

CCASE:
ENERGY COAL V. SOL (MSHA)
DDATE:
19840824
TTEXT:

~2050

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

ENERGY COAL INCOME
PARTNERSHIP, 1981-1,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. KENT 83-30-R
Citation No. 2053481; 11/4/82

Docket No. KENT 83-31-R
Citation No. 2004021; 10/22/82

Docket No. KENT 83-32-R
Citation No. 2004022; 10/22/82

Docket No. KENT 83-33-R
Order No. 2004023; 10/22/82

Docket No. KENT 83-34-R
Citation No. 2053293; 10/22/82

Docket No. KENT 83-35-R
Citation No. 2053294; 10/22/82

Docket No. KENT 83-36-R
Citation No. 2053295; 10/22/82

Docket No. KENT 83-37-R
Citation No. 2053296; 10/22/82

No. 15 Surface Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

ENERGY COAL INCOME
PARTNERSHIP, 1981-1,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 83-153
A.C. No. 15-13382-03505

Docket No. KENT 83-154
A.C. No. 15-13382-03504

Docket No. KENT 83-169
A.C. No. 15-13382-03506

No. 15 Surface Mine

SETTLEMENT DECISION

Before: Judge Melick

These consolidated cases are before me upon petitions for
assessment of civil penalty and contests filed under section

~2051

105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). On October 20, 1983, the parties submitted a joint proposal for settlement of the captioned civil penalty proceedings and a request for withdrawal of all associated contest proceedings. On November 28, 1983, the undersigned requested additional information deemed necessary for consideration of the settlement motion. Information was submitted on December 2, 1983, December 5, 1983, May 3, 1984 and, subsequent to teleconference hearings on the motion on May 30, 1984, on June 26, 1984, July 5, 1984, and July 12, 1984. The motion for settlement was amended on July 5, 1984, in that the mine operator indicated a willingness to pay the full amount of penalties as originally proposed by the Secretary rather than the reduced amounts first suggested in the motion for settlement.

These cases arise from the death of bulldozer operator Bernard Farrar on October 20, 1982, at the No. 15 Surface Mine of the Energy Coal Income Partnership in Davella, Kentucky. His death occurred when the outer portion of the bench-roadway over the highwall collapsed under the weight of the bulldozer he was operating. The deceased was thrown out and crushed by the bulldozer as it rolled over. The investigation revealed that the bulldozer's seat belts had previously been removed.

The evidence shows that earlier on the day of the incident the day shift bulldozer operator had been working on the south side of the surface operation. At the completion of his shift as he approached the highwall catch-bench roadway from the south side to return to the portal he observed that part of the highwall berm had collapsed. He thereupon built a "barricade" of dirt with his bulldozer as a warning to persons travelling south to north. The operator then constructed a new roadway through the pit.

The day shift supervisor on the south side, Manuel Ward, shortly thereafter travelled towards the catch bench and saw the high wall erosion, the barricade, and the new roadway. While he decided to drive through the pit over the new road he took no action to barricade or close off the other end of the road and did not report the dangerous conditions. Shortly before 4 p.m. mine superintendent Mike Cantrell and second shift foreman Jarvis Hackworth travelled over the subject roadway. Cantrell saw the slip starting on the outer edge of the roadway. He said that he told Hackworth not to use the road but Cantrell nevertheless continued to use the road himself and, indeed, drove right over the dirt barrier that had been erected by the day shift bulldozer operator at the south end. Hackworth also continued to use the subject road and later transported the deceased and another miner over the same road.

~2052

There were no entries in the on-shift examination books reflecting any unstable or hazardous conditions on the bench roadway and, indeed, the only entries indicate that the road and highwall conditions were "good." The evidence also shows that aside from the efforts of the day shift bulldozer operator to erect a dirt barricade at one entrance to the roadway the deteriorating high wall and roadway conditions were not properly reported, corrected, nor barricaded. Moreover, while it appears that the mine superintendent expressed some concern about the continued use of the subject roadway because of its deteriorating condition, he and his foreman continued to use that roadway and indeed the victim himself was transported across that roadway by the foreman shortly before the fatal accident. The message reasonably inferred under the circumstances was that management was not seriously concerned with the dangerous road condition and there was no immediate need to stop using it.

Citation No. 2004021 alleges a violation of the standard at 30 CFR 77.1713 for failing to record or correct the unstable condition of the catch-bench roadway and in failing to properly barricade the roadway to prevent access. A civil penalty of \$10,000 was initially proposed by the Secretary and a reduction to \$5,000 was proposed in the initial motion for settlement. The representations in that motion in support of the penalty reduction are not however, supported by the investigative report and statements of witnesses. Indeed in material respects the representations are in direct conflict with the investigative report. The report and the evidence in support thereof were available at the time the penalty of \$10,000 was assessed and, according to Special MSHA Investigator John S. South, no new evidence has since been developed concerning the violations.

Manuel Ward, the day shift foreman, admittedly had seen the dangerous conditions of the highwall road toward the end of his shift around 3:30 of the afternoon at issue and observed the dirt barricade erected by the day shift bulldozer operator at the south end of the road. Ward nevertheless failed to report the unstable condition and failed to see that the north end of the roadway was barricaded. In light of his clear knowledge that the road was unsafe to travel, I find his failure to report and correct the road condition to have been an omission of gross negligence.

According to the night shift foreman, Jarvis Hackworth, at the beginning of his shift at 4 p.m., Mine Superintendent Mike Cantrell told him "we're going to have to quit using this road" referring to the subject catch-bench roadway. Even assuming, arguendo, that such a statement had been made it apparently was made with no intent of immediate enforcement since Hackworth immediately thereafter drove his pick-up truck over that very same road with the deceased as one

~2053

of his passengers. Hackworth conceded moreover that even the barricade erected by the day shift bulldozer operator at the south end of the road was not sufficient to block the road and that he twice drove over the barricade with his pick-up truck--once with the deceased as his passenger. The road had still not been properly barricaded nor reported by 6:45 p.m. when the fatality occurred.

Mine Superintendent Mike Cantrell stated that during the course of the day shift and between shifts he had travelled over the subject roadway several times. Passing over the road around 3:30 that afternoon he saw that the berm had disappeared and he concluded at that point that the road was hazardous. He thought he had told night shift foreman Jarvis Hackworth that the road was "slipping off or breaking off" but did not instruct Hackworth to barricade or close the road off.

Within this framework of evidence it is clear that the fatal accident that is the subject of this proceeding was the result of gross negligence. Management personnel concede that the condition was hazardous and the seriousness of the hazard is evident from the accident that did in fact occur.

As further justification for the proposed penalty reduction the mine operator presented information concerning its financial condition including financial statements and the history of the petition for reorganization under Chapter 11 of the Bankruptcy Act. I have taken this information into consideration. In light of the high gravity and gross negligence associated with this fatal accident and considering the history of violations and size of the mine operator involved, it is clear that a penalty of \$10,000 would ordinarily be warranted. Considering however, the financial condition of the operator and that the facts underlying this violation are essentially the same as those supporting other violations and penalties in these cases, I believe a penalty of \$7,500 is appropriate.

Citations No. 2053293 and 2053294 allege violations of standards at 30 C.F.R. 77.1701(i) and 30 C.F.R. 77.403 respectively, and primarily concern the failure of the mine operator to have provided operative seat belts on the subject bulldozer. The evidence shows that the buckle or fastening device had been removed thus rendering the belts inoperative. The investigators concluded that had the deceased been wearing a seat belt he would not have been killed. The mine operator has agreed to pay the initially proposed penalties in full and considering the criteria under section 110(i) of the Act, I find the penalties to be appropriate.

~2054

Citation No. 2053295 alleges a violation of the standard at 30 C.F.R. 77.1606(c) and charges more particularly that the left brake on the subject bulldozer was defective causing a sharp left turn upon application. The investigators could not however, conclude that the cited defect either contributed or did not contribute to the fatal accident. The mine operator has agreed to pay the initially proposed penalty in full and considering the criteria under section 110(i) of the Act I feel that the proposed penalty is justified.

Citation No. 2053296 alleges a violation of the standard at 30 C.F.R. 77.1001 and charges that loose hazardous material had not been stripped for a safe distance from the top of the high wall and that loose and unconsolidated material had not been sloped to an angle of repose. The mine operator has agreed to pay the proposed penalty in full. The underlying facts supporting this violation are the same as those supporting the violation in Citation No. 2004021 and for which I have assessed a penalty of \$7,500. To the extent that the factual basis for the violations is similar it would be inappropriate to assess another penalty of the same magnitude. Under the circumstances I find that the proposed penalty is appropriate.

ORDER

Energy Coal Income Partnership (1981-1) is hereby ORDERED to pay the following civil penalties within 30 days from the date of this decision: Citation No. 2004021--\$7,500, Citation No. 2053293--\$227, Citation No. 2053294--\$2,000, Citation No. 2053295--\$227, and Citation No. 2053296--\$227. The requests to withdraw Contest Proceedings, Docket Nos. KENT 83-30-R through KENT 83-37-R are granted and the cases are dismissed.

Gary Melick
Assistant Chief Administrative Law Judge