

CCASE:
MSHA V. LANHAM COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
FALLS CHURCH, VA
April 30, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. KENT 89-186
A.C. No. 15-13428-03508

v.

Lanham No. 1 Mine

LANHAM COAL CO., INC.,
Respondent

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Secretary of Labor (Secretary);
Flem Gordon, Esq., Gordon and Gordon, Owensboro,
Kentucky, for Lanham Coal Co., Inc. (Lanham).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of 30 C.F.R. 77.1710(g) because a contractor-truck driver was working in an elevated area where there was a danger of falling, and was not wearing a safety belt and line. Pursuant to notice, the case was heard in Owensboro, Kentucky, on January 17, 1990. Gazi Bokkin and James Harold Utley testified for the Secretary. Tony Lanham testified for Respondent. The record was kept open for the submission of additional evidence, namely a copy of the death certificate of Claude J. Daugherty and a deposition of Willard Keith, M.D. These documents were received on February 12 and March 26, 1990. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Lanham was the owner and operator of a surface coal mine in Daviess County, Kentucky, known as the Lanham No. 1 Mine.

2. In 1988, the subject mine produced 197,826 tons of coal. It is a mine of moderate size.

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3. In the 24 months prior to the alleged violation involved herein, Lanham had 17 paid violations, none of which involved 30 C.F.R.

77.1710(g). This history is not such that a penalty otherwise appropriate should be increased because of it.

4. A penalty for the alleged violation will not affect Lanham's ability to continue in business.

5. Lanham had a contract with Caney Creek Trucking Company (Caney) to haul coal from the mine to Lanham's coal dock at the river approximately 14 miles from the mine.

6. Caney was owned by Claude Daugherty. Daugherty drove one of the trucks and had other employee coal truck drivers. Caney had 7 or 8 trucks. Six, 7 or 8 were operated each day hauling coal for Lanham. Caney hauled under contract with Lanham for approximately two and one half years as of December 29, 1988. Lanham paid Caney by the ton for its services in hauling the coal.

7. It was Lanham's practice to call Daugherty at night and tell him how much coal would be loaded the next day. The coal was loaded by a Lanham end loader into each truck. The truck driver indicated how much coal he wished to carry. The driver then covered the coal with a tarp and drove it to Lanham's dock. The truck was weighed and the coal dumped on the ground. Later it was loaded into a hopper and taken to a barge on the river. The truck was weighed empty and returned to the mine for another load.

8. Neither Caney nor Claude Daugherty had an MSHA Mine I.D. Number in December 1988.

9. Lanham operated end loaders, dozers and scrapers. It did not have any coal trucks.

10. Lanham did not furnish any equipment to Caney and did not control the manner in which Caney performed its services.

11. Prior to December 29, 1988, Caney's truck drivers, after the coal was loaded, tarped their trucks in a parking area off the main haul road but on mine property.

12. On December 29, 1988, Claude Daugherty drove his truck to Lanham's mine, had it loaded with coal at the pit, drove to the top of the ramp and stopped there to cover the load with his tarp. During this procedure, he fell from the truck approximately 10 feet to the ground. Daugherty was not secured by a belt or line while tarping the truck.

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13. Daugherty was taken to the Owensboro-Daviess County Hospital and transferred two weeks later to the Norton Hospital in Louisville, Kentucky. He sustained fractures of the right hip, a dislocated right shoulder, and an apparent vascular injury to the spinal cord.

14. Daugherty died in the hospital on January 22, 1989, of septic shock following renal failure.

15. Following Daugherty's death, Lanham reported the injury to MSHA and an investigation was commenced.

16. On January 23, 1989, coal mine inspector Gazi Bokkin issued a citation for a violation of 30 C.F.R. 77.1710(g) because the contractor-driver was working in an elevated area where there was a danger of falling and was not wearing a safety belt or line.

17. The citation was terminated on February 14, 1989, when a reinspection disclosed that coal trucks were "not being tarped on mine property." The loaded trucks drove off the mine property before the drivers secured the tarps.

18. Daugherty had chronic pancreatitis and an enlarged liver, neither of which was related to the fall.

19. The evidence does not establish that the fall from the truck on December 29, 1988, caused Daugherty's death on January 22, 1989.

20. The inspector had never previously cited Lanham, Caney or any other mine operator or trucking contractor for a violation involving a similar factual situation. He had previously inspected the Lanham facility and had seen trucks being tarped.

21. None of Lanham's employees normally worked in the area where the trucks were tarped.

22. Inspector Bokkin in 20 years as an inspector and 22 years as a miner had never observed coal trucks provided with belts or lines for the person putting a tarp on or removing it from a loaded coal truck. Bokkin did not know that the practice cited was a violation prior to issuing the citation involved in this case.

23. The citation was issued to Lanham rather than Caney because at the time Caney did not have an I.D. number.

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24. MSHA has never issued any instructions or bulletins regarding the duty of a mine to provide safety belts and lines for use while tarping trucks.

REGULATION

30 C.F.R. 77.1710(g) provides in part as follows:

77.171

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

* * *

(g) Safety belts and lines where there is danger of falling, . . .

ISSUES

1. Whether a mine operator is responsible under the Mine Act for violations of safety standards by its independent contractors on mine property?

2. If so, whether the evidence establishes a violation of the standard as charged?

3. If so, what is the appropriate penalty considering the statutory criteria?

CONCLUSIONS OF LAW

I. JURISDICTION

Lanham is subject to the provisions of the Act in the operation of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding. A production operator may generally be cited for violations of mandatory safety standards by independent contractors. The Secretary has discretion in such cases "to cite production operators as (s)he [sees] fit." *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). The case cited by Lanham, *Secretary v. Jim Walter Resources, Inc.*, 7 FMSHRC 1099 (1985) was based on the Review Commission decision in *Cathedral Bluffs* which was reversed by the Court of Appeals. See also *Secretary v. Consolidation Coal Company*, 11 FMSHRC 1439 (1989). I see no reason to conclude that the Secretary abused her discretion in

this case when she cited Lanham for the violation committed by Caney.

II. VIOLATION

A coal truck driver who fastens a tarp over a load of coal in his truck while standing on the load of coal is in danger of falling. In the case before me he did in fact fall. Since he was not wearing a safety belt or line, a violation of the standard has been established.

III. GRAVITY

The testimony establishes that the driver tarping his load is ten feet or more from the ground. A fall from that height can result in a serious injury. The fall which resulted here did cause a hip fracture and a shoulder dislocation. Even though the death of the driver was not shown to have been caused by the fall, the violation was serious.

IV. NEGLIGENCE

Until MSHA was notified of the contractor truck driver's death, neither Lanham nor the inspector considered the standard applicable to the tarping of trucks. The inspector never observed safety belts or lines used in such situations in more than 40 years of mining experience. MSHA had no standards or guidelines concerning this practice. Lanham had no specific notice that the practice violated the standard. It would be absurd under these circumstances to conclude that the violation resulted from Lanham's negligence. I conclude that it did not.

V. PENALTY

Lanham is a moderately sized operator. It had 17 paid violations in the 24 months prior to the issuance of the citation involved herein. It abated the violation promptly in a manner satisfactory to MSHA. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of \$250 is appropriate for the violation.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 3297324 is AFFIRMED.

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2. Respondent Lanham Coal Company shall within 30 days of the date of this decision pay the sum of \$250 for the violation found herein.

James A. Broderick
Administrative Law Judge

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