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SOL (MSHA) v. CONSOLIDATION COAL
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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.

CONSOLIDATION COAL COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEVA 91-47
A. C. No. 46-01455-03812

Osage No. 3 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Secretary of Labor (Secretary);
Walter J. Scheller III, Esq., Pittsburgh,
Pennsylvania, for Consolidation Coal Company,
(Consol).

Before: Judge Broderick

The above case was called for hearing in Morgantown, West Virginia, on April 17, 1991. Counsel for the Secretary proposed on the record that a settlement be approved for one of the two violations alleged in this docket, namely a violation of 30 C.F.R. 75.1105 alleged in Order No. 2711965. The settlement provided that Consol would pay the full amount of the assessment, \$1,000.

A hearing was had on the other violation, that charged in Order No. 2712041. This order alleged a violation of 30 C.F.R. 75.303 because of an inadequate preshift examination. The order charged that the violation resulted from Consol's unwarrantable failure to comply with the mandatory standard. Inspector Richard Jones testified on behalf of the Secretary. Todd McNayer and Richard Conrad testified on behalf of Consol.

After the parties rested and the case was submitted for decision, the Secretary filed a motion to approve a settlement with respect to the violation involved. The motion proposes an order modifying the 104(d)(2) Order to a 104(a) Citation, and the payment by Consol of the penalty originally proposed, \$1,200.

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The motion states that the Secretary agrees to drop the unwarrantable failure finding because the evidence introduced at trial did not clearly establish that the violation resulted from aggravated conduct constituting more than ordinary negligence.

I have considered the motion in the light of the evidence introduced at the trial and the criteria in Section 110(i) of the Act, and conclude that it should be approved.

Accordingly, IT IS ORDERED:

1. Order No. 2712041 issued under Section 104(d)(2) of the Act is MODIFIED to a 104(a) Citation.

2. Consol shall, within 30 days of the date of this Decision, pay the following civil penalties:

CITATION/ORDER	30 C.F.R.	AMOUNT
2711965	75.1105	\$1,000
2712041	75.303	1,200
	Total	\$2,200

James A. Broderick
Administrative Law Judge

FINDINGS OF FACT

I

Sunny Ridge was at all pertinent times the owner and operator of a surface coal mine in Pike County, Kentucky, known as the No. 1 Surface Mine. The mining method followed at the subject mine was mountain top removal. Explosives were used to loosen the coal and the overburden, and it was removed using bulldozers and end loaders. As of September 6, 1990, Sunny Ridge produced approximately 214,121 tons of coal annually. It was therefore of moderate size. During the 24 month period from August 28, 1987 to August 27, 1989, 14 violations were assessed and paid by Sunny Ridge. Eight of these were violations of the regulations having to do with miner training. Because of the number of training regulation violations, this history is such that a penalty otherwise appropriate will be increased because of it.

II

On August 28, 1989, Federal Coal Mine Inspector Prentiss Potter issued a citation charging a violation of 30 C.F.R. 48.26(a) because 11 of the 17 miners at the mine site had not received the newly employed experienced miner training required by the regulation. The citation charged a significant and substantial violation. The inspector also issued an order of withdrawal under Section 104(g) ordering the named miners to be removed from the mine site until provided with the required training. Sunny Ridge had a training plan in effect and a designated MSHA approved instructor. The plan showed an 8 hour course of training for newly employed experienced surface miners.

I find as a fact that the 11 miners named in the citation were newly employed experienced miners, and had not received the training prescribed in the regulation and in Sunny Ridge's plan. The citation and order were terminated on August 29, 1989, when the listed employees received the newly employed experienced miner training by an MSHA approved instructor.

REGULATION

30 C.F.R. 48.26(a) provides as follows:

(a) A newly employed experienced miner shall receive and complete training in the program of instruction prescribed in this section before such miner is assigned to work duties.

(b) The training program for newly employed experienced miners shall include the following:

(1) Introduction to work environment. The course shall include a visit and tour of the mine. The methods of mining or operations utilized at the mine shall be observed and explained.

(2) Mandatory health and safety standards. The course shall include the mandatory health and safety standards pertinent to the tasks to be assigned.

(3) Authority and responsibility of supervisors and miners' representatives. The course shall include a review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and an introduction to the operator's rules and the procedures for reporting hazards.

(4) Transportation controls and communication systems. The course shall include instruction on the procedures in effect for riding on and in mine conveyances; the controls for the transportation of miners and materials; and the use of the mine communication systems, warning signals, and directional signs.

(5) Escape and emergency evacuation plans; firewarning and firefighting. The course shall include a review of the mine escape system; escape and emergency evacuation plans in effect at the mine; and instruction in the firewarning signals and firefighting procedures.

(6) Ground controls; working in areas of highwalls, water hazards, pits, and spoil banks; illumination and night work. The course shall include, where applicable, an introduction to and instruction on the highwall and ground control plans in effect at the mine; procedures for working safely in areas of highwalls, water hazards, pits, and spoil banks, the illumination of work areas, and safe work procedures for miners during hours of darkness.

(7) Hazard recognition. The course shall include the recognition and avoidance of hazards present in the mine, particularly any hazards related to explosives where explosives are used or stored at the mine.

(8) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

ISSUES

1. Whether the evidence establishes a violation of the cited standard?

2. If so, what is the appropriate penalty?

CONCLUSIONS OF LAW

I

Respondent is subject to the provisions of the mine act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

The operator does not seriously contest the violation charged. The evidence clearly establishes that the listed miners did not receive the prescribed training. I conclude that a violation of 30 C.F.R. 48.26(a) was shown.

III

Failure to provide the training prescribed by the regulations is, in my view, a serious violation. However, the evidence presented in this case does not establish that the hazard contributed to by the violation is reasonably likely to result in a serious injury. Mathies Coal Co., 6 FMSHRC 1 (1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125 (1985). The miners here were experienced. The mine environment is, according to the evidence, not particularly dangerous or threatening. I conclude that the finding in the citation that the violation was significant and substantial is not supported by the evidence.

Sunny Ridge had been cited on a number of prior occasions for training regulation violations. Seventeen miners were on the job site; six had received the required training; 11 had not. These facts indicate that the violation resulted from a high degree of carelessness on Sunny Ridge's part.

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The citation was abated promptly and in good faith. Respondent stipulates that the proposed penalty will not affect the ability of Sunny Ridge to continue in business.

Based on the criteria in Section 110(i) of the Act, I conclude that an appropriate penalty for the violation is \$2200. This amounts to a basic penalty of \$100 for each miner not properly trained, which I increased to \$200 because of the history of similar violations.

ORDER

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

1. Citation 3364393 is MODIFIED to a nonsignificant and substantial violation and, as modified, is AFFIRMED.

2. Sunny Ridge shall, within 30 days of the date of this Decision, pay to the Secretary a civil penalty in the amount of \$2200 for the violation found herein.

James A. Broderick
Administrative Law Judge