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SOL (MSHA) V. SOLAR FUEL
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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 87-158 A.C. No. 36-06289-03522
v.	No. 10 Mine
SOLAR FUEL COMPANY, INC., RESPONDENT	

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
David C. Klementik, Esq., Windber, Pennsylvania 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 Solar Fuel Company, Inc. (Solar Fuel) with three violations of regulatory standards. The general issues before me are whether Solar Fuel violated the cited regulatory standards as alleged, and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2695362 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.1725(a) and alleges as follows:

> The top and bottom belt rollers of the No. 1 main belt were not maintained in a safe operating condition in that from station spad No. B-71 and extending inby to station spad No. 193, 9 bottom rollers were found frozen and worn into the rollers from the bottom belt and seven top rollers were worn, broken and badly damaged. Coal dust, float coal dust and combustible material was present on, under and around

> the bottom rollers. This belt was in operation at the time. This citation was one of the factors that contributed to the issuance of imminent danger order No. 2695361 dated 12-30-86; therefore, no abatement time was set.

The cited standard, 30 C.F.R. 75.1725(a), provides that "[m]obile 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".

Citation No. 2695363 charges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.400 and alleges as follows:

> Coal dust, including float coal dust, loose coal, and combustible material, in the form of empty rock-dust bags are present on, under, and around bottom belt rollers, the jabco power cable and belt structures beginning at spad No. B-71 and extending inby a distance of approximately 1,200 feet to the belt tail (spad No. 193) of the No. 1 main belt. These accumulations measured from 1 to 12 inches in depth and from 12 to 72 inches in width under this belt. Coal float dust accumulations also existed on the mine floor from No. 2 main belt inby to the tail of No. 1 main belt. This area measured approximately 10 feet wide for a distance of approximately 360 feet. This belt was in operation at the time. Measurements were made with a six foot standard rule and 50 foot tape measure.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

Vincent Jardina, a Coal Mine Safety and Health Inspector for the Federal Mine Safety and Health Administration (MSHA), was conducting a regular inspection of the Solar Fuel No. 10 Mine on December 30, 1986, when he observed float coal dust accumulations and combustible materials consisting of empty rock dust bags, beginning at spad B-71 and continuing for some 1,200 feet. The accumulations were dry, mostly dark in color and from 1 to 12 inches deep and from 12 to 72 inches wide. The area had not been rock dusted. According to Jardina the accumulations were more than normal and most likely were caused by excess air flow through an air lock door frozen open. Excessive coal dust was thus blown off the conveyor belt causing rapid accumulation of the dust.

Jardina believed the condition to be dangerous and could contribute to a fire or explosion. In particular he observed that the conveyor belt was operating with 16 damaged and/or frozen rollers within close proximity to the coal dust. (See discussion of Citation No. 2695362) According to Jardina, seven top rollers were damaged (some of which were not rotating) and nine bottom rollers were "frozen". Indeed one of the "frozen" bottom rollers had been rubbed flat from the belt. In addition the area of the conveyor structure near one of the suspect rollers felt "very warm" to Jardina. Under these conditions Jardina thought it likely that the heat generated by friction from the damaged rollers would ignite the coal dust causing a fire or explosion. Energized power cables and electrical installations also provided ignition sources. The fire hazard was further aggravated by the undisputed fact that if the conveyor belt itself caught fire it would give off carbon monoxide and toxic phosgene gases even before smoke appeared.

The noted hazard was even further aggravated by the fact that the belt air was vented directly into the return aircourse--the secondary escapeway. Thus fire, toxic fumes and smoke could very well bar the safe use of that escapeway. If an explosion should blow out critical stoppings the entire work area would also likely be contaminated with smoke and toxic gases. Jardina also observed that the primary escapeway had been rendered impassible to vehicles because of icing conditions. Miners attempting escape would thus be forced to crawl over ice in a coal height of only 30 to 32 inches in the last 150 to 200 feet of the primary escapeway. With eight miners working inby at the time it may reasonably be inferred that fatalities would occur.

Within the framework of this undisputed evidence I am convinced that a disaster of major proportions was imminent. The violations were unquestionably of the highest gravity and "significant and substantial". Secretary v. Mathies Coal Co. 6 FMSHRC 1 (1984). In reaching these conclusions I have not disregarded the evidence that an increased number of fire sensors had been placed along the subject beltline and indeed were on 40-foot centers. Thus in the event of a fire an alarm would more likely be triggered. I have also considered the evidence that Solar Fuels had provided self rescuers and personal oxygen supplies. In addition I recognize that the subject coal was of "low volatility" Nevertheless these factors are not of a magnitude to significantly impact on the overall severity of the cited violations.

Inspector Jardina also concluded that the violations were the result of high negligence. He opined that the accumulations had developed over one complete work shift and the last work

shift had been from 3:00 p.m. to 11:00 p.m. the night before. The conditions were cited around 6:41 a.m. shortly after the beginning of the 6:00 a.m. to 2:00 p.m. work shift. In addition the mine examiner's book showed that the belt had been examined between 9:00 a.m. and 10:45 a.m. and again between 3:00 p.m. and 6:00 p.m. the day before but the examiners had not reported any accumulations. Jardina also noted that the examiners had reported that the belt rollers "should be replaced" but in fact defective rollers still remained at the time of his inspection.

Solar Fuel Safety Director Alvy Walker also told the inspector that they were having difficulty obtaining a type of roller needed for the belt. Walker said that in any event he would not stop the belt to replace any single defective roller. At the same time Walker admitted to the danger of accumulations of "fine coal" near a frozen roller and acknowledged that they had problems with dust accumulating because of the high air velocity. Indeed in certain locations they had found it necessary to clean up the dust twice a day. He also acknowledged that they had only one man responsible for cleaning up 5,000 feet of belt line and that no one was working on the subject belt at the time of the citation even though it had been operating for at least 40 minutes before he met with the inspector.

Solar Fuels argues in defense that they had a "clean up" plan that, in essence, permitted them to clean up accumulations during the following shift. The alleged clean-up plan, which had been submitted by a predecessor company to the Mine Safety and Health Administration on May 12, 1982, provided that accumulations would be "cleaned up during the shift or the following shift". However, while it is true that the regulatory standard at 30 C.F.R. 75.400-2 does require that a program for regular clean up and removal of accumulations of coal and float coal dust, loose coal and other combustibles be established and maintained there is no process set forth for the approval of such a plan by the Secretary of Labor. The regulatory requirement for a clean up program thus cannot provide a basis to estop the Secretary from enforcing the requirements of the standard at 30 C.F.R. 75.400. The Secretary is in any event not subject to the doctrine of equitable estoppal. See Secretary v. King Knob Coal Company Inc. 3 FMSHRC 1417 (1981). Solar Fuel's argument, therefore, that it was not subject to the cited standard because it had a clean-up plan, is devoid of merit.

Within this framework of evidence I find therefore that the violations are proven as charged, that the violations were serious and "significant and substantial" and were the result of high operator negligence.

Citation No. 2695425 alleges a non-significant and substantial violation of the standard at 30 C.F.R. 70.508(a) and charges as follows:

> A periodic survey of the noise exposure to which each miner in the active workings of the mine is exposed was not received by the Mine Safety and Health Administration. The survey was required to be conducted during the three month period ending December 31, 1986.

The citation was issued January 16, 1987, by Inspector Jardina and the operator was given until January 30, 1987, to abate the violation. However, on February 19, 1987, the condition had still not been abated and Inspector Jardina therefore issued a withdrawal order under section 104(b) of the Act. The survey was finally conducted and the order terminated on the following day. According to Jardina the violation was not serious and he considered that the operator could have forgotten to have completed the survey prior to the initial citation. The operator furnished no excuse however for to failing to abate the violative condition within the period set for abatement in the initial citation. Solar Fuels admits to the violation and provided no satisfactory reason for its failure to abate the violation in a timely manner.

In assessing penalties herein, I have also considered that the operator is relatively small in size and has a modest history of violations. I have also considered that the operator abated the violations charged in Citations No. 2695362 and 2695363 in a good faith manner.

ORDER

Citations No. 2695362, 2695363 and 2695425 are affirmed and Solar Fuel Company Inc., is directed to pay civil penalties of $500, $500, and $100 respectively for the violations charged therein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
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