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SOL (MSHA) V. AMHERST COAL
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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.

AMHERST COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 83-271
A.C. No. 46-01369-03516

MacGregor Cleaning Plant

DECISION

Appearances: William M. Connor, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner;
Edward W. Conch, Esq., Lexington, Kentucky,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for four alleged violations of the same mandatory safety standard--that contained in 30 C.F.R. 77.205(e). The Secretary takes the position that the violations were significant and substantial (although one was not so designated in the citation). Respondent denies that the alleged violations occurred, and asserts that the regulation involved is void and unenforceable because of vagueness. Pursuant to notice, the case was heard on the merits on May 1, 1984, in Charleston, West Virginia. David Francis Mulkey testified on behalf of Petitioner; Robert Doss and Ernest Marcun testified on behalf of Respondent. Both parties waived their rights to file posthearing briefs. Each argued its position on the record at the close of the hearing.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent hereto, Respondent was the owner and operator of the MacGregor Preparation Plant located in Logan County, West Virginia.

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2. Respondent is a wholly owned subsidiary of Diamond Shamrock Coal Company and produces approximately 1.5 million tons of coal annually. Respondent is a large operator.

3. The imposition of penalties in this proceeding will have no effect on Respondent's ability to continue in business.

4. Between October 15, 1982 and June 2, 1983, the subject mine had a history of 57 paid violations, 31 of which were designated as significant and substantial. Seventeen of these violations were of the safety standard in 30 C.F.R. 77.205 concerning travelways. This is a significant history of prior violations.

5. The conditions cited as violations in each of the citations involved herein were abated promptly and in good faith after the citations were issued.

6. On June 3, 1983, Federal Mine Safety Inspector David Mulkey issued a citation charging a violation of 30 C.F.R. 77.205(e) because Respondent failed to provide toe boards on the walkways in the bottom of the "foreign" silo.

7. On June 3, 1983, the walkways in the bottom of the "foreign" silo were not completely provided with toe boards. The foreign silo was a raw coal storage area for coal before it was taken to the preparation plant. Toe boards had been installed, apparently by the contractor who built the silo, on about half of the walkway.

8. The walkway area was in part open to the weather. Rain and snow could blow into the area. Coal dust was present in the area and on portions of the walkway.

9. The walkway was elevated about 6 feet above a cement floor. There was also a conveyor belt running under the walkway.

10. The walkway itself was constructed of expanded metal with holes in it. It was approximately 24 inches wide. It contained a hand rail or top rail approximately 42 inches from the walkway, and a midrail approximately 24 inches from the walkway.

11. The walkway was dry at the time the citation was issued. There were metal guards and feeder top covers lying

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against the handrail on part of the walkway at the time the citation was issued.

12. Toe boards were installed along the entire walkway to abate the citation. They were made of metal and were approximately 5 inches high.

13. On June 6, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. 77.205(a) because Respondent did not provide toeboards on the walkways of the pan line ramp in the rear area of the preparation plant.

14. On June 6, 1983, the walkways in the pan line ramp in the subject mine did not have toeboards. There was water and mud on parts of the walkways. The area was exposed to the weather. The walkway was elevated about 7 feet above the surface. There were no work areas or travelways beneath this walkway. There was a mid rail about 16 inches from the walkway and a hand rail about 30 inches from the walkway.

15. Toe boards were installed along the walkway to abate the citation. They were metal and were approximately 4 inches high.

16. On June 6, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. 77.205(e) because toeboards were not provided in certain areas of the internal part of the preparation plant including the control room, the platform around the raw coal conveyor, the top or roof of the preparation plant, the top of the slate silo, and the No. 2 cut slate belt platform and walkways.

17. On June 6, 1983, toeboards were not present on the walkways described in the citation referred to in Finding of Fact No. 16. (The top or roof of the preparation plant was not designed as a walkway but was used as such). Tools and buckets were present on the control room platform which was about 10 feet above the next level. It was not exposed to the weather. There was a midrail 23 inches from the platform floor and a handrail 41 inches from the floor. There was grease on the platform of the raw coal conveyor. This platform was 52 inches high. The top of the preparation plant was exposed to the weather. There was scrap metal lying around what was used as a walkway. Its height varied from 2 to 60 feet. There was a safety net 8 to 10 feet wide along the edge of the plant under the belt line. The net did not extend all around the plant, however. There was a bottom railing 16 inches from the floor, a second rail 22 inches from the floor and a top rail approximately

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10 inches above that. The top of the slate silo was exposed to the weather, and there were pieces of perforated metal lying on the walkway. It was about 30 feet high. There was a midrail 19 inches from the floor and a handrail 38 inches from the floor. The cut slate belt platform had pieces of slate on the walkway. It was 49 inches high. There was a midrail 19 inches from the floor and a handrail 40 inches from the floor.

18. Toeboards were installed in the areas cited to abate the violation. They were constructed of 4 inch metal.

19. On June 7, 1983, Inspector Mulkey issued a citation charging a violation of 30 C.F.R. 77.205(e) because toeboards were not provided in the entrance platform by the front door of the preparation plant and throughout the entrance level of the plant.

20. On June 7, 1983, toeboards were not present in the entrance platform by the front door of the preparation plant and throughout the entrance level of the plant. The entrance platform was open to the weather. The entrance level of the plant was not exposed to the weather. This area contained steel plates and perforated metal piled against the outside of the plant, and in one area screens were lying against the railing. The entrance platform was approximately 19 feet high. The walkways had midrails 23 inches from the floor, and handrails 39 inches from the floor. The platforms were constructed of metal and concrete. The entrance level was approximately 49 inches above the floor below. There was a mid rail 19 inches from the floor and a top rail 42 inches from the floor.

21. Toeboards were installed to abate the citation. They were constructed of 4 inch metal. Almost 3,000 linear feet of the boards were installed to abate all the citations referred to in this decision.

REGULATION

30 C.F.R. 77.205(e) provides as follows: "Cross-overs, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided."

ISSUES

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1. Whether the regulatory requirement that toeboards shall be provided where necessary is impermissibly vague?

2. If it is not, whether the evidence shows that toeboards were necessary in the areas cited in this proceeding?

3. If violations were shown, what is the appropriate penalty for each?

CONCLUSIONS OF LAW

Vagueness

The Review Commission has interpreted the mandatory safety standard in 30 C.F.R. 56.11-2 which is identical with that contained in 30 C.F.R. 77.205(e). *Secretary v. El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (1981). It held that the toe board provision was designed to protect persons working below the elevated walkways as well as those using the walkways themselves. *Id.* at 39. The decision did not indicate that the standard was impermissibly vague because of the general terms, "where necessary." See also *Secretary v. UNC Mining & Milling*, 5 FMSHRC 1164 (1983) (ALJ). I conclude that a reasonably prudent person familiar with the mining industry should be able to determine whether toeboards were "necessary." Therefore, the standard was not unconstitutionally vague.

Violations

The inspector testified that he cited the absence of toeboards on elevated walkways where (1) there was a slipping or tripping hazard and (2) the walkway was used by employees with some degree of frequency. He found slipping hazards to exist where the walkway was open to the weather and thus subject to snow, rain and ice or where there was oil, grease, or coal dust on the way itself. He found tripping hazards to exist where there were objects present along the walkway over which an employee could trip or stumble. Whether toeboards are necessary in such instances is a matter of judgment. In each case cited, there were handrails and midrails present, which reduced the likelihood of slipping off the walkway. Nevertheless, I accept the inspector's judgment and conclude that in each instance cited, toeboards were necessary. The violations charged were established by a preponderance of the evidence. I distinguish the case of *Secretary v. Big Ten Corporation*, 2 FMSHRC 2266 (1980) (ALJ), in which the Judge found toeboards unnecessary where the walkway extended 6 inches beyond the rails. Such is not the case here.

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Significant and Substantial

Three of the four citations involved in this case were designated as significant and substantial. Much of the testimony and argument of counsel was devoted to the propriety of these designations. However, the issue was not raised in the pleadings or the prehearing submissions. I conclude that the issue is not before me and I do not rule on the question whether the violations were of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

Penalties

The seriousness of each of the violations is diminished by the fact that hand rails and mid rails were installed on all the walkways in question reducing the likelihood that an employee could slip or fall through to the level below. Should he do so, however, serious injuries could result. The inspector deemed Respondent's negligence to be low, and I concur in this determination, since MSHA inspectors had been through the areas many times previously and had not cited the conditions.

Considering the criteria in section 110(i) of the Act, I conclude that appropriate penalties for the violations are as follows:

1. Citation No. 2141934 involved the foreign silo walkways. The seriousness of this violation is increased because three slipping or tripping factors were present: The area was open to the weather (though it was dry at the time the citation was issued); coal dust was present on portions of the walkways and objects were present on the walkways. The walkways were elevated 6 feet above the surface below. The midrail was 24 inches high. I conclude that an appropriate penalty for this violation is \$75.

2. Citation No. 2141938 involved the pan line ramp walkway. Water and mud were on the walkway which was open to the weather. The walkway was elevated 7 feet above the surface below. However, the seriousness of the violation is diminished by the fact that the midrail was only 16 inches above the walkway, making the possibility of slipping off the walkway unlikely. I conclude that an appropriate penalty for this violation is \$40.

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3. Citation No. 2141939 involved many areas around the control room platform, the raw coal conveyor, the roof of the preparation plant, the slate silo and the cut slate belt platform. Some of these areas were exposed to the weather; there was grease on some of the areas; the elevations varied from 2 feet to 60 feet. The bottom rail height varied from 16 inches to 23 inches. Because of the number of areas involved, I conclude that an appropriate penalty for this violation is \$100.

4. Citation No. 2142184 involved the entrance platform and throughout the entrance level. Part of this area was open to the weather and objects were present on the walkways. The elevation varied from 49 inches to 19 feet. The midrails varied from 19 inches to 23 inches. I conclude that an appropriate penalty for this violation is \$75.

ORDER

Based on the above Findings of Fact and Conclusions of Law, IT IS ORDERED that within 30 days of the date of this decision, Respondent pay the following civil penalties for the violations found herein to have occurred.

CITATION	PENALTY
2141934	\$ 75
2141938	40
2141939	100
2142184	75
Total	\$ 290

James A. Broderick
Administrative Law Judge