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SOL (MSHA) v. CANNELTON INDUSTRIES
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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. WEVA 85-101 A.C. No. 46-05992-03510
v.	
CANNELTON INDUSTRIES, INC., RESPONDENT	Indian Creek No. 2 Preparation Plant

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
William C. Miller II, Esq., Cannelton Industries, Inc., Charleston, West Virginia, for Respondent.

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for one violation of the regulatory standard at 30 C.F.R. 77.1710(g). The general issues before me are whether the cited violation was 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 violation was "significant and substantial", and the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.(FOOTNOTE.1)

Citation number 2147345, issued under section 104(d)(1) of the Act, alleges a violation of the standard at 30 C.F.R. 77.1710(g) and reads as follows:

> Two men were observed working in an unattenable [sic] position sealing a leak in an overhead pipe. One man was standing on top of the sieve bend structure leaning forward up and out applying compound to a ruptured pipe, about 4-8 feet higher than the height of the sieve bend structure. The height of sieve bend structure is about 15 feet above floor level. A fall from said position could result in a serious injury. The area at the base consisted of sieve bend structure and a vibrator screen deck. Safety equipment such as a lifeline, safety belt and ladder was not used during this work procedure.

The cited standard provides, in relevant part, as follows:

> Each employee working . . . in the surface work areas of an underground coal mine will be required to wear protective . . . devices as indicated below: . . . (g) Safety belts and lines where there is a danger of falling. . . ." (FOOTNOTE.2)

The violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard as admitted herein, (2) there is a discrete safety hazard, (3) there is a reasonable likelihood that the hazard contributed to or result in injury and (4) there is reasonable injury in question will be of a reasonably serious. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Much of the essential evidence is not in dispute. Gary King, a Cannelton employee for 14 years, found a leaky pipe on the third floor of the preparation plant and reported this condition to his supervisor, foreman Charles Williams. Williams thereafter directed another employee, Douglas Price to pick up some "water plug" (a putty-like material used for patching leaks) for the pipe repairs and they proceeded to the problem area. Williams had the plant shut down, then left the work site to take a phone call at the plant office. Before he left, Williams gave no specific instructions on how

to complete the task. Both Price and King testified that they had performed similar tasks many times before and therefore knew what to do without any specific instructions. Price had worked for 10 years and King 5 years at the Cannelton plant under the supervision of Williams.

After Williams left, King climbed onto the sieve box platform, 15 inches wide and 54 inches long. Price mixed the "water plug" and handed it to King from 6-1/2 to 7 feet below. Using the "water plug" King began repairs on the pipe while standing on the sieve box and leaning on another pipe. Price then joined King to assist. In order to get into position he had to "duck walk" on the 8 inch diameter pipe some 12 to 14 feet above the floor level. Price then crouched on the pipe while holding onto a beam with one hand and applied dry "water plug" with the other hand. At the same time Price was also apparently able to hold onto a can containing 6 to 8 pounds of the patching material.

Both King and Price had previously performed repairs from similar elevated positions without a safety belt or lifeline in the presence of foremen and were never told it was unacceptable. Price claims that he could not in any event have used the safety belt available at the plant because its 30 inch tether was too short. It is undisputed that there was only one safety belt available near the plant and that belt had only a short extension or tether of approximately 30 inches. There is no evidence that any lifeline was available at the plant.

Joseph LonCavish, inspector for the Federal Mine Safety and Health Administration (MSHA) was conducting a regular inspection of the plant in the presence of his supervisor Richard Browning, when he saw Price and King working in an elevated position without safety belts or lifelines. While there was some disagreement over the distance the miners could have fallen (estimated as from 4 to 10 feet) both concluded that there was indeed a danger of falling onto the vibrator screen or the sharp metal edging around the screen and receiving serious and permanently disabling injuries e.g. limb, rib and head fractures. It is not disputed that such a fall was reasonably likely and that such serious injuries were likely to result. Accordingly I conclude that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Company, supra.

The violation was also the result of gross negligence. Both King and Price had admittedly on prior occasions performed similar tasks from elevated positions while not using safety belts or lifelines without correction or discipline

from supervisory personnel. There is, moreover, no evidence that employees had been specifically trained in the use of safety belts and lifelines. Indeed, from Price's testimony it appears that he did not know how to use a safety belt and lifeline in connection with the job he was performing. Finally, the evidence shows that only one safety belt was even available at the plant (with only a 30 inch tether) and that no lifeline was available. Under the circumstances only one employee could have used a safety belt at a time and, without a lifeline, was of little value.

It may reasonably be inferred from the nature of the job to be performed that superintendant Williams knew, or could reasonably have expected, that two employees would have been working on the pipe repairs from an elevated position. Finally, Williams gave no instructions before he left the repair site to use a safety belt and lifeline and, by his past practices of allowing previous work on such tasks without safety belts and lifelines, implicitly condoned the unlawful practice. Within this framework it is clear that superintendent Williams was grossly negligent. This negligence is imputed to the mine operator. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980). Negligence may in any event be found in this case based alone on the lack of supervision and training of the two employees concerning the use of safety belts and lifelines and the lack of discipline for failing to use that equipment under similarly hazardous conditions. Secretary v. A.H. Smith Stone Company, 4 FMSHRC 13 (1893).

In assessing a penalty herein I have also considered that the mine operator is large in size and has a moderate history of violations. The evidence shows that the instant violation was abated by the instruction of employees on the use of safety equipment to be used in elevated areas of the plant and the acquisition of necessary safety equipment. Under the circumstances a civil penalty of $850 is appropriate.

ORDER

Citation number 2147345 is affirmed. Cannelton Industries, Inc., is ordered to pay a civil penalty of $850 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 Cannelton does not dispute that a violation of the cited standard did in fact occur but contends that it was merely an insignificant technicality. Since Respondent did not contest this

section 104(d)(1) citation pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company, 1 FMSHRC ----, (1979). There is nevertheless ample evidence to support such a finding. See discussion of operator negligence infra.

~Footnote_two

2 See Southwestern Illinois Coal Corporation, 5 FMSHRC 1672 (1983) and Southwestern Illinois Coal Corporation, 7 FMSHRC ---- (May 15, 1985) for the Commission's interpretation of the standard at issue.