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SOL (MSHA) V. PEABODY COAL
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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 Proceedings Docket No. CENT 79-29 A.C. No. 23-00402-03005
v.		Docket No. CENT 79-221 A.C. No. 23-00402-03011
PEABODY COAL COMPANY,	RESPONDENT	Power Mine

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner Thomas Gallagher, Esq., St. Louis, Missouri, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This matter involves two proceedings filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter, MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), to assess civil penalties against Peabody Coal Company (hereinafter, Peabody) for violation of a mandatory safety standard. The cases were consolidated prior to hearing. The petitions allege a total of five violations of 30 C.F.R. 77.1607(aa), failure to properly trim trucks which are loaded higher than their cargo space. A hearing was held in Kansas City, Missouri, on February 6 and February 7, 1980. Lester Coleman

testified on behalf of MSHA. Larry Womble, Fred Gallo, and Ron Kelly testified on behalf of Peabody. Both parties waived their rights to file briefs, proposed findings of fact, and conclusions of law. Instead, they made oral arguments at the conclusion of the taking of testimony.

This matter involves the alleged violation of 30 C.F.R. 77.1607(aa), failure to properly trim haulage trucks which are loaded higher than their cargo space. Three citations were issued for this alleged violation on November 27, 1978, and two orders of withdrawal were issued for the same alleged violation on February 27, 1979. MSHA contends that, at all times, large chunks of coal were found above and near the edge of the cargo area. Peabody does not dispute the testimony concerning the size and location of the coal chunks but contends that there are no published guidelines or standards for trimming haulage trucks and, therefore, the industry standard of loading the trucks until the coal seeks its "angle of repose" applies.

ISSUES

Whether Peabody violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalties which should be assessed.

APPLICABLE LAW

30 C.F.R. 77.1607(aa) provides as follows: "Railroad cars and all trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space."

Section 110(i) of the Act provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. The Commission has jurisdiction of this proceeding;

2. Respondent is an operator within the meaning of the Act;

3. Respondent's mine is a mine within the meaning of the Act;

4. Any objections to the foundation of exhibits to be offered are waived;

5. The only issue of fact is whether or not respondent properly trimmed its haulage trucks on the dates in question;

6. The only issues of law are whether the standard applies to respondent and, if so, did respondent violate the standard;

7. The coal on all five haulage trucks was no more than 3 feet above the confines of the cargo areas.

SUMMARY OF THE EVIDENCE

In response to an anonymous written complaint, MSHA inspector Lester Coleman was directed to make an inspection of Peabody's Power Mine, a surface mine, concerning an allegation of coal falling off haulage trucks due to overloading. On November 27, 1978, he arrived at the mine. On the haulage road between the pit and the dumping area, he stopped and inspected three 100-ton haulage trucks. On each truck, he observed that coal was

piled higher than the confines of the cargo area. The highest point of the coal was in the center of the cargo area and was described as a "graveyard hump." On each truck, he observed large chunks of coal weighing up to 30 pounds at various places above the confines of the cargo area. None of the trucks had any "freeboard" or unloaded areas around the edge of the cargo area. He concluded that the three trucks were not properly trimmed since any of these large chunks of coal could fall off the truck and strike miners or small vehicles using the roadway. He described the haulage road as well-maintained, but it crossed two railroad tracks and two paved county roads. The haulage road went over hills and around curves. The only person who might be struck by falling coal was the miner who worked on foot in the dumping area. He issued three citations for a violation of 30 C.F.R. 77.1607(aa).

On February 27, 1979, Inspector Coleman returned to the Power Mine for a regular inspection. On this occasion, he stopped two haulage trucks and found the same conditions concerning large chunks of coal piled above the confines of the cargo area with no "freeboard." Thereupon, he issued two orders of withdrawal pursuant to section 104(d)(2) of the Act.

Inspector Coleman admitted that he did not observe any chunks of coal on the haulage road during either of his inspections. There were chunks of coal on the back of the truck beds. Although the inspector's statement covering Citation No. 390749 indicates that persons on foot in the pit area where coal is loaded may be exposed to falling coal, he conceded that he did not visit the pit on November 27, 1978, and did not know if there were

persons on foot there. He never witnessed any coal falling off haulage trucks at this mine. He believed that the haulage trucks vibrated "heavily." He conceded that such vibrations were not visible. He believed that the failure to trim the trucks should have been detected by the pit foreman.

Inspector Coleman testified that compliance with the regulation in controversy required the operator to leave an area of "freeboard" if large chunks of coal are piled higher than the confines of the cargo area or to remove or break up the large chunks of coal if there is no "freeboard." He conceded that there were no written MSHA guidelines to support his opinion concerning "freeboard" and the removal or breaking up of large chunks of coal.

Larry Womble, a health and safety supervisor for Peabody, testified that he accompanied Inspector Coleman on his inspection. He confirmed that the coal was heaped in the center of the cargo space and sloped downward until the coal came to rest on the edge of the cargo space. He described this as the "angle of repose" of the coal. The peak in the center of the cargo area was estimated to be approximately 3 feet above the cargo space in all the trucks. The loader operators at the pit load the truck from front to rear until coal rests on the outer edges of the cargo body. No miners work on foot in the immediate loading area. At no time, did he observe any coal falling off the trucks. He testified that the haulage road was approximately 6 miles long and was 50 to 70 feet wide. The width of the road resulted in 7 to 20 feet of clearance between passing vehicles. He knew of no accidents caused by coal falling from a truck. Prior to August 1978, the Power Mine had 332 mandays of inspection prior to the issuance of the first

citation for a violation of 30 C.F.R. 77.1607(aa). He did not agree with the inspector's interpretation of the regulation. He did not believe that it was feasible to use a loader to remove large chunks of coal or trim the load.

Fred Gallo, assistant superintendent of the Power Mine, testified that he observed the same conditions of the haulage truck as were described by Inspector Coleman and Larry Womble. It had been Peabody's practice to leave no "freeboard" in loading its haulage trucks. He believed that compliance with Inspector Coleman's interpretation of the regulations was costing Peabody 5 to 8 tons on each load. He testified that the loading equipment was not sufficiently mobile to remove large chunks of coal from the truck. It would be extremely hazardous to place a miner on the truck bed to trim the load manually. He believed that Peabody was following the industry standard in loading its trucks. He did not believe that Peabody's loading procedures presented a danger to anyone.

While Mr. Gallo testified that a loader could tamp large pieces of coal and break them up, this procedure would "destroy the load" because it would push coal to the side away from the loader. However, he conceded that if a large piece of coal was sticking up out of the load, such a piece could be picked out by the loader. To his knowledge, this process of picking out large chunks of coal was not known to exist anywhere in the industry.

Ron Kelly, safety manager for Peabody's West Central Division, testified that he requested and obtained a computer printout of all falling material accidents in 1978 from MSHA. He received this printout (Exh. R-9) and

found only two reports of accidents involving coal falling off a haulage truck. In Mr. Kelly's 11 years of coal mine safety experience, he never heard of an accident at Peabody involving falling coal from a haulage truck. In his opinion, the Peabody practice of loading haulage trucks did not present a hazard to anyone.

MSHA introduced in evidence descriptions of large chunks of coal prepared by Inspector Lester Coleman at the time of his inspection. These chunks of coal were estimated to be 24 inches by 18 inches and 20 inches by 16 inches (Exh. G-4). MSHA also introduced a computer printout of the history of Peabody's Power Mine for the 10-year period prior to November 27, 1978, and February 27, 1979. That document showed one prior violation of 30 C.F.R. 77.1607(aa) (Exh. G-5). Peabody presented evidence that the height of the top of the cargo area on its haulage trucks varied from 11 feet 4 inches to 14 feet 7 inches (Exhs. R-7, R-8). Peabody also introduced in evidence MSHA's admission that there are no written memoranda, guidelines, opinions, or other written instructions concerning the construction, application, or implementation of 30 C.F.R. 77.1607(aa) (Exh. R-10).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that on November 27, 1978, and February 27, 1979, MSHA inspector Larry Coleman inspected a total of five haulage trucks at Peabody's Power Mine and found each of them to be in violation of 30 C.F.R. 77.1607(aa). It is undisputed that each of the trucks wa loaded with coal higher than the confines of the cargo space. It is also

undisputed that there were large chunks of coal weighing up to 30 pounds each on the slope above the confines of the cargo space and no area of freeboard around the edge of the cargo area which would have prevented any chunk of coal from falling out of the cargo area. Under these facts, MSHA alleges a violation of 30 C.F.R. 77.1607(aa) in failing to properly trim the trucks. The regulation on its face applies to "all trucks." Peabody asserts that these facts fail to establish a violation of the above regulation because there are no published guidelines or standards concerning the regulation and, therefore, MSHA must accept the industry standard of loading the trucks until the coal reaches its "angle of repose." Peabody further asserts that the inspector's requirement of allowing "freeboard" or, in the alternative, removing large chunks of coal above the confines of the cargo area is infeasible. In conclusions, it is Peabody's position that a haulage truck is "trimmed properly" when the coal reaches its "angle of repose."

The "angle of repose" is defined as follows: "[T]he maximum slope at which a heap of any loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope." Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, U.S. Department of the Interior (1968). In essence, Peabody argues that a haulage truck may be loaded to its maximum slope where no loose coal will slide down the slope. Acceptance of this argument would render the regulation in controversy meaningless since there would be no duty to properly trim any load. Moreover, it ignores the fact that this heap of coal will not remain stationary. The undisputed evidence shows that the haulage trucks at the Power Mine traverse hills, curves and railroad tracks. It

is also undisputed that the trucks vibrate while in transit. While it is true that there is no direct evidence of any chunks of coal falling off any of the involved trucks, MSHA is not required to await the occurrence of an accident before promulgating regulations to prevent such accidents. The documentary evidence offered by Peabody establishes at least one personal injury accident when a miner was struck by coal falling from a haulage truck. Peabody's proposed construction of 30 C.F.R. 77.1706(aa) that haulage trucks may be loaded to their "angle of repose" is rejected. Rather, the regulation, on its face, permits loading haulage trucks above the confines of their cargo space only if they are "trimmed properly."

The term "trimmed properly" is not defined in the Act or regulations. "Trim" is defined as "to free of excess or extraneous matter by or as if by cutting." Webster's New Collegiate Dictionary (1979). Hence, the term "trimmed properly" as used in 30 C.F.R. 77.1607(aa) means that excess coal must be removed from trucks which are loaded higher than the confines of their cargo space to prevent such coal from falling off the trucks. The evidence of record indicates that there are several ways to properly trim a truck, to wit, leaving an area of "freeboard" around the cargo area to confine falling chunks of coal, removing large chunks of coal from the top of the pile above the cargo area, and breaking up large chunks of coal. Therefore, Peabody's assertion that it is not feasible to comply with the regulation is rejected.

I conclude that MSHA has established five violations of 30 C.F.R. 77.1607(aa) by Peabody in that the haulage trucks were not "trimmed properly." This is so because in each instance, coal was loaded loaded higher than

the cargo area with large chunks of coal weighing up to 30 pounds on top of the pile with no freeboard to confine such coal within the cargo area.

Since violations have been established, the next issue is the amount of the civil penalties to be assessed for such violations. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of the civil penalty.

Peabody's prior history shows 49 violations in the 2 years prior to November 27, 1978, and 66 violations in the 2 years prior to February 27, 1979. Of those numbers, only one violation was of the regulation in controversy here.

Peabody is a large operator. The assessment of civil penalties herein will not affect its ability to continue in business.

Peabody was negligent in failing to properly trim its haulage trucks when such a procedure was mandated by the regulation in controversy. Under all the facts of this case, Peabody's negligence amounts to ordinary negligence.

In determining the gravity of the violations, consideration must include the following: (1) the likelihood of injury; (2) the number of workers exposed to such potential injury; and (3) the severity of potential injuries. In the instant case, the likelihood of injury as a result of coal falling from a haulage truck is slight. Only one worker was exposed to such a risk. Considering the fact that a 30-pound chunk of coal could fall from a

distance of more than 15 feet, the severity of potential injuries is moderate. Hence, the gravity of these violations is in the range of slight to moderate.

After notification of the first three violations, Peabody promptly abated those violations. However, it resumed its prior practice of not trimming the trucks and two withdrawal orders were issued 3 months later. While these facts do not demonstrate good faith compliance, I find that Peabody challenged these violations on the good faith belief that its trucks were properly trimmed.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that civil penalties should be imposed for the violations found to have occurred as follows:

Citation or Order No.	Date	30 C.F.R. Standard	Penalty
390749	11-27-78	77.1607(aa)	$ 200
390750	11-27-78	77.1607(aa)	200
390751	11-27-78	77.1607(aa)	200
792415	02-27-79	77.1607(aa)	200
792416	02-27-79	77.1607(aa)	200
		Total	$1,000

ORDER

Wherefore, it is ORDERED that respondent pay the sum of $1,000 within 30 days of the date of this decision as a civil penalty for five violations of 30 C.F.R. 77.1607(aa).

James A. Laurenson
Judge