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SOL (MSHA) V. UNIVERSAL COAL & ENERGY
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 87-95 A.C. No. 23-01432-03524
v.	
UNIVERSAL COAL & ENERGY COMPANY, INC., RESPONDENT	Randolph No. 1 Strip

DECISION

Appearance: Charles W. Mangum, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Secretary;
N. William Phillips, Esq., Phillips & Spencer, Milan, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

The Secretary (Petitioner) filed, on September 11, 1987, a Petition for Assessment of Civil Penalty for an alleged violation by Respondent of 30 C.F.R. 77.205(b) on April 16, 1987. Pursuant to notice the case was heard in Jefferson City, Missouri, on November 17, 1987. Larry G. Maloney testified for Petitioner and Chris Duren, John Sulltrop, Earl Read, and Michael Sinicropi testified for Respondent.

Petitioner filed its Posthearing Brief on January 4, 1988, and Respondent filed its Findings of Fact and Memorandum on January 6, 1988. The Parties' Reply Briefs were filed on January 20, 1988.

Stipulations

Respondent filed, on November 16, 1987, the following stipulations which were signed by Counsel for both Parties:

1. That jurisdiction over this proceeding is conferred upon the Federal Mine Safety and Health Commission by section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

2. That the condition for which Petitioner seeks an assessment of civil penalty involved Respondent's mine known as the Randolph No. 1 Strip which is located near the town of Higbee, Howard County, Missouri.

3. That the size of Respondent's Randolph No. 1 Strip mine is based on 66,410 production tons in 1986.

5. That on April 16, 1987, Larry G. Maloney, an inspector for the Mine Safety and Health Administration, conducted an onsight inspection of the Randolph No. 1 Strip mine. (Sic)

7. That as a result of the April 16, 1987 inspection, referred to in paragraph number 5., Respondent was issued Citation Number 2817510 alleging violation of the mandatory safety standard found at part 77.205(b) of Title 30, Code of Federal Regulation.

10. That Respondent was granted until April 20, 1987 to abate the violation alleged in citation number 2817510.

12. That on April 20, 1987, Larry G. Maloney Conducted a follow-up inspection of Respondent's Randolph No. 1 Strip and issued a section 104(b) Withdrawal Order Number 2817515

At the hearing, the Parties further stipulated that the imposition of a civil penalty in these proceedings will not effect the ability of the Respondent to continue in business, that Respondent is a small operator, and that Respondent's history of past violations is evidenced by Petitioner's Exhibit 1.

Issues

The issues are whether the Respondent violated 30 C.F.R. 77.205(b), and if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and whether the alleged violation was the result of the Respondent's unwarrantable failure. If section 77.205(b), 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 2817510, issued on April 16, 1987, alleges a significant and substantial violation in that "Coal spillage had accumulated on the bottom floor of the preparation plant. It had accumulated to a depth of approximately 10" over the entire floor (approx 40þ square). Piles of spillage had accumulated to a depth of approx 4 ft. blocking the stairs on the southeast corner. The plant had not been in operation since 4/9/87 but was in the process of being operation." (Sic.)

Regulation

30 C.F.R. 77.205(b) provides as follows:

> "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

Findings of Fact and Conclusions of Law

I

Larry G. Maloney, a mine inspector employed by the Mine Safety and Health Administration, testified that on April 16, 1987, when he inspected Respondent's coal processing plant, he observed an accumulation of coal in the lowest or (sump level) that completely covered the whole area to a depth of approximately 10 inches. In addition, it was essentially his testimony that the accumulation of coal at a stairway located in the southeast corner of the sump area had piled to a depth of approximately 4 feet. It further was his testimony that a person attempting to climb over this pile to go to the stairway would be subjected to a possibility of slipping on the coal accumulation as it was uneven. He also said that there were cracks or crevices in the coal accumulations which would cause unsecured footing.

Chris Duren, Respondent's pit supervisor and supervisor of mechanics and John Sulltrop, Respondent's safety director, testified, in essence, that the southeast stairway would not be used when the plant is in operation as it is located directly underneath a conveyer belt, and one using this stairway would be subject to debris falling from the belt. Duren and Sulltrop also indicated that most of the tools are located in the central office which is more accessible to the stairway at the northwest corner rather than the southeast corner. They also indicated that the former stairway is the one nearest a winch line beam.

I find, based on the uncontradicted testimony of Maloney, that on the date in question there was an accumulation of coal in the sump area which created a stumbling or slipping hazard. Also, I find, based upon the testimony of Maloney and Duren, that although work is not performed in the sump area on a daily basis, nontheless, as part of the normal operation of the plant workers are required to go to that area to lubricate, clean up, or open valves. Also, I find that although it may have been more efficient for a worker in the sump area to utilize the stairway of the northwest corner, the stairway at the southeast corner is clearly a means of access to the sump area from the level above it. Hence, I find that it has been established that Respondent violated section 77.205(b), supra.

II

In analyzing whether the violation herein is of such a nature as to fall within the purview of section 104(d)(1) of the Act as significantly and substantially contributing to a safety hazard, I am guided by the Commission decision in Mathies Coal Company 6 FMSHRC 1 (January 1984).

In Mathies Coal Co., supra, the Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (6 FMSHRC, supra, at 3Ä4.)

As discussed above, infra, I have already found that a mandatory safety standard, i.e., 30 C.F.R. 75.205(b), has been violated. Accordingly, the first element of Mathies, supra, has been satisfied. In evaluating whether or not the additional elements set forth in Mathies, supra, have been met, I find that the only evidence in the record on this issue consists of the testimony of Maloney. In essence, it was the testimony of Maloney that the nature of the violation herein was significant and substantial, inasmuch as the uneven coal accumulation in the sump area contained cracks and crevices and as a result created a hazard whereby one walking over such a surface could slip and suffer permanent disability due to a severely twisted ankle, or a broken leg. He also opined that an injury to one's head or body could occur as result of slipping or falling against hazardous

objects located in the sump area such as medal handrails, pumps, and support beams. Inasmuch as this testimony was not contradicted or diluted upon cross examination, I adopt it and find that the nature of the violation herein is to be considered significant and substantial within the purview of section 104(d) of the Act.

III

According to Respondent's witnesses on April 9, 1987, a screen located above the sump area, on the highest level of the plant, became plugged causing coal to overflow and fall to the sump area. In addition a water pump had broken causing the remaining water pumps in the circuit not to operate, thus shutting down the entire processing plant operation. It was further the testimony of Respondent's witnesses that from April 9, 1987, through April 16, 1987, the date of Maloney's inspection, the processing plant was not in operation and no one went to work in the sump area. Further, inasmuch as the pumps were not in operation, there was no way to provide water pressure to clean out the accumulation of coal in the sump area by having it washed out.

In order to find, as argued by Petitioner, that the violation herein was caused by Respondent's unwarrantable failure, I must find that the accumulation of coal in the sump area resulted from Respondent's aggravated conduct which constitutes more than ordinary negligence (Emery Mining Corp., 9 FMSHRC _____, (Slip op., Dec 11, 1987)). Petitioner, in its brief, argues that the coal accumulation in the sump area was ultimately caused by and not corrected due to Respondent's "lack of reasonable care." I conclude that although Respondent's actions herein might constitute "lack of reasonable care," they do not reach the level of aggravated conduct and thus can not be characterized as being encompassed in the term "unwarrantable failure" (Emery Mining Corp. supra). Moreover, Petitioner's augment is based upon testimony from Earl Read, who was Respondent's Plant Foreman in the time period in issue, which tends to indicate that Respondent had previously had problems with the secco screen (Tr. 207Ä208). Petitioner also cited Read's statement of June 16, 1987, and his testimony which tends to indicate that "the Company" and Read's supervisor, Guy Schippia, were not willing to replace screens and pumps. However, both Duren and Read testified that from April 9, to April 16, they were waiting for pump parts that had been ordered. This belies a finding that Respondent's action was "aggravated conduct."

Further, since the plant was not in operation between April 9 and April 16, and no one went down to the sump area in that time period, I find that it was not "aggravated conduct" for

Respondent to have opted to wait for the plant's returned operation in order to clean out the area with high pressure water which is the customary method of cleaning out the sump area.

IV

In assessing a civil penalty in this matter, I have carefully considered the criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. The Parties have stipulated to the Respondent's history of previous violations, size of its' business, and the effect of a penalty assessed on its ability to continue in business. I adopt the Parties' stipulations.

The remaining statutory factors are in issue. Based on the testimony of Duren (Tr. 147Ä148) that Respondent had problems with the pump system prior to April 9, and Read's testimony that Respondent previously had problems with the screen, I find Respondent negligent to a moderate degree in that it had not, prior to April 9, fixed the portion of the system that caused the spillage in the sump area. Also, Respondent was negligent in a less than moderate degree in allowing the coal accumulation to remain from April 9 to April 16.

I find that until the abatement of the citation was commenced, there is no evidence that any of Respondent's employees actually entered the sump area where the coal had accumulated. Indeed, the processing plant was not in operation between April 1 and April 16, 1987. It was the testimony of Read, in essence, that because the plant was not in operation then there would not have been any reason for any employee to go to the sump area. Also, I note that although there was an accumulation of coal 4 feet high beside the stairway in the southeast corner of the sump area, there was no such accumulation or blockage by the stairway at the northwest corner, which is the one closest to the area on the floor above where the tools were kept. As such, I find that the gravity of the violation herein was low.

The condition giving rise to the violation herein was initially observed by Maloney on April 16, 1987. At that time, he proposed to Respondent that the condition should be abated by April 20, and according to Maloney's testimony Respondent did not object. When Maloney returned on April 20, the accumulation of coal was still in evidence. Maloney then issued a withdrawal order predicated upon Respondent's failure to abate. This order was terminated on April 27, 1987, when the original condition giving rise to the violation was abated. In mitigation, Duren testified that subsequent to Maloney's inspection on April 16, Respondent's work force was taken off the pit area and sent to the plant to repair the screen and pump and clean up the accumulation of coal in the sump area. According to Duren the pump was repaired on April 16, and according John Sulltrop, Respondent's safety director at that time, the plant was in operational

condition by quitting time at 3:30 p.m. on April 14. However, Respondent's workers, with one exception, refused to work overtime to clean the sump area. The one worker who remained, worked with Read and Sulltrop until 7:00 p.m. to flush out the system. In addition, according Respondent's President Michael Sinicropi, some coal was run through the system from the yard on April 17, with the intention of cleaning up the sump area on Monday morning April 20. However, according to Sinicropi, Respondent's employees were on strike Monday morning and Respondent needed some time to clarify its legal position whether it could hire nonunion personnel to clean the sump area. Subsequently, on April 20, Respondent contacted two nonunion employees who arrived at the mine Tuesday morning April 21, and cleaned out the sump area. Taking into account all of the above circumstances, as established by the uncontradicted testimony of Respondent's witnesses, I find that Respondent acted in good faith in abating the violation herein.

Taking into account all the statutory factors discussed above, especially Respondent good faith and low level gravity of the violation herein, I conclude that a civil penalty of $200 is appropriate.

ORDER

It is ORDER that Respondent pay the sum of $200, within 30 days of this Decision, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge