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SOL (MSHA) V. FRANK IREY
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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. WEVA 89-14 A. C. No. 46-01433-03504 C70
v.	Loveridge Preparation Plant
FRANK IREY, JR., INC., RESPONDENT	

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
William H. Howe, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C. 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 of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary has charged Frank Irey Jr., Inc., (Irey) with two violations of regulatory standards. The parties have submitted a motion to approve a settlement agreement with respect to Citation No. 3106975 in which the Respondent has agreed to pay the proposed penalty of $500 in full. I have considered the documentation submitted in support of the motion and find that it comports with the requirements set forth under section 110(i) of the Act. Accordingly the motion is approved.

Order No. 3106979 remains at issue. The order, issued pursuant to section 104(d)(1) of the Act(FOOTNOTE 1) charges a "significant and substantial" violation of the standard at 30 C.F.R. 48.28 and of section 115(a) of the Act. More specifically the order, as amended at hearing, alleges as follows:

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The following personnel were observed performing maintenance and repair duties in the preparation plant, the tripper belt, and conveyor belt underneath the coal storage bins: Jack Byron, Joe Barskite, Dennis Hanzeley, Paul Lasko, Jim Shaffer, Robert Sigwalt, Robert Susick, John Williams, Jr., John Burch, Ron Clark, Jim Fine, John Pollack, Steve Supko, John Woods, Robert Kondratowicz, and Lawrence Vizzence and has [sic] not received the requisite safety training as stipulated in Section 115 of the Act.

The above name employees are experienced and have worked with the company more than three years and had received little or none of the required 24 hours of training. In the absence of such training the employees are declared to be a hazard to themselves and others and are to be immediately withdrawn from mine property work areas until they have received the required training.

Section 115(a) of the Act provides in relevant part as follows:

Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary of Labor. The Secretary

> shall promulgate regulations with the respect to such health and safety training programs not more than 180 days after the effective of the Federal Mine Safety and Health Amendment Act of 1977. Each training program approved by the Secretary shall provide as a minimum that-*** (3) all miners shall receive no less than 8 hours of refresher training no less frequently than once each twelve months, except that miners already employeed on the effective date of the Federal Mine Safety and Health Act Amendments of 1977 shall receive this the refresher training no more than 90 days after the date of approval of the training plan required by this section ***.

30 C.F.R. 48.28(a) provides that "each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section." Moreover 30 C.F.R. 48.28(b) sets forth the specific courses of instruction that must be included in the annual refresher training program.

While there is no dispute that the cited Irey employees did not have the current training under these regulations Irey maintains that all of its employees at the Loveridge Mine project here at issue were "construction" workers and not "miners" and were therefore excluded from coverage under the training regulations at 30 C.F.R. 48.23 through 48.30.

The definition of "miner" for the purposes of 30 C.F.R. Part 48 Subpart B is set forth in 30 C.F.R. 48.22, which provides in pertinent part as follows:

> For the purposes of this subpart B--
>
> (a)(1) "Miner" means, for purposes of 48.23 through 48.30 of this subpart B, any person working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works at the mine on a continuing, even if irregular, basis. Short-term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under 48.26 (Training of newly employed experienced miners) of this subpart B, may in lieu of subsequent training under that section of each new employment, receive training under

48.31 (Hazard training) of this subpart B. This definition does not include:

> (i) Construction workers and shaft and slope workers under subpart C of this part 48; . . . .

The Secretary argues with equal conviction that the Irey employees were indeed subject to the noted training requirement as "maintenance" workers "contracted by the operator to work at the mine for frequent or extended periods." Whether these workers are found to be "maintenance" workers or "construction" workers is significant because the Secretary has yet to develop training regulations for the latter.

The parties agree that the terms "maintenance" worker and "construction" worker are not defined in the regulations. The Secretary urges however that the definition in her program policy manual be followed. That manual provides the following descriptions:

> Construction work includes the building or demolition of any facility, the building of a major addition to an existing facility, and the assembling of a piece of new equipment, such as installing a new rotary pump or the assembling of a major piece of equipment such as a dragline.
>
> Maintenance or repair work includes the upkeep or alteration of equipment or facilities. Replacement of a conveyor belt would be considered maintenance or repair.

MSHA Program Policy Manual, U.S. Department of Labor, Vol. III, Page 14 (Release III-1; July 1, 1988).

Irey, on the other hand suggests that the term "maintenance" be defined as work performed to keep a building or structure from deteriorating or falling into a state of disrepair. Even if the definition advanced by Irey is applied to the facts of this case however it is clear that the work performed by its employees at the Loveridge Preparation Plant was indeed "maintenance". There is no dispute that the work performed by Irey involved essentially six projects performed before, during, and after the two week period ending on or about July 8, 1988, when the Loveridge No. 1 Mine was shut down for miners' vacation. The replacement of steel beams inside the Preparation Plant was performed before, during, and after the vacation period and involved 6 to 8 Irey employees. The steel beams had become rusted and deteriorated to the point that some had holes in them. The evidence shows that the basic structural design was not changed by Irey and the only changes made were the

replacement of the rusted beams and deteriorated structural members with new materials.

During and before the vacation Irey also replaced concrete on the second floor of the plant using 4 to 6 employees. The existing concrete floor was leaking and had holes in it exposing the reinforcing wire. Irey removed the deteriorated concrete and replaced it with new reinforcing steel and concrete. There was some change in design in that three wells were built under the belts where the floor had previously been flat.

Four Irey employees also worked during the vacation period straightening the structure on the tripper. The structure had become bent with only temporary bracing added. Irey employees removed some of the temporary support structure and renovated the earlier repairs with heavier materials.

Four of the Irey employees also replaced the tail roller on the No. 15 belt in the raw coal bin area during the vacation period. The tail roller had become badly worn and Irey removed the old tail roller (pulley) and replaced it with a new tail roller. The new tail rollers were standard equipment and of a similar nature to those replaced.

Approximately 4 to 6 Irey employees also worked during the vacation period on the No. 15 belt support structure. The structure had become twisted and rusted and had holes in it. Some of the legs had also rusted off. The Irey employees replaced pieces of the "C channel" and new legs were welded under the belt. There is some dispute as to whether there was any change in the basic structural design of the support structure.

Finally, the evidence shows that approximately 4 Irey employees were involved during the vacation period sand-blasting and painting steel beams in the preparation plant that had become rusted.

Within this framework of evidence it is clear that the work performed by Irey at the Loveridge Preparation Plant was "maintenance" work even within the meaning of Irey's proffered definition and that while the Irey employees were performing that work they were "maintenance" workers within the scope of the MSHA training regulations under 30 C.F.R. 48.28 through 48.30. Since the work was performed over more than a two-week period I also find that the work was contracted for an "extended" period of time within the meaning of Section 48.22(a)(1). The failure of Irey to have had the cited employees trained in accordance with the noted regulations therefore constituted a violation.

I note that while some of the work performed by Irey might broadly be construed to be "construction" work, e.g. the erection of new steel beams to replace deteriorated beams, the overall purpose and intent of all of the work was for the "maintenance" of the existing preparation plant. Thus, in any event, I find that the cited Irey workers were indeed "maintenance" workers subject to the existing MSHA training regulations.

I do not find however on the facts of this case that the violation was the result of the "unwarrantable failure" of Irey to comply with the law. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987) appeal pending (D.C. Circuit No. 88-1019). In the Emery case the Commission compared ordinary negligence as conduct that is "inadvertent", "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure, i.e. conduct that is not "justifiable" or "excusable".

In this case the evidence is undisputed that several months before the beginning of the Loveridge project Irey contacted the MSHA district manager to inquire about the necessity for training on the particular project. It is not disputed that Irey was informed that training would not be required under the circumstances of the particular project. I also observe that Irey's interpretation of the regulations was not frivolous and the instant case is apparently one of first impression on the precise issue. Under the circumstances it cannot be said that Irey was either negligent or that the violation was the result of its "unwarrantable failure". Order No. 3106979 must accordingly be modified to a citation under section 104(a) of the Act.

While the Secretary also alleged that the violation was "significant and substantial" it has failed to address this issue in her brief. In order to find that a violation is "significant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discreet safety hazard (a measure of danger to safety) contributed to by the violation, a reasonable likelihood that the hazard contributed to will result in an injury, and a reasonable likelihood that the injury in question will be of a reasonably serious nature. See Mathies Coal Co., 6 FMSHRC 1 (1984).

In this case the existence of another violation found at the same work site where the untrained miners were working clearly illustrates the "significant and substantial" nature of the instant violation. The admitted violation under Citation No. 3106975 was as follows: Burning and welding operations were being done in the tripper belt enclosure in

the presence of float coal dust ranging from 2 to 4 inches in thickness on the structure within the enclosure. The "significant and substantial" nature of this violation was likewise not disputed.

The existence of that violation is illustrative of the discreet safety hazard existing from the failure to have the Irey employees trained. It may also reasonably be inferred that the hazard contributed to would result in an injury of a reasonably serious nature. According to the undisputed testimony of MSHA inspector Alex Volek the ignition of the existing float coal dust from the welding operations would likely result in fatalities. Within this framework of evidence I conclude that indeed the violation was "significant and substantial" and serious. In assessing a civil penalty in this case I have also considered the size of the operator, its history of violations, and its good faith abatement of the violation. Under the circumstances I find that a civil penalty of $200 is appropriate.

ORDER

Order No. 3106979 is modified to a citation under section 104(a) of the Act. Frank Irey, Jr., Inc., is directed to pay the following civil penalties within 30 of the date of this decision: Citation No. 3106975-$500, Citation No. 3106979-$200.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Section 104(d)(1) of the Act reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.