

CCASE:  
SOL (MSHA) V. GRAFTON COAL  
DDATE:  
19860714  
TTEXT:

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 86-118  
A.C. No. 46-02450-03516

v.

Harrison County Mine  
(Kincheloe No. 4 Job)

GRAFTON COAL COMPANY,  
RESPONDENT

DECISION

Appearances: William T. Salzer, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Philadelphia, Pennsylvania for Petitioner;  
James R. Christie, Esq., Clarksburg, West  
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 section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging one violation against the Grafton Coal Company (Grafton) of the regulatory standard at 30 C.F.R. 707.1605(k). The issues before me are whether Grafton has committed the violation as alleged and if so whether that violation was of such nature as could have significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with the criteria set forth in section 110(i) of the Act.(FOOTNOTE 1)

~1110

The citation before me, No. 2702082, alleges a "significant and substantial" violation of the noted standard and alleges as follows:

Berms or guards were not provided on the outer bank of elevated roadway for a distance of approximately 800 feet, where two International 350 pay haulers were observed hauling spoil material to the dumping location at the Kincheloe Pit.

The cited standard requires that "berms or guards §y(3)27 be provided on the outer bank of elevated roadways."

Inspector James M. Bailey of the Federal Mine Safety and Health Administration (MSHA) was conducting a regular inspection at the Grafton Coal Company Kincheloe Pit on October 16, 1985, when he observed two International 350 pay haulers carrying overburden over the haulage road. According to Bailey the elevated portion of the road was approximately 800 feet long and rose to an elevation of 40 feet above the surrounding ground. One side of the road abutted the hillside and the other side, unprotected by any berm or guard, sloped down an embankment. It is not disputed that the embankment at its steepest location had a 68% slope.

Bailey recalled that the road was approximately 14 to 15 feet wide with the exception of two locations where the trucks could pass and that the pay haulers were approximately 14 feet wide. These measurements were rough estimates not made with a tape measure or other measuring device. According to Bailey there was absolutely no evidence of any berm along the entire length of the elevated road and no evidence that any berm had ever existed there.

Bailey concluded that under the circumstances it was reasonably likely for serious injuries or fatalities to occur if one of the vehicles should overtravel the road and overturn down the unprotected embankment. He also observed that the road was composed of nature spoil material and that rain would make the material slippery and more likely for a vehicle to lose control. Bailey also believed that the violation was the result of operator negligence. According to Bailey the mine foreman, Al Schrock, admitted that he knew the roadway was not bermed. Bailey had also issued three citations over the preceding year for similar violations at other Grafton mines.

Grafton Safety Director, Steve Cvechko was not present at the Kincheloe Pit on the date of the violation. Cvechko did however pace off the cited road and found it to be 25 feet wide at its narrowest location. He opined that the

~1111

outslope or embankment at the upper portion of the road was 68% and acknowledged that a truck overtraveling the embankment would likely overturn. When Cvechko had last been at the cited Kincheloe Pit he saw a knee-high berm over 300 to 400 feet along the upper road. He acknowledged however that the berm could have been subsequently graded off.

The surface foreman at the Kincheloe Pit, Allen Schrock, claims that the elevated portion of the cited roadway (the upper 500 feet) had "somewhat of a berm, about a foot or so high." Schrock acknowledged that a berm was required there and thought that it was only a "matter of opinion" as to the adequacy of the berm he claims was there. Schrock conceded however that he had no conversation with Inspector Bailey about the adequacy of his alleged berm. Schrock further conceded that he knew MSHA required the berms to be of axle height and that the axle height of the 350 haulage vehicle was 1 1/2 to 2 feet.

In evaluating the conflicting evidence before me I find the testimony of Inspector Bailey to be the more credible. If there had been "somewhat of a berm" in place as Schrock claims and there was only a "difference of opinion" as to its adequacy it would be reasonable to expect some discussion between Schrock and Inspector Bailey about the matter. Schrock concedes that there was no such discussion. In addition if a berm of some size was in place and only its height was at issue, it would be reasonable to expect that Bailey would have taken some measurements to more precisely determine the adequacy of such a berm. Similarly if Schrock had actually believed in good faith that his alleged berm was adequate it would be reasonable to expect that he too would have measured that berm in the presence of Inspector Bailey to prove his point. Finally, I find Schrock's testimony that he had "somewhat of a berm" so equivocal as to be lacking in probative evidentiary value. Within this framework I find that a serious violation has been proven as charged and that it was "significant and substantial." Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

Particularly since Grafton officials knew that a berm was required along the outer bank of its elevated haul road, it is clear that the violation was caused by its negligence. The fact that the Grafton Safety Director also had knowledge of three prior citations for inadequate berms at other Grafton Mines in the region also suggests laxity in compliance with the cited standard. This factor adds to the finding of operator negligence herein.

In determining the appropriate penalty in this case I have also considered that the operator is of moderate size and has a history of 3 violations of the standard here at

~1112

issue over the 13 month period preceding the instant violation. I also observe that the operator abated the violative condition promptly and in a good faith manner. Under the circumstances I find that the Secretary's proposed penalty of \$600 is appropriate.

ORDER

Grafton Coal Company is hereby order to pay a civil penalty of \$600 within 30 days of the date of decision.

Gary Melick  
Administrative Law Judge

1 The violation herein was cited under section 104(d)(1) of the Act and it is alleged that it was caused by the "unwarrantable failure" of the operator to comply with the standard. However, since the citation was not contested within 30 days of its issuance as required under section 105(d) of the Act the issue of whether or not the violation was caused by the "unwarrantable failure" of the operator to comply is not before me in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Co., 1 FMSHRC 1477 (1979).