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SOL (MSHA) V. BURGESS MINING & CONSTRUCTION
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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
v.
BURGESS MINING AND CONSTRUCTION
CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. SE 80-47
A/O No. 01-01897-03004I

Gurnee Strip Operation No. 2

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA
W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation

DECISION

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Burgess Mining and Construction Corporation. A hearing was held on November 10, 1980.

In a series of written stipulations filed on October 22, 1980, the parties agreed to the following stipulations (Tr. 4-5):

(1) Burgess Mining and Construction Company is the owner and operator of the Gurnee Strip Mine No. 2 located in Shelby County, Alabama.

(2) The parties are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The Administrative Law Judge has jurisdiction over this proceeding.

(4) The inspector who issued the subject citation and termination was a duly authorized representative of the Secretary of Labor.

(5) The true and correct copy of the subject citation, termination and extension were properly served upon the operator in accordance with the Act.

(6) Copies of the subject citation and termination are authentic and may be entered into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

(7) 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 Gurnee Strip Mine No. 2 produced an annual tonnage of 55,772, and the controlling company, Burgess Mining and Construction Corporation, had an annual tonnage of 540,361.

(8) The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 11, and the total number of inspection dates in the preceding months is 4.

(9) The alleged violation was abated in a timely manner, and the operator demonstrated good faith in attaining abatement.

(10) The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-139). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 139-140). A decision was rendered from the bench setting forth findings, conclusions and determinations with respect to the alleged violation (Tr. 156-160).

BENCH DECISION

> This case is a petition for the assessment of a civil penalty. The mandatory standard involved is 30 C.F.R. 77.1606(c) which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."
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> The alleged violation is set forth in the subject citation as follows:
>
>> The parking brake was inoperative on the 180 International Payhauler Company S/H, 15-19, Serial No. 669. It was not properly secured or adjusted. Brake lining was worn 50%. The running brakes were not adequate as only the right rear brake was operative as reported by the operator who was involved in the accident on November 3, 1978 at 2:45 p.m.

According to the testimony of record, the piece of equipment in question, a payhauler, is used to transport coal from

the pit to the preparation plant or to the storage pile. The payhauler itself weighs about 40 tons and can carry up to 50 tons of coal. It is, therefore, a very big and a very heavy piece of equipment. The record further shows that on November 3, 1978, the payhauler loaded with coal failed to make it to the top of the ramp leading out of the pit and after stalling at a point 15 to 20 feet from the top rolled back down the ramp until it hit the highwall. The driver of the payhauler was seriously injured. I accept the testimony which indicates the foregoing occurred.

During the hearing today, the driver testified in detail with respect to the cited payhauler. He stated he had been driving this payhauler for about 2 weeks before the accident and that the brake bands were worn so badly that they would not touch the drums and that only the brake on the right rear wheel worked. I found the driver a credible witness and I accept his testimony.

I further accept the MSHA inspector's testimony that 3 days after the accident the parking brake lining was 50 percent worn upon a visual examination. The payhauler, of course, had not been used in the intervening 3 days since it had been so badly damaged in the accident. I conclude that the conditions described by the driver and the inspector constituted defects in the equipment. Moreover, I find that these defects should have been corrected before the payhauler was used on the day in question. Accordingly, I find a violation existed. There is no dispute as to the injury suffered by the driver. He had a fractured left elbow, a broken left wrist, a broken pelvis, first and second degree burns of the right arm and the right shoulder and lacerations over the left eye. This was a very serious violation. I further conclude the operator was guilty of a high degree of negligence. I accept the driver's testimony that during the first week he drove the truck he told the pit mechanic about the defective brakes. It is no defense for the operator to state that the pit mechanic was a union man. The operator acts only through employees and is responsible to see to it that they do their job. The driver's testimony is uncontradicted that a week before the accident he told the mine superintendent that the brakes were not working and that the superintendent's response was only to say that they would try to fix the brakes as soon as they could.

Such a response was clearly inadequate. There is no doubt that the operator is responsible for the acts of the superintendent

whom it placed in such a position of authority. Finally, on the day of the accident the driver discussed the defective brakes with the truck foreman who, according to the operator's evidence today, is the pit mechanic's supervisor. Far from seeing that the payhauler was immediately taken out of service, the truck foreman asked the driver to take one load of coal out of the pit and it was on this very trip that the unfortunate accident occurred. In light of the foregoing, it is clear that the driver contacted everyone along the ladder of authority with respect to the payhauler, but that the operator's response at each and every level was deficient. I recognize that the driver drove the payhauler for 2 weeks in its dangerous condition. The driver testified that he did this because it was Christmas time. However, whether or not the driver's actions were foolhardy or justifiable is irrelevant. It is the operator's responsibility to insure that the equipment is free from defects affecting safety before being used. Accordingly, I conclude there was a high degree of negligence.

I take into account the stipulations regarding history, good faith abatement, size and ability to continue. The first three justify mitigation of the penalty amount. However, gravity and negligence are so great that a very substantial penalty must be imposed in this instance.

Accordingly, a penalty of $5,000 is hereby imposed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $5,000 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge