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SOL (MSHA) V. MID-CONTINENT COAL & COKE CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-29-P A.C. No. 05-003001-03001F
v.	
MID-CONTINENT COAL AND COKE COMPANY, RESPONDENT	Dutch Creek No. 1 Mine

DECISION

Appearances: James Abrams, Esq. and James Barkley, Esq., Office of the Solicitor, Department of Labor, Denver Colorado, for Petitioner
Edward Mulhall, Jr., Esq., Delaney and Balcomb, Glenwood Springs, Colorado, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was heard on the merits before Judge Malcolm P. Littlefield, in Denver, Colorado, on June 12 and June 13, 1979. Judge Littlefield retired from Federal service on June 30, 1979, before he was able to issue a decision in the case. With the consent of counsel, the matter was assigned to me for decision based upon the record made before Judge Littlefield and the contentions of the parties. Posthearing briefs were filed on behalf of both parties. To the extent of the proposed findings and conclusions are not incorporated in this decision, they are rejected.

Philips Gibson, Jr. and Freeman Staples, Federal mine inspectors, testified on behalf of Pestitioner. Donald Ford and John Turner testified on behalf of Respondent.

The case arises under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. The Act was amended by the Federal Mine Safety and Health Act of 1977 which became effective March 9, 1978. The amendments do not affect this case.

STATUTORY PROVISION

Section 109 of the Coal Mine Safety Act provides in part:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard * * * shall be assessed a civil penalty * * * [of] not more than $10,000 * * *. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

REGULATORY PROVISION

30 CFR 75.1725(a) provides: "Mobile and stationary machinery and equipiment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

ISSUES

1. Whether Petitioner established that the violation charged in the notice occurred; more specifically whether the Respondent was shown to have failed to maintain the hoist assembly and wire rope used in raising and lowering the ventilation door on the inby end of the No. 50 crosscut between No. 6 and No. 7 slopes in the subject mine in safe condition on January 17, 1978?

2. If a violation occurred, what is the appropriate penalty and with respect to the questions of gravity and negligence, was the violation related to the fatality which occurred on January 17, 1978?

MOTION TO REOPEN RECORD AND ADMIT EXHIBIT

On September 4, 1979, Petitioner moved to reopen the record for the purpose of admitting into evidence Petitioner's Exhibit G-2, a computer printout of the history of violations of the operator at the subject mine from January 18, 1976 to January 17, 1978. Respondent has not filed a reply. The motion is GRANTED and Petitioner's Exhibit G-2 is received in evidence.

FINDINGS OF FACT

1. Respondent, Mid-Continent Coal and Coke Company, on January 17, 1978, and prior thereto, was the operator of a coal mine in Petkin County, Colorado, known as The Dutch Creek No. 1 Mine, I.D. No. 46-01477.

2. The record does not contain evidence concerning the size of Respondent's business.

DISCUSSION

Petitioner's posthearing brief states that "this firm registered over 1-1/2 million production tons per year when the proposed assessment was issued." I have not found evidence in the record to support this statement either by way of testimony, exhibits, stipulations or otherwise. I can assume from Exhibit G-2 showing the number of prior violations that the operator is not small. In the absence of more specific evidence on this issue, I will treat the size of the business of Respondent as moderately large.

3. There is no evidence that the assessment of a penalty herein will affect Respondent's ability to continue in business, and therefore, I find that it will not.

4. Exhibit G-2 shows a total of 419 paid violations occurring at the subject mine between January 18, 1976 and January 17, 1978, including eight violations of 30 CFR 75.1425. I find this to be a substantial history of prior violations and if a penalty is assessed herein, it will reflect this finding.

5. The evidence establishes that Respondent showed good faith in promptly abating the condition after the notice was issued.

6. On January 17, 1978, a fatal accident occurred at the subject mine. The driver of a battery-powered scoop tractor was killed when his chest was crushed by a partially opened airlock door located on the inby end of the No. 50 crosscut between No. 6 and No. 7 slope in the subject mine.

7. On January 17, 1978, Philip R. Gibson, a coal mine inspector and a duly authorized representative of the Secretary, issued Respondent a notice in which he alleged a violation of 30 CFR 75.1725(a).

VIOLATION

8. On January 17, 1978, one of the two wire ropes used to lift the airlock door was frayed and abraded; four of its six strands were broken. The frayed portions of the cable would not pass through the pulley system used in lifting the door.

9. On January 17, 1978, the "keys" in the griphoist cranking lever used to raise the airlock door were missing and were replaced by a nail and a screw. It was necessary for one operating the lever to hold the nail and screw in place while operating the cranking lever with his other hand.

10. The condition found in Finding of Fact No. 8 was unsafe, in that it could result in injuries to miners if the cable broke.

11. The conditions found in Findings of Fact No. 8 and No. 9 were unsafe in that it rendered raising the door more difficult and required more physical exertion.

GRAVITY

12. Three employees were potentially exposed to the unsafe conditions found to exist in Findings of Fact No. 10 and No. 11, one on each shift.

13. The employees referred to above were material handlers who carried supplies to the working section. When such employees reached the door, they were required to leave their vehicles, open the outby door, drive through the door, lower the door and repeat the process for the inby door, thereby maintaining an airlock and preventing disruption in mine ventilation.

14. The door in question was 4 feet high, and 13 feet 9 inches wide with a 6 inch flap on each side. It was constructed of 1/4 inch plate steel, and weighed over 850 pounds. The capacity for lifting materials of the griphoist mechanism in question was 2,000 pounds.

15. The crosscut in question was 20 to 22 feet wide and 7 to 8 feet high.

16. On January 17, 1978, an employee of Respondent, the driver of a battery-powered scoop tractor was killed when his chest was crushed by the inby airlock door as he was driving through. There were no witnesses to the accident.

17. The tractor headlight was damaged, indicating that the vehicle struck the door in proceeding through the opening before the fatal injury.

DISCUSSION

Much of the testimony at the hearing and much of the discussion in the posthearing briefs of counsel is directed to the question of the cause of the fatality. Whether in fact the alleged safety violation caused the fatality is not per se an issue in this proceeding. However, if the alleged safety violation did or could have contributed

to a fatal injury, it would of course be important in determining the gravity of the violation. The evidence of record would not support a finding that the fatal injury was in fact the result of the conditions found herein to exist in Findings of Fact No. 8 and No. 9. However, the record does show, and I find that the conditions just referred to could have resulted in or contributed to serious injuries to miners including fatal injuries. The conditions were very serious.

NEGLIGENCE

18. The conditions of the wire ropes described in Finding No. 8 and of the griphoist cranking level described in Finding No. 9, were evident to visual inspection. They were or should have been known to Respondent's management as the result of preshift examinations. The conditions had existed at least for some days prior to January 17, 1978.

CONCLUSIONS OF LAW

1. Respondent on January 17, 1978, and prior thereto, was subject to the provisions of the Coal Mine Health and Safety Act of 1969, with respect to the operation of the subject mine.

2. As an Administrative Law Judge of the Mine Safety and Health Review Commission I have jurisdiction of the parties and subject matter of this proceeding.

3. The conditions found in Findings of Fact Nos. 8 and 9 constituted a violation of the mandatory safety standard contained in 30 CFR 75.1725(a).

4. The violation described in Conclusion No. 3 was very serious and was the result of Respondent's negligence.

5. Based on the above findings of fact and conclusions of law and considering the criteria in section 109 of the Act, I determine that an appropriate penalty for the violation is $7,000.

ORDER

Respondent is ordered to pay, within 30 days of this decision, the sum of $7,000 as a civil penalty for the violation of the mandatory safety standard in 30 CFR 75.1425(a) on January 17, 1978.

James A. Broderick
Chief Administrative Law Judge