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SOL (MSHA) V. ASSOCIATED ELECTRIC COOPERATIVE
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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 88-89 A. C. No. 23-00465-03529
v.	Associated Electric Cooperative Inc. - Mining Division
ASSOCIATED ELECTRIC COOPERATIVE, INCORPORATED, RESPONDENT	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary;
Gene Andereck, Esq., Stockard, Andereck, Hauck, Sharp & Evans, Springfield, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On June 30, 1988, the Secretary (Petitioner) filed a Proposal for Penalty seeking the imposition of civil penalties for alleged violations of 30 C.F.R. 77.205(a) and 30 C.F.R. 77.205(b). An Answer was filed by the Operator (Respondent) on August 12, 1988. Pursuant to notice, the case was heard in Springfield, Missouri, on January 24 - 25, 1989. At the hearing, Larry Greg Maloney, Jackie Williams, Gary Ronchetto, Gary McQuitty, and Randy McQuay testified for Petitioner. Richard McClelland, Lennoth Greenwood, and Delbert Gipson testified for Respondent.

The Parties each filed a Post Hearing Brief on April 10, 1989.

Stipulations:

1. Associated Electric Cooperative, Inc., is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.

2. Associated Electric Cooperative, Inc., is the owner and operator of Associated Electric Cooperative, Inc., Mine, MSHA I.D. No. 23-00465.

3. Associated Electric Cooperative, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Associated Electric Cooperative, Inc., on the date and place stated herein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. Associated Electric Cooperative, Inc., is a large mine operator with 1,707,757 tons of production in 1987.

Citation No. 3035355

Citation

Citation No. 3035355 provides as follows:

> The three crews to the Bee-veer slurry dredge were required to travel up & down the approximately 25 ft high-face to the slurry pit. The slope of the face was approximately .5 to 1 consisting of unconsolidated materials and uneven footing. A minimum of six personnel daily are required to climb the face. The catwalk had been removed since at least 2/4/88 and only about 3 hours of refabrication and welding had been performed during that duration.

Regulations

30 C.F.R. 77.205(a) provides as follows: "Safe means of access shall be provided and maintained to all working places."

Findings of Fact and Discussion

I.

Respondent, an electrical generating cooperative, in connection with its Thomas Hill Energy Center operates a surface coal mine. As part of this operation, two employees on each of Respondent's three shifts are stationed on a dredge located in a slurry pond. The dredge, which is moved by cables, cuts coal from below the surface of the pond, and pumps a mixture of coal and water to a processing plant. The employees working on the dredge reach it by way of a rowboat from the shore. In general, these employees reach the rowboat, left at the edge of the pond by the previous shift, by traveling by vehicle to the embankment, and then walking down to the edge of the pond.

On February 10, 1988, Larry Greg Maloney, pursuant to a request made under section 103(g) of the Federal Mine Safety and Health Act of 1977 (the Act), inspected the above Bee-Veer Slurry Impoundment, and noted several sets of foot prints going up and down the bank to and from the embankment to the pond, in an area which he estimated as being at an incline of .5 to 1. He testified, in essence, that in the area where the foot prints were observed the embankment was approximately 25 feet above the level of the pond. He testified that in the area where he saw the foot prints, there was some packed snow, and described the ground material as containing loose unconsolidated granular coal. He indicated, in essence, that due to the condition of the area in which he observed the foot prints, and its slope, he did not consider it a safe access to the pond. He indicated that there was no other access to the pond. According to the uncontradicted testimony of Maloney, there was no catwalk or walkway in any area from the pond to the top of the embankment.

Lennoth Greenwood, Respondent's second shift supervisor at the Bee-Veer Slurry Impoundment, indicated that on February 10, 1988, the employees working on the dredge went from the embankment to the pond by way of a ravine, which he indicated was to the left of the access area denoted by Maloney, and then walked along the edge of the water to the rowboat. He opined that this means of access was safe. He indicated that on February 9 - 10, 1988, he observed the workers from the first shift returning from the dredge coming up the bank in the same general area as the ravine. On cross-examination, he indicated that the ravine was approximately 20 feet above the pond, at a slope of about a 30 to 45 degree angle, and that there was snow in the ravine on February 10, 1988.

Gary Ronchetto, a welder working for Respondent, who is a member of the UMWA's Safety Committee, testified on cross-examination, in essence, that on February 10, it was possible to

go from the embankment to the pond at different places, but on redirect examination indicated that he did not see any areas he considered safe as an access down to the pond. Ronchetto described the material between the embankment and the pond as a slurry made out of coal and earth and said on February 10, the bank was "slick across it" (Tr. 187).

Gary McQuitty, who was Respondent's dredge helper in January and February 1988, had the responsibility of working on the dredge on the first shift. He indicated that on February 10, 1988, he went from the top of the bank to the pond along a clay road which was "more stable than the slimy fill" (Tr. 271), and which he denoted was located at a point to the right of the areas denoted by Maloney. He indicated that during the day, if it warmed up, the frozen material on the road would thaw and become "pretty slick" (Tr. 277). He said that the top of the clay road was 20 to 25 feet above the pond and was at slope of .5 to 1. He said that in February 1988, he described the footing going down to the pond, as "extremely treacherous," that the angle of descent was "steep," and he would slip and slide to the edge of the water (Tr. 279). He said that there was no other way to get down the embankment to the pond.

I find that on February 10, 1988, access to the pond, from the embankment, was only by way of the area taken by McQuitty. I observed McQuitty's demeanor and found his testimony credible. Also, inasmuch as McQuitty's sole responsibility was working on the dredge, I place more weight on his testimony with regard to the route taken rather than the testimony of Greenwood, who had other responsibilities in addition (at times) to being on the dredge, and could not recall if he drove men out to the embankment on February 9. He also could not recall if McQuitty worked on his shift on February 9 - 10, 1988. I adopt the testimony of Maloney that, in essence, there was only one access to the pond on February 10 as, in essence, it was corroborated by Ronchetto. I adopt Maloney's testimony with regard to the hazards occasioned by the steep angle of the access areas, inasmuch as it was corroborated by Ronchetto. Also, I found persuasive, the testimony of McQuitty, who went daily from the embankment top to the pond and back, that the access was "extremely treacherous" (Tr. 279), and in February 1988, he would slip and slide going from the top to the pond. Also, although Greenwood indicated that access to the pond by way of the ravine was safe, he nonetheless characterized the slope as being between 35 to 45 degrees, and indicated that on February 10, 1988, there was snow in the ravine. For these reasons, I conclude that on February 10, 1988, there was no safe access provided from the embankment top to the

edge of the pond, where a row boat could be utilized to go to the dredge, the working site of two men per shift. As such, I find that Respondent herein has violated section 77.205(a), supra.(FOOTNOTE 1)

II.

Taking into account the steepness of the slope of the access to the pond, as well as its slick and snow-covered condition as discussed above, I., infra, along with McQuitty's testimony that the footing was extremely treacherous, and in going up and down the slope he would slip and slide, I conclude that the violation herein contributed to the hazard of slipping and falling into the water which had been estimated by McQuitty to be 15 to 20 feet deep. Access from the embankment top to the impoundment below, is utilized daily by two miners on each of the three daily shifts going from the embankment to the pond and then returning. According to McQuitty, in the month of January 1988, Verlin Niece lost his footing going down the bank to the pond to work on the dredge, and slid into the water up to his knees and had to be pulled out.(FOOTNOTE 2) Taking these factors into account, I conclude that

due to the violation herein, the hazard of an employee slipping and falling while ascending or descending the access to the impoundment, was reasonably likely to occur. McQuitty testified that the impoundment water was extremely cold, and was 15 to 20 feet deep. He also indicated that normally employees working on the dredge leave their life jackets in the rowboat, and usually wear heavy boots and coats. Accordingly, he opined that it would be difficult for one to stay afloat after falling into the impoundment. None of McQuitty's statements have been rebutted or contradicted. Accordingly, I find that, due to the hazard created herein, as consequence of the violation, there was a reasonable likelihood of the occurrence of a reasonably serious injury. Accordingly, I conclude that the violation herein was significant and substantial.(FOOTNOTE 3) (Mathies coal Co., 6 FMSHRC 1, (January 1984)).

III.

According to Greenwood, prior to the issuance of the instant citation, he was not confronted with the specific "issue" (Tr. 345) of the difficulty of access up and down the embankment. However, McQuitty, who worked on the dredge on the first shift, indicated that on "numerous different occasions" he told management there were problems with the access (Tr. 282). Furthermore, Ronchetto indicated that, in his capacity as member of the safety committee, sometime between Christmas 1987, and January 1988, he received complaints from the dredge crew that the walkway was out, and pursuant to these complaints, told Bill King, the day shift supervisor, that the dredge crew did not have a safe access. According to Ronchetto, and corroborated by McQuitty, later that day Ronchetto called Sam Laws, superintendent to the preparation plant and slurry impoundment, and advised him that the men needed a safe access. Ronchetto indicated that Laws told him he would try to take care of it. Ronchetto said that he then confronted David Moehle who said that he would look into it. According to Ronchetto, on January 7, 1988, he looked up at the walkway along with Moehle, and described it as having a steep angle, and not having any cleats. He said that at the steep angle there was no adequate footing. Ronchetto testified that he then told Moehle that the walkway needed cleats, and Moehle said that he understood and would try to take care of it. In essence, Rochetto's testimony was corroborated by Randy McQuay, another safety committee member, who also was present.

According to McQuitty, between January and February 1988, the walkway was taken in and out continuously, and one end was so steep that ice would accumulate on it. According to McQuitty and Greenwood, the walkway had been removed approximately 4 days prior to the issuance of the citation. Some welding work was then performed on the walkway. But according to Maloney who observed it at the Preparation Plant on the date of the citation, only a quarter of its distance had steps and he indicated it did not have any cleats. This testimony does not appear to have been contradicted by Greenwood, who indicated that prior to the citation, the walkway did not have all its cleats. On February 9, 1988, at a safety committee meeting, according to Ronchetto and corroborated by McQuay, Moehle was again informed that there was no safe access, and he responded that he would look into it, and that they were still working in it.

Based on the above, I conclude that at least as early as January 7, 1988, management was made aware of the employees' complaints with regard to safe access. Indeed, Ronchetto's testimony was uncontradicted that on January 7, Moehle observed the condition, and indicated that he understood it and would try and to do something about it. Although efforts may have been made to ensure safe access by way of a walkway, the evidence indicates that when the walkway was installed it still did not provide safe access. Further, although efforts may have been made to improve the walkway, by welding material on it, I find that as of the date of the citation, February 10, Respondent had failed to install sufficient cleats to ensure safe access by way of the walkway. Thus, taking all of the above into account, I find that Respondent's conduct herein was more than ordinary negligence, and constituted aggravated conduct. As such, I conclude that the violation herein resulted from Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1197 (December 1987)).

IV

Based on the factors discussed above, II., infra, I conclude that the gravity of the violation herein was relatively high. For the reason set forth above, (III., infra), I conclude that Respondent herein acted with a high degree of negligence. Taking these conclusions into account, as well as the remaining statutory factors stipulated to by the Parties, as well as the history of Respondent's violations, as contained in Government Exhibit P-1, I conclude that a penalty herein of $500 is appropriate.

Citation No. 3035356

On February 11, 1988, Citation No. 3035356 was issued which provides as follows:

Air hoses and drop cords were lying on the floor in five locations. Machine parts, tools, hoses expanded metal and other miscellaneous materials were on the floor between six of the bay doors creating stumbling hazards.

Regulation

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

> Travel ways 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 Discussion

I.

Respondent operates a maintenance shop which was built in approximately March 1983. The interior of the shop contains one wash bay and six work bays. Each bay has a door on each side to accommodate large pieces of equipment including 160 ton trucks that are worked on in the bays. A tire repairman, one shop laborer, one welder, and 13 mechanics work in the shop. According to Maloney, (as depicted on Government Exhibit P-3), when he inspected the premises, on February 11, 1988, he observed air hoses, drop cords, machine parts, tools, and expanded metal, at various locations on the floor. He also testified that an exit door was completely blocked by hoses. In essence, he said that in the middle of the shop where support beams were located there were tools, hoses, and drop cords, which created a safety hazard, and which he had to step over. He said that, in general, there were hoses in the area where personnel were not located.

Delbert Gipson, Respondent's truck and tractor day shift supervisor, testified that, in general, the material observed by Maloney are items utilized by the workers at the shop. Thus, he said that the air hoses are used to operate the air wrenches and blow out dirt, and the extension cords are used for the lights. He said that generally, engines that have to be repaired are left in a broken condition while awaiting parts. He was asked whether the material on the floor created any stumbling hazard and he indicated that there were probably parts mechanics laid on the floor around where they work, and that these are items that mechanics "live with every day" (Tr. 364). He indicated essentially that the material was not out of the ordinary and that "most of the material" was being used (Tr. 364). In a similar fashion Maloney agreed on cross-examination, that air hoses and chains are used in making repairs and that in small quantities expanded metal is also used in the shop.

It appears to be Respondent's position, based upon the testimony of Gipson, that no violation should be found herein inasmuch as the materials in question are either utilized by Respondent's mechanics or left in place pending receipt of the replacement parts, and that having material on the floor is part of Respondent's normal operation. I do not find merit to Respondent's argument. I note that section 77.205(b), supra, requires travel ways and platforms or other means of access to areas where persons are required to work "shall be kept clear, of . . . other stumbling or slipping hazards." Based on Maloney's testimony I find that the materials in question, located on the shop floor, were in areas where employees at the shop would have to walk to go to various work bays, and to go to the bathroom from the bays. I find Maloney's testimony credible that the materials on the floor constituted stumbling or slipping hazards, as his testimony was essentially corroborated by Jackie Williams, Respondent's mechanic who worked in the shop. In this connection, it was essentially Williams' uncontradicted testimony that there were bolts, nuts, and wheel bearings lying around and that he could hardly get around as he had to step over these materials. Indeed, he indicated that a motor that had its parts taken out, had been sitting on the floor for about a month before it was taken out by him and another employee to abate the above citation. Also, the testimony of Maloney was corroborated by Ronchetto, who also observed the conditions on February 11, and indicated he was not able to go from one place to another without going around materials and crawling over them. Also Gipson admitted on cross-examination that there were "probably" some air hoses and trouble lights "strung out" at an exit (Tr. 368, 369). Although he indicated that, in his opinion, on February 11, the accumulation of material was not too bad to walk around, nonetheless he indicated that it "probably" did need to be cleaned up (Tr. 376). Thus, I find Respondent herein violated section 77.205(b), supra.(FOOTNOTE 4)

II.

According to Maloney, the stumbling hazard created by the accumulation of materials could result in an injury. It was his opinion that an injury occasioned by a fall to the concrete surface could range from a bruise to a broken member. Williams indicated that he had to step over the material and he could have stepped on a ball bearing. Ronchetto indicated a stumbling, tripping, and falling hazard and opined that in falling one could hit one's head against a beam, part, or heavy equipment.

Taking into account the number of employees at the shop, the cluttered nature of the material on the floor, and the need to crawl over it, as established by Petitioner's witnesses, I find that the violation herein contributed to a discrete safety hazard of stumbling or falling. I also find, based on the these factors and taking into account the presence of tools, equipment, and beams there existed a reasonable likelihood that the hazard of stumbling or falling would result in an injury. Maloney indicated that the injury could range from a bruise to a broken member. Ronchetto indicated that a person falling could hit his head against a beam or heavy equipment. It is clear a serious injury could result, however, inasmuch as there is no evidence before me relating to any specific distance between any of the materials constituting a hazard, and any sharp or hard object, I must conclude that it has not been established that there is any reasonable likelihood that the injury resulting from the hazard of slipping or falling would be of a reasonably serious nature. Accordingly, I must conclude that it has not been established that the violation herein is significant and substantial (See, Mathis Coal Co., supra).

III.

According to the uncontradicted testimony of Williams, the same conditions observed on February 11, were in existence the day before, and had existed for approximately 3 weeks prior to the citation. Although Gipson indicated that in his opinion the material was not too bad to walk around, he did indicate it probably did need cleaning up on February 11. Also, it was Ronchetto's uncontradicted testimony that at a February 9, 1988, meeting at which time Moehle was present, he (Ronchetto) told Moehle that there was an accumulation of parts and hoses, and that Moehle indicated that he would try and take care of it. The extent of the accumulation of the material is indicated by the testimony of Williams that, in abating the citation, he and six or seven other employees worked the entire shift to clean up but did not finish. Based on the above, I conclude that the accumulation of material was considerable and existed for a significant

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period prior to February 11, 1988, and that at least as of February 9, 1988, Respondent's management was aware of this condition. As such, I find that Respondent acted with a moderately high degree of negligence in not having the material cited by Maloney cleaned up prior to February 11. Also, as discussed above, I conclude that the violation herein was moderately serious as it could have resulted in a person stumbling and injuring himself. In assessing a penalty, I have also taken into consideration the various factors of 110(i) of the Act, and the history of violations as indicated in Government's Exhibit P-1. Taking all these factors into account, I conclude that a penalty herein of $150 is appropriate.

ORDER

Respondent shall, within 30 days of this Decision, pay the sum of $650 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. In essence, it is the Respondent's position that its Board of Directors, as indicated in a safety manual provided to all employees, (R-6), that it is dedicated to operate in accord with accepted safety rules and procedures, and that its employees, in the safety manual, are specifically told not to work "near or under dangerous highwalls or banks," and that they're not permitted to walk in any area at or near a surge or storage pile while a reclaiming operation may expose them to a hazard. (R-6, 37, 41). As such, Respondent argues that any employee faced with the hazard of traveling from the embankment top to the pond, to reach a work site on the dredge, had the option of refusing to work and being exposed to a hazard pursuant to company policy. I do not find merit to Respondent's argument. It is the Respondent's responsibility to adhere to all relevant regulations. Inasmuch as the evidence establishes that Respondent failed to provide a safe means of access from the embankment top to the working area on the dredge, it must be concluded that Respondent herein violated section 77.205(a).

~FOOTNOTE_TWO

2. I have adopted this testimony as there is nothing in the record to contradict it. I have taken into account the acknowledgment by Lennoth Greenwood, Respondent's second shift foreman, that prior to February 9, 1988, he did not know of any employee having fallen down the embankment. I find that the lack of knowledge on Greenwood's part does not by itself rebut McQuitty's testimony.

~FOOTNOTE_THREE

3. In reaching this conclusion, I have taken into account Respondent's evidence on this point which essentially consists of the testimony of Greenwood that the access was "safe." However, in evaluating the condition of the access, and the gravity of the

violation herein, I place more weight on the testimony of Maloney and McQuitty as analyzed above, I. and II., infra.

~FOOTNOTE_FOUR

4. I note that section 77.205(b), supra, by a plain reading of its language, does not explicitly allow for the accumulation of materials constituting a stumbling or slipping hazard if the materials accumulate in the ordinary course of the operation, or are used in the operation. To read such an exclusion into section 77.205(b), would be unduly restrictive and would render meaningless the protective intent behind this regulation. I also have considered Respondent's arguments set forth in its Post Hearing Brief. I do not find merit to these arguments, for the reasons set forth in footnote 1, infra.