionally gloss this standard, or confuse the Secretary and mine operators, by requiring that the absence of the miner from the tanks be "...for reasons immediately related to the performance of that task." Slip op. at 5. One searches fruitlessly for any relationship between either the language or the purpose of the standard, and the reason for the absence of the miner. Nor does the majority explain the relevance of the reason for the absence to the standard's requirement for the safeguarding of the contents of these tanks, and most importantly, the miners who work with them. It appears self-evident that, whatever the reason for the absence,

it bears no relationship to the purpose of the standard, which is to guard against malfunctions, and the accidental escape and ignition or explosion of this oxygen/acetylene mixture. A three minute trip to pick up one's paycheck is apparently now impermissible, while a twenty minute drive to the hardware store for task related reasons is non-violative, under the majority's reasoning.

In summary, the standard has now been rewritten by the majority, without even the assertion of a statutory, legislative, regulatory or judicial source for this newly promulgated modification.

Fidelity to the Act compels acceptance of the interpretation--if there is an ambiguity, which does not appear to be the case--which will promote safety and prevent death or injury to miners.

District 6, *United Mine Workers of America et al. v. United States Dept. of the Interior, Board of Mine Operations Appeals*, 562 F.2d 1260, 1265 (1977); *UMWA v. Kleppe*, 532 F.2d 1403, 1406 (1976) cert. denied 429 U.S. 858 (1976); *Munsey v. Morton*, 507 F.2d 1202, 1210 (1974); *Reliable Coal Corp. v. Morton*, 478 F.2d 257, 262 (1973), and *Secretary v. Old Ben Coal Co.*, supra, at 1957, 1958.

---

3/The quantity of gas which could be released, and the consequent area of hazard, would obviously be limited by closure of the valves at the tanks. And, of course, in an underground setting with conditions conducive to concentration of the escaped gas, the likelihood of explosion or fire in the confined and hazardous environs of a mine will grow accordingly. (Tr. 44, 48, 49). These tanks when in use are kept in a welded frame for protection to keep them from falling over. (Tr. 19).

~319

The contents of these tanks were not being used or consumed at the time this citation was issued. The tank valves were not closed. Nor was this a situation in which the torch operator momentarily extinguished the torch while remaining at his work bench. The hazard of accidental ignition of highly flammable gases in an underground mine needs no verbal underpinning. "Temporary" periods of absence, for task related reasons, is not approved in this or any related standard.

To me a violation of the standard, a very serious violation, of a magnitude with devastating potential for injury or death to miners, for whose protection this Act has been written, has been established.

I therefore dissent.

~320

Distribution

John A. Snow

Van Cott, Bagley, Cornwall & McCarthy  
Suite 1600  
50 South Main Street  
Salt Lake City, Utah 84144  
Michael McCord  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, Virginia 22203  
Administrative Law Judge John Morris  
Fed. Mine Safety & Health Review Commission  
333 West Colfax Ave., Suite 400  
Denver, Colorado 80204