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SOL (MSHA) v. JIM WALTER RESOURCES
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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. SE 84-79 A.C. No. 01-00758-03601
v.	No. 3 Mine
JIM WALTER RESOURCES, INC., RESPONDENT	

DECISION

Appearances: George D. Palmer, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner;
R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for the alleged violation of 30 C.F.R. 75.1403-8(d) for which a citation was issued on April 4, 1984. Termination was required by 8:00 a.m., April 6, 1984. The citation referred back to a notice to provide safeguards issued July 27, 1976. Respondent contends that the safeguard notice did not establish a mandatory safety standard, the violation of which could support the assessment of a civil penalty.

Pursuant to notice the case was called for hearing in Birmingham, Alabama on October 22, 1985. Luther McAnally and T.J. Ingram testified on behalf of Petitioner. Respondent did not call any witnesses. Both parties have filed post-hearing briefs.

I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent is the owner and operator of an underground mine in Jefferson County, Alabama, known as the No. 3 Mine.

The operator is of "medium" size, and has an average history of prior violations.

On July 27, 1976, Federal Mine Inspector T.J. Ingram issued a Notice to Provide Safeguards based on an inspection conducted the same day. The notice stated that "the authorized representative of the Secretary . . . directs you to provide the following specific safeguards--adequate clearance and signs at necessary points, clearance side free of material." The notice went on to provide as follows:

Specific Recommended Safeguards:

> Several locations along the track haulageways that were used for travel had clearance less than 24 inches. Refuse, loose rock and supplies obstructed the available clearance in the provided walkways. Signs were not provided in places where the clearance side could be changed. The track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations. Track haulage roads . . . should have clearance on the "tight' side of at least 12 inches from the farthest projection of the normal traffic . . . the clearance space on all track haulage roads should be kept free of loose rock, supplies and other loose materials.

On August 20, 1976, the Inspector notified Respondent that the required safeguards specified were provided. A violation notice (now called a citation) was issued on February 23, 1977 charging a violation of the safeguard notice. It was extended twice and on November 28, 1977 at 10:40 a.m. an order of withdrawal was issued under section 104(b) of the Act because the condition had not been abated. The order was terminated on November 30, 1977 at 11:50 p.m. when the condition was abated. A citation was issued on January 29, 1979 charging a violation of 30 C.F.R. 75.1403-8(b) because a continuous clearance on one side of at least 24 inches was not being maintained along the track entry. An order of withdrawal was issued on February 5, 1979 because of failure to abate. The citation and order were terminated thereafter. Neither the citation nor the order referred to the notice to Provide Safeguards.

Citations were issued on January 22, 1981, September 12, 1983, and September 27, 1983, all charging violations of 30 C.F.R. 75.1403-8(b) because of failure to follow the notice to provide Safeguards of July 27, 1976.

The citation involved in this proceeding was issued April 4, 1984 and charged that:

> The track haulage road over which men and material are transported the required clearance was obstructed by timbers--crib blocks--pipe--belt rollers and structures--cement blocks--large rocks--hydraulic jacks--3 x 10 lumber and coal.

It referred to the safeguard notice issued July 27, 1976.

An order of withdrawal was issued on April 9, 1984 at 1:00 p.m. because the condition cited was not abated and "little or no effort has been made to remove the loose rock and coal from the required clearance." The order was terminated on April 9, 1984 at 10:30 p.m. when the track was cleaned up.

Inspector McAnally testified that when he came into the mine on April 4, 1984 he saw "junk" scattered all over the track haulage road. Clearance was obstructed on both sides. The haulageway is used for hauling materials and supplies and for hauling personnel in mantrips. It is used on all three shifts. The Inspector stated that when he returned on April 9, 1984, some of the junk, such as the belt structures and other loose materials, had been removed, but the rock and coal had not been removed and the required clearances were not provided. Because of this testimony, I do not accept the stipulation that "the alleged violation was abated in good faith."

Respondent did not offer any rebuttal testimony. Therefore, I find that the conditions cited by the Inspector on April 4, 1984 existed in the haulageway, and that they had not been abated at the time the withdrawal order was issued.

REGULATORY PROVISIONS

30 C.F.R. 75.1403 provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

30 C.F.R. 75.1403-1 provides in part as follows:

> (a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under 75.1403. Other safeguards may be required.
>
> (b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.
>
> 30 C.F.R. 75.1403-8 provides in part as follows:
>
> (b) Track haulage roads should have a continuous clearance on one side of at least 24 inches from the farthest projection of normal traffic. Where it is necessary to change the side on which clearance is provided, 24 inches of clearance should be provided on both sides for a distance of not less than 100 feet and warning signs should be posted at such locations.
>
> (c) Track haulage roads developed after March 30, 1970, should have clearance on the "tight' side of at least 12 inches from the farthest projection of normal traffic . . .
>
> (d) The clearance space on 11 track haulage roads should be kept free of loose rock, supplies and other materials.

ISSUES

1. Whether Respondent's failure to comply with the terms of the Notice to Provide Safeguards constitutes a violation of a mandatory safety standard for which a penalty may be assessed?

2. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act) in the operation

of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

Section 314(b) of the Act is repeated in the regulation at 30 C.F.R. 75.1403. It authorizes a Federal inspector to require that a mine operator provide specific safeguards to minimize hazards on a mine-by-mine basis, with respect to the transportation of men and materials. 30 C.F.R. 75.1403-1 directs the Secretary to advise the operator in writing of the specific safeguard that is required. If the operator fails to maintain the safeguard thereafter, a notice under section 104 of the Act (a citation) shall be issued. Thus, the inspector is in effect authorized to establish a mandatory safety standard applicable to the conditions in a specific mine, without following the notice and comment requirements applicable to rule making. For this reason, the authority conferred on the inspector and his exercise of that authority must be strictly construed. Secretary v. Jim Walter Resources, Inc., 1 FMSHRC 1317 (1979) (ALJ); Consolidation Coal Company v. Secretary, 2 FMSHRC 2021 (1980) (ALJ); U.S. Steel Mining Co., Inc. v. Secretary, 4 FMSHRC 526 (1982) (ALJ). I agree with Respondent here that the test is whether it was given notice that the safeguards set out in the notice in this case were mandatory standards.

The notice in question is on a Department of Interior form. It notifies the operator that upon an inspection the authorized representative of the Secretary "directs you to provide the following specific safeguards (this is printed on the form)--adequate clearance and signs at necessary points, clearance side free of material . . ." (this was written by the Inspector) (emphasis supplied by me). Beneath this language the form contains the printed words: "Specific Recommended Safeguards:" This phrase is centered above a blank space on the form. The Inspector then added by hand the conditions which he found and which prompted the notice. Following this, he wrote in the requirements of 30 C.F.R. 75.1403-8(b), (c), (d), copying the regulations verbatim except for the addition of the word "the" at the beginning of subsection (b). These provisions all contain the word "should." However, it is clear that the regulation intends a mandatory standard: the provisions of 1403-2 through 1403-11 are intended to guide the inspector in determining the safeguards which should be required.

I conclude that the notice in this case required the operator to maintain his track haulageways with adequate clearance free of material, and that the specific provisions of the notice as to the extent of clearance, though phrased with the word "should," intended and were understood to be mandatory. That they were so understood is evidenced by the fact that 4

citations were issued between January 1979 and September 1983, for failure to follow the safeguard notice and were not challenged by the operator. The fact that they were served upon different representatives of the operator is unimportant. The operator as an entity is charged with knowledge of them.

The provisions of the regulations clearly intend that after the original notice is issued, compliance with its terms is mandatory. The use of the term "should" in the subsequent subsections does not argue otherwise. Nor does the fact that these subsections were copied verbatim in the notice by the inspector argue that the notice intended other than a mandatory provision.

I conclude that a violation of a mandatory standard was charged in the citation and was estabished by the evidence.

The violation was moderately serious and resulted from Respondent's negligence. The operator did not abate the violation in the time specified in the citation. Therefore, it cannot be credited with good faith in attempting to achieve rapid compliance. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $650.00.

ORDER

Based upon the above findings of fact and conclusions of law IT IS ORDERED that within 30 days of the date of this decision, Respondent shall pay the sum of $650.00 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge