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SOL (MSHA) V. ALT, INC.
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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. PENN 85-312 A.C. No. 36-06352-03505
v.	Iselin Mine
ALT, INCORPORATED, RESPONDENT	

DECISION

Appearances: Mark Swartz, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Donald P. Tarosky, Esq., Greensburg,
Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed a petition for Assessment of Civil Penalty for an alleged violation by Respondent of 30 C.F.R. 77.1001. Pursuant to notice the case was heard in Pittsburgh, Pennsylvania, on March 12, 1987. Wendell A. Hill testified for Petitioner, and Harold Altmire and Jay Altmire testified for the Respondent.

Petitioner, at the onset of the hearing, made a motion to disallow Respondent from introducing evidence on the issues of "significant and substantial" and "unwarrantable failure." Decision was reserved to allow the Parties to brief this issue.

Petitioner filed its posthearing brief on May 7, 1987, and Respondent filed its brief on May 13, 1987.

Stipulations

The Parties have stipulated as follows:

1. Alt, Incorporated owned and operated the Iselin Mine on May 5, 1985, and is subject to the jurisdiction of the Federal Coal Mine Safety and Health Act of 1977, Public Law 91-173, as amended by Public Law 95-164 (Act).

2. Alt, Incorporated owned and operated the Iselin Mine as of November 19, 1984.

3. The Iselin Mine is a surface coal mine and is subject the regulations found at 30 C.F.R., Part 77.

4. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Act.

5. A copy of Citation Number 2409178 (attached to the Petition for Adjudication (sic.) of Civil Penalty) is an authentic copy of the original citation.

6. The Parties stipulate to the authenticity and admissibility of the following documents:

a. A copy of Citation Number 2409178 issued by Wendell E. Hill on May 15, 1985.

b. A copy of the inspector's notes prepared by Wendell E. Hill concerning his May 15, 1985 inspection of the Iselin Mine.

7. During the period from November 19, 1984 through May 14, 1985, the Alt, Incorporated Iselin Mine had a history of one assessed and paid violation: 104(a) Citation Number 2408087 issued on February 1, 1985, with an assessment of \$20.00.

8. The assessment of \$500 penalty in this matter will not affect the Respondent's ability to continue in business.

9. Currently, there is no production at the Iselin Mine.

Issues

The issues are whether the Respondent violated 30 C.F.R. 77.1001 and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and affect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable

~1081

failure. If section 77.1001, supra, has been violated, it will be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., (the "Act").

Citation

Citation 2409178, issued on May 15, 1985, alleges a significant and substantial violation in that "loose hazardous material was not placed for a safe distance from the top of the highwall there was a piece of rock 10 feet long, 5 and 1/2 feet wide, and 8 to 12 inches thick that had not been removed."

Regulation

30 C.F.R. 77.1001, as pertinent, provides as follows:
"Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls. . . ."

Findings of Facts and Conclusions of Law

I

On May 15, 1985, Wendell A. Hill, MSHA Inspector, with over 13 years of experience as an inspector, arrived at Respondent's Iselin Mine (a surface mine) to make a complete inspection. While in the pit, Hill observed a rock overhanging, or jutting out from the top of the highwall. He estimated the size of the overhanging rock to be 6 feet long, 5 and 1/2 feet wide, and 8 to 10 inches thick. He told the two miners, who were working in the pit, to stay clear of the rock. He then proceeded to the top of the highwall to make a closer examination of the rock. He observed a crack 2 or 3 feet from the tip of the rock. He testified that there was no dirt or other material on top of the rock that was jutting out. Hill described the rock as sand rock and estimated its weight to be more than a ton. Hill brought the rock to the attention of the Respondent's President, Harold Altmire, and indicated that it should be taken down. Altmire agreed to cooperate, and made a road to the top of the highwall so that a backhoe could be driven there to remove the rock. Jay Altmire, a miner employed by Respondent, took the backhoe to the top of the highwall to remove the rock. Hill testified that he stood off to the side approximately 6 feet from the highwall when the backhoe was removing the rock. It was further his testimony that no dirt had to be removed from the top of the rock and that it was only necessary to remove soil from behind the rock. He further stated that when the bucket of the backhoe initially touched the back of the rock, which was lying on solid ground, the tip fell off. He estimated that it took approximately 30 seconds for the backhoe to dislodge and push the rock

~1082

down the highwall. When Hill returned to the pit, he measured two large pieces of rock that had fallen down as being 6 feet long, 5 and 1/2 feet wide, and 8 to 10 inches thick, and 3 feet wide, 4 feet long, and 8 to 12 inches thick respectively. He indicated that the latter rock was the piece that had broken off when the bucket of the backhoe touched the rock.

Hill offered his opinion that prior to its removal the rock was loose as it was overhanging the highwall and there were no rocks on top of it. He also opined that it could have been shaken loose by vibrations from equipment present at the mine or from thunderstorms. He also testified, in essence, that rain could have washed out the dirt around the rock and caused it to fall.

Harold Altmire, who has over 25 years experience running open pit mining operations, testified that the rock at issue had been in the same position for about 5 or 6 days prior to May 15, 1985. He stated, in contrast to Hill, that when he saw the rock during a preshift examination on May 15, 1985, he was about 12 feet away and did not see any cracks in it. He testified that when he observed the rock from the pit that it was not extended over the edge of the pit. He also said that there was rock, soil, dust, and clay on top of the rock in question and that in addition it was covered by another rock. All these observations were corroborated by Jay Altmire, who further testified, in contrast to Hill, that the latter was not present when he operated the backhoe, and that it took him (Jay Altmire) approximately 4 minutes to remove the dirt from the rock and push it off the highwall. Harold Altmire also testified that after Hill told him to remove the rock, the latter drove up the haul road and returned after the rocks were removed. Jay Altmire testified that about a week prior to May 15, his brother tried to remove the rock with a dozer and could not. Harold Altmire testified that in his opinion the rock was not in any danger of falling. He said that if he thought there was any danger of the rock falling, that he would have removed it as he would not have wanted to cause any injury to his two sons who were the only miners working below in the pit.

Harold Altmire's testimony with regard to the condition of the rock was corroborated by the testimony of his son Jay. The latter's testimony that Hill was not present when he (Jay Altmire) removed the rock finds some corroboration in the testimony of Harold Altmire. However, I have adopted that version testified to by Hill. There was no motive adduced which would tend to impeach the credibility of Hill's testimony. On the other hand, the father-son relationship between Respondent's only two witnesses, tends, to some extent, to dilute the corroborative nature of their testimony. Moreover, the veracity of Hill's testimony is but

~1083

tressed by the existence of contemporaneous notes that he made of his inspection. In a note, which, according to his testimony, was written when he observed the rock from the pit, he described the rock as being 6 feet long, 5 and 1/2 feet in width, and 8 to 12 inches thick, and being "at top of highwall edge" (emphasis added). (Government Exhibit 2, page 5.) Also, on pages 8-9, of Government Exhibit 2, there are contemporaneous statements by Hill that "once the backhoe was in place at the top of the highwall the piece of crack 3 feet wide by 4 feet by 8 to 12 inches thick broke off and rolled into the pit." Page 7, of Government Exhibit 2, contains a contemporaneous statement that it took the backhoe 30 seconds to move the rock. Also, I find Hill's description of the rock more reliable. When he observed it on May 15, from the top of the highwall, he was only 6 feet from the rock and examined it specifically as he was apparently concerned about its condition when he had observed it from the pit. In contrast, although Harold Altmire had seen the rock prior to May 15, when he saw it on that date he was 12 feet away, and observed it in the course of his general examination. Inasmuch as his attention had not been specifically drawn to the rock, in contrast to Hill, it is concluded that Altmire's examination of the rock on May 15 was not as thorough as that of Hill's.

Accordingly, based on the testimony of Hill, I conclude that on May 15, 1985, there was a portion of rock, approximately 6 feet long, 5 and 1/2 feet wide, and 8 to 12 inches thick, with a crack in the tip, that was hanging over the top of the highwall. I also conclude, based on the testimony of Hill, that there were no rocks or other material on top of this portion of the rock. Based upon these conditions, I conclude that the rock was "loose" and was within the purview of section 77.1001, supra. In reaching this conclusion I took into account the plain meaning of the term "loose" as defined in Webster's New Collegiate Dictionary as follows: "la: not rigidly fastened or securely attached b (1): having worked partly free from attachments. . . ."

Although Harold Altmire indicated that, in his opinion, the rock was safe, he did not specifically rebut any of Hill's opinions that the rock could have been shaken loose by vibrations, or washed out by rain water. Accordingly, I find that the rock in question constituted a "hazardous" material within the purview of section 77.1001, supra. This conclusion is further buttressed by Hill's testimony, which I previously adopted, that the rock had a crack in it, and when initially touched by the bucket of the backhoe, resulted in the tip breaking off and falling down to the pit. Thus, I find that section 77.1001, supra, has been violated.

II

Although Respondent did not contest the citation herein within 30 days, I find good cause to excuse Respondent, based upon the testimony for Altmire, that when the section 104(d)(1) order

~1084

was terminated on May 15, 1985, he assumed that the matter had been resolved. Petitioner has not alleged that it has suffered any legal prejudice in Respondent's being allowed to present evidence on the issues of "significant and substantial" and "unwarrantable failure." In these circumstances, I find 29 C.F.R.

2700.22 to be controlling, in that the Respondent should not be precluded from challenging the findings, in the citation, of "significant and substantial" and "unwarrantable failure." Accordingly, I deny Petitioner's motion to disallow Respondent from introducing evidence on the issues of "significant and substantial" and "unwarrantable failure."

III

Respondent has argued that, considering the testimony of its witnesses, there is no basis for a finding of "significant and substantial." However, applying the criteria set forth by the Commission in Mathies Coal Company, 6 FMSHRC 1 (January 1984), I find, based upon the testimony of Hill, that I found reliable, that section 77.1001, supra, has been violated and that the violation herein constituted a discrete safety hazard. Furthermore, concerning the dimensions of the rock, and its characterization as sand rock, as testified to by Hill, and considering that this rock has a weight of about 150 pounds per cubic foot, as indicated by Government Exhibit 4, page 18, I conclude that there was a reasonable likelihood that in the event of the rock falling there would be an injury, of a reasonably serious nature, to either of the two miners, who were working in the area. In this connection, I note the testimony of Jay Altmire that he was working throughout the area of the pit unprotected, and it was the uncontradicted testimony of Hill that rock falling down the highwall into the pit could have bounced through the window of the equipment being operated by John Altmire causing serious injury. Accordingly, based on the above, I conclude that the nature of the violation herein was "significant and substantial."

IV

Respondent has argued that any alleged violation was not due to its "unwarrantable failure", as Altmire testified that a State Inspector, who inspected the subject mine on May 10, 1985, did not mention the hazard of the rock. Nor did the latter cite Respondent for the alleged condition. I did not place much weight on the conclusions of the inspector, a person who did not testify. Further, the written State Inspection Report, Respondent's Exhibit 2, does not indicate that the subject rock was specifically examined.

~1085

In essence, it was the testimony of both Harold Altmire and Jay Altmire that they were aware of the existence of the rock prior to May 15. Harold Altmire even saw the rock when he made his preshift examination on May 15, 1985. Accordingly, I conclude based, on the testimony of Hill, that a close examination of the rock by either of Respondent's witnesses, as performed by Hill, would have revealed a crack in the rock and the fact that the rock was hanging over the highwall. Thus, I conclude that the violation herein resulted from Respondent's "unwarrantable failure."

V

Having considered the criteria in section 110 of the Act, supra, and considering the Respondent's high degree of negligence and the seriousness of the violation, I conclude that the penalty of \$500, as proposed by Petitioner, is appropriate.

ORDER

It is ORDERED that Respondent pay the sum of \$500, within 30 days of the date of this decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge