CCASE:
SOL (MSHA) V. MOUNTAIN PARKWAY STONE
DDATE:
19891128
TTEXT:

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. KENT 89-137-M A. C. No. 15-15676-05513
v.	Staton Mine
MOUNTAIN PARKWAY STONE, INCORPORATED RESPONDENT	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Jeffrey T. Staton, Mountain Parkway Stone, Incorporated, Stanton, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In this case the Secretary (Petitioner) seeks, by way of a Proposal for Assessment of Civil Penalty filed on May 15, 1989, civil penalties for alleged violations by the Operator (Respondent) of various mandatory safety standards found in Volume 30 of Code of Federal Regulations, and generally referred to in the Proposal. Respondent filed its Answer on June 9, 1989. Subsequent to a telephone conference call with both Parties, initiated by the undersigned on August 22, 1989, the Parties agreed that this matter could be set for Hearing on August 31, 1989. The case was heard in Richmond, Kentucky, on August 31, 1989. At the commencement of the Hearing, after the Parties were provided with time to discuss the alleged violations in issue, the Parties advised that Citation Nos. 3253524 and 3253525 were settled. Subsequently, during the course of the Hearing, the Parties indicated that a settlement had been reached in Citation Nos. 3253322 and 3253523.

At the Hearing Gary Manwarring and Vernon Denton testified for Petitioner. Bobby Brewer and Charles Williams testified for Respondent.

Proposed Findings of Fact and Memorandum of Law were filed on October 27, 1989, by Petitioner, and on October 1, 1989, by Respondent. A Joint Motion for Approval of Settlement was filed on November 6, 1989.

Stipulations

The Parties have stipulated to the following:

1. Mountain Parkway Stone, Inc. is a Kentucky corporation engaged in the extraction and preparation of crushed and broken limestone for resale in interstate commerce.

2. Mountain Parkway Stone, Inc. has operated an underground mine in Powell, Kentucky since July 11, 1986.

3. Mountain Parkway Stone, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its Administrative Law Judges.

4. Mountain Parkway Stone, Inc. produced 59,552.44 tons of limestone in 1987, 54,906.49 tons in 1988, and 14,227.43 tons from January through August 1989.

Findings of Fact and Discussion

I. Citation No. 3253320

Respondent operates a limestone mine known as the Staton Mine. On March 1, 1989, Gary Manwarring, an MSHA Inspector, inspected the subject underground mine. At that time a front-e loader was present at the face, loading rock onto a haul truck. There was only one escapeway, at the portal, and there were no refuges. Respondent's operation was not involved in exploratio at that time.

Manwarring issued a section 104(a) Citation alleging a vioaltion of 30 C.F.R. 57.11050(a), which, in essence, provides that every mine shall have at least two separate escapeways to the surface, but that a second escapeway is not required during exploration ". . . or development of an ore body." (Emphasis added). Thus, the prime issue for consideration is whether or not Respondent was involved in "development" when the citation was issued.

Manwarring offered his opinion that Respondent was in production, not development, as it was removing limestone, its product. Vernon Denton, a supervising inspector employed by MSHA, indicated essentially that in a limestone mine there is not any "development" inasmuch as soon as the overburden is stripped away, access is obtained directly to limestone, and the mine is then in production. Neither of Respondent's witnesses, its employees Bobby Brewer and Charles Williams, offered any definition of the term "development."

The main drift of the mine, from the entrance to the point where the face existed on March 1, 1989, is somewhat circuitous (Joint Exhibit 1), but is the only feasible way from the entrance to the point where the second portal or escapeway was eventually broken through. As such, it appears to be Respondent's position that the approximately 945 feet of the main drift, on March 1, 1989, was "development," as the drift was proceeding by the only path possible to the point where the second portal would be broken out.(FOONOTE 1) Respondent apparently also relies on the testimony of Brewer and Williams to the effect that on March 1, 1989, Denton indicated that he had told Jeffery Staton that, in essence, he would be allowed to go 1000 feet, without the necessity of a second escapeway, in order to reach the point of a breakthrough to a second escapeway.(FOOTNOTE 2)

Respondent did not rebut the testimony of Petitioner's witnesses as to the meaning of the term "development." Nor did Respondent affirmatively present any evidence to establish a definition of that term different from that espoused by Petitioner's witnesses. Further, I note that the Dictionary of Mining, Mineral, and Related Terms, defines "development" as follows: "a. To open up a coal seam or ore body as by sinking shafts and driving drifts, as well as installing the requisite equipment. b. Work of driving openings to and in a proved ore body to prepare it for mining and transporting the ore . . . . "

On March 1, 1989, Manwarring observed Respondent loading limestone at the face, and the production reports, for 1987 through August 1989, indicated the various amounts of production tonnage for that period. Hence, Respondent was beyond the stage of opening up the ore body or preparing it for mining, as it was already engaged in mining. Respondent has not adduced any evidence which would tend to establish that its sole purpose in establishing the drift from the portal to the face was for development of the second escapeway, rather than for the production of limestone. Hence, I conclude that on March 1, 1989, there was no "development" of an ore body as the mine was engaged in production. Inasmuch as the subject mine had only one escapeway on March 1, 1989, I conclude that it has been established that Respondent herein violated section 57.11050.

The citation in question alleges that the violation herein is significant and substantial. Neither Manwarring nor Denton offered their opinion on this issue. According to Manwarring, in the event of the escapeway being blocked at the portal, the miners would be trapped. This could occur if there would be a fire, roof fall, gas, or water between the area where the miners would be working and the escapeway portal. He indicated that there were five trucks underground, either gas or diesel, and there was a possibility of the trucks igniting due the presence of flammable material. Denton indicated that if a truck would catch fire it would get so hot that it would be impossible to traverse the area, and that toxic gases would be emitted from burning tires and upholstery. He also opined that in the event of a fire there would be oxygen depletion.

He described the trucks as old and in need of some maintenance work, and indicated that the electrical wiring was deteriorating due to the fact that it contained older materials. He indicated that he saw wires with broken insulation. However, neither Denton nor High indicated specifically what wires did not have proper insulation, the length of the improper installation, what trucks these wires were located on, and their specific location. Denton indicated that there was accumulation of fuel and grease present, but he did not describe its specific location or quantity. It is clear that the risk of injury to miners at the mine as the consequence of a fire certainly is contributed to by the lack of a second escapeway. However, although the evidence indicates that a fire could have occurred, there is insufficient evidence to conclude that there was a reasonable likelihood of such occurring. It is clear that a blockage of the escapeway portal could have occurred, but there is insufficient evidence to conclude that this event was reasonably likely to occur. Accordingly, it must be concluded that Petitioner has not established that the violation herein was significant and substantial. (See, Mathies Coal Co., 6 FMSHRC at 3-4 (1984)).

According to Denton, there was a "sort of an agreement" (Tr. 73) that Respondent would be allowed to have the drift go from the entrance for about 100 feet, then go to the right between 400 to 500 feet, and then go to the right again for about 100 feet until it broke out to the surface to create a second portal. He indicated that a second escapeway parallel to the main drift was not ordered, as there was not enough room along the side of the hill, where the main portal was located, to create another portal entrance. According to Denton, he indicated to Jeffery Staton that the drift to the surface was to be a main priority. He indicated that in 1987, he visited the mine and advised Staton that, essentially, he was concerned with the number of headings off the main drift, and asked Staton to consider mining from the surface down to the drift in order to create an escapeway. He indicated that Staton told him that he started at another point on the hill to open up a portal to go down to the drift. According to Denton, in February or March 1988, he returned to the mine and Staton advised him that he had not had enough time to complete the drift. Denton indicated that he told Staton to stop driving the other headings, and instead go out to the surface. He said that Staton had told him that he felt he was entitled to a full 1000 feet of drift.

Manwarring indicated that when he inspected the mine on November 2, 1988, there was a discussion with Staton with regard to the requirement of a second escapeway, and Staton indicated that he was in the process of driving a heading to the outside to establish an escapeway. Manwarring indicated that he returned six more times, and on each visit he discussed the escapeway, and Staton indicated that he was working towards it, and would be breaking out in a short period of time. Brewer and Williams both indicated that in a discussion on March 1, 1989, in essence, Staton asked of Denton whether he had previously allowed Staton 1000 feet of drift, and Denton answered in the affirmative.

Respondent did not rebut Manwarring's testimony with regard to the numerous contacts, prior to March 1, 1989, that he had with Staton with regard to the escapeway. Respondent did not proffer the testimony of any person in management responsible for decisionmaking with regard to any circumstances which would excuse Respondent from having failed to have a second escapeway or to make one. Accordingly, it is concluded that Respondent herein acted with a high degree of negligence in not having a second escapeway.

I find that the lack of a second escapeway, with three miners working underground, is a moderately serious violation. Further, Respondent herein acted with a high degree of negligence. Taking these factors into account, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I conclude that penalty herein of $200 is proper.

~2379

II. Citation Nos. 3253522, 3253523, 3253524, and 3253525

On November 6, 1989, a Joint Motion for Approval of Settlement was filed concerning the above Citations. The Joint Motion proposes a reduction in penalties from $199 to $145. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ORDER

It is ORDERED that Citation No. 3253320 be amended to reflect that the violation therein is not significant and substantial. It is further ORDERED that Respondent shall pay, within 30 days of this Decision, $345 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Manwarring indicated on cross-examination, that the main drift was the only way to go from the entrance portal to the eventual breakthrough.

~FOOTNOTE_TWO

2. I do not find any merit in Respondent's position. In determining whether Respondent violated section 57.11050(a), supra, Respondent's mining operation must be analyzed. In this analysis it is not relevant to consider whether Respondent was proceeding in accord with statements made to it by Denton. This issue is discussed, infra, wherein Respondent's negligence is discussed.