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SOL (MSHA) V. HARMAN 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. NORT 79-63-P A/O No. 44-03614-03003
v.	No. 5-B Mine
HARMAN MINING CORPORATION, RESPONDENT	

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Robert M. Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent

Before: Judge Cook

I. Procedural Background

On January 31, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Harman Mining Corporation (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act), and alleged violations of two provisions of the Code of Federal Regulations. The Respondent filed its answer on March 5, 1979.

Pursuant to notices, the hearing was held on July 17, 1979, in Beckley, West Virginia. Representatives of both parties were present and participated. Counsel for the Petitioner made two motions during the course of the hearing: First, to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523 (Tr. 4); second, to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege that the condition described therein constitutes a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 (Tr. 67). Both motions were granted (Tr. 4, 71).

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, subsequent events necessitated a revision thereof. The Petitioner and the Respondent filed post-hearing briefs on November 14, 1979, and November 29, 1979, respectively. Neither party filed a reply brief.

II. Violations Charged

Citation No.	Date	30 CFR Standard
321763	8/10/78	75.523 75.523-1
321765	8/10/78	75.523(FOOTNOTE 1)

III. Evidence Contained in the Record

A. Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness James O. Vandyke, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Eugene Carter, a repairman and mechanical leader employed by the Respondent; and Paul Hurley, the Respondent's vice president of operations.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

(a) M-1 is a copy of Citation No. 321763, August 10, 1978, 30 CFR 75.523.

(b) M-2 is a copy of the inspector's statement pertaining to M-1.

(c) M-3 contains notes made by Inspector Vandyke.

(d) M-4 is a computer printout compiled by the Directorate of Assessments listing the history of violations for which the Respondent had paid assessments beginning August 10, 1976, and ending August 10, 1978.

2. The Respondent did not introduce any exhibits into evidence.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of 1977 Mine the Act occur, and (2) what amount should

be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violation; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing approximately 300 employees (Tr. 4).

2. The proposed penalty would not affect the operator's ability to continue in business (Tr. 4).

B. Occurrence of Violation

MSHA inspector James O. Vandyke visited the Respondent's No. 5-B Mine at approximately 9 a.m., August 10, 178, to make a complete health and safety inspection (Tr. 16). He was accompanied on the inspection tour by Mr. Roy Owens, an employee of the Respondent (Tr. 16, 18; Exh. M-1).

The inspector observed a canopy-equipped coal drill operating in the face area of the No. 2 entry of the 001 section (Tr. 18, 100, Exh. M-1). At the inspector's request, the coal drill operator tested the machine's deenergizing device at which time the inspector observed that the device would not deenergize the machine (Tr. 18). A close examination revealed the presence of a wooden cap wedge driven behind the device, propping it open (Tr. 18, 73). The inspector testified that absent the wedge it would have been possible to cut the machine's electrical power by depressing the deenergizing device (Tr. 73). Accordingly, the inspector issued the subject citation alleging that "[t]he device being used to deenergize the coal drill on the 001 section quickly in the event of an emergency was inoperative" (Exh. M-1). The petition for assessment of civil penalty, as amended, alleges that the condition sets forth a violation of 30 CFR 75.523 and 30 CFR 75.523-1. The latter regulation will be addressed first, and provides, in part, as follows:

> (a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. The requirements of this paragraph (a)

shall be met as follows:

(1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;

(2) On and after February 15, 1975, for all other types of self-propelled electric face equipment.(FOOTNOTE 2)

The coal drill was trammed by two hydraulic tramming motors. A pump turned by an electric motor provided the hydraulic pressure necessary to operate the tramming motors. It pumped hydraulic fluid at the rate of approximately 15 to 18 gallons per minute at a pressure of 1,200 to 1,400 pounds. After leaving the pump, the pressurized hydraulic fluid was transmitted to a control box, or valve bank, and, in turn to the hyraulic motors (Tr. 73-74, 129, 139-141). All hydraulic levers, including those used to operate the tramming motors, were self-centering (Tr. 130), meaning that the levers automatically returned to a neutral position when released by the machine operator (Tr. 28, 112-113, 130). Releasing the tramming motor levers would stop the flow of hydraulic fluid to the tramming motors and thus stop the movement of the machine, assuming the levers self-centered (Tr. 29-30, 37, 75-76). Machine movement would be arrested almost instantaneously (Tr. 112, 132). However, the electrically-powered pump would still be in operation, providing pressure to the valve bank (Tr. 81). The lever could then accidentally be pushed again starting movement of the drill.

The Respondent sets forth essentially two arguments germane to the question of whether a violation of 30 CFR 75.523-1 occurred: First, the regulation applies solely to electrical tramming motors and has no application to hydraulic tramming motors. Second, the coal drill was equipped with a device that would quickly deenergize the tramming motors in the event of

an emergency as required by 30 CFR 75.523-1. (Respondent's Posthearing Brief, pp. 5-6). I disagree with both arguments. The purported distinction between electrical tramming motors and hydraulic tramming motors is superficial in view of the presence of the electrically-powered pump on the hydraulic system. This electric motor was the primary source of power for the hydraulic system. Any deenergizing device meeting 30 CFR 75.523-1(a)'s requirement for "a device that will quickly deenergize the tramming motors of the [self-propelled electric face equipment which is used in the active workings] in the event of an emergency" must, of necessity, deenergize the electric pump motor.

Additionally, 30 CFR 75.523-1(a) must be read in conjunction with the requirements of 30 CFR 75.523-2(a), which provides as follows:

> (a) Deenergization of the tramming motors of self-propelled electric face equipment, required by paragraph (a) of 75.523-1, shall be provided by:
>
> (1) Mechanical actuation of an existing pushbutton emergency stopswitch,
>
> (2) Mechanical actuation of an existing lever emergency stopswitch, or
>
> (3) The addition of a separate electromechanical switch assembly.

This regulation mandates the use of one of three types of switches in order to meet the requirements of 30 CFR 75.523-1(a). The term "switch" is defined in Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 1111 as: "A mechanical device for opening and closing an electric circuit; a mechanism for shifting a moving body in another direction." Given the context of electric face equipment, a "switch" must be construed as referring to a mechanical device for opening and closing an electric circuit.

It is clear from the evidence contained in the record that the coal drill's self-centering hydraulic levers were not "switches" within the meaning of 30 CFR 75.523-2(a), since they did not open and close an electric circuit. It would be accurate to state that they opened and closed a hydraulic circuit, but as such were inadequate to provide complete deenergization of the tramming motors. That could only be achieved through the deenergization of the electrically-driven pump.

In addition we find that 30 CFR 75.523-2 went on to provide further performance requirements for such deenergization equipment by providing as follows in subsections (b) and (c):

> (b) The existing emergency stopswitch or additional switch assembly shall be actuated by a bar or lever which

shall extend a sufficient distance in each direction to permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

Such panic bar did exist on the subject equipment but a wooden wedge had been driven behind it to stop it from functioning. It is clear from 30 CFR 75.523-2 that such a panic bar is what was contemplated by the regulations in question.

In light of these considerations, it cannot be concluded that the levers were adequate to meet the requirements of 30 CFR 75.523-1(a). Accordingly, the Respondent's arguments are not persuasive on the issue of whether a violation occurred.

The presence of the wooden cap wedge is, however, determinative. I read 30 CFR 75.523-1(a) as requiring an operable emergency deenergizing device on the coal drill. Since the evidence establishes that the placement of the wedge rendered the device inoperable, it must be found that a violation of 30 CFR 75.523-1(a) has been established by a preponderance of the evidence.

In view of this finding, it is unnecessary to determine whether the above-stated facts establish a violation of 30 CFR 75.523.

C. Negligence of the Operator

Mr. Carter testified that the machine had been purchased as used mine equipment from Mercer Welding in Bluefield, West Virginia. He did not know whether the emergency deenergizing device had been installed by the original manufacturer but his testimony indicated that it had been installed prior to the purchase by the Respondent (Tr. 126).

The testimony of both Inspector Vandyke and Mr. Carter indicates that the deenergizing device had been rendered inoperative through the placement of the wooden cap wedge in order to compensate for the device's poor design and installation. This design and installation deficiency rendered it virtually impossible to operate the machine without blocking-out the deenergizing device, as attested to by the inspector's conversation with the coal drill operator:

Q. Mr. Vandyke, were any statements made to you by the operator or any of the miners concerning this alleged violation?

> A. Well, the operator of the machine said that the device, when it was operative and not being blocked out, would, in the normal functions of the machine, in tramming the machine from one face to another, the vibrations and so on, and being that the deck was narrow, he said that he was required to lean into close proximity of the device and he said that he would bump it off several times because of the design of the working deck of the machine.

(Tr. 24).

I find this hearsay testimony entitled to great probative weight because the testimony of Mr. Carter confirms, in part, the assertions of the hearsay declarant. Mr. Carter testified that he could understand why the wedge had been used to render the deenergizing device inoperable (Tr. 120). During cross-examination, he testified as follows:

> THE WITNESS: [The deenergizing devices] are trouble. They are balanced out. A rough botton [sic] or vibration will knock them off; shut you down. I mean, you will working [sic] and all of a sudden it will de-energize the machine and it will stop. If you want to stop, turn loose your lever; it will stop.
>
> They're not supposed to do it, but sometimes the operator will -- I suppose that's the way it got there. I don't think it got there by accident; it may have.

(Tr. 119).

It can be inferred that the deficiency had existed for a considerable period of time. Corrective action should have been taken at the time of purchase or as soon as the deficiency was apparent. Given the nature of the deficiency, the Respondent should have foreseen the miners blocking out the device in order to perform their assigned mining tasks.

Additionally, the condition should have been detected during the weekly examinations of electric equipment required by 30 CFR 75.512-2.

Accordingly, I conclude that the Respondent demonstrated far more than ordinary negligence.

D. Gravity of the Violation

The No. 5-B Mine has an uneven surface with water and mud in various locations (Tr. 16, 124). The inspector testified that the machine operator requires the ability to deenergize the machine in emergency situations to prevent striking another control lever prior to regaining his composure (Tr. 20). According to Inspector Vandyke, the coal drill operator could lose control of the machine due to the uneven surface and, in a state of fright

or panic, pull the wrong levers (Tr. 21). The machine could pin him against a rib, timber, or another machine (Tr. 21, 97). The uneven surface could also result in a loss of control while tramming to another working face. Pulling the wrong lever could result in injuries to other miners (Tr. 21). Additionally, the machine operator could encounter other persons or another machine while traveling through one of the fly curtains used to help ventilate the working faces (Tr. 21-22).

The inspector indicated that all miners on the section would have been exposed to the hazard, a figure placed at approximately eight men (Tr. 18, 22). However, he testified that only one person would sustain injury during a given occurrence (Tr. 22). Anticipated injuries ranged from broken bones and contusions to death (Tr. 97).

These considerations, standing alone, point to a very serious violation. However, an appropriate assessment of the gravity of the violation requires that consideration be accorded to the characteristics of the self-centering hydraulic levers bearing upon safety. Messrs. Carter and Hurley testified that the machine moved at approximately 70 to 75 feet per minute, i.e., slowly (Tr. 112, 132). Releasing the levers would cause the machine to stop in less than 1 foot, depending on the conditions (Tr. 132), and also lock the wheels (Tr. 117). Thus, according to Mr. Hurley, the machine would stop quickly in the event of an emergency (Tr. 131).

It should be noted that the machine could coast for approximately 6 to 10 feet by leaving the hydraulic lever in the forward position with the pump motor deenergized (Tr. 133). However, I find it unlikely that such an event would occur in the event of an emergency if the levers self-centered properly. There was no evidence adduced establishing that they were defective in any manner. Once the lever is self-centered there is the possibility that it could be accidentally pushed forward again.

Considering all apsects, I conclude that the violation was moderately serious.

E. Good Faith in Attempting Rapid Abatement

The Respondent abated the violation in 15 minutes (Tr. 18, Exh. M-1). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Respondent's various mines for which the Respondent had paid assessments during the 24 months prior to August 10, 1978, is set forth as follows:

Violations of 30 CFR	Year 1 8/11/76 - 8/10/77	Year 2 8/11/77 - 8/10/78	Totals

All Sections	176	89	265
Section 75.523-1	8	2	10

G. Appropriateness of Penalty to Operator's Size

The parties stipulated that Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing over 300 employees (Tr. 4).

H. Effect on Operator's Ability to Continue in Business

The parties stipulated that the proposed penalty would not affect the operator's ability to continue in business (Tr. 4). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Harman Mining Corporation and its No. 5-B Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector James O. Vandyke was a duly authorized representative of the Secretary of Labor on August 10, 1978.

4. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.

5. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.

6. The condition set forth in Citation No. 321763, issued on August 10, 1978, is found to have occurred and to constitute a violation of 30 CFR 75.523-1.

7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed

findings and conclusions, have

been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
321763	8/10/78	75.523-1	$175

ORDER

A. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.

B. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.

C. The Respondent is ORDERED to pay a civil penalty in the amount of $175 within 30 days from the date of this decision.

D. IT IS FURTHER ORDERED that Citation No. 321765, August 10, 1978, 30 CFR 75.523, be, and hereby is, VACATED and that the petition for assessment of civil penalty, be, and hereby is, DISMISSED as relates to said citation.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1
As noted previously, the petition for assessment of civil penalty was dismissed as relates to this citation.

~FOOTNOTE 2
The exceptions set forth at 30 CFR 75.523-1(b) and (c) provide as follows:

"(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

"(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor 4015 Wilson Boulevard,

Arlington, Va. 222203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramming motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in 75.523-2."

The coal drill in question was canopy-equipped and thus not within the 30 CFR 75.523-1(b) exception to the general requirement. The Respondent presented no evidence establishing the applicability of 30 CFR 75.523-1(c).