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SOL (MSHA) V. WILMONT 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. LAKE 85-47 A.C. No. 33-02929-03505
v.	North Mine
WILMOT MINING COMPANY, RESPONDENT	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Thomas Eddy, Esq., Eddy & Osterman, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all relevant times, Respondent operated a strip mine known as North Mine, which produced coal for sale or use in or substantially affecting interstate commerce.

2. On May 25, 1984, at about 2:00 p.m., a vehicle accident occurred in the 001Ä0 pit of the North Mine, resulting in the death of John D. Schrock, who was the pit foreman.

3. Schrock was operating a Terex 72Ä41 front-end loader on a pit road that had a 20% grade. As he was exiting the pit, he stopped about 100 feet from the pit bottom and began to back up, to make room for a descending coal truck. Schrock's vehicle rolled backward downhill, went off the road, struck the face of the highwall, and rolled over.

4. The vehicle did not have a rollover protective structure. The cab roof was crushed and Schrock was fatally injured when the vehicle rolled over.

5. The vehicle rolled downhill and went out of control because it did not have adequate brakes.

6. On May 24, 1984, the day before the accident, Schrock left his regular vehicle, a 510 International Harvester front-end loader, in the pit so that a part could be removed for repair. A short time before May 24, Schrock told the General Manager, Harold Bain, that he was having starter trouble on his 510 International Harvester. Bain said that whenever Schrock was ready, he would take the starter to Dover "and let the electrical people rebuild" it (Tr. 86). He also said that a 910 Caterpillar was available for Schrock's use and that, when the starter finally gave out, Schrock should "go to the garage, and get the 910 Caterpillar" (Tr. 86). However, Schrock decided to use another vehicle as a substitute, a Terex 72Ä41 front-end loader.

7. The Texex 72Ä41 loader was not equipped with a rollover protective structure. Schrock's regular vehicle, the 510 International Harvester, and the vehicle offered by Bain, the 910 Caterpillar, were both equipped with a rollover protective structure.

8. Schrock made several trips into the pit with the Terex 72Ä41 loader on May 25. At about 7:00 a.m., the pit crew went to their work areas. Schrock met Glen Shoup, a front-end loader operator, at the pit about 7:20 a.m., and discussed plans for loading coal from the pit. Shortly thereafter, Schrock used the Terex 72Ä41 loader in the pit to clear overburden from the coal seam so Shoup could load coal into coal trucks. Schrock left the pit about 10:00 a.m., using the Terex 72Ä41 loader for transportation, and drove to another part of the mine. He returned with the loader to continue the clearing process in the pit two other times, and left to travel to other areas of the mine.

9. On May 25, not very long before the accident, Bain saw Schrock with the Terex 72Ä41 loader near the road to the pit and gave him the employees' paychecks to deliver in the pit. He knew, or by the exercise of reasonable judgment should have known, that Schrock would use the Terex loader to go into the pit to deliver the checks. Bain also knew that the Terex 72Ä41 loader did not have a rollover protective structure.

10. About 1:45 p.m., Schrock drove the Terex 72Ä41 loader to the parking area near the entrance to the pit. He saw a mechanic, Ralph Hoover, and told him that he was having brake trouble. Hoover went to get tools to check the brakes, but Schrock drove off before Hoover could inspect the brakes. Schrock then drove into the pit, where the accident occurred about 2:00 p.m.

11. Bain was in charge of annual refresher training at the mine. However, he conducted no refresher training in 1982, in 1983, or in 1984 up to the date (May 26) when the Federal inspection team requested to see the annual refresher training records. Bain did not provide refresher training in those periods because in his opinion there were not enough miners to justify the expense of a training class.

12. Following an investigation of the fatal accident, Federal Mine Inspector Ray Marker issued three citations charging violations of mandatory safety standards:

a. Citation 2327028, charging a violation of 30 C.F.R. 48.28 (requiring a minimum of 8 hours annual refresher training for each miner).

b. Citation 2327029 charging a violation of 30 C.F.R. 77.403a(a) (requiring rollover protective structures on front-end loaders).

c. Citation 2327030, charging a violation of 30 C.F.R. 77.1605(b) (requiring adequate brakes on mobile equipment).

13. Respondent is a small operator. At the time of the citations, Respondent employed 14 miners, producing about 300 tons of coal a day.

14. In each instance, Respondent made a good faith effort to achieve rapid compliance after a violation was charged in the above-cited citations.

15. In the 2Äyear period before the citations involved here, Respondent had three paid violations at the North Mine.

DISCUSSION WITH
FURTHER FINDINGS

Citation 2327028

This citation alleges that Respondent's 14 miners did not receive the required 8 hours refresher training in 1982 or 1983, in violation of 30 C.F.R. 48.28(a), which provides:

> Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.

Respondent acknowledges that there was no refresher training of its miners in 1982 or 1983, but it argues, among other things, that:

(1) The regulation impliedly requires that a miner be employed at least 12 months to be covered by the annual refresher training provision.

(2) The Secretary has not shown that any of the 14 miners was a covered miner, i.e., not an exempt supervisor, and was employed at least 12 months without training.

This argument is not persuasive. The Secretary made a prima facie case of a violation by showing that 14 miners were employed at the time of the inspection, that the mine was a going concern in 1982 and 1983, and that no refresher training was conducted for any miner in 1982 or 1983. Respondent did not rebut this prima facie case by any evidence that there were no covered miners in 1982 or 1983 or that the required training was in fact conducted. Instead, Respondent's evidence showed that refresher training was not conducted for over two years because the General Manager was waiting for a larger employment body (than just a few miners) to justify, in his opinion, the expense of refresher training.

However, the training regulation requires annual training for "each miner," and does not provide an exemption based on the number of miners employed.

Respondent further argues that the regulation is unconstitutionally vague as to the type of refresher training required. This argument is rejected. Section 48.28(a) requires refresher training "prescribed in this section," and section 48.28(b) spells out in ample detail the type of refresher training required.

Finally, Respondent contends that the proposed penalty of $500 is "grossly excessive and unreasonable as a matter of law." This contention is apparently based upon the ground that Schrock, as a supervisor, was not subject to the refresher training requirement and, therefore, a violation of section 48.28(a) had no connection with the fatal accident. This argument does not render the violation nonserious. The requirements of section 48.28 are at the heart of a preventive safety and health program for miners. Failure to provide the required training (see section 48.28(b)) could jeopardize each miner and expose other persons to dangers that could result from a failure to follow the safety, health, and job rules involved in the refresher training. Respondent has demonstrated a negligent, lax, and wholly unjustified attitude toward this mandatory and important safety and health training requirement. Considering all of the six criteria for civil penalties in section 110(i) of the Act, I find that a penalty of $500 is appropriate for this violation.

Citation 2327029

This citation charges a violation of 30 C.F.R. 77.403a(a), which requires that "All rubber-tired ... front-end loaders ... that are used in surface coal mines or the surface work areas of underground coal mines shall be provided with rollover protective structures...."

It is undisputed that Schrock operated a front-end loader that had no ROPS, drove it into the pit, and was fatally injured when the vehicle rolled over and crushed him.

Respondent contends, among other things, that:

1. John Schrock willfully acted in contravention of his job responsibilities as mandated by the operator when he operated the Terex loader in the pit.

2. This act of malfeasance was unforseeable by the operator.

3. John Schrock risked injury only to himself by operating the Terex in the pit.

4. The operator was not negligent as a matter of law.

I find that the General Manager knew that Schrock was operating a vehicle without ROPS when he gave Schrock paychecks to be delivered in the pit and that he knew or should have known that it was probable that Schrock would drive that vehicle (the Terex) into the pit to deliver the paychecks. Respondent was therefore negligent in allowing Schrock to operate the Terex in the pit. Because of the gravity of this violation, I find that this conduct was gross negligence.

Apart from Bain's action in allowing Schrock to drive the Terex into the pit, Schrock himself was grossly negligent in driving the Terex into the pit. Because Schrock was a supervisor representing Respondent, his gross negligence is imputed to Respondent.

The gravity of this violation--operating a front-end loader in a coal pit without ROPS--is most serious because, in the event of an accident, a rollover could result in the death or serious injury of the vehicle driver.

Considering all of the six criteria in section 110(i) for assessing civil penalties, I find that a civil penalty of $2,000 is appropriate for this violation.

Citation 2327030

This citation charges a violation of 30 C.F.R. 1605(b), which provides:

> Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

About 15 minutes before the fatal accident, Schrock drove the Terex front-end loader into the equipment parking area and told a mechanic that he was having brake problems. However, before the mechanic could get his tools and come back to examine the brakes, Schrock drove off and entered the pit knowing he had defective brakes. A careful test of the brakes after the accident showed that the brakelines, wheel cylinder and hydraulic brake fluid lines were all intact, i.e., they had not leaked because of the accident, but the master cylinder and auxiliary brake cylinder were very low in brake fluid. When the brakes were tested on level ground, it took 36 feet to stop with the amount of fluid found after the accident, but when fluid was added to the normal level, it took only five to ten feet to stop. On a steep road, such as the pit road with a 20% grade, the Terex loader would have virtually no brakes at all. At the hearing, the General Manager, Bain, testified that Schrock's act of driving the Terex on the pit road, with effectively no brakes, was, in Bain's opinion, tantamount to suicide. Schrock knew that the brakes were defective, and told the mechanic about the problem. However, for some unknown reason he drove off before the mechanic could inspect the brakes.

I find that Schrock's act of driving the Terex into the pit with known defective brakes was an act of gross negligence which greatly endangered himself and other persons who might have been injured in an accident involving the Terex. Because of his supervisory position, Schrock's gross negligence is imputed to Respondent.

Considering all of the six criteria in section 110(i) for assessing penalties, I find that a civil penalty of $5,000 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. 48.28(a) as charged in Citation 2327028. Respondent is ASSESSED a civil penalty

of $500 for this violation.

3. Respondent violated 30 C.F.R. 77.403a(a) as charged in Citation 2327029. Respondent is ASSESSED a civil penalty of $2,000 for this violation.

4. Respondent violated 30 C.F.R. 77.1605(b) as charged in Citation 2327030. Respondent is ASSESSED a civil penalty of $5,000 for this violation.

ORDER

Respondent shall pay the above civil penalties in the total amount of $7,500 within 30 days of this Decision.

William Fauver
Administrative Law Judge