CCASE:
SOL (MSHA) V. TEXAS UTILITIES MINING
DDATE:
19900111
TTEXT:

~60

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. CENT 89-121 A.C. No. 41-01900-03526
v.	Monticello Mine
TEXAS UTILITIES MINING, CO., RESPONDENT	

DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Chris R. Miltenberger, Esq., Worsham, Forsythe, Sampels & Wooldridge, Dallas, Texas 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 Act of 1977, 30 U.S.C. 801 et. seq., the "Act", charging the Texas Utilities Mining Company (Texas Utilities) with one violation of the regulatory standard at 30 C.F.R. 77.404(a) and proposing a civil penalty of $850 for the violation. The general issue before me is whether Texas Utilities violated the cited regulatory standard and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At the conclusion of the Petitioner's case-in-chief the Respondent filed a Motion for Directed Verdict which was granted at hearing in a bench decision. That decision is set forth below with only non-substantive corrections:

> All right. I'm prepared to rule. I'm going to grant the Motion for a Directed Verdict as to Citation No. 2932036 insofar as it was issued pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. The citation charges as follows: "The Delta 24BE2570 dragline (G area) was not maintained in a safe operating

condition and the walkway inside the revolving frame and tool room was cluttered with extraneous material, paper, hoses, metal, rope, and a five-gallon container, also, a rope was tied crisscross across the access ladder rendering it unsafe for travel."

Now, the mine operator does admit that the violation did occur and that it was a "significant and substantial" violation. It argues only that it was not the result of an "unwarrantable failure" and that, accordingly, the citation should be one under Section 104(a) of the Mine Safety Act, rather than under Section 104(d)(1).

Now, the Commission two years ago redefined the term "unwarrantable failure" and apparently this definition has not been disseminated to all MSHA personnel. In the Emery Mining Corporation decision, 9 FMSHRC 1997, issued in December 1987 the Commission held that "unwarrantable failure" means aggravated conduct constituting more than ordinary negligence by the mine operator in relation to a violation of the Act. The Commission further stated that while negligence is conduct that is inadvertent, thoughtless or inattentive, conduct constituting unwarrantable failure is conduct that is aggravated or inexcusable. The Commission went on to say that only by inexcusable, aggravated conduct constituting more than ordinary negligence can unwarrantable failure be found.

Now, in the case today, I do not find evidentiary support for such a finding of aggravated conduct. The testimony by Inspector Coleman - and, of course, I accept his testimony at this point as being completely credible - on the unwarrantable failure issue was, essentially, that he overheard the mine operator's area supervisor, a man named Alan Atkinson, say to somebody that he should have already had the area cleaned up. Mr. Coleman also testified that he was told by somebody else from management - he wasn't sure who, but it was someone from management - that the cited rope had been used to hold a pan to catch oil drippings but that, after the condition had been corrected, they had failed to take it down. Inspector Coleman also observed that the cited condition was within the area subject to inspection by the mine operator under the regulations.

The problem in this case is that there is no evidence to establish how long these conditions existed. Indeed, on the basis of the evidence before me, it could be concluded that the conditions had all occurred that very same morning before the citation had been issued at 10:15 a.m. There is insufficient evidence from which a person might even infer that the cited conditions had existed long enough to have been subject to the required examination under the regulations. So, the statement attributed to Alan Atkinson that he should have already had the area cleaned up is not sufficient to meet the aggravated conduct test required by the Commission in its Emery decision. Nor is there sufficient evidence outside of that for a conclusion of aggravated conduct to be reached.

Therefore, I modify the citation to a section 104(a) citation with "significant and substantial" findings and modify the penalty to $250. This decision is not final and will not be final until issuance of a written decision. The operator will then have 30 days in which to make payment on the penalties. These proceedings are, therefore, concluded at this time.

ORDER

Texas Utilities Mining Company is hereby directed to pay a civil penalty of $250 with 30 days of the date of this decision.

Gary Melick
Administrative Law Judge