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SOL (MSHA) V. TURNER BROS.
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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	CIVIL PENALTY PROCEEDING Docket No. CENT 83-9 A.C. No. 34-01317-03502
v.	Docket No. CENT 83-13 A.C. No. 34-01317-03503
TURNER BROTHERS, INC., RESPONDENT	Heavener No. 1 Mine

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner Robert J. Petrick, Esq., Turner Brothers, Inc., Muskogee, Oklahoma, for Respondent

Before: Judge Melick

Hearings were held in these cases on October 27, 1983, in Fort Smith, Arkansas. A bench decision was thereafter rendered and essentially only the amount of penalties have been changed. That decision, as modified herein, is now affirmed.

Waiver of Right to Presence at Hearing

> As a preliminary matter, I find that Turner Brothers, Inc., has waived its right to be present at this hearing today and to cross examine witnesses and present evidence on its own behalf. It is clear that the operator received adequate notice well in advance of hearing. It is also clear from the last minute telephone calls made late yesterday by the operator's representative and received by the Solicitor and by my office after I had already departed for this hearing, that the operator did not request and did not want a continuance of this hearing.
>
> Indeed, the telephone calls to the Solicitor's Office and to my office were to the effect

that the operator's representatives had more important business to attend to elsewhere and that it would go ahead and pay whatever penalties were imposed. This determination by the operator was made, I find, after having been fully informed by the Solicitor's Office that the penalties that had been proposed initially by the Secretary could be modified by the Administrative Law Judge and indeed could be increased as well as decreased after hearing the evidence in the case. Accordingly, I find that the operator has waived its right to be present and to participate at this hearing.

The Merits

These cases are, of course, before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, which I will refer to hereafter as the "Act". The Secretary, in the petitions filed, is seeking civil penalties for seven violations of regulatory standards.

The general issues before me are whether the operator, that is, Turner Brothers, Inc., which I will refer to hereafter as "Turner", has committed the violations charged and, if so, the amount of civil penalty to be assessed. In determining the amount of civil penalty to be assessed I must, of course, independently consider the criteria under Section 110(i) of the Act. This is a de novo determination and I am not bound in any way by the proposed assessment or findings previously made by the Secretary pursuant to his own regulations. Section 110(i) requires consideration of the operator's history of previous violations, the appropriateness of any penalty assessed to the size of the business of the operator charged, whether the operator was negligent, the effect of the penalty 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 the violation.

According to MSHA Inspector Donalee Boatright, the mine in this case had an annual coal production of about 350,000 tons and had 51 employees. Total annual production at all of Turner's mines was about one million tons. The mine and the operator are accordingly of medium size.

Now, the Secretary of Labor has also submitted, and it has been admitted in evidence, a printout of prior violations. This print-out shows a minimal history of violations and does not show any violations of standards cited in the particular cases before me. There is no evidence that the operator would be unable to pay the penalties that I impose in this case or that they would affect its ability to stay in business. It appears, moreover, that the violations in this case were abated in a timely fashion and in good faith.

Now, proceeding to the individual citations, I consider first of all Docket No. CENT 83-13, Citation No. 2007396. The citation reads as follows: "An unplanned ignition of explosives occurred at this mine sometime in late August of 1982, and the mine operator did not notify MSHA of the accident. The operator did not have a report of his investigation of the accident at the mine office, so the exact date in August could not be determined. The accident occurred when an unexpected electrical storm came up and ignited 16 charged holes while the employees were being removed from the blasting area. No injuries occurred."

The citation charges a violation of the standard at 30 CFR Section 50.10. That standard states as follows: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

The evidence before me is that Inspector Boatright received information from his supervisor on December 6, 1981, concerning an explosion at the Heavener No. 1 Mine, operated and owned by Turner. Inspector Boatright thereupon went to the mine and talked to the mine superintendent, Jim Payne. Mr. Payne at first denied that there had been any ignition of explosives or any other accident but upon further inquiry admitted that some time the previous August, they did have a pre-ignition of explosives caused by an electrical storm.

Although Mr. Payne allegedly had made an investigation of the incident, he admittedly did not report it to the Mine Safety and Health Administration, as required. His excuse was that he did not think he had to report it to MSHA because there had been no injuries.

The incident in question involved a premature detonation by an electrical storm of a number of charged holes. It appears that a number of the drilled holes, each approximately 50 feet deep and five inches in diameter, had been fully charged, i.e., explosives had been placed to within approximately eight feet of the surface. Each of the charged holes had also been provided with a detonator and wires were protruding from the holes in preparation for final wiring for detonation. At this time an electrical storm passed through the area setting off a number of the holes depicted in Petitioner's Exhibit No. 2, causing explosions to within approximately 88 feet of an individual who was operating the high wall drill. Indeed, there were charged holes to within 22 feet of the driller operator, and if these holes had also detonated, he could very well have been killed.

The evidence shows that the miners in the vicinity of the charged holes had previously withdrawn from the site upon the approach of an electrical storm, but had prematurely returned after some 35 minutes on the belief that the storm had passed. Apparently no citation was issued for the incident itself, but only for the failure to report it. Now the operator would no doubt contend, as it appears from the Answer filed in the case, that he looks upon this violation as non-serious -- a mere failure to file some paperwork. I look upon the violation somewhat more seriously. Here there was an accident of a particularly serious nature. Without a sufficient deterrent penalty, it would be too easy for the operator to avoid a Mine Safety and Health Administration inspection and investigation of such incidents and it would just be too simple for the operator to cover up his misdeeds. Moreover, without the impetus of MSHA, it would be too easy for an operator to fail to take corrective action to avoid future accidents of a similar nature. This could very well lead to future fatalities and serious injuries. I therefore find that there must be a stronger disincentive than a mere $10 or $20 penalty for the

intentional or negligent failure of mine operators to notify MSHA in this regard. Under the circumstances, I believe a penalty of $175.00 is appropriate.

The second violation relating to this incident appears in Citation No. 2007397. That citation charges and the evidence shows that the mine operator did not have a report of his investigation of the unplanned explosion available for MSHA examination. The cited standard, 30 CFR Section 50.11(b), requires that such investigation must be completed by the operator after each accident at the mine and a copy must be submitted upon request to MSHA. The standard also sets forth the specifics that must be included in any such report. While the Mine Superintendent alleged that he had sent such a report to the mine office, apparently no such report was produced. Under the circumstances there is some question as to whether the proper report had indeed been completed. Accordingly, I find that a penalty of $175.00 is appropriate for the violation.

Moving now to the citations in Docket No. CENT 83-9, Citation No. 2007386 alleges a violation of the standard at 30 CFR Section 77.208(d). It reads as follows: "[f]ive compressed gas cylinders (1 acetylene, and 4 oxygen) were not secured in a safe manner in that they were laying on the ground near the cylinder storage rack near the mine office." The standard cited reads as follows: "[c]ompressed and liquid gas cylinders shall be secured in a safe manner."

According to the undisputed testimony of Inspector Boatright, upon the initiation of his regular inspection of the Heavener Mine No. 1, on November 1, 1982, and in fact as he was leaving the mine office after making his initial contact with the superintendent, he observed five compressed gas cylinders lying on the ground in front of the mine office. The cylinders were within view of anyone entering or leaving the office or parking adjacent to the office. The cylinders were exposed to vehicles parking in an area where pick-up trucks, mechanics trucks, and a lube truck regularly parked.

It was not unlikely therefore for a truck to strike one of those cylinders and to rupture the cylinder or its valve. Inspector Boatright pointed out that if such an event should occur, the cylinder could act like an uncontrolled rocket. The cylinders weighed approximately 70 to 80 pounds and could kill a person under those circumstances. Superintendent Payne explained that the cylinders had apparently been left by the delivery man earlier that morning, or the mechanic. I find that the superintendent should have seen the cylinders lying exposed on the ground right outside of his office, and that he was therefore negligent in failing to have them secured in a timely fashion. Under the circumstances, I find that the violation warrants a penalty of $175.00.

Citation No. 2227387 charges a violation of the standard at 30 CFR Section 77.1605(b), and alleges in particular that the Caterpillar rock haulage truck No. 915, operating at Pit 001-0 was not equipped with a parking brake in operating condition.

The cited standard requires that mobile equipment shall be equipped with adequate brakes and all trucks and front end loaders shall also be equipped with parking brakes. It is implicit in that standard that when the equipment is equipped with parking brakes, that the brakes must also be in operating condition.

It is undisputed in this case from the testimony of Inspector Boatright that the cited haulage truck did not have an operating parking brake. As pointed out by the inspector, ordinarily these trucks are not parked in areas where there would be an incline but are parked on level ground. However, there could very well be occasions where the truck might break down and have to be stopped and parked. Indeed, without an adequate parking brake, the truck could roll out of control and strike another vehicle or pedestrians in the area, and of course cause fatalities or serious injuries.

The superintendent stated that the brakes were checked as a matter of routine each morning and the equipment operator stated that he, as a matter of practice on that morning before working

at 7:00 a.m., had checked the brake and found it to be operating.

It is noted that this violation was discovered some several hours after the start of the shift at 7:00 a.m. that morning. While it is possible that the parking brake did become defective during that short period of time, I do not find the explanation to be credible. Accordingly, I find that a penalty of $175.00 is appropriate for this violation.

Citation No. 2007388 charges a violation of the standard at 30 CFR Section 77.1605(d). It appears from that citation that the same rock haulage truck that had a non-operating parking brake also did not have an operating audible warning device, i.e., a front horn.

The standard cited requires that mobile equipment shall be provided with audible warning devices. It is undisputed that this vehicle did not have a front horn, that is, an audible warning device, just as charged in the citation. The inspector pointed out that without such an audible warning device, the haulage truck could not warn other vehicles or pedestrians of its approach, and this indeed could foreseeably result in fatalities or serious injuries.

Again the equipment operator stated that when he had checked the equipment that morning before his shift at 7:00 a.m., all systems, presumably including the front horn, were in functioning condition. While again it is certainly possible that the horn as well as the parking brake could have become defective in the few hours between the beginning of the shift and the discovery of this defect by the inspector, I find the explanation to be lacking in credibility. Under the circumstances, I find that a penalty of $175.00 is appropriate for this violation.

Citation No. 2007389, charges another violation of the standard at 30 CFR Section 77.1605(b). It appears that the front end loader did not have an operating parking brake. As pointed out by the inspector, the hazard in this situation was similar to that involving the haulage truck. The machine operator in this case also said that he had checked the brake before the beginning of the

shift at 7:00 a.m., and that it was functioning at that time. The citation was issued at 10:20 that morning. The explanation is not credible. Under the circumstances, I find that a penalty of $175.00 is appropriate for the violation.

Citation No. 2007390, charges a violation of the standard at 30 CFR Section 48.29(a). In particular, the citation reads that "[t]raining certificates (MSHA Form 5000-23) for 14 employees were not available at the mine site for inspection. The mine superintendent (Jim Payne) stated that the 14 employees had been trained within the last year by Frank R. Pasteur."

The standard at Section 48.29(a) requires not only the individual miner's completion of MSHA approved training but also requires that training certificates for the miners who have completed the training must be available at the mine site for examination by MSHA, the miners, the miners' representatives, and State inspection agencies.

It turns out in this case that indeed the 14 miners for whom the certificates were not available at the mine office did, in fact, have the training but that apparently the contractor, Mr. Pasteur, had not forwarded the proper forms back to the mine office. Under the circumstances, I find that only a nominal penalty of $20.00 is appropriate for that particular violation.

ORDER

In accordance with the Decision in this case, Turner Brothers, Inc., is hereby ordered to pay civil penalties in the amount of $970 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge