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SOL (MSHA) V. SHAMROCK 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. KENT 89-261 A. C. No. 15-11065-03577
v.	No. 10 Mine
SHAMROCK COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Neville Smith, Esq., Smith & Smith, Manchester, Kentucky, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On October 19, 1989, the Secretary (Petitioner) filed a Proposal for Assessment of Civil Penalty alleging the Operator (Respondent) violated various provisions of Volume 30 of the Code of Federal Regulations. Respondent filed an Answer on November 15, 1989. Pursuant to notice, the case was scheduled for a hearing on February 14, 1990, in Bristol, Virginia. On February 5, 1990, Respondent filed a Motion to have the hearing scheduled at some place other than Bristol, Virginia, on the ground that the driving time between Respondent's home office and Bristol, Virginia, is approximately 3 hours. Respondent indicated that Petitioner did not have any objections to the Motion. The hearing was subsequently rescheduled for Richmond, Kentucky, and the matter was heard on February 14, 1990. At the hearing, John Walter Peck testified for Petitioner, and Elmer Richard Couch and Gordon Couch testified for Respondent. Petitioner filed Proposed Findings of Fact and a Memorandum of Law on May 14, 1990. Respondent did not file any brief or Proposed Findings of Fact.

Stipulations

1. The history of previous violations of this Operator is shown in Government's Exhibit 1.

2. The penalties proposed by the Secretary for the violations upheld are appropriate to the size of the business of the Operator, and will not affect the Operator's ability to continue in business.

3. The Operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations, where appropriate.

4. The size of this operation is shown in the pleadings: for 1988, this Operator produced 22,631,844 tons; and at the No. 10 Mine, where these citations arose, the Operator produced 1,438,937 tons in 1988.

Citation Nos. 9983904 and 3205192

At the commencement of the hearing, Counsel indicated that a settlement had been reached with regard to Citation Nos. 9983904 and 3205192. The Operator had agreed to pay in full the assessed penalties of $79 and $112 respectively. I have considered the representations made by Counsel, at the hearing as well as the documentation in this matter, and the criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act), and conclude that the proffered settlement and the agreed upon penalties are appropriate.

Citation Nos. 3202975 and 3205191

On May 23, 1990, Petitioner filed a Joint Motion to Approve Settlement. A reduction in penalty from $290 to $150 is proposed. I have considered the representations and documentation submitted in this matter, and I conclude that the proffered settlement, and the agreed upon penalty, are appropriate under the criteria set forth in Section 110(i) of the Act.

Citation No. 3205138

I.

On July 10, 1989, John Walter Peck, an MSHA Inspector, inspected the surface area of Respondent's No. 10 Mine. He issued a Section 104(a) citation alleging a violation of 30 C.F.R. 77.205(b) in that "travelways," to areas where persons are required to travel or work, were not kept clean of stumbling or slipping hazards. Specifically the citation alleges that seven foot wooden posts, sections of round pipe, coiled cable, concrete blocks, and "assorted equipment parts," and communication wire were "in the travelway used to reach number 1 head drive and the area where work persons load/unload man trips" (sic).

30 C.F.R. 77.205(b), provides as follows: "Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

According to Peck, the number 1 belt conveyor head-drive, at the surface area, is enclosed by a fence. Entry to the belt, for examination each shift, and for maintenance work, is by way of a gate in the fence. According to Peck the "travelway" or "walkway" to the gate was "obstructed" with material, (Tr. 33), and it was not possible to walk to the gate from the yard without stepping on the items designated in Government Exhibit 11. He indicated that one would have to climb over the crib blocks and miscellaneous items to reach the gate. On direct examination, he testified that "immediately in front" of the gate, he observed crib blocks of the dimensions of 6 inches by 6 inches by 30 inches. (Tr. 21). On cross-examination, he indicated that there were 2 or 3 such crib blocks located 4 to 6 feet from the gate. I accord more weight to this latter testimony as to the specific distance of the crib blocks to the gate, rather than Peck's general testimony on direct examination. Hence, taking into account the fact that the crib blocks were approximately 4 to 6 feet from the gate, and considering that there is no testimony with regard to the configuration of the blocks or the manner in which they were arranged, I cannot find that they constituted a stumbling or slipping hazard.

According to Peck, two metal battery stands and a battery charger were located 2 to 3 feet from the crib blocks. Inasmuch as there was no evidence presented as to the shape and dimensions of these items, I cannot conclude that they constituted stumbling or slipping hazards. Similarly, although Peck indicated that there was some wire within the fenced area, however, there was no evidence presented as to its size, shape, and specific location vis-a-vis a path that could be taken from the gate to the belt or to some other area within the fence requiring maintenance work. Thus, I cannot conclude that the wire constituted a stumbling or slipping hazard.

Peck indicated that a trailing cable containing 200 feet in a coil was in the area, and one going to the gate could stumble over it or become entangled in it. Inasmuch as there is no evidence of the dimension of the surface area in question, nor is there any evidence in the record as to the spatial relationship between the trailing cable and the gate, I cannot conclude that the cable was in any path that would be traveled by miners seeking access to the gate. Nor is there evidence that miners perform any work duties in the surface area in question, aside from the fenced in area.

According to Peck, a 20 inch section of a plastic water pipe, with a 2 inch diameter, was within the fenced area. Elmer Richard Couch, Respondent's superintendent in charge of the No. 10 Mine, indicated that a pipe was not within the fenced area when he checked it out. There is no evidence that he checked it out at the time of Peck's inspection. Thus, I find Couch's testimony to be insufficient to contradict the testimony of Peck, that he observed the pipe in question when he made his inspection. I thus find that there was a water pipe of the dimension testified to by Peck within the fenced area, which, considering its length, and cylindrical shape, could constitute a stumbling or slipping hazard.

Peck testified that he observed miners exiting from a rail runner. In essence, he indicated that he saw miners climbing and crawling over timber which had been placed on either side of the track within 2 feet of the rail runner. According to the uncontradicted testimony of Peck, there were 16 timbers of approximately 6 inches in diameter and 67 feet in length. The timbers were located unevenly on either side of the rail runner. They had been stacked one on top of another to a pile of approximately 4 feet high. Some of the timbers were on the ground. I find that the pile of timbers, in the path taken by the men exiting the rail runner as observed by Peck, constituted a slipping or stumbling hazard.

Inasmuch as the area in question contained timbers and a pipe in areas where men work and travel, and these items are stumbling and slipping hazards, I find that Respondent herein did violate section 77.205(b), supra.

II.

According to Peck, a person tripping or stumbling could easily fall on the battery charger, which had sharp edges, causing lacerations or broken bones. He indicated, on cross-examination, that there was a very good likelihood that someone stumbling over the hazardous equipment could have injured himself. He indicated that a person climbing over the timbers in exiting the rail runner could have fallen backwards and struck the rail runner. He opined that, in such an event, it was very possible there would be a serious injury, such as a laceration or broken bones. I find, with regard to the pipe and timbers, that, upon tripping or stumbling, one could have fallen against a battery charger or other objects. It has not been established that there was a reasonable likelihood that a person would stumble or slip over this material, rather than walk over it or around it. Further, due to the lack of evidence of the dimensions of the battery charger and stands, and their distance from the pipes, and other materials, I cannot conclude that there was a reasonable likelihood of one stumbling and sustaining serious injury.

Further, I find, based on the uncontradicted testimony of Couch, that normally it was the procedure for the rail runner to stop between a battery charger and the truck haul-way, and not alongside the timbers. Further, I note, as testified to by Couch, that the rail runner has a length of approximately 25 feet. There is no evidence that the 7 foot timbers were stacked in such a fashion as to have stretched over a 25 foot distance parallel to the tracks. Accordingly, the men exiting the rail runner, from its edges at either side, would not necessarily have been in the path of the stacked timbers. For these reasons, I conclude that Petitioner has not established that the violation herein was significant and substantial (See, Mathies Coal Corporation, 6 FMSHRC 1, 3-4, (1984)).

III.

There is no evidence before me with regard to the length of time that the material in question had been in place prior to its' being observed by Peck. I consider too hypothetical Peck's statement that, given the amount of material in question, it ". . . would had to have accumulated over a two or three shift period" (Tr. 27). Further, as noted, Couch's testimony was not contradicted that usually the rail runner did not park alongside the stacked timbers. I thus find that Respondent herein acted with only a moderate degree of negligence. Taking into account the remaining factors in 110(i) of the Act, I conclude that a penalty of $80 is appropriate.

Citation No. 3205139

Peck testified that on July 10, 1989, he examined the Daily Report of the preshift examiner, and noted that the reports of the preshift examinations from June 30, 1989 to July 10, 1989, were signed by the preshift examiner, but were not countersigned by either the foreman or superintendent. Couch indicated that he was the superintendent and line foreman on July 10, 1989. He indicated that among his duties were to check the preshift reports to see if any hazards or dangerous conditions were noted by the preshift examiner. He indicated that, unless there were dangerous conditions, which required immediate attention, it was his normal practice to countersign the preshift examination report between 5:50 a.m. and 6:20 a.m. He said that on July 10, he did countersign the report between 5:50 a.m. and 6:30 a.m. He indicated that prior to Peck's inspection on July 10, previous MSHA Inspectors had considered it acceptable for him to countersign. I observed the demeanor of the witnesses and find Couch's testimony to be credible with regard to his countersigning the reports on July 10.

Peck issued Citation No. 3205140 alleging a violation of 30 C.F.R. 57.323, on the ground that the reports in question were not countersigned by the foreman.

Section 57.323, supra, in its first sentence requires the mine foreman to countersign the Daily Report. In the last sentence, it requires the mine superintendent or assistant superintendent to also countersign the reports. Although Couch indicated that he was the mine foreman, he nontheless testified that in the period in question, Jerry Farmer was the section foreman, and he (Peck) was the superintendent in charge of all three shifts. I find that a plain reading of Section 75.323 requires that both the mine superintendent and foreman countersign the reports. Inasmuch as Farmer was the foreman, he was obligated to countersign the reports. Inasmuch as the latter did not countersign the reports from June 30 to July 10, I find Respondent herein violated section 75.323 as alleged. Considering the statutory factors set forth in section 110(i) of the Act, I conclude that a penalty of $20 is appropriate.

Citation No. 3205140

Peck testified that in the two or three times he had visited the mine in the year prior to July 10, 1989, he had observed timbers standing on the left side of the haulage track. He indicated that on July 10, in a 500 foot area, some of these timber posts were on the ground and some were missing. He said that he observed men walking along the left side of the haulage track. He also observed draw-rock, ranging from 6 inches by 1 inch to 18 inches by 3 inches by 3 feet, in various areas of the roof. He required the Operator to scale down the draw-rock, as he opined that this loose material could cause a fatality. He indicated that the roof, consisting of shale material, had deteriorated, and thus timbers were necessary for support. In this connection, he indicated that timbers functioned in the same way as bolts in supporting the roof.

Peck issued Citation No. 3205140 alleging a violation of 30 C.F.R. 75.202(a) in that at least 56 posts "installed as additional roof support" were observed lying on the mine floor. 30 C.F.R. 75.202(a) provides, in essence, that the roof or areas where persons work or travel ". . . shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

Gordon Couch, Respondent's safety director, acknowledged that there was deterioration of the roof caused by differing moisture conditions in the winter and summer. He indicated, however, that in addition to the proper setting of roof bolts as required by the roof control plan, additional bolts were provided as well as strapping. According to Couch, the timbers, which were not treated, were accordingly subject to rot, and were not to be used permanently. He indicated that when the section in

question was "rehabilitated" (Tr. 123) in 1983 or 1984, timber jacks were used when the area was bolted, as the bolter did not have an automatic temporary roof support. He indicated that the deterioration of the roof is controlled by scaling down the draw-rock, and that timbers prevent deterioration only for the diameter of the timber.

It appears from the testimony of both witnesses, that when observed by Peck, the roof in question did suffer from deterioration, and contained draw-rock which presents a hazard of falling. In light of this condition, I conclude that the support present on July 10, had not been adequate to prevent deterioration and draw-rock. Accordingly, the roof was not being adequately supported. Thus, I find that on July 10, as observed by Peck, Respondent was in violation of section 75.202(a) as alleged.

Considering the presence of significant amounts of drawrock, I conclude that the violation herein was of a moderate level of gravity. Considering the remaining statutory factors of section 110(i) of the Act, I conclude that a penalty herein of $112, as assessed, is appropriate.

ORDER

It is ORDERED that, within 30 days of this Decision, Respondent pay the sum of $553, as civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge