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SOL (MSHA) V. WESTRICK COAL CO.
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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.

WESTRICK COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-119
A.C. No. 36-07571-03516

JPLMJ Strip Mine

DECISION

Appearances: Therese I. Salus, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary;
Raymond Westrick, Owner, Westrick Coal Company,
Patton, Pennsylvania, for the Respondent

Before: Judge Weisberger

Statement of the Case

In this case, the Secretary (Petitioner) has filed a Petition for Assessment of the Civil Penalty alleging that the Respondent, on July 1, 1987, violated 30 C.F.R. 77.1710(d). After the Operator (Respondent) filed an Answer, a Prehearing Order was issued on March 11, 1988, to which the Respondent did not comply. Subsequently on April 11, 1988, Petitioner filed a Motion to Dismiss Respondent's Notice of Contest on the ground that Respondent did not comply with the terms of the Prehearing Order. Respondent did not file any response to Petitioner's motion, and on April 21, 1988, a Show Cause Order was issued, directing Respondent to comply with the terms of the Prehearing Order, or show cause why it should not be held in default for failure to comply with the Prehearing Order. The Show Cause Order further provided that if Respondent shall not file any response by May 2, 1988, a default judgment shall be entered in favor of Petitioner. No response was filed by Respondent, and on May 25, 1988, a Default Decision was entered. On June 24, 1988, Respondent filed a Petition for a Discretionary Review. The Commission, by Order dated July 8, 1988, vacated the Default Decision to allow Respondent to present reasons for failures to respond to the previous Orders, and allow the Petitioner to interpose any objections to relief from the Default Decision. The Order further

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provided that, should it be determined that relief from default is "appropriate," the civil penalty issues in this matter should be resolved. Pursuant to the Order and pursuant to Notice, a hearing was held in Indiana, Pennsylvania, on August 18, 1988.

At the hearing, Raymond Westrick, Respondent's owner, testified with regard to the reasons for his failure to respond to the previous Orders. I found persuasive the testimony of Westrick, a non-attorney, who was appearing pro se, that he did not have any office help, was personally involved with many matters dealing with his mine, and had health problems at the time the Orders were received. According to Westrick, his wife signed the registered postal receipt for the Orders concerned, and he described his wife as forgetful, and tending not to give messages. Westrick also testified that he was confused by the various correspondence he had received concerning this and other alleged violations. Taking all these factors into account, as well as Westrick's age, I concluded that it was in the interests of justice, and appropriate, for the case to be heard on the merits. The case was heard on the merits on August 18, 1988. Gerry Boring testified for Petitioner, and Raymond Westrick testified for Respondent.

Citation

Citation 2697967 issued on July 1, 1987, states as follows:

"Observed two men working in the active 001 pit, repairing a caterpillar bulldozer, and were not wearing hard hats to protect them from falling hazards (debris from the highwall)."

On August 25, 1987, the Citation was modified to a 104(d)(1) Citation.

Regulation

30 C.F.R. 77.1710 provides as pertinent that each employee working in a surface coal mine shall be required to wear protective clothing and devices including "* * *(d) a suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. . . ."

Stipulations

1. The J.P.L.M.J. Strip Mine is owned and operated by Respondent, Westrick Coal Company.

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2. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

4. The subject citation, the modification order, and terminations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent on the dates, times and places stated therein. They may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or the relevancy of any statement asserted therein.

5. The Parties stipulate to the authenticity of the exhibits, but not to the relevance nor to the truth of the matters asserted therein.

6. The alleged violation was promptly abated.

7. The J.P.L.M.J. Strip Mine, the only mine operated by Westrick Coal Company, was producing 37,279 annual production tons in 1987.

Finding of Facts and Discussion

Gerry Boring, a MSHA Inspector, testified that on July 1, 1987, when he inspected Respondent's JPLMJ Strip Mine, he observed two men in the pit doing repair work on a dozer. These men were not wearing hard hats. He indicated that there was no hazard of falling rocks to these men from either the highwall, where clearing was performed 100 to 150 feet away, nor was there a hazard of falling objects from the loading of trucks which were hauling dirt from the highwall. However, according to Boring, trucks transporting stones and rocks had, on their way to the haul road, which was at an elevated grade, passed within 15 to 20 feet from and on the same level of the men repairing the dozer. It was Boring's testimony that the trucks, transporting items that varied from pulverized material to rocks weighing a couple hundred pounds, were open at the rear end, had a slight pitch, and were not covered. As such, he opined that as these trucks travel approximately 5 miles an hour over a "rough" road, they could bounce and sway, causing rocks to fly out of the trucks, (Tr. 62), and hit the men on the head, causing a possible fracture to the skull, depending upon the size of the material thrown out of the trucks. With regard to the condition of the road, he testified that Respondent had four or five trucks going back and forth, loading and unloading, and this truck traffic "creates" ruts in the road which is made out of dirt and stone (Tr. 89). He also indicated that there was a hazard to the men in being hit in the head when performing the repair work with wrenches.

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According to Boring, one of the men performing the repair work without a hard hat was Alfred Lieb, Respondent's pit foreman. In the opinion of Boring, the latter should be familiar with the requirement with regard to wearing hard hats. Boring opined that Lieb did not show reasonable care in not wearing a hat, and did not set a proper example for the men he had to supervise. However, Boring indicated that he does not know of any such cases where one has been injured due to the lack of wearing a hard hat. He also indicated that he never observed such an incident. Also, on cross-examination, he was asked whether he saw anything that could fall off the side of the trucks, and indicated that he did not recall. Also, on cross-examination, he was asked whether he observed how high the material was piled in the trucks and he indicated that he could not recall.

Raymond Westrick, Respondent's owner, testified that the trucks in question had a bed which sloped down to the cab which had a protector to prevent the stones from hitting the cab. He also indicated that the materials that the trucks were transporting from the overburden contain stones which weighed up to 40 pounds. According to his testimony, the trucks were loaded with buckets, each one containing 6 to 8 tons. He said that the 35-ton trucks were loaded with three buckets, and the 50-ton trucks were loaded with four buckets. He said that he observed the trucks loaded on July 1, 1987, and the biggest piece of rock in the trucks was about 50 to 60 pounds, and the trucks were loaded only about 60 percent. He said that in his opinion, there was no danger of rocks falling out of the trucks, and that he had never observed rocks falling out of the trucks. According to his testimony, loaded trucks traveled from the overburden to the haul road and passed the men in question, who were approximately 175 feet away. He described the surface that the trucks traveled on from the overburden to the haul road as being "smooth as glass" and comprised of solid slate (Tr. 130). He described the surface as being real hard and up to 3 inches thick. He said that the last time it was scraped by a loader was probably the previous day, but that he did not recall. Also, his testimony indicated, in essence, that there was no physical barrier preventing the trucks traveling closer to the men in question while going from the overburden to the haul road and back again.

Based upon the testimony of both witnesses, it appears uncontroverted that uncovered trucks, open in the back, containing materials with rocks up to 60 pounds, were traveling in the pit area at approximately 5 miles an hour. Should these trucks sway or bounce, it is not entirely inconceivable that some rocks might

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fall out and hit the men in question, depending upon their distance from the truck. Accordingly, since there is some possibility of this hazard occurring, and that it is not totally impossible, I must conclude that section 77.1710(d), supra, has been violated, in that the men, not wearing hard hats, would be exposed to this hazard.

Petitioner herein has alleged the violation to be significant and substantial. In essence, according to Boring there was a likelihood of a rock being thrown from the uncovered, open-ended trucks based upon their uncovered condition, speed of 5 miles an hour, the rough condition of the road with ruts, and the proximity of 15 to 20 feet from the men in question. However, I found Westrick's testimony more persuasive with regard to the condition of the surface the trucks traveled and the path they took in relation to the men. It does not appear that Boring observed Respondent's operation on more than the one occasion when he made his inspection on July 1, 1987. Neither the contemporaneous notes of Boring (Government Exhibit 4), nor the narrative of the Citation issued on July 1, 1987, contains any description of the road condition, the level of the material in the trucks, or the distance that the men in question were from the path taken by the trucks which were loaded. It would thus appear that Boring's testimony was based upon his current recollection of one visit more than 2 years ago. In contrast, I find Westrick's description of the path taken by the loaded trucks to be more accurate, as he related the path taken to both the haul road and the overhang where the trucks actually did their loading. Also, inasmuch as Westrick was in the pit on a frequent and regular basis, I find his description of the surface more credible. This conclusion is also based upon my observations of his demeanor. Also, although Boring could not recall how high the material was piled in the truck, I find Westrick's testimony that the trucks were filled to only 60 percent of their space more credible, as it was based upon his recollection of the tonnage capacity of the trucks and the number of buckets each truck was loaded. Hence, I find that it has not been established that the road was rough, and that the material in the truck was piled more than 60 percent of the volume capacity. Nor has it been established that the trucks were traveling within 15 to 20 feet of the men, nor has it been established that the trucks traveled in an upgrade from the men in close proximity. I therefore find that it has not been established that there is any likelihood of the hazard of falling rock occurring. In addition, I note that even Boring indicated that, in essence, he does not have any knowledge of men without hats being injured from rocks falling out of trucks in similar circumstances. Also Boring indicated that there was no hazard from material falling on the men from the highwall work or from the loading of the trucks. He indicated that the men might have been injured from the wrenches they were working with.

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However, it is clear that this hazard is not within the purview of section 77.1710(d), supra, which refers to a hazard from "falling objects." Further, there is no evidence upon which to conclude that there was a likelihood to any degree of this injury occurring from a wrench. Therefore, for these reasons, I must conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, 6 FMSHRC 1 (January 1984)).

Petitioner relies upon Secretary v. Turner Brothers, Inc., 6 FMSHRC 2125 (January 1984). However, I do not find Turner Brothers, supra, to be relevant to the disposition of this case at bar. In Turner Brothers, supra, Judge Koutras affirmed a finding of significant and substantial with regard to a violation of section 1710, supra, as the testimony indicated that the miners therein, not wearing hard hats, were exposed to the hazard from falling rocks from the highwall. In contrast, in the case at bar, according to Boring, there was no evidence of any hazard of rocks falling from the highwall.

The citation herein was modified on August 25, 1988, and upgraded to a 104(d)(1) Citation, because, according to Boring, one of the men not wearing a hard hat was Respondent's foreman, who "should be familiar with the requirements with reference to wearing hard hats" (Tr. 80). There was no further evidence adduced with regard to the issue of unwarrantable failure. The Commission has recently held that unwarrantable failure is more than ordinary negligence and requires aggravated conduct. (Emery Mining Corporation 9 FMSHRC 1997 (December 1987)). Inasmuch as the evidence herein has failed to establish a likelihood of a hazard created by falling objects, I conclude that there was no aggravated conduct in Respondent's foreman not having worn a hard hat. Accordingly, I conclude that the violation herein was not caused by Respondent's unwarrantable failure.

As analyzed above, infra, because it has not been established that an injury herein was likely to occur, I conclude that the gravity herein was low. I conclude that Respondent's foreman, Lieb, who did not wear a hard hat, should have been aware of the regulation in question and should have set a better example for the men that he had to supervise. Accordingly, I rate the negligence herein as moderately high. Westrick indicated, in essence, that imposition of a penalty herein would affect Respondent's ability to continue in business as it is ready to go out of business, and that this Citation, along with other Citations that it had received, is forcing it into bankruptcy. However, although he indicated that it was hard to answer whether Respondent had a profit in 1987 and 1986, he indicated that it did pay taxes and that Respondent was always able to pay its employees on time. Accordingly, I conclude that the imposition of a penalty herein

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would not affect the Respondent's ability to continue in business. I also have taken into account all the remaining statutory factors as stipulated to by the Parties. Based upon all the above, and especially the low level of gravity herein, I conclude that a penalty of \$50 is appropriate.

ORDER

It is ORDERED that the Citation 2697967 is hereby amended to reflect the fact that the violation is not significant and substantial, nor is it a result of Respondent's unwarrantable failure, and accordingly it is amended to a 104(d) Citation. It is further ORDERED that the Respondent shall pay a civil penalty herein of \$50 within 30 days of the date of this Decision.

Avram Weisberger
Administrative Law Judge