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SOL (MSHA) V. TEN-A-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. WEVA 89-274 A.C. No. 46-05682-03505
v.	Ward Mine
TEN-A-COAL COMPANY, RESPONDENT	

DECISION

Appearances: Javier I. Romanach, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;
Harold S. Yost, Esq., Bridgeport, West Virginia, for the Respondent.

Before: Judge Maurer

This case is before me upon the petition for civil penalty filed by the Secretary of Labor (Secretary) 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 Ten-A-Coal Company (Ten-A-Coal) with two violations of the regulatory standards found in 30 C.F.R. Part 77.

Pursuant to notice, this case was heard in Morgantown, West Virginia on January 9, 1990. Subsequently, the parties have filed post-hearing proposed findings and conclusions which I have considered along with the entire record in making this decision.

STIPULATIONS

At the hearing, the parties stipulated to the following, which I accepted (Tr. 7-8):

1. The Administrative Law Judge has jurisdiction to hear and decide this case.

2. Inspector James A. Young was acting in his official capacity as a federal coal mine inspector on May 3rd, 1989, when he issued 104(a) Citation No. 2944252 and 104(d)(1) Citation No. 2944253.

3. Citation o. 2944252 and Citation No. 2944253 were properly served to Respondent's agents.

4. Abatement of the condition cited in the listed citations was timely.

5. The combined proposed penalty of $800 will not adversely affect the Respondent's ability to continue in business.

6. The respondent does not dispute the facts on the proposed assessment data sheet (GX-8).

DISCUSSION WITH FINDINGS

Citation No. 2944252, issued pursuant to section 104(a) of the Act, charges a violation of the standard at 30 C.F.R. 77.1004(b) and alleges as follows:

> A proper examination and subsequent action taken was not being performed on the 001 pit on the Ward mine site. An unsafe ground condition was observed in the high wall of the 001 coal pit, and coal was being loaded from this pit. The condition was observed by the operator and no action was taken other than loading coal.
>
> An unsafe condition in relation to safe work areas shall be corrected promptly or the area effected shall be posted. The pit was examined and no action taken to remove or post.

Citation No. 2944252 was issued as a section 104(a) citation on May 3, 1989, by MSHA Inspector James A. Young. The violative condition was abated by the operator to his satisfaction and Inspector Young terminated the citation at 12 noon on May 3, 1989. Later that day, Inspector Young went back to his office, discussed the conditions surrounding the citation with his supervisor and decided the conditions met the criteria for an unwarrantable failure. Therefore, the next day, May 4, 1989, Inspector Young modified the previously terminated Citation No. 2944252 to a section 104(d)(1) order.

I find and conclude that the attempted modification cannot stand. The inspector no longer had the authority to modify the citation after he had terminated it. Once a citation is no longer in effect because it has been terminated, it cannot be modified. See: Old Ben Coal Co., Docket No. VINC 76-56 (June 15, 1976) (ALJ Sweeney), Appeal dismissed, IBMA 76-104 (October 19, 1981).

Citation No. 2944253, issued pursuant to section 104(d)(1) of the Act, charges a violation of the standard at 30 C.F.R. 77.1000 and alleges as follows:

> The established ground control plan for the Ward mine 001 pit was not being complied with; in that, the high wall above this pit was not scaled back from the edge of the wall and all loose material was not removed. A required bench of 20' width was not present along the highwall above the working pit. Loose clay material was above the wall with mud mixed and water passing through this material and running into the pit. The bench provided on the highwall was only 10' and partially filled in with the clay material. Old entries were being crossed from an underground mine and part of the highwall had collapsed with only a 5' barrier left between the bench and the fall. The wall was straight up on one side without any bench present for over 40'.

There is no dispute concerning the fact that on May 3, 1989, a required bench with a width of 20 feet was not present along the highwall above the working pit in violation of the ground control plan.

The pit foreman was a Mr. Eubank and Inspector Young observed him on the day in question operating a backhoe, loading a coal truck in the bottom of the pit. At that time, Young also observed the highwall and noticed that it was not scaled back. Old underground entries from an underground mine were being crossed and part of the highwall had collapsed with a 5-foot barrier left between the bench and the wall. The wall was straight up on one side without any bench present for over forty feet. There had been four or five days of steady rain prior to this date and, due to the poor condition of the highwall, loose clay material, including rocks, was slipping over the highwall and running into the pit. Eubank admitted to Young that he had been aware of the condition of the highwall, yet he had continued to operate the backhoe because he needed to get the coal out of there.

The widest part of the bench was ten feet, but it got down to seven to eight feet in various locations. The highwall itself was in excess of sixty feet high. According to the ground control plan, the bench was required to be twenty feet wide.

Inspector Young issued section 104(d)(1) Citation No. 2944253 for a violation of 30 C.F.R. 77.1000 because the established ground control plan for the Ward Mine 001 pit was not

being complied with - the highwall above the pit was not scaled back from the edge of the wall and a required bench of twenty foot width was not present along the highwall above the working pit.

I find that violation to have been proven as charged.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon 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 Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Young testified that due to the condition of the highwall and the lack of size of the bench a discrete hazard was created, "[t]here was water in the pit; there was falling material of varying size, some of it large, some of it very heavy; there was silt; there was water coming over the side of the wall which was continually deteriorating the condition of the wall." (Tr. 23). Young's testimony demonstrates that there was a reasonable likelihood that the hazard contributed to would result in an injury. "It was very likely [that somebody could have been struck by the falling rock, mud, etc.] because we stood there and watched it fall. We were observing it fall the whole time we were there." (Tr. 34). Finally, Young's testimony shows that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. "We have documented records in our agency of fatalities from highwalls collapsing and rocks coming over the top." (Tr. 24). Young's testimony regarding these matters is uncontradicted, very credible and I do credit it fully.

The Secretary also urges that I find this violation to be an "unwarrantable failure".

In several relatively recent decisions concerning the interpretation and application of the term "unwarrantable failure," the Commission has further refined and explained this term, and concluded that it means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

There is no question that the operator's actions constituted aggravated conduct. The foreman was aware of the hazardous conditions of the highwall and the bench but made no effort to correct the obvious conditions. Instead, the foreman himself proceeded to work directly under the highwall and exposed himself and the driver of the truck to the risk of death or serious injury.

Citation No. 2944253 will be affirmed in its entirety. Furthermore, considering the entire record and the criteria in section 110(i) of the Act, a civil penalty of $400, as proposed, will be assessed as appropriate to the violation and special findings.

On the same day Inspector Young also issued section 104(a) Citation No. 2944252 for a violation of 30 C.F.R. 77.1004(b) because the operator, after observing the above described conditions surrounding the 001 pit on May 3, 1989, did not correct these conditions nor did he post the area.

It is also undisputed that the unsafe conditions of the highwall and the pit were not corrected promptly or posted as required by section 77.1004(b). Accordingly, that standard was violated.

Inspector Young's unrebutted testimony demonstrates to me that the operator's failure to promptly correct the hazardous conditions at the highwall or to post the area exposed miners to the hazards of falling rocks and mud. Young found Eubank and a coal truck driver working directly under the highwall. Young's testimony also establishes that it was reasonably likely that the hazard contributed to would result in an injury by falling rock. Young observed rocks falling into the pit near Eubank and the truck driver. Finally, Young's testimony establishes the reasonable likelihood that any injury suffered from the falling rocks was likely to be fatal or at least produce a serious injury. Therefore, I find this violation to be significant and substantial as well. Mathies Coal Co., supra.

For the reason stated earlier in this opinion, the purported order will thus be affirmed as an "S&S" section 104(a) citation.

Considering the criteria in section 110(i) of the Act and the entire record herein, along with the arguments of the parties, I find that an appropriate civil penalty for this latter violation is $200.

ORDER

1. Section 104(d)(1) Citation No. 2944253 is AFFIRMED.

2. Section 104(a) Citation No. 2944252, unsuccessfully and without effect modified to a Section 104(d)(1) Order, is AFFIRMED as an "S&S" section 104(a) Citation.

3. Ten-A-Coal Company is ordered to pay the sum of $600 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge