

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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14 JUL 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEVA 80-41  
: A.C. No. 46-02380-03008 I  
v. :  
: Bishop Preparation Plant  
BISHOP COAL COMPANY, :  
Respondent :

## DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S.  
Department of Labor, Philadelphia, Pennsylvania, for  
Petitioner;  
Karl T. Skrypak, Esq., Consolidation Coal Company,  
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

## JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding 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) (hereinafter the Act), to assess a civil penalty against Bishop Coal Company (hereinafter Bishop) for a violation of mandatory safety standards. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. §§ 77.1605(k) and 77.1605(1). A hearing was held in Charleston, West Virginia, on May 21, 1980. Franklin Walls testified on behalf of MSHA. James Lawless and Jack Holt testified on behalf of Bishop. Upon completion of the taking of testimony, the parties submitted oral arguments.

This matter involves the alleged failure of Bishop to provide berms or other guards at a dumping location and on the outer bank of elevated roadways. The order on which the civil penalty is proposed was issued following an investigation of an accident at the Bishop Preparation Plant. The accident occurred when a truck, operated by an employee of an independent contractor, missed the ramp to the dumping area while backing up and went down an embankment.

#### ISSUES

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

#### APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i), 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.

30 C.F.R. § 77.1605(k) provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

30 C.F.R. § 77.1605(1) provides as follow: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

## STIPULATIONS

The parties stipulated the following:

1. Bishop Preparation Plant is owned and operated by Respondent Bishop Coal Company.
2. Bishop Preparation Plant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 as amended.
3. The administrative law judge has jurisdiction over this proceeding, pursuant to section 110 of the 1977 Act.
4. The subject order and termination thereof were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statement asserted therein.
5. The assessment of civil penalties in this proceeding will not affect the Respondent's ability to continue in business.
6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979 the Bishop Preparation Plant processed an annual tonnage of 751,799 and the controlling company, Bishop Coal Company, had an annual tonnage in excess of approximately 751,799 tons.
7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.
8. The gravity of the alleged violation was that an accident occurred. It affected one person and resulted in said person losing a work day.

## SUMMARY OF THE EVIDENCE

During darkness on the midnight shift on February 28, 1979, a truck haulage accident occurred at the Bishop Preparation Plant. A coal haulage truck, weighing 40 to 50 tons, operated by an independent contractor was attempting to back onto the dumping ramp at the plant. This was only the truck driver's second trip to the site and he apparently was working his

second consecutive shift at the time of the accident. The driver misjudged the ramp and the right rear wheels missed the ramp by several feet. This caused the haulage truck to go over the embankment which was approximately 11 feet above the surface below. The driver jumped out of the truck prior to its fall and sustained an injury causing him to lose one day of work.

MSHA assigned inspector Franklin Walls to investigate this accident. Upon completion of his investigation, Inspector Walls issued an imminent danger order of withdrawal under section 107(a) of the Act, due to inadequate berms or guards at the dumping site and along portions of the elevated access roadway leading to the dumping site.

The facts concerning the physical condition of the dumping site at the time of the accident are in dispute. Although numerous photographs were received in evidence, they are subject to different interpretations in light of the extensive damage caused to the area by the falling truck. Bishop alleged that prior to the accident, the following berms or guards were provided at the point where the truck went over the edge of the dumping area: a handrail type fence, a small pile of rocks and debris along the edge of the bank, and a metal pipe 8 inches in diameter. MSHA asserts that the 8-inch metal pipe was not present at the time of the accident. Bishop concedes that the handrail was not intended to prevent trucks from going over the edge.

According to the calculation of the parties, if the truck in question were perfectly centered on the ramp, there would be approximately 1-1/2 to 2 feet of clearance on each side of the truck. Based upon the location of

the right rear tire marks at the edge of the bank, the truck missed the ideal backup point by 3 or 4 feet. Both parties agreed that the truck driver was negligent.

Bishop's superintendent, James Lawless, contended that the 8-inch pipe along the ramp and the part of the pipe that went around the corner where the right rear wheels of the truck went over the bank was in place at the time of the accident. He further alleged that the pipe was torn from the concrete and knocked down the bank in the accident. Inspector Walls disagreed and testified that the pipe was found lying at the bottom of the bank covered with float coal dust which indicated that the pipe had not been recently dislodged.

There was some disagreement between Inspector Walls and Superintendent Lawless as to whether even the berm which was installed for abatement would be sufficient to prevent the occurrence of this accident. However, both agreed that under certain circumstances the berm would be sufficient.

Bishop produced further evidence that since 1971 more than 100 trucks use this dumping ramp on each working shift. There had been no accidents or complaints concerning the berm or guard prior to the instant accident. Moreover, the access road and dumping location had been inspected numerous times by MSHA and its predecessor since 1971 with no prior complaints about the inadequacy of berms or guards.

With regard to the access road, Inspector Walls identified four separate locations where berms were either inadequate or nonexistent. The total

length of the cited areas of the access road was several hundred feet. In these locations, the inspector testified that there was an embankment on one side and where berms existed they were very low and would not have been sufficient to prevent overtravel by haulage trucks. Superintendent Lawless testified that he had walked the access road with another MSHA inspector approximately 3 months prior to the date of the instant order and that inspector said nothing about inadequate berms. He contended that the condition of the berms had remained essentially the same from the date of the prior inspection to the time of the accident. However, he conceded that the winter weather conditions and truck usage of the road may have lowered the berms between the date of the prior inspection and the date of this order.

#### EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. MSHA contends that Bishop failed to provide adequate berms or guards at the dumping site and along the access road. MSHA further asserts that Bishop is chargeable with a high degree of negligence or gross negligence and that a civil penalty in the amount of \$4,000 should be assessed. Bishop asserts that it provided berms at all locations where they were required. Bishop also asserts that it was not negligent in any way and that a \$4,000 civil penalty would be "absurd."

Since MSHA's investigation was prompted by the truck accident at the dumping site, the evidence concerning the dumping site will be examined first. The regulation in question, 30 C.F.R. § 77.1605(1), provides as follows: "Berms, bumper blocks, safety hooks, or similar means shall be

provided to prevent overtravel and overturning at dumping locations." I find that the preponderance of the evidence establishes that at the time of the accident in question, the means provided by Bishop to prevent overtravel and overturning were the following: a metal pipe 8 inches in diameter and a small pile of rocks and debris. Although a small metal handrail was also present, this was not intended to prevent overtravel by trucks. I find that the physical evidence, particularly the photographs taken shortly after the accident, supports Bishop's contention that the 8-inch metal pipe was dislodged by the truck's fall. Nevertheless, I find that Bishop violated the regulation in question because the metal pipe and the small pile of rocks and debris were not sufficient "to prevent overtravel and overturning at dumping locations." While the truck driver was admittedly negligent in misjudging the entrance to the dumping ramp by a few feet, this does not exculpate Bishop from liability. Although there is no evidence of any prior accident at this site, Bishop should have known that an 8-inch pipe and a small pile of debris were insufficient to prevent overtravel and overturning of trucks weighing 40 to 50 tons. However, I find no evidence in the record to support MSHA's contention that Bishop is chargeable with a high degree of negligence or gross negligence. For this violation, I find that Bishop is chargeable with ordinary negligence.

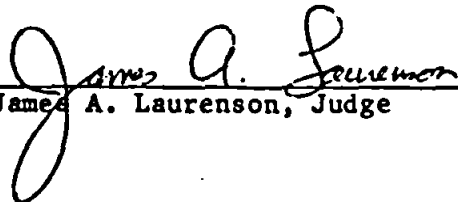
The preponderance of the evidence establishes that Bishop failed to provide adequate berms or guards along the outer bank of parts of its access road to the preparation plant. Bishop's contention that the small piles of rocks or debris along the elevated roadway constituted a berm is rejected. The requirement of 30 C.F.R. § 77.1605(k) that berms or guards shall be

provided means that they must be adequate to prevent overtravel of the outer bank. The evidence establishes that Bishop violated this standard. Bishop's reliance upon the failure of MSHA inspectors to cite this condition during earlier inspections is misplaced. Even if the condition of the berms was the same as on the prior inspections, Bishop is on notice by the regulation that adequate berms or guards are required. Since Bishop should have known of this violation, I find it chargeable with ordinary negligence.

In assessing a civil penalty, I have considered Stipulations 5 through 8 and the fact that Bishop is chargeable with ordinary negligence in this case. Based upon the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$2,500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that Respondent pay the sum of \$2,500 within 30 days of the date of this decision, as a civil penalty for the violation of 30 C.F.R. §§ 77.1605(k) and 77.1605(l).

  
James A. Laurenson, Judge

Distribution by Certified Mail:

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