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TUNNELTON MINING 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

TUNNELTON MINING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 88-258-R
Citation No. 2888637; 6/21/88

Marion Mine
Mine ID 36-00929

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

v.

TUNNELTON MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. PENN 88-333
A. C. No. 36-00929-03638

Marion Mine

DECISION

Appearances: Joseph Yuhas, Esq., Tunnelton Mining Company,
Ebensburg, Pennsylvania, for the Respondent;
Thomas A. Brown, Esq., Office of the Solicitor,
U. S. Department of Labor, Philadelphia,
Pennsylvania, for the Secretary.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases, the Secretary (Petitioner) seeks a civil penalty for an alleged violation by the Operator (Respondent) of 30 C.F.R. 77.1710(h). Pursuant to notice, these cases were heard in Bellefonte, Pennsylvania on June 19, 1989. Rex Morgart and Kenneth Dice testified for Petitioner, and Harold Kimmel and Darryl Hanna testified for Respondent. Proposed Findings of Fact and Memorandum of Law were filed by Respondent and Petitioner on September 21 and 25, 1989, respectively. A Reply Brief was filed by Respondent on October 1, 1989.

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Stipulations

1. The Marion Mine is owned and operated by Respondent, Tunnelton Mining Company. Tunnelton Mining Company is a subsidiary of the Pennsylvania Mines Corporation.
2. Tunnelton Mining Company and the Marion Mine are 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 1977 Act.
4. The inspector who issued the subject citation was a duly authorized representative of the Secretary of Labor.
5. A true and correct copy of the subject citation was properly served upon the Operator in accordance with Section 104 of the 1977 Act.
6. Copies of the subject citation and termination may be admitted into evidence for the purposes of establishing their issuance, and not for truthfulness or relevance of any statements asserted therein.
7. Respondent demonstrated good faith in the abatement of the citation.
8. The assessment of a civil penalty will not affect Respondent's ability to continue in business.
9. The Respondent's annual production tonnage is 1,435,690 tons.
10. The Marion Mine produces an annual production of 773,668 tons.
11. Tunnelton Mining Company was assessed 327 violations over 522 inspection days during the 24 months preceding the issuance of the subject citation.
12. The printout of the civil penalty complaint reflects the Secretary of Labor's history of violations at the Marion Mine.

Findings of Fact and Discussion

I.

On June 21, 1988, Respondent's employees Harold Kimmel and Darryl Hanna, were in the process of removing a pump from a water clarifier bin in order to repair it. Hanna stood on a catwalk alongside a boom post and was ratcheting a chain in order to

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raise the pump which was submerged in the bin. Kimmel was approximately 4 feet below Hanna, and had his left foot on a 4 inch angle iron and his right foot on a pipe. He had his knee on a pipe and was leaning over the bin in order to attach a chain to the pump. (See, Government Exhibits 3-A, 6, 7, and 8 for a depiction of the position of Kimmel's right leg (R) and left leg (L), as testified to by Rex Morgart, an MSHA Inspector.) Although the testimony of Kimmel and Hanna was at variance with that of Morgart with regard to where the former had positioned his left foot, I accept the version testified to by Morgart, due to my observations of the witness' demeanor on this point, and also due to the fact that Morgart's testimony related specifically to what was observed by him, whereas the testimony of Kimmel did not specifically describe the placement of his left foot when he was observed by Morgart.(FOOTNOTE 1) Kimmel thus was positioned in a leaning over position facing away from the catwalk and above the water. He was approximately 2 to 3 feet from the top of the water, and the water was approximately 12 feet deep. Kimmel had his left hand either on the structure or the chain, and was using his right hand to unhook the chain from the pump. According to Kimmel, the pump, which was approximately 18 inches in diameter, was located a couple of feet in front of him when he reached for the chain.

Kenneth Dice, a mechanic for Respondent who accompanied Morgart on his inspection, indicated that the pump was directly below Kimmel, and that Kimmel was probably "a wee bit" to the right. I accepted the testimony of Kimmel with regard to the position of the pump, relative to where he was working, as he was directly involved in the operation, and the record does not indicate where Dice was standing in relation to Kimmel. Thus, inasmuch as Kimmel was straddling a structure, had his left foot on an angle-iron that was only 4 inches wide, was holding on with only his left hand, leaning over water located about 2 feet below him, and reaching below him, I conclude that a reasonably prudent person would have recognized a danger of falling, and would have worn a lift jacket or belt. Accordingly, I find that Respondent herein did violate section 77.1710(h). (See Austin Power, Inc., 9 FMSHRC 2015 (December 1987)).

II.

Morgart indicated that in his opinion the violation herein was significant and substantial in that, if a worker would be without a belt or life jacket every time the pump was brought up, then there would be "a chance" of a fatality or a serious injury (Tr. 38). He said that there have been serious injuries in falling over the top of a bin including fatalities. He said, in essence, over a period of time there would be a reasonably likelihood for one to drown or lose one's balance, and strike one's head against two or three objects which were present. Dice opined that there was a "very good chance" of slipping and hitting one's head on a railing (Tr. 61) He said that in such an event a person ". . . could have knocked himself out or drowned." (Tr. 61, emphasis added.)

In order for a violation to be significant and substantial, in addition to establishing a violation of a mandatory safety standard and a discrete safety hazard, it must be established that there was a reasonable likelihood that the hazard contributed to would result in an injury-producing event. (See, Mathies Coal Company 6 FMSHRC at 3-4 (January 1984); Austin Power Inc., supra.) The discrete safety hazard contributed to by the violation herein, was the danger of falling into the water. However, Kimmel was supported by the placement of his legs. In addition, he was being supported by his left hand by holding onto the chain or structure, and all stationary obstructions were to his rear, the opposite direction in which he was facing. Further, the pump was approximately 5 feet below the surface, according to the uncontradicted testimony of Hanna, and Kimmel was only approximately 2 feet above the surface of the water. Also, although Kimmel was fully clothed and had on shoes with steel toes, he knew how to swim, and was working approximately 4 feet away, and in the view of Hanna throughout the time he was working. Hanna, although also wearing shoes with steel toes, was able to swim, and had at his feet a 1 inch aluminum pipe, approximately 8 to 10 feet long, which could have been used to save Kimmel had he fallen in. Also, a rope and an inflated rubber tube was approximately 20 to 25 feet away, and down a ladder. For all these reasons I conclude that it has not been established that there was a reasonable likelihood of the occurrence of an injury of a reasonably serious nature. Hence, I conclude that it has not been established that the violation herein was significant and substantial (See, Mathies Coal Company, supra). (C.F. Austin Power, Inc., supra.)

III.

Both Hanna and Kimmel knew that Kimmel was working straddling two structures, and leaning over the bin containing water. Kimmel's testimony was to the effect that approximately once a year or less he has had to perform similar work pulling up a pump.

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As outlined above, I., infra, a reasonably prudent person would have realized that there was some danger to Kimmel of falling into the water. Safety belts were available at the office of Kimmel's supervisor, Kirk McKnight, but neither a belt nor a life jacket was provided to Kimmel. Accordingly, I find that the violation herein resulted from Respondent's aggravated conduct and as such constitutes unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987))(FOOTNOTE 2)

IV

I find that the gravity of the violation herein to be less than moderate, taking into account the factors discuss in II, infra. Inasmuch as Respondent failed to act as a reasonable prudent person as set forth in I., infra, I conclude that Respondent's negligence herein was of a moderately high degree. Considering these factors, as well as the remaining factors set forth in section 110(i) of the Act, I find that a penalty herein of \$75 is appropriate for the violation of section 77.1710(h), supra.

ORDER

It is ORDERED that Order 2888637 be amended to reflect the fact that the violation herein is not significant and substantial. It is further ORDERED that Respondent shall, within 30 days of this Decision, pay \$75 as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Hanna testified in general as to where Kimmel stood, but did not specifically contradict Morgart's testimony with regard to the placement of Kimmel's feet as depicted in Government Exhibit 3A, 6, 7, and 8.

~FOOTNOTE_TWO

2. I find that the cases relied on by Respondent at Pages 14-15 of its Brief are not dispositive of the issues presented herein. In Secretary v. Florence Mining Co., 11 FMSHRC 747 (1989), the Commission held that the Operator's conduct did not constitute an unwarrantable failure as it was based on its good faith interpretation of the requirements of an approved emergency escape facilities plan. In Secretary v. Rochester and Pittsburgh Coal Co., 9 FMSHRC 2069 (1987), Judge Koutras held that the Operator's negligence was to be mitigated as it was based upon an interpretation of provisions of a ventilation plan. Reasonable persons can differ with regard to the interpretation of various terms of ventilation plans. In contrast, in the case at bar, Respondent's conduct was as a consequence of failing to act as a reasonably prudent person. (Infra, I).