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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. BARB 79-301-P
A.O. No. 15-10364-03002

v.

Preparation Plant

GOLDEN R COAL COMPANY,
RESPONDENT

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of
Labor, Office of the Regional Solicitor, Nashville,
Tennessee, for the petitioner
Byron W. Terry, Safety Director, Seymour, Indiana,
for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), on March 6, 1979, charging the respondent with one alleged violation of the provisions of 30 CFR 77.1605(k). The alleged violation was cited on September 18, 1978, by an MSHA inspector in Citation No. 400123, which states as follows:

Berms or guards are not provided on the outer bank of the elevated roadway at the dumping location. The elevated roadway extends 75p outby the hopper and is approximately 15p -20p high at the highest point. Trucks using this roadway are in reverse operation. If over travel were to occur overturning could result in a serious or fatal injury.

Respondent filed an answer to the petition on April 6, 1979, taking exception to the citation, and defending on the following grounds:

(1) The mine area in question had been previously inspected by MSHA and no mention was ever made of the existence of any hazard.

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(2) In the respondent's opinion, the outside limit of the backing area, although not protected by a guard rail or high berm, did have a roll that a truck driver could "feel" and known that he was approaching the outside of the road, thus eliminating any hazard.

(3) The inspector would not permit the construction of a berm but would only accept a guard rail.

By notice of hearing issued May 9, 1979, the matter was scheduled for hearing on August 24, 1979, and the parties appeared on that date and presented evidence and testimony in support of their respective positions.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of any civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

Stipulations

The parties stipulated to the following (Tr. 5, 6):

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1. Respondent's prior history of violations consists of seven violations which were assessed against, and paid by, the respondent.

2. Respondent's average daily coal production is 250 tons and respondent employs two production employees.

3. Any civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business.

4. Respondent's mining business is subject to the requirements of the Act.

Petitioner's Testimony

MSHA inspector Earl T. Leisure testified that he conducted a safety and health inspection, including the roads, records, and equipment, at the preparation plant in question. During the inspection, Inspector Leisure testified that he examined a roadway that was used by contract coal trucks to dump coal into a hopper. The roadway is approximately 125 feet long, 15 or 16 feet high at its maximum point, and elevated for some 75 feet at its highest point. The degree of the slope of the elevated roadway varied from 35 to 45 degrees, and the roadway was constructed of crushed limestone adjacent to a coal stockpile (Tr. 15). The roadway did not have berms or guards as required by mandatory safety standard section 77.1605(k), which requires that elevated roadways be provided with berms or guards along the outer banks in order to prevent coal trucks from accidentally overturning (Tr. 18). The trucks back up along the entire length of the roadway, and in the event of rain, coal spillages, and dust, the roadway tends to become slick, narrow and hazardous (Tr. 20). Although truck drivers use the rearview mirror in backing up along the righthand side of the elevated roadway, they cannot see directly behind them in dumping coal into the hopper (Tr. 18). Having a spotter to direct drivers in dumping the coal may provide some protection against accidents; however, the spotter would not provide the safety protection that section 77.1605(k) provides. Serious injuries and fatalities are likely to occur at the elevated roadway, especially when large moving trucks may fall or overturn 15 feet to the ground level. If the truck load is 20 tons or more, the chances for serious injuries and fatalities are increased substantially (Tr. 19). Inspector Leisure took pictures of the roadway, the adjacent slope, and the hopper facility, after the citation was abated (Exh. P-14, Nos. 1-5).

After issuing the citation, Inspector Leisure discussed the requirements of section 77.1605(k) with the respondent, and the inspector believed that guards along 75 feet of the roadway were better than berms because the width of the roadway is too small to accommodate berms. Respondent abated the citation by installing

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125-foot guards along the entire 125 feet of the roadway and did an exceptional job in achieving compliance within the time fixed for abatement (Tr. 25). Mr. Leisure believed the respondent should have been aware of the condition cited and the hazard presented because it was obvious that the roadway was elevated (Tr. 23). Responding to questions as to whether the five photographs were accurate descriptions of the coal-dumping operation when the citation was issued, Inspector Leisure testified that the coal stockpile depicted in photograph Nos. 1 and 2 did not exist when the citation was issued, and that 15 or 20 feet of the existing guardrail was not included in photograph No. 2 (Tr. 33).

On cross-examination, Inspector Leisure testified that if coal trucks were to run off the road, they were likely to overturn on the elevated roadway, and he was aware of an accident at another mine where a coal truck overturned when the driver backed into a 2-foot hole (Tr. 41). Although he has not driven coal trucks on elevated roadways, Inspector Leisure testified that truck drivers normally use their rearview mirrors in backing up to the hopper, and at other mines he has observed truck drivers open the door and look out the left side of the truck in backing up to the hopper (Tr. 45). On the question of driver visibility, Inspector Leisure testified that the trucks are approximately 25 feet in length and if a driver operating in reverse were to open the door and look to his left, he would be unable to see on the right side of the truck (Tr. 49).

On recross-examination, Inspector Leisure testified that he spoke with Mr. C. J. Rust on the telephone about the citation after it was issued and informed him that the condition cited constituted a violation and that he could not allow the respondent to install a guardrail without being cited for a safety violation (Tr. 50).

On bench examination, Inspector Leisure testified about the coal dumping operation at the preparation plant owned by Mr. Rust, and he indicated that a guardrail was located near the hopper which was used by the drivers as a guide in positioning the trucks before dumping coal into the hopper. Once the 20-ton trucks are in position, drivers dump the locally-produced coal into the hopper. When he issued the citation, Inspector Leisure testified that he did not see any work activity, including spotters, workmen, coal, stockpiled along the elevated roadway, and no trucks were using the road or dumping coal into the hopper (Tr. 59). During his 3-1/2 years as a Federal coal mine inspector, Inspector Leisure testified that he does not have knowledge of any truck accidents or near misses at respondent's preparation plant (Tr. 60).

Responding to a question as to how a mine inspector determines when a facility is an elevated roadway, Inspector Leisure testified that there are no statutory criteria, customary guidelines or manuals to assist in making that kind of determination. He also stated

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there are no statutory criteria, customary guidelines, or manuals that are used by coal inspectors in determining whether the facility is a roadway, ramp, dumping location or haulage road (Tr. 91-94).

Respondent's Testimony

Mine operator Chester J. Rust testified that his company had installed a 15- to 20-foot galvanized steel guardrail at the hopper to prevent trucks from overturning or overbacking (Tr. 63). Previous MSHA inspections were conducted at the tipple area in question but no previous comments were ever made about the lack of guards or that the roadway in question was considered to be an elevated roadway. He believes a haul road is one where trucks travel to the mine or on a road at some speed and he never considered the road leading up to the hopper in question as a roadway. He considered the use of a spotter, who is there much of the time, and a "roll" at the edge of the roadway, which would give the driver a "feel" that the truck were starting to slide, as sufficient safety precautions. Further, he did not install guardrails because he did not believe they were required, and this was based on the fact that the area was strictly a "back-up" area for the trucks and not a haul road. Previous inspectors had not cited the violation (Tr. 64-65).

Mr. Rust identified 11 photographs which were taken of the roadway and hopper area in question, all of which were taken after the condition was abated (Exhs. R-1 - R-11), and he described what each photograph depicted (Tr. 70-74). In response to bench questions, he indicated that in the event a truck backed off the slope adjacent to the hopper, it would take an inexperienced driver for it to overturn. He also indicated that he was given no option to erect a berm rather than a guardrail, and he would have considered a berm since it is cheaper, but a berm would have reduced the size of the coalyard (Tr. 76). He did not discuss the matter of any option with the inspector but was simply told he had to install a guardrail (Tr. 87).

On cross-examination, Mr. Rust defined a "roadway" as any place that trucks travel in forward gear, and a "ramp" was defined as any place that trucks travel in reverse (Tr. 78). He would consider the ramp to be elevated for at least half the distance of the 125 feet described as a "road." A spotter is not always present and it is possible that one is not there when the trucks travel up in reverse (Tr. 78-80).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 CFR 77.1605(k), which states: "Berms or guards shall be provided on the outer bank of elevated roadways."

The initial question presented is whether petitioner has established that the location cited is in fact an elevated roadway. As for the question of whether the alleged "roadway" was elevated, I find that the testimony of the inspector with respect to the surrounding topography, terrain, slope, etc., of the area cited, including the photographs introduced by the parties, establishes that the unprotected portion of the roadway in question is in fact elevated. In my view, the location and elevation of the hopper from the bottom of the incline where the trucks begin their ascent by backing up along the 125-foot area described by the inspector is of sufficient height above the adjacent terrain to create a hazard in the event a truck ran off the unprotected elevated portion of the roadway in question.

The question as to whether the area characterized by the inspector as a "roadway" was in fact a roadway within the meaning of the cited safety standard is in dispute. During the course of the hearing, respondent argued that the area cited was not in fact a roadway, but a portion of the dumping facility covered by section 77.1605(1), which requires berms or other devices to prevent overtravel and overturning at dumping locations (Tr. 94-106). In support of its argument in this regard, respondent suggests that the area characterized as a "roadway" is in fact a ramp and part of the dumping facility where trucks simply turn around and back up to unload. Petitioner obviously believes that the area is in fact an extension of the main roadway leading to that area, and that the portion leading to the hopper is in fact a roadway. Petitioner seeks a broad interpretation of the cited standard to include the area where the trucks actually back up in reverse along the entire length of the "roadway."

Although the term "roadway" is not further defined by statute or regulation, the Dictionary of Mining, Minerals and Related Terms (1968) at page 931, defines it in part as "[a]n underground passage, whether used for haulage purposes or for men to travel to and from their work." While we are dealing in the instant case with a surface roadway, I find the definition equally applicable even though the dictionary definition refers to underground. Webster's New World Dictionary of the American Language, Second College Edition, defines the term "road" in part as "a way; path; course." The term "roadway" is defined as "that part of a road used by cars, trucks, etc; traveled part of a road."

After careful consideration of all of the testimony and evidence adduced in this proceeding, including the arguments presented by the parties in support of their respective positions, I conclude that petitioner has the better part of the argument and that its interpretation and application of section 77.1605(k) is correct and I find that the area cited by the inspector was in fact a roadway within the meaning of section 77.1605(k). Although it is true that subsection

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(1) requires berms and other protective devices to prevent overhaul and overturning at dumping locations, and may be interpreted to require only berms, that subsection is limited to dumping locations. On the facts presented here, I construe this to mean the hopper location and not the elevated portion of the roadway which is used by the trucks as a means of access to the hopper. Although at the time of the inspection respondent had already installed guardrails at the entrance to the hopper (see photograph exhibits), it apparently did so in compliance with subsection (l) and not (k). Further, I take note of the fact that subsection (i) dealing with ramps and dumps, and sections 77.1608(a) and (b) dealing with dumping locations and haulage roads, and truck spotters, distinguish between the actual dumping location and the actual hazards which may be encountered by a truck while it is traveling or using the haulage road to reach the actual dumping area. In the circumstances, I cannot conclude that petitioner's interpretation of subsection (k) is overly broad. It seems clear to me that the roadway is regularly used by coal haulage trucks transporting coal onto mine property for dumping and processing at the hopper, and the only means of travel to that point is by way of the roadway used by the trucks to back up to the hopper. After dumping their loads, the trucks travel back down the roadway and leave. The purpose of the cited safety regulation is to protect the truck drivers and to prevent injuries to men traveling the roadway in the course of their mining duties. It is clear from the evidence presented that the roadway is elevated and that the failure to provide some means of protection along the unguarded elevated portion of the roadway constitutes a violation of section 77.1605(k). The citation is AFFIRMED.

Gravity

The unprotected portion of the elevated roadway in question presented a potential hazard to the truck driver in the event that his loaded coal truck were to go over the elevated portion while backing up to the hopper. Although the inspector saw no trucks on the roadway at the time the citation issued, the fact is that the trucks backed up the incline on a regular basis to dump their loads and the hazard was ever-present. Respondent's testimony reflects that a spotter is not always present and that not all truck drivers are experienced and have the "feel" for the road. The roadway is in fact elevated, and notwithstanding the fact that the grass along the embankment may have been cut without incident, it seems clear that in the event a loaded coal truck were to go over the embankment while backing up, serious injury would result. In the circumstances, I find that the violation is serious.

Negligence

Respondent takes the position that it made a good-faith effort at compliance when it determined that the area cited was a ramp and not

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a roadway. However, the fact remains that the roadway in question was in fact elevated for at least 75 feet and respondent should have recognized the potential hazard and installed a protective barrier of some sort, whether it be a berm or guardrail. The fact that previous MSHA inspectors had not cited the location is immaterial. The question presented is whether the inspector who issued the citation was correct in his interpretation of the cited standard, and I believe that he was. Further, while there was a dispute as to whether the inspector gave the respondent any option as to how to achieve compliance, that is, whether to install a berm or guardrail, the fact is that respondent accepted the guardrail and went beyond the minimum requirements to achieve compliance, and I am not convinced that respondent really disagreed with the inspector or that the inspector acted arbitrarily. Further, while the respondent may have in good faith misinterpreted the application of section 77.1605(k), the fact is that a potential hazard was presented by not having the roadway guarded, and respondent's failure to take reasonable precautions in the circumstances to correct a condition which it reasonably should have recognized constitutes ordinary negligence.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business

The parties stipulated that respondent's daily coal production averages 250 tons and that respondent employs two production people at its facility. I find that respondent is a small coal mine operator. In addition, the parties stipulated that any civil penalty assessed in this matter will not adversely affect respondent's ability to remain in business, and that is my finding.

History of Prior Violations

The seven previous citations for which respondent has paid a total of \$630 in civil penalties does not constitute a significant history of prior violations. I have also considered the fact that this is the first citation for a violation of section 77.1605(k).

Good Faith Compliance

The conditions cited in this case were promptly abated by the respondent within the time fixed by the inspector. In addition, having viewed the mine operator on the stand during the course of his testimony, and considering the presentation of the safety director during the course of the hearing, I am favorably impressed with the fact that the respondent is safety-conscious, and while respondent may not agree with the interpretation placed on section 77.1605(k) by MSHA on the facts of this case, I find that it made a good-faith effort at compliance and not only installed protective guardrails at the elevated areas of the roadway in question, but installed such protective barriers along the entire length of the roadway. These factors have been considered by me in assessing a civil penalty in this case.

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ORDER

In view of the foregoing findings and conclusions, and taking into account the statutory requirements of section 110(i) of the Act, I find that a civil penalty in the amount of \$85 is reasonable for the violation which has been established and respondent is ORDERED to pay that amount for Citation No. 400123 within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter should be dismissed.

George A. Koutras
Administrative Law Judge