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SOL (MSHA) V. WESTERN KEY ENTERPRISES
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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 PROCEEDINGS

Docket No. WEST 87-189-M
A.C. No. 42-00768-05502

v.

Small Fry Mine

WESTERN KEY ENTERPRISES,
RESPONDENT

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle &
Latimer, Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. the "Act". The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges the operator of a small uranium mine, the Small Fry Mine, with five violations of certain mandatory regulatory standards found in 30 C.F.R.

The operator filed a timely appeal contesting the existence of the alleged violations, and the appropriateness of the proposed penalties.

Pursuant to notice an evidentiary hearing was held at Salt Lake City, Utah on November 16, 1988. Both oral and documentary evidence was presented, post-hearing briefs filed and the case submitted for decision on January 8, 1989.

Stipulations

The parties agreed to the following stipulations:

1. The size of the operator's business is small.
2. The operator is engaged in mining and selling of uranium in the United States. Its mining operation affect interstate commerce. The operator of the mine is subject to the "Act".

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3. This Administrative Law Judge has jurisdiction to hear and decide this matter.

4. On November 6, 1986, Rex Ebon Scharf a miner employed by respondent was fatally injured by a fall of ground accident at the Small Fry Mine. There were no eye witnesses to the accident.

5. The subject citations were properly served by duly authorized representative of the Secretary upon an agent of the respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance.

6. The exhibits offered by the Respondent and the Secretary are stipulated to be authentic.

7. Each violation that is established is properly characterized as significant and substantial.

8. The printout of the Assessed Violations History Report is a true and accurate history for the Small Fry mine and admissible in evidence in this matter.

9. The operator demonstrated good faith by timely abatement of each of the alleged violations by permanently closing the mine.

Law and Motion

At the hearing, counsel for the Secretary moved to vacate Citation No. 2646365 which alleges a 104(a) violation of 30 C.F.R. 57.3020 and Order No. 2646495 which alleges a violation of 30 C.F.R. 57.3022. The Secretary's counsel stated for the record that in analyzing the evidence in preparation for trial it was found that Citation No. 2646365 was duplicitous with Order No. 2646363. There was no objection to the Secretary's motion. The motion to vacate Citation No. 2546365 was granted.

The Secretary's motion to vacate Order No. 2646495 was also based on the fact that on review and analysis of the evidence in preparing for trial it was found that the citation was duplicitous and on the additional ground that there was insufficient evidence to establish the violation. There was no objection to the motion. The motion to vacate Order No. 2646495 was granted.

The Regulation

The three remaining violations, Order No. 2646363 and Citation Nos. 2646366 and 2646496 each allege a violation of 30 C.F.R. 57.3022 which provides as follows:

57.3022 Examination of ground conditions and ground control practices

Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Admissions

At the hearing respondent admitted on the record that it had violated the provisions of the above quoted 30 C.F.R. 57.3022 as alleged in Order No. 2646363 and Citation Nos. 2646496 and 2646366. Thus, respondent admitted that the roof of the mine was not properly examined and that loose roof was not removed or adequately supported. Respondent also stipulated that each of the admitted violations was properly characterized significant and substantial and that the gravity of each of the admitted violations was serious, leaving in issue, however, the appropriate penalties, including the negligence of the operator and the effect of the proposed penalties on the operator's ability to continue in business.

The Violations

The three remaining violations, discussed below, were cited by MSHA following the inspection of the Small Fry mine on November 6th, the day after the fatal fall of ground accident.

Order No. 2646363

This citation was issued for a violation of 30 C.F.R. 57.3022 because loose ground in the 1600 South heading had not been taken down or supported. The citation states that on November 6, 1986 at 2:00 p.m. a fatal ground fall accident occurred in the 1600 South heading. A slab approximately 27 feet long by 15 feet wide and 1 to 2 feet thick fell. Reportedly the victim was drilling the second round in this heading on this shift and had two holes to drill when the slab fell. Ground support was not used in this area where the accident occurred.

The Secretary at the hearing moved to amend its proposed penalty for the violation so as to increase the amount of the proposed penalty from \$2,000 to \$8,000.00. Over the objection of respondent, the motion was granted. Counsel for petitioner stated for the record that the penalty for this violation should

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be increased since it was the violation alleged in this citation that contributed to the fatal accident rather than the violation alleged in Citation No. 2646365 which was vacated.

Citation No. 2646496

This citation alleges a section 104(a) violation of 30 C.F.R. 57.3022 because the supervisor did not make a daily examination of the ground conditions in the area where the pillars were being extracted. The Secretary's proposed a \$2,000 penalty for this violation.

Citation No. 2656366

This is a 104(a) citation that alleges a failure to remove loose roof in another area of the mine. The Secretary was permitted to amend the amount of the proposed penalty from \$1,000 to \$500.00.

Penalty

The only remaining issue is the appropriate penalty for each of the admitted violations. With respect to this issue the parties presented oral and documentary evidence primarily on the degree of the operator's negligence and the effect of the penalty on the operator's ability to continue in business. The stipulations of the parties with respect to the other four penalty criteria set forth in section 110(i) of the Act are accepted as established fact.

Both parties agree that the operator was negligent but differ as to the degree of negligence. The respondent's position with respect to these three citations is that the degree of negligence was low or at most moderate rather than high, as urged by the Secretary of Labor. Both parties agreed at the hearing to rely upon the depositions that had been taken in this action and to make a post-hearing submission setting out those areas of the depositions where testimony was given which relate to the negligence issue, and upon which that party relies.

Respondent in support of its position that the degree of negligence is low or moderate rather than high submitted as its exhibits excerpts from the following depositions: (A) MSHA inspector Larry J. Day who inspected the Small Fry mine the day after the fatal ground fall accident (B) deposition of Robert Shumway one of the owners of the mine, (C) deposition of MSHA inspector Ronald L. Beeson who inspected the Small Fry mine the day after the ground fall accident and (D) deposition of Jerry Cowan one of the supervisors at the mine.

The sworn testimony in the depositions indicated that the miners did examine and test the roof, face, and ribs of their working places at the beginning of each shift and frequently thereafter; that supervisors examined the ground conditions during daily visits to ensure that proper testing and ground control practices were being followed; and that loose ground was taken down prior to any of the work being done. There was testimony that the miners had barred down the area where the accident occurred immediately prior to the time the accident occurred.

It is respondent's position that the degree of negligence should be moderate, or low, as opposed to high as urged by the Secretary of Labor, for the reason that the ground control practices which were employed by respondent in this mine, to protect against an unintended roof fall, substantially met with the requirements of the standard, and were all that could be expected given the circumstances prevailing in this mine, and the mine operator's experience in this mine.

The excerpts from the depositions received into evidence indicates that this operator sounded and barred down the roof prior to the time of the accident and that this was standard operating procedure and practice; that this operator had no indication that there was bad roof and no indication that an unintended roof fall would occur. The depositions indicate that the reason for the unintended roof fall in this mine was because of a mud seam above the slab that fell which neither the operator, nor any of the operator's employees, could have detected by visual means or other means at their disposal. Petitioner contends that the bad back or roof, in this mine, was not known to this operator and could not have been known under the circumstances.

The Secretary's assessment of negligence as stated in her post-hearing submission is primarily based upon the following facts. During an earlier inspection, nine months before the November 6, 1986 accident, the same supervisory personnel, Mr. Cowan and Mr. Beck, had been told by MSHA Inspector Benson that he found roof support timber that had fallen and loose roof that had developed in the main haulage and in some drifts. As a result of this earlier inspection Benson issued roof control citations and warned Cowan and others that they needed to take better care of the roof. He warned that if they did not start barring down someone would be fatally injured.

On review of all the evidence on the issue of negligence I find that the violations affirmed resulted from the operator's failure to exercise reasonable care which constitutes ordinary or moderate negligence.

The only evidence presented on the issue of the effect of the proposed \$10,500.00 penalties on petitioner's ability to continue in business was the unrebutted testimony of Gary Shumway at the November 16, 1988 hearing. Mr. Shumway testified that he was president of Western Key and has been employed by both Western Key and W.K. Enterprises for approximately four or five years. The witnesses stated that both organizations were established for the convenience of the same owners, the Shumway family. He testified that the proposed high penalties would seriously jeopardize the ability of both organizations to continue in business as a uranium mining company.

The Solicitor, on the other hand, understandably presented no evidence on the issue of the effect of the proposed penalty on petitioner's ability to continue in business but points out that the proposed \$10,500.00 penalty represents less than 3 percent of respondent's gross income and slightly more than 6 percent of the outstanding operating loan. Petitioner concedes however, that uranium operators have suffered declines which adversely affect their income.

CONCLUSION

Having considered the stipulations and the evidence presented in this case I find that based upon the six criteria set forth in section 110(i) of the Act that the appropriate penalty for each of the admitted violations is as follows:

Citation No. 2646363 involving a violation of 30 C.F.R. 57.3022, \$3,500.00.

Citation No. 2646366 involving a violation of 30 C.F.R. 57.3022 \$500.00.

Citation No. 2646496 involving a violation of 30 C.F.R. 57.3022 in another part of the mine \$1,000.00.

I believe the amount of these penalties should be sufficient to deter future violations of mandatory safety standards while not unduly hampering the ability of this small operator to remain in business.

ORDER

Citation No. 2646363, 2646366 and 2646496 are affirmed and Citation Nos. 2646365 and 2646495 are vacated. Western Key Enterprise is directed to pay a civil penalty of \$5,000.00 within 30 days of the date of this decision.

August F. Cetti
Administrative Law Judge