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SOL (MSHA) V. ENERGY SUPPLY
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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

v.

ENERGY SUPPLY, INCORPORATED/ DONRAY INDUSTRIES, INCORPORATED, RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 86-291
A.C. No. 36-04007-03512

Mack Mine

UNITED MINE WORKERS OF AMERICA ON BEHALF OF JEFFREY STENNETT, COMPLAINANT

v.

ENERGY SUPPLY, INCORPORATED/ DONRAY INDUSTRIES, INCORPORATED, RESPONDENT

COMPENSATION PROCEEDING

Docket No. PENN 86-228-C

Mack Mine

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;Vasilis C. Katsafanas, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

The above Civil Penalty Proceeding is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary (Petitioner) on November 5, 1986, alleging a violation by Energy Supply, Incorporated (Respondent) of 30 C.F.R. 77.404(a). An Answer was filed by the Respondent on January 15, 1987. On February 6, 1987, I ordered the above Civil Penalty Proceeding to be consolidated with Docket No. PENN 86Ä228ÄC, as identical issues were involved in both cases i.e., the propriety of the issuance of Order No. 2695927. Pursuant to notice, these cases

were scheduled for hearing on May 5, 1987, in Pittsburgh, Pennsylvania. On April 29, 1987, a communication was received from the United Mine Workers of America, the representative of the Complainant in the above compensation case, indicating that it will not appear at the hearing on May 5, 1987, and would rely on evidence presented by the Secretary in the above Civil Penalty Proceeding regarding whether Order No. 2695927 was properly issued. The Civil Penalty Proceeding, Docket No. PENN 86Ä291, was heard on May 5, 1987, in Pittsburgh, Pennsylvania. Wendell Hill testified for the Petitioner and Raymond L. Hulings testified for the Respondent. At the hearing, Counsel for both Parties indicated that a settlement had been reached with regard to the following Citations: 2695932, 2695934, and 9945451 and Order No. 2695934. The Secretary, subsequently, on May 12, filed its Motion to Approve Settlement concerning these citations. For the reasons that follow, these Motions have been granted.

Petitioner filed its brief on June 25, 1987 and Respondent filed its brief on June 15, 1987.

Regulatory Provision

30 C.F.R. 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Issues

1. Whether Respondent violated 30 C.F.R. 77.404(a).

2. If a violation of Section 77.404(a), supra, occurred, was it of such a nature as could have significantly and substantially contributed to the cause and effect of a safety hazard.

3. If a violation of Section 77.404(a), supra, occurred, whether such violation was caused by Respondent's unwarrantable failure to comply with Section 77.404(a).

Findings of Fact and Conclusions of Law

I have jurisdiction to hear and decide this case. The Respondent owns and operates the Mack Mine which is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

On May 15, 1986, at approximately 9:30 a.m., Wendell Hill, a MSHA Inspector, in the course of an inspection at Respondent's Mack Mine, issued a 104(d)(2) Order in which he alleged that a Ford Truck, Model 800, that had a drill mounted on it, was not being maintained in good operating condition inasmuch as the

drive engine "will not operate," and the differential gears were "damaged." The Respondent does not contest the existence of the above conditions. Its owner and operator, Raymond Hulings indicated, in essence, that the truck's engine and gears had been inoperable for approximately 2 month prior to May 15, 1986. Although the truck's brakes were fully operable, it is clear that because the engine and gears were not operable, the truck was not maintained in a safe operating condition. Also, although the truck was not being used in a fashion that required its engine and gears to function, it was not removed from service as it was being used as a platform for a drill rig that was mounted on it, and was pushed or pulled by a bulldozer, 3 to 4 times a shift, to transport the drill to various drilling sites. As such, I conclude that Section 77.404(a) has been violated.

Upon the truck being pulled by a bulldozer from one drilling site to another the operator of the bulldozer, and the person sitting in the truck's cab to control it, would both be facing in the same direction. Accordingly, there would not be any possibility of visual communication between the two. Further, audio communication would be difficult. Thus, some degree of hazard would be created if the truck would be pulled down a grade. In this situation, the truck would not have the benefit of the braking power of its engine, and its rate of descent would be controlled solely by its brakes. Hence, there would be some degree of risk of a collision with the bulldozer. However, it was essentially the uncontradicted testimony of Hulings, that the truck is pulled at a speed of approximately one or two miles an hours, and that more than half the time when the truck is moved, it is moved along the bench which is level.

When the Order in question was issued, there was no lighting system in the area of the highwall. Thus, when the truck was being pushed by a bulldozer during an afternoon shift after sunset, the area behind the truck towards the highwall, would be illuminated only by the lights on the rear of the truck, as well as the headlights from the bulldozer. Also, were the person in the cab of the truck to apply the brakes to stop the truck, the operator of the bulldozer would notice a slight decrease in speed of the bulldozer and an increase in its RPMs. However, the application of the truck's brakes would not stop the bulldozer from pushing it. Accordingly, the failure to remove the truck from service, did create some degree of risk of the bulldozer pushing the truck over the highwall or causing it to come in contact with and injure a spotter who might be working in the area behind the truck.

I conclude that there is no evidence that the fashion in which the truck was used, when being pulled or pushed by the bulldozer, created any reasonable likelihood of a injury that

would of a reasonably serious nature. (See, Mathies Coal Co., 6 FMSHRC 1 (January 1984). In this connection, I note the uncontradicted testimony of Hulings, that the bulldozer pulling the truck was moving at about 1 or 2 miles an hour, and that more than half the time the truck was being pulled on a level grade. Also, when the truck was being pushed by the bulldozer, the blade of the bulldozer was not raised high enough to prevent the bulldozer operator from being able to see the operator of the truck who was facing him. In this regard, I rely more on the testimony of Hulings, whose testimony was based on his personal knowledge, rather than the upon testimony of Hill, whose knowledge in this regard was based upon what others told him. Taking into account the facts that the back of the drill had 12 volt flood lights, that the bulldozer travels at only 1 or 2 miles an hour, and that the operators of the truck and bulldozer were in visual contact, I find that the evidence does not establish that the failure to remove the 800 truck resulted in any reasonable likelihood of a reasonably serious injury. Therefore, based upon all of the above, I conclude that the violation by Respondent of 30 C.F.R. 77.404(a), was not significant and substantial (See Mathies Coal Co., supra).

At the date the Order herein was issued, Hulings, Respondent's owner and operator, had known for 2 months that the engine and the gear of the 800 truck was inoperable. In spite of this, Respondent did not repair the truck nor did it remove it from service. Accordingly, I find that the violation of section 77.404(a), was due to Respondent "unwarrantable failure." (U.S. Steel Corp., 6 FMSHRC 1423 (June 1974).

Based upon the statutory criteria in Section 110 of the Federal Mine Safety and Health Act of 1977, I find that a penalty of $100 is appropriate for the violation of 30 C.F.R. 77.404(a).

Subsequent to the hearing, on May 14, 1987, the Petitioner has filed a Motion to Approve a Settlement Agreement for Citation No. 2695932, Citation No. 9954451, and Order No. 2695934. A reduction in penalty from $123 to $80 was proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlements are appropriate under the criteria set forth in Section 110(i) of the Act.

On May 22, 1987, the United Mine Workers of America and Energy Supply Incorporated filed a Joint Stipulation wherein they agreed that if Order No. 26959527 is found to have been properly issued, then Jeffery Stennett will be entitled to compensation pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977. The Parties further stipulated that Energy Supply Incorporated will, within 15 days of the issuance of a final decision in PENN 86Ä291, pay Jeffery Stennett $526.05 plus interest

at the rate of 10 percent per annum. Considering this Stipulation, and the fact that I have found that Order No. 2695972 was properly issued, I conclude that Jeffery Stennett is entitled to compensation pursuant to section 111 of the Act, in the amount of $526.05 plus interest at the rate of 10 percent per annum.

ORDER

It is ORDERED that:

1. The operator pay the sum of $223, within 30 days of this decision, as a civil penalty for the violations found herein.

2. The operator pay Jeffery Stennett, within 15 days of this decision, $526.05 plus interest at the rate of 10 percent per annum.

Avram Weisberger
Administrative Law Judge