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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

v.

FARCO MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 87-54
A.C. No. 41-02803-03527

Palafox Mine

DECISION

Appearances: V. Denise Howard, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for Petitioner;
Arturo Volpe, Esq., Wilson, Volpe, Freed & Hansen, Laredo,
Texas, 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 Farco Mining Company (Farco) with three violations of regulatory standards (Footnote 1).

The general issues before me are whether Farco violated the cited regulatory standards 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.

The facts surrounding the death of Pedro Leija at Farco's Palafox Mine on October 4, 1986, are set forth in the investigative report authored by Theodore Caughman a senior special investigator for the Federal Mine Safety and Health Administration (MSHA). The report was admitted into evidence without objection (Exhibit RÄ2) and states in relevant part as follows:

On Saturday, October 4, 1986, a crew of men consisting of two utilitymen, one laborer, one welder, and a preparation plant operator, arrived at the mine to perform maintenance work on components related to the preparation plant facility. The crew was under the supervision of Perfecto Cervera foreman. After the foreman assigned duties, he went to the substation and locked out the power providing power to the raw coal storage bin crusher facility. Maintenance work to be performed this day consisted of changing the main hydraulic pump on the Stamler Belt Feeder Conveyor, replacing and/or repairing flights in the conveyor of the Stamler and replacing or installing picks (bits) on the crusher roller. Also, a number of conveyor belt idler rollers were to be replaced in the raw coal overland feeder belt that removed the coal after it had been run through the crusher. These activities continued until about 3:00 p.m., when Cervera checked on the progress of the work being performed. Arturo Valdez, utility, and Pedro Leija, laborer and victim, had just completed installing all the available picks (bits) at the site on the breaker roller, the hydraulic pump had been repaired, and the belt idler rollers had been replaced. Arturo Valdez, welder, and Danny Munoz, preparation plant operator, were in the process of installing a missing flight in the chain conveyor which transports the coal from the raw coal storage bin to the crusher roller. Perfecto told Valdez he could go home, and Valdez left. Perfecto instructed Leija to gather up the tools they had been using, clean them and put them in the tool box. He then told Munoz and Lozano that he was going to restore the power to the Stamler so the conveyor could be operated to see if additional flights needed to be replaced or if any others were missing. He then went to the substation and restored power to the Stamler. On his way back, he stopped at the warehouse and picked up two buckets of picks (bits) for the crusher roller since all the spare ones at the crusher had been installed. He returned to the raw coal storage bin crusher facility, set the two buckets of bits in the area where they were normally stored, and told Lozano and Munoz that the

power had been restored. He also told them that he and Jose Luis Aguilar, utilityman who had been cleaning surface areas, were going to the clear water pond to prime the clear water pump so water would be available when the preparation plant was put in operation. At this time Leija, victim, was about 125 feet away, near the tool box, cleaning the tools he had gathered. Lozano and Munoz were working on the flights, and Cervera and Aguilar traveled to the clear water pond. After arriving at the pond, Cervera sent Aguilar to obtain a bucket to fill with water so the pump could be primed. Aguilar traveled by foot to the tool box area, where Leija had been working, got a bucket and walked back toward the clear water pump. When he was at the tool box area he did not observe Leija, although he did see the tools he had been cleaning still in the bucket of cleaning solvent. Meanwhile, Munoz and Lozano had finished installing the flight they had been working on and Lozano started walking around the coal storage bin to engage the hydraulic controls so the conveyor chain could be rotated and Munoz energized the Stamler crusher electrical system. As the machinery started, Lozano looked up toward the crusher assembly and saw Leija being pulled into the crusher. Lozano yelled at Munoz to shut off the machinery. Munoz ran around the end of the crusher to where Lozano was, found out Leija was in the crusher, and using the emergency stop switch on the raw coal belt conveyor that transports the coal from the crusher, stopped the machine. Help was summoned and Leija was pronounced dead at the scene by the Webb County Coroner. The body was removed from the crusher assembly by the Laredo Fire Department Paramedics and transported to Jackson Funeral Home in Laredo, Texas.

As a result of its investigation, MSHA issued several citations under section 104(a) of the Act, two of which remain at issue. Citation No. 2830087 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 77.1607(bb) and charges as follows:

The entire length of the chain conveyor of the Stamler coal cracker was not visible from the starting switch that was used and a positive audible or visible warning system was not installed and operated to warn persons that the conveyor was to be started. This violation observed during the investigation of a fatal accident which occurred on October 4, 1986.

The cited standard provides in relevant part that "[w]hen the entire length of the conveyor is not visible from the starting switch, a positive audible or visible warning system shall be installed and operated to warn persons that the conveyor will be started".

Farco maintains that the cited standard is not applicable to the facts herein because the "Stamler Belt Feeder - Conveyor" was not a "conveyor" nor was it "loading and haulage equipment" to which, it argues, the cited standard is limited, citing the caption to the subheading to section 77.1607, i.e. "Loading and Haulage Equipment: Operation". The term "conveyor" is defined in A Dictionary of Mining, Minerals, and Related Terms, U.S. Department of Interior (1968) as "[a] mechanical contrivance generally electrically driven, which extends from a receiving point to a discharge point and conveys, transports, or transfers materials between those points." The term "conveyor-type feeder" is defined therein as "[a]ny conveyor, such as apron, belt, chain, flight, pan, oscillating, screw, or vibrating, adapted for feeder service."

The machine here at issue is labeled "Stamler Belt Feeder-Conveyor" and incorporates, by the Respondent's own evidence, a 3-speed conveyor (Exhibit R4). It is also undisputed that the machine functions as a conveyor in that it has flights which drag coal from a bin through the crusher. Since the equipment is labeled by its manufacturer to be a conveyor and performs the functions of a conveyor one may reasonably infer that it is a conveyor.

Further, even assuming, arguendo, that the cited equipment must come within the scope of the subtitle "Loading and Haulage Equipment" it is clear that it performs such functions. The term "haulage" is defined as the "drawing or conveying, in cars or otherwise, or movement of men, supplies, ore and waste, both underground and on the surface." A Dictionary of Mining Mineral and Related Terms, supra. It is not disputed that there is a bin or hopper mounted on the machinery into which coal is loaded. The coal is then drawn or conveyed to the crusher by the conveyor. The coal is crushed and then further conveyed to a storage area. Within this framework of evidence it may reasonably be inferred that the cited equipment performs a haulage function within the meaning of the subtitle "Loading and Haulage Equipment: Operation". Farco's argument that the cited equipment was not therefore haulage equipment is accordingly rejected.

Farco further argues that the cited equipment was purchased in full compliance with "Federal and State legislation" and therefore presumably it should not be responsible for any violation of Federal law. Even if this were true however the

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evidence shows that following its purchase it was modified by the installation of a large bin over the hopper area, thereby obstructing the view from the start-stop switch to the area of the breaker roller. The contention accordingly has no merit. With regard to the specific violation charged herein, it is undisputed that the cited crusher-conveyor was not equipped with an audible or visible warning system. The evidence also shows that the coal crusher-conveyor at issue was activated by a start-stop switch from which the crusher roller upon which the deceased in this case was working could not be seen (Exhibit RÅ2, p. 3, Tr. 40 and 69). Accordingly the violation is proven as charged.

The failure to have complied with this regulatory standard was clearly a causative factor in the death of Mr. Leija. It may reasonably be inferred therefore that the violation was serious and "significant and substantial". Secretary v. Mathies Coal Co. 6 FMSHRC 1 (1974). The violation was also the result of operator negligence. By having a large bin erected (thereby obstructing sight between the on-off switch and crusher) on equipment known by Farco to meet Federal safety standards, Farco should have been on notice of potential safety violations and of this violation in particular.

Citation No. 2839108 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 77.404(c) and charges that "the Stamler Coal Crusher was not blocked against movement while repairs were performed, which resulted in fatal injuries to employee Pedro Leija on October 4, 1986."

The cited standard provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." It is not disputed that the cited machinery was not blocked against motion.

Farco maintains however that the deceased was performing an unauthorized task at the time of his death and should not have been working on the Stamler crusher when power was engaged. It concedes that motion of the Stamler is not necessary during replacement of the picks but maintains that that task had already been completed and the deceased was directed to work elsewhere before the next maintenance procedure, repair of the flights, was begun. The Secretary does not dispute that motion is necessary during repair of the flights and that the exception provided in the cited standard would apply to that specific procedure.

It is undisputed that the deceased and utilityman Arturo Valdez began replacing bits on the crusher roller at around 2:30 on the afternoon of October 4th. At around 3:00 that afternoon

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they had completed installing the bits that were available at the crusher. Foreman Perfecto Cervera then told Valdez that he was free to leave and told the deceased to gather up his tools, clean them and put them away. Cervera then restored power to the Stamler, apparently to permit the next repair process to begin, and obtained two buckets of bits from the warehouse. Cervera left these buckets at the Stamler work platform where they were ordinarily kept.

Following the accident it appeared that two bits were missing from the buckets, one having been installed on the crusher roller and another having been found on the floor below along with the tools necessary to change the bits. It may reasonably be inferred from this evidence that the deceased had returned to the Stamler unit without specific direction from his foreman to replace additional bits. Thus it is apparent that maintenance work was being performed by the deceased while power was engaged and the machinery was not blocked against motion - and motion was not necessary to the specific task he was performing i.e. the replacement of bits. While the credible evidence shows that Foreman Cervera had directed the deceased to perform other tasks and the work of changing bits may have been contrary to the deceased's instructions from his foreman, the law is well-established that an operator is liable for violations of the Act committed by its employees even if it is totally without fault. Thus on the issue of whether a violation existed, it is immaterial whether or not Farco officials knew that the deceased was replacing bits at a time when the power to the Stamler unit was not cut-off and when the machinery was not blocked against motion. *Sewell Coal Company v. FMSHRC*, 686 F.2d 1066 (4th Cir.1982); *Alabama By-Products Co. v. FMSHRC* 666 F.2d 890 (5th Cir.1982); *Secretary v. Asarco Inc.*, 8 FMSHRC 1632 (1986); *El Paso Rock Quarries, Inc.* 3 FMSHRC 35 (1981). Thus the violation is proven as charged. In light of the fatality it may reasonably be inferred that the violation was also serious and "significant and substantial". *Mathies Coal Co.*, supra.

However since the credible evidence demonstrates that foreman Cervera directed the deceased to perform work other than changing bits on the crusher roller after 3:00 p.m. and that he was unaware that the deceased had returned to work on this unit, Farco is chargeable with but little negligence in regard to this violation. In determining the appropriate civil penalties in this case I have also considered that the mine operator is relatively small in size and that it has a moderate history of violations. It appears that the instant violations were abated in full compliance with the Secretary's directions. Under the circumstances I find that the following civil penalties are appropriate: Citation No. 2830087, \$1,000; Citation No. 2839108, \$50.

