

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FALLS CHURCH, VIRGINIA 22041

JUN 24 1981

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-362-P
Petitioner : A/O No. 01-01310-02005V
v. : Gayossa Pit
RON COAL COMPANY, :
Respondent :

DECISION

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
Ronald Morgan, President, Ron Coal Company, Inc., Jasper, Alabama, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. The hearing in this matter was held on May 11, 1981, in **Birmingham, Alabama.**

The notice of violation at issue herein, Notice No. **5-A.B.C.**, dated March 2, 1977, was issued pursuant to section 104(c)(1) of the Act. The inspector cited 30 C.F.R. 77.1004(b) which reads as follows:

Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

The inspector described the condition or practice which led him to issue the notice of **violation** as follows:

Unsafe conditions such as trees leaning over with roots pulled out of the ground were present directly over the drill operator. The area had not been posted to keep persons from entering. The **highwall** was approximately 40 feet high. The tree was approximately 10 inches in diameter at the bottom. The drill operator was drilling a hole approximately 3 feet from the bottom of the wall.

Notice No. 5 A.B.C. was terminated after the timely abatement of this condition.

Inspector A. B. Cates conducted an inspection of Respondent's operation at the Gayossa Pit on the morning of March.2, 1977. Ron Morgan, President of Ron's Coal Company, accompanied the inspector during his inspection. Both men testified at the hearing held in this matter.

Respondent was mining in an area that had previously been mined by another company. At the time of the inspection, Clyde Morgan, the father of Ron Morgan, was drilling a hole at the base of the **highwall** left by the earlier mining operation. The **highwall** was estimated to be between 35 and 40 feet in height. The inspector observed a tree extending over the upper edge of **this highwall** above the area in which Clyde Morgan was drilling. The tree was approximately 40 feet high and 10 inches wide at its base. The inspector estimated that the tree extended 10 feet beyond the edge of the highwall. If the tree fell, it would have fallen into the pit.

It is found that the overhanging tree presented a hazardous condition and that the failure to remove it or post the area was in violation of the cited standard. Ron Morgan testified that the tree had "been there" for a long time. The inspector, however, observed that one-half of the tree's roots were exposed. Furthermore, it had been raining prior to the inspection. As a consequence, the ground was "fairly wet" and the likelihood that the tree would fall was enhanced. In view of the inspector's uncontested testimony that an extensive portion of the root system of the tree was visible, Mr. Morgan's assertion that the tree was "just as solid as all the other trees in the forest" is rejected.

It is also found that Respondent demonstrated a moderate degree of negligence in failing to remove the tree or post the area. The presence of the tree was readily observable. Even though the tree had "been there" for a long time, its condition was such that its stability should not have been presumed.

It was probable that the tree would have fallen into the pit sooner or later. It was improbable, however, that it would have caused injury to any of Respondent's employees. Respondent's employees took only one cut, and spent only part of one day in the vicinity of the overhanging tree before moving to "the other side of the hill." None of Respondent's employees drilled in the area in question again.

The inspector testified that Clyde Morgan was drilling directly under the overhanging tree. Ron Morgan testified that drilling occurred 40 feet to one side of the tree. He qualified his testimony, however, by admitting that the tree could have struck the operator if it was forced in his direction. It is found that the drill operator was close enough to the tree while he was drilling to be threatened with injury **if** the tree had fallen. It is also noted that there was nothing to prevent any of Respondent's employees from entering the area immediately below the overhanging tree. If the tree had fallen and struck someone standing underneath it, it is probable that the injury would have been serious.

Respondent demonstrated good faith in the abatement of the condition. Clyde Morgan cut the tree down immediately. It **is** noted that **Respondent** need only have posted the area to have met the requirements of the mandatory standard.

At the time the inspection was conducted, Respondent had 2 prior paid violations. The parties stipulated that Respondent's prior history of violations was good. It was a small operation with 5 employees and a daily output of 50 to 75 tons of coal. Finally, it was the un rebutted testimony of Ron Morgan that Respondent had cash flow problems and would have to borrow money against its **assets. to** pay a penalty.

At the conclusion of the hearing, Petitioner moved that **settlement** in the amount of \$175 be approved for the violation at issue herein. The violation had been assessed originally at \$350. As grounds for the reduction in penalty amount, counsel for Petitioner asserted that the negligence demonstrated was "simple", that the violation was slightly **serious**, that Respondent demonstrated good faith in the abatement of the condition and that Respondent was a small operator.

The motion for approval of settlement was granted at the conclusion of the hearing. The approval of the settlement is hereby AFFIRMED.

ORDER

IT IS ORDERED that Respondent pay the agreed upon sum of \$175.00 within 30 days of the date of this decision, if payment has not already been made.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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