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SOL (MSHA) V. KELLY TRUCKING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 89-13 A.C. No. 03-00278-03502 J3E
v.	Sugarloaf Mine No. 1
KELLY TRUCKING COMPANY, RESPONDENT	

DECISION

Appearances: Jerome T. Kearney, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Petitioner;
Curtis Kelly, Kelly Trucking Company, Hodgen, Oklahoma, for the Respondent.

Before: Judge Maurer

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 Act of 1977, 30 U.S.C. 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Kelly Trucking Company has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional issues are also addressed in this decision as they relate to specific citations or orders.

The case was heard in Little Rock, Arkansas on July 6, 1989. Both parties declined to file post-hearing proposed findings of fact and conclusions of law, however, I have considered their oral arguments made on the record during the course of the hearing in my adjudication of this case.

Section 104(g)(1) Withdrawal Order No. 2929232 was issued on July 5, 1988, and states as follows:

> Ronnie Bennett, observed performing duties on and around the dragline has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Bennett has been determined to be a new miner hired

> by this Company on 07-04-88, and has received little or none of the required 24 hours of new miner training. In the absence of this training Ronnie Bennett dragline operator is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Citation No. 2929233, issued in conjunction with the above Order and pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. 48.25(a) and charges as follows:

> Ronnie Bennett, determined to be a new miner was observed performing duties around the Koehring dragline. A discussion with Mr. Bennett revealed that he had received none of the required 24 hours of new miner training. A later discussion with the foreman revealed Mr. Bennett had received no training as stipulated in the Company's approved training plan.

Section 104(g)(1) Withdrawal Order No. 2929236 was also issued on July 5, 1988, and states as follows:

> Paul Wells (Contractor) was observed performing duties on and around the dragline has not received the requisite safety training as stipulated in section 115 of the Act. Mr. Wells has been determined to be a new miner hired by the Company on 06-29-88, and has received none of the required 24 hours of new miner training. In the absence of this training, Paul Wells Contractor and foreman is declared to be a hazard to himself and others and is to be immediately withdrawn from the mine until he has received the required training.

Issued in conjunction with Order No. 2929236 was section 104(d)(1) Order No. 2929237, alleging another violation of the regulatory standard at 30 C.F.R. 48.25(a) and charging as follows:

> Paul Wells, determined to be a new miner was observed performing duties on and around the Koehring dragline. A discussion with Mr. Wells revealed that he had not received any of the required 24 hours of new miner training that is stipulated in the Company approved training plan.

Finally, section 104(a) Citation No. 2929235 was issued on July 5, 1988, alleging a violation of 30 C.F.R. 77.1713(c) and charging as follows:

> The results of the daily examination were not being recorded.

There is no factual dispute whatsoever that the cited employees did not have the required training under the pertinent regulation or that the results of the daily examinations were not being recorded as charged. The respondent's "defense" is that he contacted Inspector Coleman prior to the July 5 inspection (on July 3 or 4) and told him that he wanted to take coal fines out of a pond or ponds at the Sugarloaf Mine near Midland, Arkansas. He explained to the inspector that he was unfamiliar with the coal mining regulations. He didn't know what he needed to do to be legal and he asked the inspector to meet with him or "one of his people" at the mine site to tell him or them what they needed to do in order to be legal. The inspector remembers the conversation but his recollection is that the respondent was concerned about making the dragline legal. He maintains that the subject of personnel training was never mentioned. In any event he testified that: "We cannot go and just give an inspection. . . . When I go to a mine, my supervisor sends me to a mine and whenever I see a violation, I have to issue a citation" (Tr. 25).

On July 5, 1988, when Inspector Coleman arrived at the mine site, there were two persons present, Paul Wells and Ronnie Bennett. They both stated they were working for Mr. Kelly. At the time, they were both performing maintenance on the dragline. When asked, Mr. Bennett stated that he had no miner's training and was unfamilar with the dragline he was working on. When the inspector asked Mr. Wells what he was doing, he replied that he was there fixing the dragline and that they were going to take some coal fines out. He also stated that he had no miner's training and had never been around a mine. He was, however, familiar with the equipment. He owned the dragline in question.

The inspector was and is of the opinion that the dragline had been there for several days and had taken out several hundred tons of coal fines already. Mr. Bennett also told the inspector that he had been there for three or four days, and there is no factual dispute that several tons of material (coal fines) had been taken out and laid up on the side. The question is who took them out.

During the inspector's conversation with Mr. Bennett, he also determined that no one was doing any kind of pre-shift inspections, checking the equipment out or anything. There was no one there that was certified to do pre-shift inspections and no records whatsoever were being kept at this mine.

Mr. Kelly testified to the effect that he didn't even know that Mr. Wells had Mr. Bennett at the mine site. It is Kelly's position that Bennett was just being tried out for a position as dragline operator and was not on the payroll of either Kelly Trucking or Mr. Wells at the time of the inspector's visit.

The arrangement between Kelly Trucking and Wells was that Wells was to furnish his dragline and an operator to Kelly Trucking for so much a ton of coal fines recovered. Kelly Trucking in turn had been hired by Earl Powers, who had the mine leased, to take out coal fines.

Mr. Kelly also takes the position that the 300 tons of coal fines out on the bank on July 5, 1988, were taken out by someone else, not him. So, the upshot of this testimony was that the pile of coal fines the inspector saw was taken out by the HHH Mining Company using a different dragline. The significance of this evidence being that neither the Kelly Trucking Company nor Messrs. Wells and Bennett were responsible for "mining" this material. I accept this evidence as credible and I do credit it. However, what Mr. Kelly describes as "experimenting" does amount to operating a mine in my opinion. He admits to being on the mine property on two previous occasions trying to take out some of these coal fines with small bulldozers. Additionally, Bennett told the inspector on July 5 1988, that he had already been on the mine property for three or four days working with this truck mounted dragline that belonged to Wells. The inspector further noted that the dragline was all set up. It had coal dirt all over it where it had been worked and Bennett told him he had been working it. Mr. Kelly even candidly allows that Bennett may have swung his bucket out there and taken out some piles of material, but not the 300 tons that the inspector assumed he did.

On the basis of the entire record herein, I find that the respondent was operating a "mine" on July 5, 1988, and that Wells and Bennett were "miners" within the meaning of the Act on that date. Accordingly, since they admittedly did not have the required training, the Secretary has proven the two training violations of 30 C.F.R. 48.25(a) alleged herein. With regard to the alleged violation of 30 C.F.R. 77.1713(c), the inspector's testimony stands unrebutted and therefore, I find that violation proven as well.

I do not find, however, on the facts of this case that the training violations were the result of the "unwarrantable failure" of Kelly Trucking to comply with the law. "Unwarrantable failure" means aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997 (1987).

In the Emery case the Commission compared ordinary negligence as being conduct that is "inadvertent", "thoughtless", or "inattentive" with conduct constituting an unwarrantable failure i.e. conduct that is "not justifiable" or "inexcusable".

In this case, I believe Mr. Kelly made a good faith attempt to comply with the regulations. His efforts just amounted to a case of too little, too late, to avoid being in a violative posture at the mine site. On his own, he contacted the MSHA inspector before the inspection and told him what he intended to do and that he wanted to operate the mine site in a legal manner. He specifically requested assistance from the inspector to achieve compliance. A fair reading of the record in this case shows that the inspector was not too helpful to Mr. Kelly in this regard.

Both the inspector and Mr. Kelly knew the inspector was coming to the mine site on the day in question, but each had a different purpose in mind. The difference is that the inspector was coming on a previously scheduled inspection and if he found violations he intended to write citations. Kelly, on the other hand, thought this visit was at his behest, "to get him legal", in his words.

Under the circumstances, I find Kelly's negligence to be ordinary negligence, attributable to his ignorance of the regulations and inattention to detail. Therefore, Citation No. 2929233 and Order No. 2929237 must be modified to citations issued under section 104(a) of the Act.

The Secretary also alleged that the violations were "significant and substantial". In order to find that a violation is "signficant and substantial" the Secretary has the burden of proving an underlying violation of a mandatory safety standard, a discrete 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).

According to the undisputed testimony of Inspector Coleman, the retaining ponds at this mine differ significantly. In some of them, the material is very consolidated and in some it is very liquified, and there is an elevated roadway that goes around these ponds that has water on one side. In the opinion of the inspector there could likely be a fatal accident if the operator turned a vehicle over into one of these ponds. The inspector also opined that just being on this property would be a very dangerous situation for an untrained person who was not familiar with that environment. Under these circumstances, I conclude and

find that the two individuals in question were exposed to the hazards inherent in such activities and that their lack of training presented a reasonable likelihood of an injury or accident of a reasonably serious nature. Within the framework of this evidence, I conclude that the training violations were "significant and substantial" and serious.

In assessing a civil penalty in this case, I have also considered the size of this operation, its history of violations (one other training violation two years prior), its good faith abatement of the violations found herein and the consequences payment of a penalty would have on the future of the company.

Counsel for petitioner was given 30 days subsequent to the hearing to put the computer printout of the respondent's violation history into the record. He has neglected to do so and therefore I assume there were no prior violations of the regulations by the Kelly Trucking Company within the 24 months preceding the violations found to exist herein. That is the gist of the operator's testimony and I accept it as being credible. By independent research of the Commission's records, I have determined that the respondent did pay a $100 civil penalty in 1987 for a training violation which arose in 1986.

Under the circumstances, I find that a civil penalty of $225 for each of the training violations found herein and a civil penalty of $20 for the recordkeeping violation are appropriate.

ORDER

1. In accordance with the foregoing findings and conclusions, including the rejection of the inspector's unwarrantable failure findings, section 104(d)(1) Citation No. 2929233 and Order No. 2929237 each citing a violation of 30 C.F.R. 48.25(a) for the failure to provide training for the two cited individuals are modified to section 104(a) citations, with "S & S" findings, and affirmed as such.

2. Section 104(a) non-"S & S" Citation No. 2929235, citing a violation of 30 C.F.R. 77.1713(c) for a recordkeeping violation is affirmed as issued.

3. The respondent is ordered to pay a civil penalty of $470 within 30 days of this decision and order.

Roy J. Maurer
Administrative Law Judge