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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATIVE (MSHA)
PETITIONER

v.

ISLAND CREEK COAL CO.,
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 80-658
A.O. No. 46-02724-03010H

No. 1 Surface Mine

DECISION

Appearances: James P. Kilcoyne, Jr., Attorney, U.S. Department
of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Marshall S. Peace, Esquire, Lexington, Kentucky, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing a civil penalty assessment for one alleged violation of mandatory safety standard 30 CFR 77.1607(b). The alleged violation was served on the respondent on September 5, 1979, through the issuance of citation no. 0648106, a section 107(a) imminent danger order issued by MSHA Inspector Sherman L. Slaughter. The condition or practice described by the inspector on the face of the order is as follows:

The elevated inclined roadway over which four 120 ton rock trucks were hauling spoil material from the shovel to the valley fill at the Mill Creek No. 3 pit was slipping because it was raining hard and the road was covered with mud. The rock trucks were sliding sideways when they came down the roadway and had to raise their beds for more traction going up the roadway. Even with the beds raised the trucks were spinning their way up the incline. The roadway did not have adequate berms on its outer banks which was elevated more than 100 feet above the hollow. The rock truck drivers did not have full control of the trucks while coming down the roadway to the fill

(77.1607(b)). It is reasonable to expect someone would get injured, possibly fatally, if the trucks continued to haul over this roadway in the above condition and it is reasonable to expect this could happen before the rain stops and/or the condition is corrected.

Respondent filed an answer to the proposal for assessment of civil penalty and denied the existence of the alleged violation. Respondent asserted that it followed the inspector's directions in its desire to cooperate with him, but denied that the conditions described constituted a violation of the Act or regulations.

A hearing was convened at Charleston, West Virginia, on March 3, 1981, and the parties appeared and participated fully therein. The parties were afforded an opportunity to file post-hearing briefs, and the arguments presented herein have been fully considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110 of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. No. 1 Surface Mine is owned and operated by Island Creek Coal Company.

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2. Island Creek Coal Company and the No. 1 Surface Mine 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 pursuant to Section 105 of the 1977 Act.

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

5. A true and correct copy of the subject order was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

6. Copies of the subject order, modification and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

7. The alleged violation was abated after a withdrawal order was issued.

8. Island Creek Coal Company is a large operator within the meaning of the Act and assessment of a civil penalty in these proceedings will not adversely affect the operator's ability to continue in business.

Testimony and Evidence Adduced by the Petitioner

William Hamrick, safety engineer, International Safety Division, United Mine Workers of America, testified that on September 5, 1979, he visited Island Creek's No. 1 Surface Mine in order to inspect the roadway at the Mill Creek job site. He concluded that the haul road was slippery because it was raining continuously, and he noticed trucks slipping and sliding due to the mud on the embankment and on the incline. He determined that the truck operators did not have full control of their vehicles, and he observed the 120-ton Webco trucks going up the hill with their beds raised in order to get the back wheels in traction. He testified that he told mine superintendent L. A. Moses that the weather conditions were too bad to operate on the road.

Mr. Hamrick stated that only one area of the roadway was repaired prior to the arrival of the MSHA inspector. This was not on the road incline, but in a location near the shovel. Mr. Hamrick and truck driver Jim Humphrey drove over to the road with Inspector Slaughter and they pointed out to him that there were no berms on either side of the road incline. Mr. Hamrick explained that the lefthand side of the uphill road dropped 50-60 feet to a coal pit and the right side dropped about 100 feet. Mr. Hamrick believed that the weather conditions could cause the trucks to collide, and that the lack of rocks on the berms would not keep the trucks from going over the steep embankment.

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Mr. Hamrick stayed at the mine throughout the day, periodically visiting the roadway to inspect conditions. He observed trucks hauling dry material down the road to the valley fill. He stayed at the property until about 3:15 or 3:30 and he noted that it was still raining at this time (Tr. 13-21).

On cross-examination, Mr. Hamrick conceded that he had never operated any of the large Webco trucks. He described the descent of the fully loaded trucks down the road incline as follows (Tr. 24-25):

Well, when they approach the steep incline, 'cause I was standing, you know, looking up at the trucks and I could tell the trucks were sliding, the operator, you know, in his steering, and I guess in his braking, the trucks would slide back. You know, I'd say, approximately, sideways for 20 feet. They'd catch, go to the other side, same way, I'd say a distance 15 to 20 feet.

In response to bench questioning, Mr. Hamrick stated that he talked with several of the truck drivers on the day in question, and while two of them acknowledged that they were slipping, they still felt that they had full control of their vehicles. Another driver felt that the road conditions were too dangerous, that he did not have full control of his vehicle, and he withdrew his truck from the roadway (Tr. 26-29).

In response to further questions, Mr. Hamrick indicated that he had had problems with the road in question on previous occasions. A citation had been issued previously on April 27, 1979, for lack of berms on the roadway and for slippery road conditions. His recommendation for keeping the roadway in question safe included packing hard material, such as shale, on the road, which would hold longer and have a good grip for traction (Tr. 145-146).

MSHA Inspector Sherman Slaughter, testified that he visited No. 1 Surface Mine on September 5, 1979, after receiving a request to do so from Mr. Hamrick. He arrived at approximately 11:15 or 11:30 a.m., and met with Mr. Humphrey, Mr. Moses, Mr. Chapman, and Mr. Hamrick.

Using a sketch of the haul road and adjacent area, exhibit P-1, Mr. Slaughter demonstrated the physical layout of the haul road and discussed his observations of the road conditions on September 5. He stated that it was raining and the roads were slick. Trucks were hauling spoil materials, a fine, grainy-like sandstone material, and spreading it on the road. Other loads of material were being transported down to the valley fill area. Thirty feet beneath the lefthand side of the road was a coal pit and 100 feet below the right side was the valley fill. He noted that there were inadequate berms on either side of the road for which he later issued a citation at 11:45 a.m.

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After speaking with company officials about the condition of the haul road, Mr. Slaughter drove to the valley fill area, and periodically, he would return to the haul road to check whether the conditions had worsened. At 4:50 p.m., he decided that it was necessary to issue an imminent-danger order for a violation of section 77.1607(b), and in order to keep the trucks from using the roadway because of the slipping conditions.

Mr. Slaughter believes that section 77.1607(b) requires a truck operator to maintain full control of his equipment at all times. He determined that the operators in this instance were not in control because he saw one truck going up the hill with its bed up, and it could only partially go up the roadway because of the muddy, slick conditions. He noted that when the trucks attempted to brake, they would slide sideways. Since the berms were inadequate, he was concerned that the trucks could slide toward the valley fill which was a 100 foot drop over the side of the roadway.

Mr. Slaughter explained that rocking the road had helped for awhile, but the continual rain had caused the road to become slick again. He determined that the respondent was negligent in that it should have stopped the hauling earlier. He noted that it was raining all day and both Superintendent Moses and the mine foreman were near the haul road throughout the day. He felt that there was a danger of a fatal injury if a truck went over the embankment (Tr. 29-45).

On cross-examination, Mr. Slaughter testified that the operator had stopped rocking the road about 12:30 or 1 o'clock. Because it continued to rain, he did not suggest that they continue to rock the road, and he conceded that he did not tell management to cease their production runs because it was not raining hard and the trucks were still getting traction. About 3 o'clock, conditions began to worsen, which led him to issue an imminent-danger order. He felt that since the truck drivers did not have full control of their vehicles, they could possibly have lost control entirely and gone through any berm at the side of the roadway (Tr. 45-65).

On redirect examination, Mr. Slaughter testified that since the road was wet, muddy, and slick, there was a detrimental effect on the truck driver's ability to keep his truck under control, and in his view the respondent should have stopped production and use of the road prior to the time he issued the order (Tr. 65-67).

In response to bench questioning, Mr. Slaughter admitted that if the operator had continued rocking the road, keeping it dry enough to maintain traction, he may not have issued the order. He indicated that the violation was eventually abated by the use of a grader, which skimmed off the slick material on the road's surface, and he terminated the order once the trucks were able to get traction on the road (Tr. 40-41, 67-76).

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In response to further questions, Mr. Slaughter stated that he was not aware of prior complaints about the road's conditions. He had never issued any citations on the road in the past (Tr. 93-96, 126-129, 138-139).

James L. Humphrey, mobil equipment operator, and chairman of the Mine Safety Committee, testified as to the factors which led him to withdraw his truck from operation on September 5, 1979. He stated that it had been raining, causing the road to become slick and he was having difficulty in maintaining full control of his vehicle. He also felt that the top of the hill was too soft and muddy, and the lack of berms made it unsafe to drive on the road. Once he withdrew himself, he discussed the matter with mine foreman, Ed Allen, and then called Mr. Hamrick at approximately 10:30. Thereafter, MSHA Inspector Slaughter arrived, but prior to his arrival, Mr. Humphrey stated that he observed two or three trucks still driving on the slick haul road. He testified that rocking the road works for a certain period of time, but if it continues to rain, the sandstone material breaks up, and the road becomes slick again (Tr. 78-87).

On cross-examination, Mr. Humphrey testified that two or three other truck operators did not withdraw themselves on the day in question. He admitted that his own truck had some mechanical defects, in that the tires were worn, but he did not complain to mine management about the condition of his tires (Tr. 87-90).

In response to bench questioning, Mr. Humphrey indicated that mine management did not object to his withdrawing himself from the roadway in question, and he went back to work the next day after the road passed inspection (Tr. 90-93). Mr. Humphrey explained the extent of previous complaints about the road which had been brought to the attention of management. He stated that any time it rained or if the ground froze and thawed, the conditions presented an imminent danger. He felt that it is a mine foreman's duty to conduct a preshift examination and warn the miners of any danger before they begin to work. He believed that the problem could have been solved if the respondent had begun plowing the road at 6:30 a.m. and put gravel on it. He felt that a hard rock, such as limestone, should be used (Tr. 139-145).

Testimony and Evidence Adduced by the Respondent

L. A. Moses, mine superintendent, testified that he had been at the mine and had observed the truck hauling prior to Mr. Humphrey's complaint. He had already ordered the shovel operator to put sandy, coarse material on the road. Using the sketch, (exhibit P-1), Mr. Moses explained what was being done to the road. On the upper inclined portion, dry material was dumped and spread with a dozer. The trucks would turn in the shovel area, back down the grade, and dump their loads. This process continued for approximately 700 to 800 feet, where the trucks would turn around, and Mr. Moses testified that the trucks

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were not slipping and sliding badly because they were able to turn around. The work on the road continued all day and the truck operators were never instructed to stop placing material on the road surface. Mr. Moses stated that no trucks had ever run off the edge or into a berm and they had never had any injuries or accidents on the road (Tr. 103-110).

On cross-examination, Mr. Moses admitted that he was not at the haul road between 3 and 5 o'clock but was working in another mine area. However, he indicated that he was in communication with the second shift foreman by means of a radio. He stated that it was normal for a truck to slip and slide as it proceeded down a wet road. He did not consider the road to be unsafe and he never heard any of the truck operators claim that it was (Tr. 110-114).

In response to bench questioning, Mr. Moses stated that the company policy was to either rip up the road or put dry material on it if they found it to be slippery. It is the responsibility of a foreman, who stays on the scene, to determine whether or not there are problems with road conditions. He admitted that on the day in question it had been raining and the roads were slippery. He explained that just after Mr. Humphrey had taken himself off the job, they decided to do something about the road. Prior to the time that the imminent danger order was issued, they had never shut the haul road down completely because of weather conditions. It was the first time they had to shut down for a full shift (Tr. 120-124).

Findings and Conclusions

Fact of violation

Citation No. 0648106, issued by Inspector Slaughter on September 5, 1979, is an imminent danger order issued pursuant to section 107(a) of the Act. The order cites a violation of mandatory safety standard 30 CFR 77.1607(b), which states as follows: "Mobile equipment operators shall have full control of the equipment while it is in motion."

The fact that the inspector found that the conditions cited amounted to an imminent danger is not controlling as to the question of whether those conditions may serve to establish a violation of section 77.1607(b). It seems obvious to me from the conditions described by the inspector on the face of the order, as well as his testimony at the hearing, that he believed the trucks which he observed using the haulroad in question were not being kept under full control by the drivers while coming down the inclined portion of the road, and while attempting to negotiate the incline in the opposite direction. The inspector's conclusions in this regard were based on his observations of trucks sliding sideways as they came down the incline, as well as their spinning and sliding even with their beds lowered to provide traction on the rain-slicked roadway. Therefore, the critical question presented is whether the evidence and testimony adduced in this case supports the petitioner's contention that

the trucks in question were not being maintained under full control by the operators.

In support of the citation issued in this case, petitioner relies on the testimony of the inspector who observed at least two of respondent's trucks on the elevated haul road in question. One of the trucks was slipping and sliding while attempting to negotiate up the elevated incline with its bed raised for traction. Another loaded truck was coming down the incline and was slipping sideways as it traversed the slippery roadway. In both instances, the roadway was extremely wet due to a rather constant rainfall during the entire day in question, and even though respondent was attempting to keep the roadway dry by "rocking" the roadway, there came a point in time during the shift when the inspector believed that the truck drivers were unable to maintain full control of their trucks as required by section 77.1607(b). Petitioner points out that one of the drivers, James Humphrey, testified that he withdrew himself from driving a truck on the day in question because he could not maintain full control of the vehicle due to the slippery conditions of the roadway. Petitioner further asserted that respondent's witness did not deny that he observed vehicles slipping and sliding during the day in question, and argues that the respondent presented no evidence that on a normal operating day trucks slip and slide while operating on the incline in question, and drop their truck beds in an attempt to keep the vehicles under control. In summary, petitioner maintains that its evidence supports a finding that trucks do not normally slip and slide while operating on the haulroad in question, and that the slipping and sliding of the trucks on the day in question is a certain indication that the operators did not have full control of the vehicles while they were in motion.

Respondent argues that since there were no accidents, injuries, or trucks sliding into berms on the haul road in question on the day the citation issued no inference can be made that the trucks were not under the full control of the drivers. Although the inspector spoke to some of the drivers at the beginning of the second shift, there is no evidence that he discussed the road conditions with them immediately before deciding to issue the imminent danger order. Since the inspector was present and had been periodically checking the road all day, respondent asserts that until the order was issued the drivers must have had full control of their trucks since the inspector issued no earlier violations. Further, respondent points out that the condition which presented any hazard was the slick haul road caused by continuing rain, and the fact that the drivers were trying different techniques to gain traction does not indicate that they did not have full control of the trucks. Conceding that an accident, collision, or a complete spin-out could establish a lack of full control of the trucks by the drivers, absent any competent testimony by any of the drivers, respondent maintains that the opinion testimony of the inspector should be given little weight in establishing a violation.

After careful consideration of the arguments presented, I conclude that the petitioner has the better part of the argument. Respondent's assertion that an accident or near-miss has to occur before a violation is established is rejected. I find that the

testimony of the inspector, coupled with the testimony of UMWA representative Hamrick, who also

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observed the slipping and sliding trucks, as well as Mr. Humphrey, the driver who withdrew himself and testified that he was experiencing difficulty in maintaining control of his vehicle due to the slick road conditions, establishes a violation of the cited standard by a preponderance of the evidence. In addition, even though respondent's witness Moses believed that slipping and sliding on a wet road was normal, I believe it is reasonable to conclude that since the respondent was attempting to improve the road conditions by hauling and spreading dry materials on the inclined portion of the roadway, it did so out of recognition that trucks were having difficulty negotiating the roadway. It seems to me that if the respondent really believed that slipping and sliding was normal, it would not have gone to such great measures to dump and spread dry materials on the roadway. Under the circumstances, I conclude and find that the trucks which were attempting to traverse the roadway in question were not under the full control of the drivers, and the citation is AFFIRMED.

History of prior violations

Respondent's history of prior violations is reflected in exhibit P-4, a computer print-out detailing 25 prior paid citations by the respondent for the period September 5, 1977, through September 5, 1979, through September 4, 1979. I take note of the fact that there are no prior citations of section 77.1607(b), and based on the size and scope of respondent's mining operation, I cannot conclude that its history of prior violations is such as to warrant any increase in the civil penalty assessed by me in this matter.

Size of business and effect of penalty on the respondent's ability to continue in business.

The parties stipulated that the respondent is a large operator and that an assessment of a civil penalty for the violation in question will not adversely affect respondent's ability to remain in business. I adopt this stipulation as my finding on this issue.

Good faith compliance

The record reflects that abatement was achieved after a withdrawal order was issued and the parties so stipulated. Although respondent may have been taking steps to improve the conditions of the roadway during the rain, its rocking became fruitless when it became evident that the rain would not stop, and only after the issuance of the order was abatement achieved. Abatement was achieved by stopping operations until the condition of the roadway improved. Under the circumstances, respondent had no choice but to cease operations and it did so at the inspector's insistence. Accordingly, I cannot conclude that respondent should be unduly rewarded for any abatement efforts which came about as a result of a withdrawal order.

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Gravity

Petitioner argues that the violation is very serious in that the inspector issued an imminent danger order because he believed a driver could be seriously injured before the rain stopped or before the respondent could correct the hazardous road conditions. In support of its argument, petitioner points to the fact that the roadway in question was elevated more than 100 feet above the valley fill below, that the berms may have been inadequate to prevent a truck from going over the embankment, and that if a truck did go over, it was reasonable to expect a serious injury. Aside from its argument that no accident or injuries occurred, respondent advances no additional arguments concerning the gravity of the citation.

After careful consideration of the arguments presented on this issue, and taking into account the fact that the road conditions were slippery and dangerous, a truck operating at the elevated incline some 100 feet above the valley below, would be placed in a hazardous and precarious position were it to slip and slide toward the embankment while loaded and travelling down the incline. The same could be said for a truck coming in the opposite direction attempting to negotiate the hill with its bed down. Under the circumstances, petitioner's arguments are well taken, and I conclude and find that the violation is serious.

Negligence

Conceding that the respondent attempted to correct the condition which caused the citation by rocking the roadway in question, petitioner nonetheless argues that the respondent failed to exercise reasonable care in correcting the condition which caused the violation. The condition which caused the violation was the failure of the truck driver's to maintain full control of their vehicles. The reason they could not fully control their vehicles was the fact that the steady rain was obviously washing away the dry materials that respondent was dumping on the roadway, and the road conditions eventually deteriorated to a point where the inspector believed that allowing operations to continue any further would result in serious injuries. At that point in time, he issued his closure order and use of the roadway ceased. Petitioner's argument suggests that the respondent should have voluntarily closed the roadway down and ceased all operations until the rain stopped. By failing to do this, petitioner argues that respondent was negligent since it has the ultimate responsibility to enforce safe working practices and procedures. Coupled with the fact that respondent was previously informed that the elevated roadway is hazardous when in a wet and slippery condition, the fact that mine management was present and aware of the conditions of the roadway on the day the citation issued, and the fact that it ceased to rock the road prior to the issuance of the citation, petitioner argues that respondent exhibited in high degree of negligence.

Petitioner does not assert that respondent is guilty of gross negligence. Based on all of the evidence adduced in this

case, I cannot conclude that the respondent exhibited a reckless or deliberate disregard for the safety of the drivers by failing to close the roadway down before the order

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issued. It seems to me that if MSHA believes that a wet and slippery haulroad is ipso facto always hazardous and dangerous, then it should take steps to shut down the roadway at the mine in question whenever it rains. On the facts presented in this case, it seems to me that the respondent was attempting to correct the road conditions by rocking the roadway with dry materials to improve traction. Although the mine superintendent was absent from the roadway location at the time the order issued, he testified that he was in communication with a foreman by means of a radio, and since none of the drivers complained, he did not believe the roadway was dangerous. However, he conceded that he became concerned and decided to do something about the road at the time Mr. Humphrey withdrew himself. Under the circumstances, I cannot conclude that mine management did nothing about the roadway conditions, nor can I conclude that it simply chose to ignore the conditions.

With regard to respondent's asserted prior knowledge of the conditions of the roadway, I take note of the fact that Mr. Hamrick's testimony suggests a difference of opinion as to how to correct any slippery conditions, and Mr. Hamrick indicated that some of the prior complaints dealt with lack of sufficient berms rather than trucks operating out of control. Further, Inspector Slaughter testified that he was not aware of any prior complaints about the road conditions, and petitioner's prior history of violations does not include any repeat violations of section 77.1607(b). Under the circumstances, I cannot conclude that the record supports a finding that respondent makes it a practice to totally ignore slippery road conditions on the haulroad in question, and makes it a practice to ignore such conditions.

Finally, I take note of the fact that the inspector who finally issued the closure order did so after he concluded that continued operations would probably result in an accident or injury. Up until that point in time, the inspector was periodically checking the conditions of the roadway, and even though he stated that the respondent ceased rocking the roadway at approximately 12:30 or 1:00 p.m., he did not advise the respondent to continue with the rocking operation since it was obvious that it was doing no further good to provide traction. He conceded that he did not at that time advise mine management to stop using the road because it was not raining hard and trucks were still able to maintain some traction, and at approximately 3:00 p.m., he believed that conditions had deteriorated to the point where he felt obliged to issue a closure order. Therefore, since the inspector who was on the scene took no action earlier than 3:00 p.m., to either issue a citation or a closure order, I believe it was reasonable for mine management to conclude that the roadway conditions were not such as to preclude the vehicle operators from maintaining full control of their trucks.

In view of the foregoing, I conclude that the violation resulted from the respondent's failure to exercise reasonable care to cease operations at the time the order issued, and that this failure on its part amounts to ordinary negligence.

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Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of \$1,500 is reasonable and appropriate for the citation which has been affirmed, and respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge