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SOL (MSHA) V. MARTY CORP.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 84-177 A.C. No. 15-10365-03509
v.	Marty Mine Nos. 16 and 17
MARTY CORPORATION, RESPONDENT	

DECISION

Appearances: William Taylor, Esq., and Joseph Luckette, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Russell M. Large, Esq., Marty Corporation, Coburn, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. the "Act" for three violations of regulatory standards. The general issues before me are whether the Marty Corporation has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2194200 alleges a violation of the standard at 30 C.F.R. 77.1001 and states as follows:

> A tree approximately 65 ft. in length, and approximately 27 to 30 inches in diameter, at the base, was observed, standing on the top edge of an approximately 12 ft. high, highwall. The wall [sic] was, observed working under the tree in question. An employee was observed working on a Michigan 475B front end loader, adjacent to this area. The area in question was located adjacent to the No. 4 pit of the 002 section. The employee and the front end loader were removed from this area. When the superintendent, Robert Christian, was notified of the violation, he stated that he was taking

> corrective action, to have the tree in question removed, but no action was being taken to barracade [sic] or post this area. Robert Christian did stop all work adjacent to this area and started action to remove the tree in question, approximately 15 min. after notification of the violation.

The citation was amended on January 27, 1984, to add the following allegations:

> The employee left the area, and the front end loader was removed from this area, before the foreman was notified of the violation. When the superintendent, Robert Christian, was notified of the violation, he stated that he had made an attempt to get a chain saw a few days prior to this date. He stated that he was taking action to have the tree in question removed. No action had been taken to barracade [sic] or post this area. Robert Christian did stop all work adjacent to this area, and started action to remove the tree in question, approximately 15 min. after notification of the violation.

The regulatory standard at 30 C.F.R. 77.1001 reads as follows:

> Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated materials shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

The essential facts are not in substantial dispute. It is primarily the interpretation to be given those facts that is at issue. MSHA Inspector Alvin Morgan was at the Marty Mine on January 19, 1984, for a regular inspection when he observed a number of trees on top of the highwall. According to Morgan the trees were not then a hazard but would become hazardous as the highwall deteriorated. Mine Superintendent Robert Christian agreed at that time to remove the trees.

Morgan continued his inspection at the Marty Mine on January 25, 1984, and observed a loader situated beneath one of the aforementioned trees. The tree was approximately 65 feet in height and about 27 inches to 30 inches in diameter at the base. Tree roots were exposed and the highwall had deteriorated. The tree was not restrained and no barricades were present. Particularly inasmuch as the mechanic was then working on the loader

beneath the tree, Morgan concluded that a "significant and substantial" hazard existed. The mechanic was working within range of the tree if it should have fallen and Morgan concluded that serious injuries were reasonably likely from branches striking the mechanic.

According to Mine Superintendent Christian, after Inspector Morgan had warned him about the trees on the highwall on January 19, he had directed his employees to stay away from the noted area and had all but one of the trees removed. Since they had been unable to bring down the remaining tree by use of a winch, he concluded that it did not present a hazard. No evidence was presented, however, as to when this effort was made and Christian acknowledged that the highwall was subject to freezing and thawing and therefore was unstable. It also appears that the mechanic working on the loader had not been warned of the danger because he services the mine only once a week and appeared unexpectedly. The citation was abated within several hours after Christian obtained a chain saw and had the tree cut down.

I find the inspector's assessment of the hazard to be the more credible under the circumstances. It is not disputed that the highwall was in a deteriorating condition as a result of daily freezing and thawing, that the roots of the tree were partially exposed and that the tree was within range of employees working in the area. In reaching this conclusion I have considered the mine superintendent's testimony that he had been unsuccessful in bringing the tree down with a cable and winch and the evidence that the mechanic was working on the side of the loader farthest from the highwall. However, since the removal efforts could have been made as many as seven days earlier, the testimony has little bearing on the stability of the tree on the date of the citation. Moreover while the mechanic may have been partially protected by the loader he was working on it may reasonably be inferred that he was also unprotected at times. Under the circumstances, I conclude that the violation was indeed "significant and substantial" Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). I further find that the superintendent was negligent in failing to have the hazard removed or have the area barricaded to prevent employee access. Indeed he was able to locate a chain saw and remove the tree within 15 minutes after the citation.

Order No. 2197746 charges a violation of the regulatory standard at 30 C.F.R. 77.404(a) and alleges as follows:

> The operator has failed to provide a safe means of access to or from the cab of the Cat. 988B front end loader, Serial No. 50W2406, cleaning coal in the No. 2

> pit of the 002 section. The loader operator has no safe means to exit the front end loader in case of an emergency, in that the left side boarding ladder was missing. The door to exit the loader cab is located on the left side of the cab. When the Superintendent, Robert Christian, was notified of the violation, he removed the front end loader from service. During the discussion with the Superintendent, he states the boarding ladder had been removed several days prior to this date. The highwall in the No. 2 pit of the 002 section varied in height from approximately 40 ft. to approximately 50 ft. in height.

The cited standard requires in relevant part that mobile machinery and equipment be maintained in safe operating condition and that machinery or equipment in an unsafe condition be removed from service immediately.

There is no dispute that on February 1, 1984, the cited loader was missing its access ladder on the left side, that the only exit door from the cab was on the left side and that the cab was located about 10 feet above ground. According to Inspector Morgan turbo fires from oil leaks on loaders such as the one at bar were common and indeed "fairly frequent." Without the boarding ladder on the left side a machine operator exiting in an emergency would, according to Morgan, find it necessary to jump the 10 feet to the ground thereby subjecting himself to permanently disabling fractures. This testimony is not disputed and it supports a finding that the violation was "significant and substantial" and a serious hazard. Inasmuch as the mine superintendent knew that the ladder was missing and allowed the loader to continue operating, I find that the violation was caused by the mine operator's negligence. The violation was abated within 1 1/2 hours when a ladder was removed from another loader and bolted onto the cited loader. It is not disputed that there had been prior violations for missing boarding ladders at the Marty Mine.

The third order at issue, Order No. 2197797, alleges a violation of the regulatory standard at 30 C.F.R. 77.1103(d). The order reads as follows:

> Several bales of straw was [sic] observed, stored under a mobile trailer, that contained two flammable liquid storage tanks, approximately 2000 gallons capacity each. The mobile trailer was identified as a flammable liquid storage area with two signs on the right side of the trailer and one sign on the front which read (No Smoking) (Flammable) (Danger no smoking or open flame within 50 feet). The mobile trailer in question was located at the oil storage area of the

001 section. Tire tracks adjacent to the mobile trailer indicated this area was traveled frequently.

The cited standard reads as follows: "Areas surrounding flammable liquid storage tanks and electric substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper, for at least 25 feet in all directions."

Mine Superintendent Robert Christian aclnowledged that the bales of straw were in fact located beneath the cited trailer but alleged that he was unaware at that time that they had been placed under the trailer. He alleged at hearing that an independent contractor responsible for land reclamation had placed them there without his knowledge. While also conceding that two oil tanks were in fact on the trailer as cited, he claimed that those tanks were empty.

Robert Brahnam, an engineer for the Marty Corporation, testified that he observed the straw bales after they were cited. It was raining at the time and when he removed the bales they were "thoroughly soaked." According to Brahnam the oil tanks on the trailer were empty and had contained only lubricating oil.

Inspector Morgan testified that the mine superintendent had told him at the time of the citation that the storage tanks had contained diesel fuel and were "almost" empty. Morgan explained that even if the tanks had in fact been empty there would have been an even greater danger of explosion from residual fumes than from a full tank.

In light of the undisputed evidence that the bales of straw were "thoroughly soaked," however, it appears that the material may not have been combustible as required by the cited standard. Accordingly the order must be vacated.

In determining the amount of penalties warranted in this case, I am also considering that the mine operator is relatively small in size and has only a moderate number of violations preceding the violations at issue. The cited conditions were abated in a timely and good faith manner. At hearing the operator presented evidence concerning its financial status to the extent that it was required by its creditors to pay in cash. The evidence is not sufficient, however, to support a finding that the penalties imposed herein would affect its ability to stay in business. Under the circumstances, I am assessing the following penalties: Citation No. 2194200 - $250, Order No. 2197746 - $150. Order No. 2197797 is vacated.

ORDER

Order No. 2197797 is hereby vacated. The Marty Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2194200 - $250, Order No. 2197746 - $150.

Gary Melick
Assistant Chief Administrative Law Judge