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SOL (MSHA) V. PEABODY COAL
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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. WEST 89-96 A.C. No. 24-00108-03520
v.	Big Sky Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Eugene P. Schmittgens, Jr., Esq., Peabody Holding Company, Incorporated, St. Louis, Missouri, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a Proposal for Penalty by Petitioner on March 2, 1989, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq.

Petitioner seeks assessment of a $119 penalty for Respondent's alleged infraction of 30 C.F.R. 77.1605(k) as described in the subject Section 104(a) Citation (No. 2929942) which was issued by MSHA Inspector James Beam on June 22, 1988, as follows:

> "The elevated roadway in the 002 pit that the 120 ton coal trucks are using to be loaded is not provided with an adequate berm or guard rail on the outer bank. The road is approximately 15 to 20 feet above the floor of the pit and 300 - 400 long. The berm that is provided goes from nothing in places to approximately 2 1/2 feet in others."

30 C.F.R. 77.1605(k), relating to the subject of "Loading and haulage equipment; installations", provides:

> "Berms or guards shall be provided on the outer bank of elevated roadways."

Respondent contends that no violation occurred since the area cited by Inspector Beam was not an "elevated roadway" within the meaning of the cited standard, and that in any event there was an adequate berm present (T. 12-13). Whether any violation was "significant and substantial" is also in dispute should an infraction of the regulation be determined to have occurred.

FINDINGS

General. The area cited by Inspector Beam, approximately 300 - 400 feet in length (T. 41, 47-48, 68, 86-87), was located on top of Respondent's "coal bench" (T. 67). The drop-off on the pit side of the bench was "approximately" 15 - 20 feet high (T. 67, 76, 78, 84), and coal trucks, a utility truck and a foreman's vehicle were traveling on it. The Inspector described the inadequacy of berms on June 22 as follows:

> "And when we traveled the road, I noticed the berm on this road. In places there wasn't any berm at all. Most of the berm that was there was coal that had rolled off of the bucket as the shovel was loading trucks."
> (T. 67)

> "The berm that I observed along the edge of the roadway was some places approximately two and a half feet high and other places there wasn't any berm at all where the coal had just rolled off into the pit."
> (T. 75)

Inspector Beam was of the opinion that there was no berm present along this elevated roadway that was capable of restraining the vehicles he observed operating on it (T. 75-76). He saw no evidence that the mine operator had attempted to install a berm in this area (T. 89) and he observed it in the same condition the day before (T. 88).

The roadway was approximately 20 feet wide (T. 68) and the widest vehicles observed using it were coal (haul) trucks which were themselves approximately 14 - 15 feet wide (T. 69, 86). The Inspector estimated the speed of the foreman's truck and service (utility) truck at 15 or 20 miles per hour (T. 68-69) and the coal trucks at 5 - 10 m.p.h. (T. 86).1

As previously noted, the drop from the bench traveled by the loading trucks was approximately 15 - 20 feet and was vertical (See Ex. R-4 and T. 46-48, 67, 74, 75, 76). Each of five coal trucks would make approximately 30 - 34 trips per day on this roadway (T. 99-100).

Prior to issuance of the Citation on the morning of June 22, 1988, the Inspector observed three of these coal trucks to enter the roadway from the southeast while empty and to exit filled with 100 tons of coal going in a northwesterly direction (T. 69, 70-73, 74, 75, 76, 77, 104, 114). Inspector Beam described the hazard and the effect this placement of the driver on the side of the vehicle opposite the vertical drop would have in this manner:

"Q. And what hazard if any is presented by the fact that this roadway either did not have a berm at all or the berm only rose to two and a half feet?

A. The hazard would be somebody going over the edge of the coal into the open pit. And the edge of the coal was just a vertical drop to the bottom of the pit.

Q. And again, would you refresh my recollection? What was the length of the vertical drop on this roadway, or the depth if you would?

A. Approximately 20 feet.

Q. Now, the fact that the drivers would have been using the road on the spoils side driving on the spoils side of the road with the outer bank to the right of the driver, what effect, if any, does that have on the hazard?

A. The driver would have to judge the distance of how close he was to the edge of the coal. In some cases this coal was sloped off maybe two or three feet back into the roadway. It wasn't 20 feet all the way along the length of this road.

Q. Was it less than 20 feet in some spots?

A. In places it was less than 20 feet.

Q. Did you observe that day how close the edge of the outer bank that vehicles came?

A. A few places, I seen places where they come within two or two and a half feet of the outer edge."

(T. 76-77)

The Inspector was of the opinion that the judgment of the driver of a vehicle as to the distance from the edge would be adversely affected by his being on the side of the vehicle opposite the edge (T. 85).

The roadway in question was used primarily to transport coal, but it was also used to carry equipment and personnel (T. 67-69, 71, 73, 77, 102, 106). According to Inspector Beam it was a roadway that was being used for "all purposes" (T. 77) and he estimated its lifetime as being "not more than a couple of weeks probably" (T. 88-89).

Inspector Beam defined the word "adequate" -- as used in the Citation with respect to berms -- as "enough to stop a vehicle if it were to go out of control" (T. 81). An adequate berm thus would had to have been "mid-axle to the biggest vehicle" to travel on the roadway, in this case coal (haul) trucks. Mid-axle to such trucks would be 44 inches (T. 91) in height and about 4 - 5 feet wide.2

Abatement was accomplished in 2 hours (T. 79) by preventing traffic from traveling on the roadway altogether rather than by installing berms along the "vertical drop" side of the bench (T. 89) although such would have been possible (T. 91).

Over the past 5 years, 61 percent of the fatalities in surface mines were to mobile equipment operators, 46% of which fatalities occurred where the operators either jumped or were thrown from vehicles (T. 77).

Respondent's Evidence. The Superintendent of Respondent's Big Sky Mine, Tracy Hendricks, was of the opinion that the bench in question was not a roadway within the meaning of the regulation, based on the following rationale:

> "Well, I believe that a roadway has to have berms, has to designed and has to have drainages and all of this sort of thing.
>
> And a working area in the pit, working off the bench is not a permanent roadway. It's there for short periods of time. It changes from day to day.
>
> And so, consequently, I do not believe it's a roadway." (T. 97) (emphasis added).

Respondent's evidence placed emphasis on the fact that the bench/roadway in question was not permanent in nature to support the opinion of its witnesses that the berm requirement was not applicable to the cited area (T. 138). Part of this rationale was that the cited area was "a working area in the pit" and not a "roadway" (T. 97, 122, 135-137).3 The size of the pit ranges from 100 feet wide to several hundred to 1000 feet long (T. 130-132).

Respondent had not been cited for failing to have a berm on a bench prior to issuance of the subject Citation, nor had it been previously advised or told that a berm was required or needed by any MSHA inspector (T. 98). Mr. Hendricks, a 19-year employee at the Big Sky Mine, indicated that he was not aware of any prior accidents at the mine involving trucks going off the bench (T. 99, 103, 146, 147) and that in its 20-year history, the Big Sky Mine's mining cycle had never utilized the practice of installing berms on the edge of the bench. Mr. Hendricks conceded that when coal is being removed from the pit, the roadway (bench) is normally elevated 10 or 15 feet (T. 100). Prior to the mining of coal, the bench is not elevated (T. 101), and thus is not elevated until some coal is removed (T. 102).

Mr. Hendricks expressed the opinion that it would not be possible for a coal (haul) truck to roll over the bench because "at that speed if a wheel were to leave the edge of the bench, . . . it would center out first." (T. 102-103). The theory supporting this opinion would not apply to pickup trucks or service trucks, however (T. 106).

Respondent's evidence that there had not been prior incidents of trucks going over the edge at the mine, based on Mr. Hendrick's testimony and that of other witnesses (T. 146-147), was not challenged or rebutted and is found as a fact. Respondent also established that its additional costs for compliance with the subject for 1990 would come to an estimated $72,300 (T. 141-143).

DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

The facts pertinent to resolution of this matter are not in significant dispute.

There is no question that if the regulation is found applicable to the cited bench area a violation occurred because the provision requiring berms (or guards) was not complied with since the loose coal and material that was present in places along the 300 - 400 foot area cited clearly was not sufficient to constitute compliance with the standard. Respondent made no substantial contention or showing in this regard. Not only was there no substantial evidence that the coal or other material which was present was sufficient to restrain a vehicle or provide reasonable "control and guidance" of a vehicle, but Respondent's witnesses did not deny or overcome the Inspector's credible testimony that in places there were no berms whatsoever (T. 75).4 There of course is no indication in this record - or contention - that "guards" were in place along the cited area.

The primary question raised by Respondent is whether the "bench" which was cited by Inspector Beam was an "elevated roadway" within the meaning of the subject regulation, 30 C.F.R. 77.1605(k).5 In connection with a similar standard, 30 C.F.R. 56.9-22, the Commission has answered the question in th affirmative. See Secretary v. El Paso Rock Quarries, Inc., 3 FMSHRC 35 (January 1981) involving a quarry bench elevated 40 feet above a lower bench. In Secretary v. Burgess Mining and Construction Corporation, 3 FMSHRC 296 (February 1981) the Commission also noted that "the same purpose and the same principles" underlying 30 C.F.R. 56.9-22 underlie 30 C.F.R. 77.1605(k) and applied the berm requirements thereof to a bridge since it was deemed to be part of a roadway.

Here, the physical hazard was a 15 - 20 foot vertical drop along the side of a roadway approximately 20 feet wide traveled by vehicles - some of which are themselves 14 1/2 feet wide -- within 2 - 2 1/2 feet of the edge (T. 75). The dangers posed by the absence of adequate berms here are no different than those posed in other situations, whether they involve bridges or more permanent roadways. The record being clear that the height of the drop is sufficient to create a danger of serious injury should a vehicle go over the side of the bench, it is found that the bench area cited is "elevated" within the meaning of the standard. There is also considerable probative evidence establishing that the bench was used with frequency by various types of trucks and that the bench was in existence a significant period of time - which the Inspector estimated as up to two weeks (T. 88-89) -- both during coal removal and after the coal was removed. It is thus concluded that this was a "roadway" and that that the regulation is applicable to the cited area.

It is finally observed that Respondent's heavy reliance on the decision in Secretary v. Peabody Coal Company, 6 FMSHRC 2530 (ALJ Morris, 1984) is not well founded. In that matter Judge Morris determined that the El Paso Rock Quarries, Inc., supra, was not controlling in view of the great width (120-140) feet) of the bench at the mine involved in his proceeding.

Specifically, Judge Morris held:

> "I do not find on this record that any vehicles transported coal, equipment or personnel closer than within 60 feet of the edge of the Peabody bench. The difference between operating not closer than 60 feet of the edge and operating within 10 to 12 feet of the edge is crucial. A distance of 60 feet is not insubstantial. An interstate highway lane measures 12 feet. If no vehicle is ever shown to have been operated within 5 such lanes of an edge, I cannot hold that the unused 60 foot portion can nevertheless be somehow denominated as a `roadway.`"
> (emphasis supplied)

In the case at hand the roadway was but 20 feet wide and trucks operated within 2 or 2 1/2 feet of the edge.

It having been determined that the standard is applicable to the 300 - 400 foot bench area described by the Inspector in the Citation and that the berms there were inadequate, an infraction of 30 C.F.R. 77.1605(k) is found to have occurred.

SIGNIFICANT AND SUBSTANTIAL

Respondent's remaining contention concerns the propriety of the "significant and substantial" (S&S) designation to the violation.

A violation is properly designated as being of a significant and substantial (S&S) nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Mathies the Commission enumerated the elements necessary to support a significant and substantial finding:

> (1) The underlying violation of a mandatory standard; (2) a discrete health hazard -- 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 question will be of a reasonably serious nature.

It has previously been found that a violation occurred. The absence of adequate berms or guards on an elevated roadway where vehicles travel close to a 15 - 20 foot vertical drop constitutes a safety hazard and patently constitutes the violation's contribution of a measure of danger to the drivers of the vehicles. Petitioner's evidence established that serious injuries could result if the hazard (a vehicle's going over the edge) should come to fruition. The remaining and critical question posed by the 4-part, so-called, Mathies formula is whether a reasonable likelihood existed that the hazard would occur should normal mining proceed.

The Inspector's judgmental basis on this issue is subject to some question in view of his belief that any "likelihood," however remote, would constitute an S&S violation. The Inspector gave the following testimony in this connection:

> "Q. Would your opinion as to the seriousness of this violation change any if we were to assume that similar circumstances had not occurred in over 20 years at this particular mine?
>
> A. No, it wouldn't. It wouldn't change at all.
>
> Q. So, as far as you're concerned an S & S is any likelihood, no matter how remote, of an occurrence happening, that would still be the S and S, is that correct.
>
> A. I believe you could say that."
>
> (T. 82)

Mine Superintendent Hendricks testified that it would not be possible to roll a haul truck over the side because at the speed they travel "if a wheel were to leave the edge of the bench," because of the weight of the coal "it would center out first." (T. 103). He conceded that this rationale would not apply to pickup, service or welding trucks (T 106) and I would infer it would not apply to unloaded coal haulage trucks. Respondent's strongest evidence -- unrebutted -- appears to be that in 20 years there has been no occurrence of trucks going

over the side of the bench. I agree with the assertion of Respondent (Brief, p. 28) that:

> "If one were to consider the total trips through the pit by haul trucks, together with service and foremen's vehicles, it is likely over one million trips on the bench have occurred. These trips have been incident free. As such, two explanations are likely. Either there is no discrete hazard, or, there is no reasonable likelihood that the hazard will lead to an injury."

In the final analysis, there is no evidence upon which to find or infer that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. Accordingly, the designation of this violation as "significant and substantial" is found unwarranted.

PENALTY ASSESSMENT

The parties have stipulated that Respondent is a large coal mine operator and that a penalty of the amount proposed by MSHA ($119) will not affect its ability to continue in business.6 Documentary evidence (Ex. P-1) indicates that Respondent had a history of 8 prior violations prior to the occurrence of the instant violation. Respondent demonstrated good faith in abating the violation after notification thereof (T. 79). Although it has been determined that the violation was not "significant and substantial", it nevertheless is concluded that such was a serious violation since serious injuries could have resulted to miners had a vehicle gone over the side of the bench/roadway.

In mitigation of penalty, it appears that no prior Citations had been issued Respondent, or MSHA enforcement action taken, for the practice (failure to provide adequate berms or guards) charged here. Also, it appears that Respondent's management personnel who testified were of the opinion that other Western surface mines had not been subject to the requirements of the standard involved here. Thus, the lack of compliance with the

standard appears to have stemmed from the genuine belief that the bench area cited was not a "roadway" within the intended coverage of the regulation rather than from an oversight, negligence, or wilful conduct.

In the premises, a penalty of $100 appears appropriate and is assessed.

ORDER

Citation No. 2929942 is MODIFIED to delete the "significant and substantial" designation thereon and is otherwise affirmed.

Respondent, if it has not previously done so, shall pay the Secretary of Labor within 30 days of the date of issuance of this decision a civil penalty in the sum of $100.00.

Michael A. Lasher, Jr.
Administrative Law Judge

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FOOTNOTES START HERE

1. Respondent's mine superintendent, Tracy Hendricks, estimated the speed of the coal trucks as not exceeding 5 m.p.h. and the speed of pickup trucks at "maybe 10 miles an hour." (T. 102).

2. "Berm" is defined in 30 C.F.R. 57.2 as a "pile or mound of material capable of restraining a vehicle."

3. Respondent offered no basis, however, for the implication that a "roadway" could not exist in or be a part of a "working area." Respondent's argument simply appears to be that since the cited area was in the working area it could not be a roadway.

4. Although in its Brief, pp. 25-26, Respondent makes the argument that "the berm which results from the blade running down the bench" is adequate to help "control and guide the vehicles," I find no probative or substantial basis in the evidentiary record, Commission precedent, or regulations (see fn. 2) to make such a finding, i.e., that the material present along the side of the bench constituted an adequate berm since it provided "reasonable control and guidance of a vehicle." I thus find the precedent cited by Respondent in support of this argument, Secretary v. U.S. Steel, 5 FMSHRC 1604 (ALJ Koutras, 1983), inapplicable to the factual situation presented.

5. As noted earlier, this standard appears in a group of regulations under the heading "Loading and haulage equipment; installations." Because hauling was a major activity involved, the question of whether the provisions of 30 C.F.R. 77.1605(k) are applicable only to loading and hauling activities is not passed on.

6. This type of stipulation, commonly seen, is in the nature of a negative pregnant which leaves open what, if any, level of

penalty assessment might jeopardize a mine operator's ability to remain in business. Such a stipulation is not binding as to the maximum amount of penalty which can be assessed in appropriate circumstances since under Commission precedent the burden is on the Respondent coal mine operator to establish that it is unable to pay a penalty at some level or amount.