

CCASE:
SOL (MSHA) v. ELY FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

v.

ELY FUEL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 90-442
A.C. No. 15-13576-03506

Ely Fuel Company

DECISION

Appearances: Elaine Smith, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee
for Petitioner;
Frank Stewart, President, Ely Fuel Company,
Pineville, Kentucky 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," in which the Secretary has proposed civil penalties for two alleged violations by the Ely Fuel Company (Ely) of mandatory standards. The general issues before me are whether Ely committed the violations as alleged and, if so, the amount of civil penalty to be assessed.

Citation No. 3380133 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 77.502-2 and charges that "the co. has not conducted a monthly examination and recorded it in an approved MSHA record book by a qualified person."

The standard at 30 C.F.R. 77.502-2 is requires that "the examinations and tests required under the provisions of this section 77.502 shall be conducted at least monthly." The standard at 30 C.F.R. 77.502 provides as follows:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such

examinations shall be kept.

In its Answer and at hearings in this case Ely acknowledges that the violation occurred as charged but denies that an injury or illness was likely to result from the violation and denies that it was a "significant and substantial" violation. According to Inspector Richard Saylor of the Federal Mine Safety and Health Administration (MSHA), during the course of his regular inspection on June 20, 1990, he examined the record books for the monthly electrical examinations at the subject mine and found that the monthly examination had not been performed. Ely Foreman, J. C. Smith, acknowledged that they had not performed the monthly exam. According to Saylor an injury was "reasonably likely" and it was "very likely that something could happen and cause a person to get hurt or injured." He noted that the purpose of an electrical inspection is to determine that nothing is wrong with the electrical system. Saylor testified that if a person "got in electricity it would have to be serious". He noted that there were electrical motors, and transformers on the crushers and it involved high voltage. More particularly he noted that a motor could get "shorted out" and you would "get power on" the person. He opined that injuries would occur to only one person that being the person operating the tipple.

Ely President Frank Stewart denied at hearing that the violation was serious. He observed that the tipple is run only five months a year and he is given a day or two notice by his contractor to run the tipple. It is only upon such notice that he arranges for the electrical inspection. On this occasion Stewart maintains he called his regular electrical inspector, Donald Dunn, the day before the citation was issued to inspect the tipple. According to Stewart, Dunn was late showing up and the MSHA inspector arrived first. Dunn purportedly showed up later. Neither Inspector Saylor nor Dunn apparently found any electrical defects in the equipment.

Stewart also testified that the requisite electrical inspection had been made early the month before and that his foreman J.C. Smith, though not a certified electrician had 35 years electrical experience and regularly inspects the tipple himself.

It is noted that Ely had previously been cited for a violation of the same standard at issue herein for failing to conduct the required monthly electrical examination under 30 C.F.R. 77.502-2, only four months before. It is also apparent that Ely management including foreman J.C. Smith knew that the required electrical inspection had not been performed when they commenced operation of the tipple knowing that such an examination was required. The violation was therefore the result of high negligence.

While there was no record of any violative electrical condition existing on the date of the citation it may nevertheless reasonably be inferred that the violation was "significant and substantial". The circumstances expected in continuing mining operations may be considered in the evaluation of whether a hazard would be reasonably likely. Under the circumstances I conclude that the violation was indeed "significant and substantial". See Mathies Coal Company, 6 FMSHRC 1 (1984).

Considering the criteria under section 110(i) of the Act I concur with proposed civil penalty of \$36.

Citation No. 3380134 alleges a violation of the standard at 30 C.F.R. 77.1707 and charges that "the company didn't have an adequate first aid kit at the tipple and that some items were missing."

The cited standard, 30 C.F.R. 77.1707 provides in part as follows:

(a) Each operator of a surface coal mine shall maintain a supply of the first aid equipment set forth in paragraph (b) of this section at or near each working place where coal is being mined, at each preparation plant and at shops and other surface installations where ten or more persons are regularly employed.

(b) The first aid equipment required to be maintained under the provisions of paragraph (a) of this section shall include at least the following:

- (1) One stretcher;
- (2) One broken-back board (if a splint-stretcher combination is used it will satisfy the requirements of both paragraph (b)(1) of this section and this paragraph (b) (2);
- (3) Twenty-four triangular bandages (15 if a splint-stretcher combination is used);
- (4) Eight 4-inch bandage compresses;
- (5) Eight 2 inch bandage compresses;
- (6) Twelve 1-inch adhesive compresses;
- (7) An approved burn remedy;
- (8) Two cloth blankets;
- (9) One rubber blanket or equivalent substitute;
- (10) Two tourniquets;
- (11) One 1-ounce bottle or aromatic spirits of ammonia
- (12) The necessary complements of arm and leg splints or two each inflatable plastic arm and leg splints.

(c) All first aid supplies required to be maintained under the provisions of paragraphs (a) and (b) of this section shall be stored in suitable, sanitary, dust tight, moisture proof containers and such supplies

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shall be accessible to the miners.

Ely does not dispute the violation but maintains that there were only a few items missing from the first aid kit and argues that the allegation in the citation was "so frivolous that it defies belief".

Inspector Saylor acknowledged that the violation was of low gravity and that only a few items were apparently missing from the first aid kit but noted that he does not have the discretion to overlook violations even when they are not serious. Indeed Saylor has noted on the citation that the violation herein was not serious and the Secretary has proposed only a nominal penalty of \$20. There is, in addition, little evidence in this case of operator negligence. Under the circumstances and considering the relevant criteria under section 110(i) of the Act I find the Secretary's proposed penalty of \$20 to be appropriate.

ORDER

Ely Fuel Company is hereby directed to pay civil penalties of \$56 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge