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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. BARB 79-255-P A/O No. 01-00550-03007V
v. BURGESS MINING AND CONSTRUCTION CORPORATION, RESPONDENT	Boothton Strip Operations

DECISION

Appearances: Murray A. Battles, Esq., Birmingham, Alabama, for
Petitioner;
William E. Prescott, 111, Esq., Birmingham, Alabama,
for Respondent

Before: Judge Forrest E. Stewart

The operator was assessed a penalty of \$200 in a bench decision at a hearing held on May 25, 1979, for not providing adequate berms on the main haul road at its Boothton Strip Operations.

Citation No. 239933 which was issued on May 17, 1978, alleged that the following condition or practice existed:

Berms were not provided on the outer banks of the main haul road leading to and from the mine.

A subsequent citation dated May 22, 1978 stated:

Citation No. 239933 dated 5/17/78 is here by modified to show correct mine as Boothton strip operation. This citation is further modified to how the following. The condition of inadequate berms existed on the haulage road leaving to company pit No. 24. The foreman had to travel the road a minimum of twice a day, because it was the only means of access to the mine. The foreman who was a certified man said, that no berm needed to be provided, that there had never been a berm and no one told him he needed a berm. It appeared that a berm had been provided but had weathered down.

Citation No. 239933 was further modified by another citation dated May 22, 1978, which stated:

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The citation number 239933 dated 5-17-78 is extended because of a misunderstanding concerning the violation. Citation No. 239933 dated 5-17-78 is hereby modified to state the following: the inadequate berm begins approximately 2 tenths of a mile from the concrete bridge that crosses the Cahaba River and extends for approximately 250 feet (on the right side of the road). From this point the condition exists for 3 tenths (on the left side of the road). Then at a distance of the 8 tenths of a mile from the bridge, the condition exists on both sides of the road approximately 100 feet. These conditions were viewed while entering the pit from the bridge side.

The citation was terminated on May 24, 1978, after additional berms were provided:

In its answer to the Petition to assess civil penalty, Respondent stated:

1. That no violation of 30 CFR 77.1605-k occurred.
2. That the road in question had been previously inspected and the location of necessary berms specifically pinpointed and berms constructed as required.
3. That the area in question did not require berms.

At the hearing, it was established that in 1972 a notice of violation had been issued for failure to have berms on the haul road and that Respondent had filed an application for review. After construction of berms on the portions of the 9-mile haul road designated by Petitioner, the notice of violation was terminated and Respondent withdrew its application for review.

On May 17, 1978, Inspector Franklin who was unaware of the 1972 violation and its abatement, issued citation No. 239933 because, in his judgement, additional berms were needed.

The hazardous conditions on most of the 9-mile haul road had been eliminated in 1972 by the installation of berms on the designated sections but a slight hazard still existed in the areas designated by the inspectors in 1978. Berms were required in the remaining areas under criteria issued by Petitioner in October 1972.

The primary issues here are whether or not there was a violation of the mandatory safety standard cited and the penalty which should be assessed if there was, in fact, such a violation. The criteria as set forth in section 105(b) of the Federal Mine Safety and Health Act of 1977, 30 USC 820 are:

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One, the appropriateness of the penalty to the size of the business of the operator charged.

Two, the operator's history of previous violations.

Three, whether the operator was negligent.

Four, the gravity of the violation.

Five, the demonstrated good faith of the operator charged in attempting to achieve rapid compliance of notification. And six, the effect of the penalty on the operators' ability to continue in business.

The record supports a finding that the company produced somewhat less than half a million tons of coal per year at the time of the violation. The tonnage produced in the particular pit at which the violation was cited was not established; however, it was established that the pit at the time of the citations was not being extensively used and not much coal was being mined at the time.

The record shows that from May 15, 1977 until May 14, 1979 there were 56 paid violations in the total amount of \$6,105.60. Most of these violations were cited at the time of the inspection during which the instant case arose. For the size of the company and the size of the mine the record of violations is moderate.

It is found that the steepness of the embankment next to the roadway was such that berms or guardrails should have been installed under the criteria set forth in Government's Exhibit No. 7.

As to whether or not the operator was negligent, I find that at a prior inspection in 1972, a number of berms and guardrails were prescribed and that the operator complied with these requirements and installed these berms and guardrails. As a result of the abatement of this violation and these conditions and termination of the notice of violation, the operator withdrew its application for review. While this does not prevent a violation from issuing, it does bear on the questions of negligence and the gravity of the violation. The operator after complying with the requirements of the Bureau of Mines in 1972, continued to operate without any further notice that additional berms were required until the inspection was performed in 1978. Therefore, he had no way of knowing that additional berms or guardrails were required. The operator did not know that he was in violation and there is no indication that he unreasonably failed to take action to abate the condition for which the citation was eventually issued in 1978. The 1978 abatement also has some bearing on the gravity of the violation. It at least shows that the inspector at

~1032

that time considered the berms and the guardrails to be sufficient to meet the requirements of the law and possibly to make the operation safer. We do have evidence on the record that the embankments next to the sections of the roadway were steep and were of a nature as to cause a truck or an automobile to turn over and possibly cause injury to the occupant. Nevertheless, The greatest portion of the unguarded and unbermed roadway was effectively fitted with guards and had berms constructed on them in 1972. Only small portions of the nine miles of roadway remained unfitted with berms at the time of this citation.

It therefore would be improbable that injury or death would occur as a result of the operator's failure to have berms installed at the three locations where they had not been installed. At one point berms had not been installed for 250 feet on the right side of the road. At another point, they were missing for only three-tenths of a mile on the left side of the road. At the third point, they were missing for only 100 feet, on both sides of the road.

As to the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation, I find that the operator exercised good faith in abating the violation and erecting additional berms. Although the violation was not abated within the time allotted, the operator did have some foundation upon which to base a good faith argument as to whether berms were required by the regulation. After the original citation was modified to show the exact nature of the abatement to bring to the operator in compliance, the operator soon thereafter was successful in abating the condition.

The final criteria hearing upon the assessment of a civil penalty is the effect of the penalty on the operator's ability to continue in his business. The operator has presented nothing to indicate that an appropriate penalty in this case would prevent him from continuing in his business; therefore, I find that a penalty would not effect his ability to continue.

In view of the findings concerning the six statutory criteria, I find that the assessment of a penalty of \$200 is appropriate.

The bench decision issued on May 25, 1979 is AFFIRMED.

ORDER

Respondent is ORDERED to pay the amount of \$200 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge