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SOL (MSHA) V. LOST MOUNTAIN MINING
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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. KENT 84-162 A.C. No. 15-05325-03504
v.	No. 2 Surface Mine
LOST MOUNTAIN MINING, INC., RESPONDENT	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Lloyd R. Edens, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Steffey

Pursuant to an order providing for hearing issued October 24, 1984, a hearing in the above-entitled proceeding was held on December 12, 1984, in Hazard, Kentucky, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence, I rendered a bench decision, the substance of which is reproduced below (Tr. 158-169):

This proceeding involves a proposal for assessment of civil penalty, seeking to have a penalty assessed for an alleged violation of 30 C.F.R. 77.1001. The evidence shows the following findings of fact should be made, which I shall list in enumerated paragraphs.

1. Inspector Harold Kouns went to Lost Mountain Mining, Inc.'s No. 2 Surface Mine on January 31, 1984, and he was accompanied by his supervisor, Charles Conatser. Both of the individuals were concerned about the highwall in the No. 2 Pit area. Inspector Kouns wrote a citation, No. 2196562, in which he stated that loose hazardous materials had not been stripped for a safe distance from the highwall for approximately 250 feet in distance. The highwall was approximately 60 feet in height, and the loose material existed while coal was being removed. The loose hazardous material was taken

down to the inspector's satisfaction by the dragging of a dragline chain across the face of the highwall, and the inspector terminated the citation 2 hours after it was issued, by stating that the loose hazardous materials had been cleaned off of the highwall. The inspector was concerned about both loose rocks, and an overhanging of materials about the middle on the right side of the area where the end loading machine was piling up coal and loading trucks. It was the inspector's view that the rocks, which he believed were unconsolidated, could be shaken loose by the drilling that was taking place in the area. He testified about experiences which he had in which rocks had fallen off of highwalls and bounced off of tires of equipment and gone through windshields of end loaders and injured the operator. Consequently, he believed that the violation was serious, and he indicated in his citation that he believed that the operator's negligence was moderate, and that if a rock had fallen, the result might have been a permanent disabling injury.

2. Russel Draughn is respondent's safety and loss control employee. He testified that he came to the pit area which had been alleged to have an unsafe highwall, and he stated that he examined the highwall, that he saw no loose material which he felt would have fallen, that he observed no spalling of materials at the base of the highwall, and that he did not think that there was any ground for Inspector Kouns to write a citation.

3. Michael Ivey is respondent's production superintendent. He is an engineer, and has worked as an engineer around coal mines for about 9 years, and he has been the production superintendent for about 1-1/2 years. He had inspected the highwall in question on the same morning that the citation was issued, at about 6:00 a.m., at which time the artificial lighting was sufficient to enable him to make a satisfactory examination, and he felt that there was no loose material on the highwall. He described in some detail the method used by respondent to construct highwalls. He presented as Exhibit B a photograph showing the highwall before any materials were dragged across it. He also presented as Exhibits C and D pictures of a 50-ton bucket which is dragged across the highwall to make it safe by removing all loose material. Materials which are not torn off by the bucket are packed down by the 50-ton bucket. He additionally presented as Exhibits H and I two photographs showing the highwall areas after the 30-foot chains were dragged across them, and it was his opinion that the materials on the highwall were loosened by the dragging of the chain, and that if anything, the wall was less safe after the dragging of the chain than it was before.

4. A person examining Exhibits B, H, and I would be led to the same conclusion that Mr. Ivey reached, because Exhibit B is photographed at an angle which does not enable one to see with great detail the exact makeup of the material on the highwall, whereas, Exhibits H and I are in a little more direct focus, and they do tend to show the highwall with greater clarity than Exhibit B does.

5. Larry Miller is a dragline operator, and he worked in the No. 2 pit area on January 31, but he did not actually operate the dragline on that day because he was involved in doing some repairs on the dragline, but he was present. He is not sure that he personally ran the dragline bucket over that particular highwall, but he saw nothing about the highwall shown in Exhibit B which was different from the usual highwall that he constructed. It was his opinion that the highwall was not hazardous.

6. Harold Perkins is an end loader operator for respondent, and he has been doing that kind of work for 6 years. He stated that on January 31 he had been loading trucks for about 2-1/2 hours before the inspectors showed up, and he did not think that the highwall was unsafe. He said if he had thought it was unsafe he would have asked his supervisor to correct any problem before he worked under it. He denied that he had ever told the inspector that he thought that the highwall was unsafe, or that he appreciated the inspector's issuing the citation about the highwall.

7. Tobe Lawson is the foreman who was in charge of the pit area on January 31. He had been making an inspection, along with Michael Ivey, before the citation was written, and he did not think that the highwall had any hazardous loose materials on it. Both end loaders had stopped operating after the inspector issued the citation and he wanted to get the citation abated as soon as possible. Therefore, he attached the chain, which weighs about a ton, to the dozer's blade and dragged it back and forth across the face of the highwall until the inspector was satisfied that the loose materials had been removed.

8. Charles Conatser, who is an MSHA inspector supervisor, testified in rebuttal that on the morning of January 31, 1984, he saw the highwall as soon as he arrived in the pit area, and that he felt there were overhanging materials along the top of the highwall which were hazardous. He also saw pieces of rock which he felt were loose. They were 8 inches wide and 12 inches long, and he believed that the highwall was a hazardous area. He stated that he did not suggest to Inspector Kouns that the citation be issued. As an inspector supervisor, he deliberately did not give his own opinion about the highwall until the inspector had issued the citation. He stated, however, that if the inspector had not issued the

citation for the highwall, he would have issued a citation. It was also Conatser's opinion that the chain had improved the conditions on the highwall and had removed the loose materials. He stated that although Exhibit I still shows an overhang at the top, that overhang, in his opinion, is less hazardous than it was before the dragging was done. He agreed with Inspector Kouns that the hazardous materials had been removed and that the citation was properly terminated.

9. Inspector Kouns was also recalled and he specifically indicated on Exhibit B an area revealing an overhang which he believed was hazardous. He also pointed to a place where he felt the loose rocks existed. He said that he would issue a citation again if he were to see the same conditions in the future.

I conclude that the above findings correctly summarize the evidence which has been presented. Section 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 material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection."

The first matter to be considered in a penalty case is whether a violation occurred. The evidence presented in this case by respondent causes me to feel that there were good grounds for respondent to believe that no violation existed. When I examined Exhibits B, H, and I, it seemed to me that Exhibit B, which was taken before any corrective measures were performed, would be a highwall which seems to be relatively nonhazardous. If I had been there and only had the view which I can see from Exhibit B, I would be inclined to agree with respondent's witnesses that the highwall is not so hazardous as to be in violation of section 77.1001.

On the other hand, when Inspector Kouns pointed out the areas on Exhibit B about which he was concerned, there is no doubt that there is an overhang at that area. There are places in that same area down farther on the wall which appear to contain rocks which possibly could fall, and which may have been loose. The Seventh Circuit held in Old Ben Coal Corp. v. Interior Bd of Mine Operations Appeals, 523 F.2d 25, 31 (1975), that inspectors should be sustained, unless they clearly abuse their discretion, because their concern is for the safety of the miners.

While I have no criticism of respondent for the matter, it is a fact that companies are in business to make a profit, and they naturally have a somewhat different view from that of an inspector who is there solely for safety, whereas they are there to produce coal and keep an eye on safety at the

same time. It is possible that at times their judgment is different from that of the inspector, but I believe that this case presents one of those situations in which the company has presented convincing evidence that no violation occurred. On the other hand, I have to take into consideration that the inspector was there, and he did look at this highwall under better conditions for evaluating safety than I have from a single photograph. Consequently, I am going to sustain the allegation that there was a violation of section 77.1001. I am finding that a violation occurred with the additional support that the inspector's opinion has also been confirmed by his supervisor who was present, and who did not attempt to influence him before he had come to the conclusion that a violation existed.

When it comes to the criteria that a judge is required to consider in assessing a penalty, which of course he has to do if he finds that a violation occurred, the parties have entered into certain stipulations with respect to four of the criteria, which are very helpful. Those stipulations have been received in evidence as Exhibit 4. They agree that respondent is subject to the jurisdiction of the Commission. They state that in 1983 respondent produced 501,187 tons of coal from the No. 2 Surface Mine, and that Lost Mountain, the respondent in this proceeding, is a subsidiary of Mountain Coals, Incorporated, and that the total company operations resulted in an annual tonnage of 1,414,262 tons. Those statistics support a conclusion that respondent is a large operator. To the extent that penalties are based on the criterion of the size of respondent's business, a penalty in an upper range of magnitude would be appropriate.

As to respondent's history of previous violations the stipulations indicate that respondent has not previously been cited for a violation of section 77.1001 within the last 24 months. Consequently, no portion of the penalty should be based on the criterion of respondent's history of previous violations.

The stipulations also state that assessment of the penalty of $168 proposed by the Secretary in his proposal for assessment of civil penalty would not affect respondent's ability to continue in business.

It has been stipulated that respondent abated the violation in a timely manner. Consequently, no portion of the penalty should be assessed because of respondent's failure to show a good faith effort to achieve rapid compliance.

The fifth criterion of negligence must be evaluated in light of all the evidence which I have summarized in my findings. The Commission held in Penn Allegh Coal Co., 4 FMSHRC

1224 (1982), that a judge is not bound by the inspectors' or the witnesses' opinions as to negligence, as it is his responsibility to draw legal conclusions from the evidence considered as a whole. I believe that in view of the abundant amount of evidence which the respondent has presented in this case that we have in this instance a true difference of opinion on behalf of management and its employees, as opposed to the inspectors, and I believe that that evidence supports a finding that respondent was not negligent in the occurrence of the violation.

The final criterion to be considered is gravity. The Commission has discussed the fact that an inspector may note on a citation issued under section 104(a) that a violation, in the inspector's opinion, is significant and substantial, as that term is used in section 104(d)(1) of the Act, specifically, that the violation is of such a nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard. The Commission defined the term "significant and substantial" in National Gypsum Co., 3 FMSHRC 822 (1981) by stating at page 825:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

Thereafter, the Commission in Consolidation Coal Co., 6 FMSHRC 189 (1984), and Mathies Coal Co., 6 FMSHRC 1 (1984), applied its National Gypsum definition of significant and substantial in four steps. Step No. 1 is whether a violation occurred, and I have already found that a violation occurred. Step No. 2 is whether the violation contributed a measure of danger to a discrete safety hazard. The evidence in this case is so equivocal on whether there was a specific hazard that I am of the opinion that step No. 2 has not been proven when one considers the entire record with respect to it. It is possible that a rock might have fallen and might have injured someone. But it is more likely than not that this coal would have been cleaned up and no rock would have fallen and no one would have been injured.

The third step is whether there is a reasonable likelihood that the hazard contributed to would result in injury. That consideration also has to be evaluated in light of all the facts, and I am not convinced that the record supports a finding that the hazard, if any, would have contributed to or resulted in an injury.

The fourth step in evaluation is whether there is a reasonable likelihood that the injury in question would be of a reasonably serious nature. The inspector did present some testimony to the effect that rocks have been known to fall down and hit tires on end loaders and bounce through the windshield and injure people. But first of all, you have to have a reasonable likelihood that that is going to happen, and in light of respondent's evidence, I think I must recognize the fact that there is an honest difference of opinion here, and the entire record does not convince me that there was a reasonable likelihood that an injury would occur of a reasonably serious nature in this instance. Consequently, I find that the inspector's citation should be modified to eliminate the designation of "significant and substantial".

Since I have found that a violation occurred, and since the Act requires that a penalty be assessed for any violation (Tazco, Inc., 3 FMSHRC 1895 (1981)), regardless of its gravity, I think that a penalty in this instance of $20 would be appropriate in view of the fact that the violation was nonserious and that there was no negligence associated with its occurrence.

WHEREFORE, it is ordered:

(A) Citation No. 2196562 issued January 31, 1984, is modified to delete therefrom the designation of "significant and substantial".

(B) Lost Mountain Mining, Inc., within 30 days from the date of this decision, shall pay a civil penalty of $20.00 for the violation of 30 C.F.R. 77.1001 alleged in Citation No. 2196562 dated January 31, 1984.

Richard C. Steffey
Administrative Law Judge