

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2. 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUN 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-4
Petitioner : Assessment Control
v. : No. 15-04567-03002
ELY FUEL COMPANY, :
Respondent : Fields Preparation Plant

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Mr. Frank Stewart, Pineville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was held on April 23, 1980, in Barbourville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 37-43):

The Petition for Assessment of Civil Penalty was filed in this proceeding on May 14, 1979, in Docket No. KENT 79-4. The issues raised by any Petition for Assessment of Civil Penalty are whether a violation occurred, and if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

The citation involved in this case is No. 126517 and it alleges a violation of 30 CFR 77.400. The condition or practice set forth in the citation which is Exhibit P-2 in this proceeding, reads as follows: "Guards were not provided on a conveyor beltline to haul the coal from the tipple to the crusher and to the cars where men were exposed to the hazard while the tipple was being operated."

The testimony of both respondent's witness and the inspector indicated that the condition or practice, as I have just quoted it from the citation, was somewhat inexact in that what the inspector really was citing was the failure of the company to have a guard at the tailpiece of the conveyor belt which transported coal from the tipple to the railroad cars,

The inspector's testimony showed there were guards on another conveyor belt and that the only place there was a lack of guard was at this **tailpiece**. The testimony of both respondent's witness and the inspector indicates that a violation of section 77,400 occurred because there was not a guard at this tailpiece, Section 77,400 does provide that gears, sprockets, chains, drives, head, tail, and take-up pulleys, flywheels, couplings, shafts, sawblades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded, Having found that a violation of section 77.400 occurred, I must now assess a civil penalty based on the six criteria which I have just mentioned.

The first criterion is the size of the operator's business* It has been stipulated that this is a small **company**,

The second criterion is whether the payment of penalties would cause respondent to discontinue in business. It has been stipulated that payment of penalties would not cause respondent to discontinue in business,

The third criterion is the history of previous violations. There was submitted as Exhibit P-1 in this proceeding a computer printout which indicates respondent has not previously violated section 77,400, It has been my practice in all of my decisions to increase a civil penalty otherwise assessable under the other five criteria if I find that respondent has violated the same section of the regulations which is involved in the case before **me**, Inasmuch as there has been no previous violation of section 77,400, I find that the penalty should neither be increased nor decreased under the history of previous violations brought to my attention in this proceeding,

The fourth criterion is whether the respondent demonstrated a good faith effort to achieve rapid compliance after being advised of the violation of section 77.400. The inspector's citation gave the respondent a period of approximately two weeks, or from November 27, 1978, to December 11, 1978, within which time to correct the violation.

The inspector testified that he went back on December 11, and found that the guard had been installed. And he therefore terminated the violation as shown in Exhibit P-3. The inspector did not know whether the respondent had corrected the violation quite a few days before the expiration of the time which had been given.

Respondent's witness testified that on the same day the citation was written, that is, November 27, 1978, he ordered from J.R. Hoe and Son, the company which built the tippel which they were using, a guard for this tailpiece. The guard became available on the next day which would have been November 28, 1978, and respondent picked up the guard on November 28, and installed it the next day; which would mean that he achieved compliance within 3 days, although respondent had been given about 2 weeks to achieve compliance. I find under those conditions that that was an outstanding effort to achieve compliance and that the respondent should be given considerable credit for that rapid compliance in the assessment of a penalty.

We come to the question of negligence and the former Board of Mine Operations Appeals has held that a company is absolutely required to be aware of all safety regulations. So any time a company fails to comply with a regulation, even if it is one that he says he didn't know about, the law still says he should have known about it.

So I must necessarily find that there was ordinary negligence in the failure to have the guard on the tailpiece. There are some extenuating circumstances however. For example, Mr. Smith, the respondent's witness and who was foreman of this tippel, stated that he had operated an older tippel at the same site for 23 years and during that period of time he did not have a guard on this tailpiece and yet he was not cited for failure to have a guard. And he said if he had known he was supposed to have a guard he would certainly have had one on there. So while I'm finding and must find there was ordinary negligence, I am taking into consideration that the respondent does have an excellent attitude toward safety and that he did operate for a long period of time under the erroneous impression that this particular tailpiece did not have to be guarded.

We come now to the criterion of gravity. There are quite a few extenuating circumstances on that. It is true as the inspector testified that it would be possible for a person to become caught in a pulley or wheel driving a belt and a person could lose a hand that way, and I suppose a person could even

be killed. So there's no doubt that any time there is an unguarded wheel that it's a possibility that someone could be injured.

So we have to find that this was a moderately serious violation. Of course, I am taking into consideration the fact that respondent's witness stated that the tailpiece is always deenergized when any greasing is done around the tailpiece. According to respondent's testimony the fact that this was a new tipple meant there would be very little coal spilled at this area, and there would be very few times and it would be a long period between times, when any cleaning around the tailpiece would be necessary. The inspector indicated that he saw no need for any cleaning to be done on the day the citation was written.

Under those circumstances, while the violation was moderately serious the fact remains there would be few times when anyone could be exposed to injury here, because people are very rarely in this area when the tailpiece is running. Finally; it should be noted that respondent has been operating a tipple for 23 years and has never had an accident, according to respondent's testimony.

With **all those** extenuating circumstances, I find that a penalty of \$25.00 is appropriate.

WHEREFORE, it is ordered:

Within 30 days after the date of this decision, respondent shall pay a civil penalty of \$25.00 for the violation of 30 C.F.R. § 77.400 alleged in Citation No. 126517 dated November 27, 1978.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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