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ROCHESTER & PITTSBURGH COAL 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

ROCHESTER & PITTSBURGH COAL COMPANY, CONTESTANT	CONTEST PROCEEDING Docket No. PENN 89-64-R Order No. 2890946; 12/22/88
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No PENN 89-78-R Order No. 2890947; 12/22/88 Greenwich Collieries #2 Mine Mine ID 36-02404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 89-132 A. C. No. 36-02404-03749
v.	Greenwich Collieries #2 Mine
ROCHESTER & PITTSBURGH COAL COMPANY, RESPONDENT	

DECISION

Appearances: Paul Inglesby, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary;
Joseph Yuhas, Esq., Rochester & Pittsburgh Coal Company, Ebensburg, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of 30 C.F.R. 75.1722(c) and 75.303(a). The Respondent has contested the issuance of Order Nos. 2890946 and 2890947, and has filed an Answer, on May 5, 1989, with regard to the Petition for Assessment of Civil Penalty, which had been filed on April 27, 1989. Pursuant to notice, a hearing in this matter was held in Ebensburg, Pennsylvania, on September 26, 1989. At the hearing, Vincent James Jardina, Jr. testified for Petitioner, and Robert John Elick, William Loughran, and Michael S. Skarbek testified for Respondent. Proposed Findings of Fact and Briefs were filed by the Respondent and Petitioner on November 14 and 21, 1989, respectively.

Stipulations

At the hearing, the Parties indicated that the facts that they stipulated to, as set forth in Respondent's Response to the Prehearing Order filed June 7, 1989, are as follows:

1. Greenwich Collieries is owned by Pennsylvania Mines Corporation and managed by Respondent, Rochester and Pittsburgh Coal Company.

2. Greenwich Collieries is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject Orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

5. The Respondent demonstrated good faith in the abatement of the Orders.

6. The assessment of a civil penalty in this proceeding will not affect Respondent's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be based on the facts that:

   a. The Respondent company's annual production tonnage is 9,386,168;

   b. And that the Greenwich Collieries No. 2 Mine's annual production tonnage is 1,411,039.

8. Greenwich No. 2 Mine was assessed 914 violations over 1,250 inspection days during the 24 months preceding the issuance of the subject Order.

9. The Parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

Findings of Fact and Discussion

Order No. 2890946

I.

On December 22, 1988, at approximately 8:30 in the morning, Vincent James Jardina, Jr., inspected Respondent's M-16 Section. He observed that the guarding for the No. 1 belt entry tail consisted of two pieces of mesh metal screen. The left side was standing "partially upright," but was bent and twisted a "little bit" (Tr. 17), and the right side was "smashed and flattened down almost to ground level" (Tr. 18). He indicated that with the use of a ruler, the distance between the guard and the pulley was measured at 11 to 18 inches, and the two pieces of the guard were "approximately" 15 inches apart (Tr. 19). William Laughran, a beltman employed by Respondent, testified that when Jardina wrote the Order in question, he (Laughran) was present and stood 2 to 3 feet or less from the guarding. He indicated that the left side did not have any damage, and the right side was just bent down. He did not take any measurements, but testified that the guarding was from 4 to 6 inches away from the tail, and the two pieces of the guarding were 2 to 4 inches apart. I place more weight on Jardina's testimony due to my observations of his demeanor, and also based upon the fact that his testimony finds corroboration in his detailed contemporaneous notes. Also, I find his testimony as to the measurement of various distances involved to be reliable, as he used a ruler in making the original measurements.

According to Jardina, the end of the guarding, where it contacted the tail, was leaning in an upright position, but none of the guarding was secure in any way. This testimony has not been rebutted by any of Respondent's witnesses or by any documentary evidence. Accordingly I find, that the guarding in question was not secured in place. Hence, I find that Respondent herein violated 30 C.F.R. 75.1722(c), as cited by Jardina, which provides, as pertinent, that ". . . guards shall be securely in place while machinery is being operated."

II.

According to Jardina, he observed a miner walking across the No. 1 belt entry, and going in the direction of the No. 2 belt head. He indicated that this would be the shortest route between those two areas. He also observed two shovels in the area, one

being approximately 2 feet to the left of the tail. Two beltmen were in the area, and had the responsibility of cleaning the belt at least once a shift. According to Jardina, depending upon the amount of coal accumulation, shoveling to clean the belt could take up to an hour, and cause the miner shoveling the coal to get up to within a foot of the belt. Further, according to Jardina, a miner greasing the belt would be in proximity to the tail and the exposed fin portion. In this connection, he indicated that he did not observe any extension to the grease hose. I find more credible the testimony of Loughran, who actually performed the greasing. Loughran indicated that the hose to be greased extended out a foot, and that the bearings were guarded.

Jardina indicated that it would be easy to lean on the guarding and make contact with the moving tail conveyor, as there was nothing securing the guarding. He opined that due to the fact that the guard was not secured, and the area was "very wet and slippery" (Tr. 22), it was "very likely" (Tr. 23) that those working in the area could make contact with the belt conveyor tail.(FOOTNOTE 1) He subsequently testified that, if the tail is not adequately guarded, contact with the tail conveyor is "reasonably likely" (Tr. 29), "by passing by, slipping, shoveling, the pulley being able to pull their shovel in and their arm, there could be a loss of a hand or even an arm, it could even pull them into the pulley" (Tr. 29). He was asked, on cross-examination, how a hand or arm could get caught in the belt. He answered as follows: "In that situation, cleaning the belt which I've shown on --- as I said, on the side view. But let's look at another situation where hazard exists also" (Tr. 82) (sic).

He also testified that in cleaning the side part of the pulley, contact can be made with "the moving fin part of the pulley" (Tr. 73). However, this item was not described by Jardina, nor did he testify as to its dimensions and specific location. He also indicated that a shovel could be pulled in the direction of the belt, but did not testify as to the speed of the belt, nor as to the likelihood and nature of any injuries as a consequence of this occurrence.

Jardina testified that he evaluated the violation as significant and substantial, because there was a violation of a mandatory safety standard and ". . . the conditions that prevailed at the time were evident that a serious injury could occur, . . . and the fact also that the belt was in operation at the time and the condition of the guarding" (Tr. 35) (sic).

In order for it to be found that the violation herein was significant and substantial, it must be established, in addition to an existence of a violation of a mandatory safety standard, that there was ". . . (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." (Mathies Coal Co., 6 FMSHRC 1, at 3-4 (1984)).

I do not place much weight on Jardina's testimony, as it does not set forth in sufficient detail the basis for his opinions and conclusions. Specifically, I find that Petitioner has failed to establish that there was a reasonable likelihood that, as a consequence of the violation herein, there was a hazard contributed to, with a reasonable likelihood of a resulting injury of a reasonably serious nature. Accordingly, I find that it has not been established that violation herein was significant and substantial. (See, Mathies Coal Company, supra.)

III.

The record is devoid of any evidence establishing, with any degree of specificity, the length of time the violation herein existed. According to Jardina, at about 8:30 a.m. on the morning of December 22, when he informed two beltmen who were in the area, that the guarding was not securely in place, one of them said, ". . . that wasn't like that yesterday" (Tr. 17). Robert John Elick, a supervisor for Respondent, indicated that he worked the 4:00 p.m. to midnight shift on December 21, 1988, and in the course of his duties examined the M-16 tail between 9:30 and 9:40 p.m., and that "to the best of my knowledge" the guarding was in place (Tr. 113). He also indicated that "to my knowledge," no work was performed at the tail after he made his examination (Tr. 114). He indicated, however, that on that shift, two mechanics had dragged a cable out of the section, and in so doing could possibly have hit the guarding with the cable. In this connection, Jardina indicated that he noted the area near the tail was "worn from crawling and dragging feet or equipment. . . " (Tr. 28). Loughran, who was on the section at approximately 7:15 a.m., did not see the guarding until Jardina cited the condition.

According to Jardina, when he observed the guarding, the belt was in operation, and no corrective action had been taken to secure it. He indicated that records he examined prior to going underground on December 22, 1988, indicated that a preshift examination of the M-16 belt tail track had been performed, and

it was noted that there were no hazardous or unsafe conditions. According to Jardina, the No. 1 belt entry tail was exposed, and was seen by him from a man trip as he approached the area.(FOOTNOTE 2)

Michael S. Skarbek testified that on December 22, 1988, between 5:00 and 6:15 a.m., he performed a preshift examination of the M-16 Section, including the belt entries. He said that he got off the man trip at the tail area, checked the head area, but did not specifically remember the guarding, and did not specifically remember looking at it. On cross-examination, he indicated that on a preshift examination he always checks the guarding, and does not recall it being down. He said that on the second shift, a cable had been pulled out of the section. He opined that it was possible that the cable could have caught the guarding and bent it. He indicated that when the belt started at the commencement of the third shift, it could have further caught the guarding.

I find, based upon Jardina's testimony, that the unsecured condition of the guarding was exposed. However, since the evidence does not establish the guarding in question was not secured at the time of the preshift examination, I can not find that Respondent was negligent in this regard to any significant degree. In the same fashion, as the record does not clearly establish when the violation herein occurred, and how long it had been in the condition observed by Jardina, I do not find that the violation herein was as the result of Respondent's "aggravated conduct." As such, I find it was not been established that the violation herein was as the result of Respondent's unwarrantable failure. (See, Emery Mining Co., 9 FMSHRC 1997 (1987)).

I find that, should a person come in contact with the moving belt, as a consequence of the guarding herein not having been secure, there could have been a serious injury. I further find, that Respondent was negligent to a nonsignificant degree concerning the violation herein. I have also taken into account the remaining statutory factors set forth in section 110(i) of the Act, as stipulated to by the Parties. Considering all of the above, I conclude that a penalty herein of $100 is appropriate for the violation found herein.

Jardina indicated that he also issued Order No. 2890942 alleging a violation of 30 C.F.R. 75.303(a), in that the Operator failed to discover and correct the hazardous condition at the tail, i.e., the fact that the guard was not secure.

According to Skarbek, he did perform an inspection of the working section of M-16 3 hours prior to commencement of the second shift, but does not recall looking at the guarding. He also indicated that he did not specifically recall the guarding being apart or down. No indication was made in the examination book that any hazardous or unsafe conditions were discovered at the preshift examination.

Jardina testified that the date board, which indicated that an examination had been conducted in the belt tail area, was approximately 10 feet from the defective guard, and that the No. 1 tail was not hidden or concealed. Jardina conducted his inspection of this area at approximately 8:26 a.m., on December 22, 1988, less than 2 and 1/2 hours after Skarbok had been in the area. It was Jardina's opinion that it would have been impossible to miss the condition of the defective guard because it was neither concealed nor hidden, was in plain view, and could be seen from either a moving man trip or by walking up the track.

In essence, section 75.303(a), supra, requires a mine examiner to notify the Operator if he ". . . finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such an area. . . . " (emphasis added). Thus, in order for Petitioner to prevail, and establish a violation of section 75.303(a), supra, Petitioner must establish, by a preponderance of the evidence, that there was a hazardous condition that should have been noted. I conclude, for the reasons set forth, infra, II., that the record does not contain sufficient evidence to establish the length of time the violative condition existed. I thus conclude that Petitioner has failed to establish that, at the time of Skarbek's preshift examination, the guarding was not secured and was in the condition observed subsequently by Jardina. I therefor find that it has not been established that Respondent violated section 75.303(a), supra.

ORDER

It is ORDERED that Order No. 2890947 be DISMISSED. It is further ORDERED that Order No. 2980946 be AMENDED to a section 104(a) Citation to reflect the fact that the violation was not the result of Respondent's unwarrantable failure, and it

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shall further be AMENDED to reflect the fact that the violation therein was not significant and substantial. It is further ORDERED that, within 30 days of this Decision, Respondent shall pay $100 as civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Although Jardina used the term "moving machine parts," (Tr. 23), he subsequently indicated that this term is meant to be "the No. 1 belt conveyor tail" (Tr. 34). Accordingly, I find that, as used by Jardina, these terms are synonymous.

~FOOTNOTE_TWO
2. In contrast, Loughran indicated that at 7:30 a.m., on December 22, 1988, he passed the area in question in an open man trip, and did not notice the guarding. He said that it is not possible to see the tail piece from the man trip. Based on observation of the witnesses' demeanor, I accept Jardina's testimony that when he traveled on the man trip, he was able to see the area in question.