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M.A.E. WEST V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

M.A.E. WEST, INCORPORATED,
CONTESTANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CONTEST PROCEEDINGS

Docket No. WEVA 87-234-R
Citation No. 2909484; 5/14/87

Docket No. WEVA 87-235-R
Citation No. 2909485; 5/14/87

Docket No. WEVA 87-236-R
Citation No. 2909486; 5/14/87

Docket No. WEVA 87-237-R
Citation No. 2909487; 5/14/87

Docket No. WEVA 87-238-R
Order No. 2909488; 5/14/87

Docket No. WEVA 87-239-R
Citation No. 2909489; 5/14/87

MAE West Preparation Plant
Mine ID 46-03755

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

M.A.E. WEST, INCORPORATED,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 88-92
A.C. No. 46-03755-03534

M.A.E. West Preparation Plant

DECISIONS

Appearances: Mark M. Neil, Esq., Rist, Neil & Associates, and William D. Stover, Esq., M.A.E. Services, Inc., Beckley, West Virginia, for the Contestant/Respondent;
Jack E. Strausman, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern six Notices of Contests filed by M.A.E. West Incorporated pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the validity of four section 104(a) citations, with special "significant and substantial" (S & S) findings, and two section 107(a) imminent danger orders issued at M.A.E. West's Preparation Plant on May 14, 1987. The citations and orders were issued after the conclusion of a fatal accident

investigation conducted by MSHA (Exhibit GÄ27). A hearing was conducted in Beckley, West Virginia, during May 24Ä25, 1988, and the parties appeared and participated fully therein.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.
2. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The issues presented in these proceedings are as follows:

1. Whether or not the conditions and practices cited in the imminent danger orders constituted an imminent danger within the meaning of section 107(a) of the Act.
2. Whether or not the conditions or practices described in the citations issued pursuant to section 104(a) of the Act constituted violations of the cited mandatory safety standards, and if so, whether or not these violations were significant and substantial.
3. The appropriate civil penalty assessments that should be assessed against M.A.E. West for the violations in question, taking into account the civil penalty assessment criteria found in section 110(i) of the Act.

Stipulations

The parties stipulated to the following (Exhibit ALJÄ1; Tr. 5Ä6):

1. MAE West, Inc. is a West Virginia Corporation located at 41 Eagles Road, Beckley, West Virginia 25801.
2. MAE West, Inc. operates a bituminous coal preparation plant at Uneeda in Boone County, West Virginia.
3. The federal mine identification number for the MAE West Prep. Plant is 46Ä03755.
4. MAE West, Inc., and the operation of the MAE West Prep. Plant, are subject to the jurisdiction of the Mine Safety and Health Act of 1977, as amended, 30 U.S.C. 801 et seq.
5. The Administrative Law Judge has jurisdiction over this proceeding.
6. The inspector who issued the subject 104(a) citations (numbers 2909484, 2909485, 2909487, and 2909489) and the subject 107(a) imminent danger orders (numbers 2909486 and 2909488) was a duly authorized representative of the Secretary of Labor.
7. The subject 104(a) citations (numbers 2909484, 2909485, 2909487 and 2909489) and the subject 107(a) imminent danger orders (numbers 2909486 and 2909488) were properly served upon the operator in accordance with sections 104(a) and 107(a) of the Act.
8. Copies of the subject citations and orders, and the subsequent modifications or terminations issued, are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness of any statement therein.
9. A copy of Form RÄ17, the Assessed Violation History Report for the MAE West, Inc. Prep. Plant accurately sets forth the number and types of violations assessed for said plant

during the period from May 12, 1985 to May 11, 1987 and may be admitted into evidence.

10. For purposes of section 110(i) of the Act, MAE West, Inc. is a moderate-sized company.

11. The imposition of the proposed civil penalties will not affect the operator's ability to continue in business.

12. For purposes of section 110(i) of the Act, the operator demonstrated good faith in achieving compliance with the Act after being notified of the subject 104(a) violations (numbers 2909484, 2909485, 2909487, 2909489).

Bench Ruling

During opening statements at the hearing, MSHA's counsel moved for leave to amend and modify section 107(a) Order No. 2909486 to cite a violation of 30 C.F.R. 77.404(c) rather than 30 C.F.R. 77.516 (Exhibit GÄ3Äa). Counsel also moved to amend and modify section 104(a) Citation No. 2909487 to cite a violation of section 77.404(c), rather than section 77.516, and to delete the sentence which originally appeared in item #8, "condition or practice" on the face of the original citation form, which read "The practice is contrary to the National Electrical Code section 430Ä86" (Exhibit GÄ4Äa).

M.A.E. West's counsel filed a previously prepared written objection to the proposed modifications and amendments, and after further arguments on the record, MSHA's request was granted, and the objection was rejected (Tr. 8).

Discussion

The contested citations and orders, as modified and amended, are as follows:

Section 104(a) "S & S" Citation No. 2909484, 30 C.F.R. 77.502 (Exhibit GÄ1):

The conduit provided for the 480 volt a.c. three phase circuit for the drive motor of the raw coal bypass belt, also called the breaker reject belt, included a junction box that was damaged to the extent that muck and water were allowed to accumulate in it. This resulted in

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a power lead shorting to ground, and it shorted out the start-stop controls of the Koppers rotary breaker.

Section 104(a) "S & S" Citation No. 2909485, 30 C.F.R. 75.516 (Exhibit GÄ2):

The No. 14 AWG control leads for the JDG switch of the Koppers rotary breaker were spliced 12 feet in by the large splice box located on the underside of the 2nd floor of the breaker building. The splice shorted to the conduit and shorted the start-stop switches for the Koppers rotary breaker. The splice was located inside a run of conduit tubing, not acceptable in the National Electrical Code, section 346Ä14 for rigid metal conduit, and section 345Ä14 for intermediate metal conduit.

Section 107(a) Imminent Danger Order No. 2909486, 30 C.F.R. 77.404(c), (Exhibits GÄ3 and GÄ3Äa)

During the investigation of a fatal accident, it was revealed that a practice of working on and inside the Koppers rotary breaker without locking out the circuit breaker which was the disconnecting device, existed.

Section 104(a) "S & S" Citation No. 2909487, 30 C.F.R. 77.404(c) (Exhibits GÄ4 and GÄ4Äa):

The investigation of a fatal accident revealed that a practice of not turning power off and locking out the circuit breaker for the Koppers rotary breaker existed when work was being performed on the machine. The circuit breaker was the power disconnecting device.

Section 107(a) Imminent Danger Order No. 2909488, 30 C.F.R. 77.516, (Exhibits GÄ5)

During the investigation of a fatal accident it was found that some circuit breakers in the circuit breaker room of the breaker building which were the power disconnecting devices for the motor circuits were not provided with a means to be locked out when work was being performed.

Section 104(a) "S & S" Citation No. 2909489, 30 C.F.R. 77.516,
(Exhibit GÄ6):

Some circuit breakers used as the power disconnecting devices for motor circuits in the breaker building were not provided with a means to be locked out when work was being performed on the machines. This is contrary to the National Electrical Code section 430Ä86. These circuit breakers included the rock bin undercut gate, the 2Ä48 inch slope conveyor, and the main.

MSHA's Testimony and Evidence

In support of its position in these proceedings, MSHA presented the testimony of Federal Mine Inspectors James E. Davis and Roy W. Milam. Inspector Davis prepared the official report of investigation concerning the accident in question, and he testified as to his findings which were included in the report, as well as to certain information developed during interviews with certain witnesses in the course of the investigation (Exhibits GÄ27 and GÄ30). Inspector Milam, the individual who issued the contested citations, testified as to the facts and circumstances concerning his electrical inspections, and the reasons for the issuance of the citations in question.

During the second day of the hearing, and during a break in the cross-examination of Inspector Milam, the parties advised me that they had reached a proposed settlement in all of these matters, and MSHA's counsel requested some additional time to contact his office for the purpose of discussing and clearing the proposed settlement with his supervisor. Counsel's request was granted, and the hearing was recessed to accommodate the parties in their further settlement negotiations. The hearing was subsequently reconvened, and the parties advised me that they had reached an agreement and proposed settlement of all of the cases, and they were afforded time to present their settlement motions, including supporting arguments on the record. MSHA's counsel confirmed that Inspectors Davis and Milam agreed with the terms of the settlement, which are as follows (Tr. 55Ä60):

1. Docket Nos. WEVA 87Ä234ÄR, WEVA 87Ä235ÄR, and WEVA 87Ä239ÄR. With regard to section 104(a) "S & S" Citation Nos. 2909484, 2909485, and 2909489, the parties are in agreement that the citations may be affirmed as issued and modified by the inspector.
M.A.E.

West agreed to pay the full amount of the proposed civil penalty assessments for the violations in question, and agreed to withdraw its contests in this regard.

2. Docket No. WEVA 87Ä238ÄR. The parties agreed that the contested section 107(a) Imminent Danger Order No. 2909488, may be affirmed as issued and modified by the inspector, and M.A.E. West agreed to withdraw its contest in this regard.

3. Docket Nos. WEVA 87Ä236ÄR and WEVA 87Ä237ÄR. With the concurrence of Inspector Milam, the parties agreed to amend and modify section 107(a) Imminent Danger Order No. 2909486 and section 104(a) "S & S" Citation No. 2909487, so that the "condition or practice" described by the inspector will read as follows:

During the investigation of a fatal accident it was concluded that Chester Asbury entered the Koppers Rotary Breaker for the purpose of repairs and maintenance without the power being off in violation of 30 C.F.R. 77.404(c).

The inspector's "high" negligence finding with respect to Citation No. 2909487 is reduced to "moderate," thereby justifying a reduction of the original civil penalty assessment.

The parties agreed that the contested order and citation, as amended and modified above, may be affirmed as issued, and subsequently amended and modified. M.A.E. West agreed to withdraw its contests in this regard.

With respect to MSHA's proposed civil penalty assessment of \$8,000, for the Citation No. 2909487, MSHA agreed to reduce its proposed penalty assessment for this violation to \$7,000, and M.A.E. West agreed to pay that amount in satisfaction of the violation.

Conclusion

After careful review and consideration of the pleadings, and the arguments presented by the parties in support of the proposed settlement disposition agreed to by the parties in these proceedings, the proposed settlements were accepted and approved from the bench. Further, pursuant to the requirements of Commission Rule 30, 29 C.F.R. 2700.30, I conclude and find that the settlement agreements are reasonable and in the public interest, and my bench decisions in this regard ARE REAFFIRMED.

ORDER

All of the citations, orders, and violations in issue in these proceedings ARE AFFIRMED. M.A.E. West IS ORDERED to pay the following civil penalty assessments for the violations in question, within thirty (30) days of the date of these decisions and order:

Citation/ Order No.	Date	30 C.F.R. Section	Assessment
2909484	05/14/87	77.502	\$ 255
2909485	05/14/87	77.516	\$ 255
2909487	05/14/87	77.404(c)	\$7,000
2909489	05/14/87	77.516	\$ 180

IT IS FURTHER ORDERED that the Notices of Contests filed by M.A.E. West in connection with the contested violations in issue in these proceedings ARE DISMISSED. Upon receipt of payment of the aforesaid civil penalty assessments by the petitioner, the civil penalty proceeding is likewise dismissed.

George A. Koutras
Administrative Law Judge