CCASE:
SOL (MSHA) V. TARGET INDUSTRIES
DDATE:
19880203
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, NE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 87-120 A.C. No. 36-06873-03536
v.	No. 1 Mine
TARGET INDUSTRIES, INC., RESPONDENT	

DECISION

Appearances: Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; J.E. Ferens, Esq., Waggoner & Ferens, Uniontown, Pennsylvania, for Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," for two alleged violations of the mandatory safety standards. The general issues before me are whether Target Industries, Inc., (Target) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to a specific citation or order.

The case was heard in Pittsburgh, Pennsylvania, on June 24, 1987. Supplemental evidence in the form of depositions was submitted into the record on January 22, 1988. Both parties have waived the filing of post-hearing briefs.

STIPULATIONS

The parties stipulated to the following:

1. The Target No. 1 Mine is owned and operated by the Respondent, Target Industries, Inc.

2. The Target No. 1 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to 105 of the Act.

4. The citation, order, terminations and modifications, if any, involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the respondent at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not the relevance or the truth of the matters asserted therein.

6. The alleged violations were abated in a timely fashion.

7. The total annual production of the respondent is approximately 120,000 tons of coal. The respondent employs approximately 31 employees at this mine.

8. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

9. The imposition of the proposed civil penalties will have no effect on the respondent's ability to remain in business.

DISCUSSION

Section 104(d)(1) Citation No. 2687303, issued at 9:15 a.m. on December 9, 1986, cites a violation of 30 C.F.R. 75.303 and alleges the following condition or practice:

> There were no dates recorded on date boards along the main belts from the belt drift opening to the 2 Left and 3 Left working section to indicate such belts were examined on 12Ä8Ä86 for the afternoon shift. The day shift belt examiner stated he had completed his examination from no. 20 crosscut no. 1 belt to the 2 Left section along main belts. The record book on the surface indicated no violation or hazardous conditions were observed for 12Ä9Ä86. The following conditions were observed by the writer in the belt entry float coal dust from the drifting opening inby to 2 Left & 3 Left section, belt rollers contacting loose coal, coal dust, guarding removed from no. 3 tail roller and take up roller at no. 3 drive.

Section 104(d)(1) Order No. 2687304, issued at 10:00 a.m. on December 9, 1986, cites a violation of 30 C.F.R. 75.400 and alleges the following condition or practice:

> Float coal dust was observed on rock-dusted surfaces from the belt drift opening to the feeder in 2 Left and 3 Left working sections. Float coal dust was observed on all belt drive structures (No. 2, No. 3, No. 4, and No. 5). Loose coal was permitted to accumulate and contact the belt and belt roller (bottom) between the air lock doors no. 1 belt, on the overpass top structure, and several locations along the no. 2 belt conveyor system. Loose coal and coal dust was shoveled from under the tail roller of no. 3 tail and piled against the coal rib to depth of 2 ft. The tail roller of no. 2 belt was also contacting coal dust. A program was not available indicating a regular clean up and removal of accumulation of loose coal, coal dust, float coal dust, and other combustible materials.

MSHA Inspector Charles Pogue testified as to his background and experience, and he confirmed that he inspected the mine on December 9, 1986, and issued the Section 104(d)(1) Citation and Order which are the subjects of these proceedings.

He testified that accompanied by Mr. John Pesarsick, the mine superintendent, he left the surface and proceeded to inspect the belt lines. Starting his inspection, he went through the set of air-lock doors at the drift mouth opening. At that point, he found an accumulation of loose coal and coal dust, approximately four to six inches in depth, contacting the belt rollers and the bottom belt. They proceeded inby this location on down the No. 1 belt. The further they walked along the belt toward the number 2 belt drive, the darker the belt became with coal dust. It was black in color. Once they got up to around the number 2 belt drive, the belt became very black, and there were accumulations on the belt drive. At the No. 2 drive, he continued inby, finding additional accumulations of loose coal, coal dust and float coal dust, particularly at a second set of air-lock doors and at an underpass on the No. 2 belt line. Inby those air-locks and underpass, he found approximately seven frozen belt rollers and an additional 10 to 12 rollers that were contacting accumulations of coal. At the No. 3 belt drive there were accumulations of loose coal, coal dust and float coal dust approximately 12 to 15 feet in length and 4 to 8 inches in depth.

As he walked the belt he was also looking at the date boards which are located along the belt for date, time and initials that would indicate the belt had been examined on the afternoon shift of December 8, 1986.

Belt conveyors on which coal is carried are required to be examined after each coal-producing shift has begun by 30 C.F.R. 75.303. Inspector Pogue determined from Mr. Pesarsick that coal had indeed been run on the afternoon shift of December 8, but he was unable to find any date boards along the belt line that had been signed by a belt examiner or fire boss on the afternoon of December 8, 1986, to indicate that the belt had been examined, as required. Section 75.303 also specifically requires the examiner to place his initials, the date and the time at all such places he examines. Because the date boards he observed were not so initialed, dated, and timed and because of the conditions the inspector observed on the belt line, he came to the conclusion that the belt line had not been examined on the afternoon of the eighth and that therefore there had been a violation of 30 C.F.R. 75.303

The inspector testified that along the No. 1 belt, between the air locks where he entered and the No. 2 drive there were 3 date boards and beyond the No. 2 drive, a further undetermined number along the No. 2 belt line. He couldn't remember how many, but he did state that none he saw were initialed on the afternoon of December 8, 1986. He did, however, concede that he was unsure of whether or not he had observed each and every date board in existence on the belt lines. He also checked the mine examiner's book on the surface. The examiner who has inspected the belt conveyors is also required by 30 C.F.R. 75.303 to record the results of his examination in a book on the surface. There is no indication of any hazardous conditions such as coal dust accumulations on the belt line reported as observed on December 8. To the contrary, the entry for the dayshift on the eighth of December indicated that no hazards had been observed, and there was no entry at all for the afternoon shift, at least according to the inspector. Mr. Pesarsick recalls that the book stated "none" under "hazardous conditions" for the afternoon shift of the 8th and that it was signed by John Kent, who had made the examination. Neither the book itself or a copy was produced at the hearing.

Mr. Pesarsick testified that he likewise did not see John Kent's initials on any of the date boards that he passed on the No. 1 belt line up to the No. 2 drive, but he states that he was not specifically looking for them.

Mr. Fisher, the dayshift fire boss, also testified. On the morning of December 9, he had been in the mine doing the preshift examination and after the coal-producing shift started, he walked the belts out. He started at the back of the mine, coming forward whereas Mr. Pesarsick and Inspector Pogue had started at the front of the mine and walked back. The three met at the No. 2 drive. Mr. Fisher states that he

saw John Kent's initials on two date boards that day. One was right there at the No. 2 drive and the other was at the underpass on the No. 2 belt. He stated that he erased Kent's initials and date from the two date boards and replaced them with his own just prior to meeting up with Mr. Pesarsick and Inspector Pogue at the No. 2 drive. I do not credit this testimony, however, because it seems highly unlikely that Kent would have initialed all (both) the date boards on the No. 2 belt as Fisher states, but none of the three boards on the No. 1 belt if he had in fact examined both belt lines. Hence, even if I were to credit Fisher's testimony and find that Kent did examine the No. 2 belt line, it only makes the case stronger that he did not examine the No. 1 belt line. Either way, there is a violation of the cited standard.

Even Superintendent Pesarsick conceded that it was possible that the examination wasn't done on the afternoon of the eighth based on the conditions he observed along the No. 1 belt line on the morning of the ninth.

The fact that the date boards along the No. 1 and No. 2 belt lines were not initialed, dated and timed by John Kent, the belt examiner on the afternoon shift of December 8, 1986, is therefore unrefuted in the record and standing alone is a violation of 30 C.F.R. 75.303. Moreover, the preponderance of circumstantial evidence compels the conclusion that the No. 1 belt line between the air locks and No. 2 drive and the No. 2 belt line to No. 3 drive were not examined on the afternoon shift of December 8, 1986, also a violation of 75.303.

I specifically find that an onshift examination was not conducted on the No. 1 and No. 2 belt lines between the belt drift opening and No. 3 drive on the afternoon shift of December 8, 1986, in that an obvious accumulation of loose coal and coal dust existed along those belt lines and this condition had not been reported or recorded in the book provided for this purpose on the surface. In my judgment, this condition which was discovered on the morning of December 9 had existed on the afternoon of December 8 as well. Furthermore, I find that none of the date boards on the No. 1 or No. 2 belt lines were initialed, dated or timed for the afternoon shift of December 8, which I find to be an additional circumstance supporting the allegation that the examination was not performed in those areas that afternoon. This latter fact is, of course, a violation of the cited section in its own right, albeit perhaps a "technical" one.

A violation is "significant and substantial" if (1) there is an underlying violation of a mandatory safety standard, (2) there is a discrete safety hazard, (3) there is a reasonable

likelihood that the hazard contributed to will result in injury, and (4) there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

In this regard, Inspector Pogue testified that the belt examiner's purpose in walking these belts is to detect hazardous conditions and to report them and/or correct them. If these conditions go unfound or uncorrected, a mine fire or explosion could result from, for instance, the accumulation of combustible materials contacting the belt structure. Specifically, he observed accumulations of loose coal, coal dust and float coal dust present on the structure of the belt drives and on electrical equipment. Since the examination wasn't made in these areas, these conditions were not reported to mine management, and were permitted to exist and exacerbate. If a fire were to start, it would be reasonably likely to spread to the extent where it could cause serious injury. Under the circumstances, I find that the violation was "significant and substantial" and serious.

The Secretary further urges that this violation was caused by the operator's "unwarrantable failure" to comply. Inspector Pogue, when asked by the Solicitor why he issued this violation as an unwarrantable failure replied:

> Because it is the obligation of the operator to insure that examinations of the belt entry are made after the coal producing shift begins, for each coal producing shift . . . [S]o that the operator can be aware of conditions in the belt entry, any hazardous conditions that may exist in the belt entry.

This is clearly insufficient cause, in and of itself, to issue an "unwarrantable failure" citation. Nor does my examination of the record turn up any better cause to term this violation an "unwarrantable failure."

I therefore find that the violation was not caused by "unwarrantable failure." In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed

> to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984). And most recently, in Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC ÄÄÄÄ, slip op. at 1, WEST 86Ä35ÄR (December 11, 1987), the Commission stated the rule that "unwarrantable failure" means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. There is no evidence in this record that will support a finding that the operator exhibited aggravated conduct that exceeded ordinary negligence. For the purpose of assessing the penalty, I find that negligence to be "moderate."

Accordingly, I will modify the Section 104(d)(1) citation to a citation issued pursuant to Section 104(a) of the Act, and assess a penalty accordingly.

Turning now to the violation of 30 C.F.R. 75.400 alleged in Order No. 2687304, the cited standard requires that "coal 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."

Inspector Pogue described the violative conditions and areas. He testified that beginning at the air-lock doors at the drift mouth opening there was approximately four to six inches of dry coal dust contacting the belt rollers and the bottom belt. Proceeding inby up the No. 1 belt entry to the No. 2 belt drive, it got blacker as he went further. At the No. 2 belt drive was the first location that he saw accumulations on the belt drive. Proceeding inby on the No. 2 belt line, he came to an area where there were accumulations of dry loose coal and float coal dust on the top of an undercast measured by him to be 12 inches deep and ten feet in length contacting the belt roller and belt in that location. At No. 3 drive, he found further accumulations of loose coal, coal dust and float coal dust four to eight inches deep for a length of 12 to 15 feet. At the No. 3 tail piece, he found coal thrown up against the rib, but this had apparently just been done by Mr. Fisher, preparatory to getting it cleaned up.

Mr. Pesarsick agreed that the coal accumulations along the No. 1 belt "needed some taking care of" and that the

"air-lock needed shoveling," but generally disagreed with the alleged severity of the problem. He was also aware, because Mr. Fisher told him, of the coal spill at No. 3 tailpiece. Mr. Fisher concurred that there were "some" accumulations along the No. 2 belt as well.

I think it is a fair statement to say that the operator does not disagree that there was a violation, but disagrees with the alleged severity of that violation and strongly disagrees with the "unwarrantable failure" allegation.

I find that the violation of 30 C.F.R. 75.400 is proven as charged. I also find that it was a "significant and substantial" violation of the mandatory standard. Mathies Coal Company, supra. The record amply demonstrates that the violation presented a discrete safety hazard, i.e., explosion and fire. I accept Inspector Pogue's testimony that there were ignition sources present along the belts in proximity to the cited accumulations, and that had there been a mine fire or explosion, persons inby these locations could have suffered serious injury, possibly death. As an example, I note that the stuck or frozen rollers found by the inspector would be capable of creating enough frictional heat to ignite the combustible accumulations. I also note that the Commission has previously recognized the explosive character of float coal dust. Old Ben Coal Co., 1 FMSHRC 1954 (1979).

With regard to the issue of unwarrantability, the inspector opined that these accumulations took a minimum of 5 days to build up under normal mining conditions and that therefore the operator knew or should have known of the violative condition in his mine. Therefore, at least to the inspector, this amounted to an "unwarrantable failure" to comply with the mandatory standard.

I disagree. My reasoning relies in part on the integrity of the mine examiner's book on the surface. There was an entry from the day before the inspector's visit; the day shift entry for the eighth. That entry did not make a note of any of the conditions which the inspector observed on the morning of December 9. This apparent discrepancy is explained by the operator, at least as to the accumulations around the air-locks and underpass as being caused by high air pressure on the belt lines causing such accumulations to build up quicker than normal. As to the other parts of the belt where there were accumulations, the operator credibly explained these as spills, which could have occurred since the last belt examination. One such spill, at the No. 3 tailpiece, was reported to mine management and clean-up ordered before the inspector saw it. This situation is not congruent with the aggravated conduct test announced in Emery Mining Corp., supra.

I will, therefore, modify this Section 104(d)(1) order to a Section 104(a) citation and assess an appropriate civil penalty.

In assessing the civil penalties herein, I find that both violations were serious and resulted from the operator's ordinary negligence, which I rate as "moderate." I have examined the operator's history of previous violations and take note here of the stipulations concerning operator size, good faith abatement and the effect civil penalties would have on the operator's ability to remain in business. I conclude that a civil penalty assessment of $200 for each violation is appropriate under all the circumstances.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED THAT:

(1) Citation No. 2687303, issued December 9, 1986, under Section 104(d)(1) IS MODIFIED to delete the finding that the violation was caused by the operator's "unwarrantable failure" to comply with the standard. The citation is therefore hereby converted to one issued under Section 104(a), and a civil penalty of $200 is assessed.

(2) Order No. 2687304, issued December 9, 1986, under Section 104(d)(1) IS MODIFIED to delete the finding that the violation was caused by the operator's "unwarrantable failure" to comply with the standard. The order is therefore hereby converted to one issued under Section 104(a), and a civil penalty of $200 is assessed.

(3) Target Industries, Inc., is directed to pay a civil penalty of $400 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge