CCASE:
SOL (MSHA) v. AGIPCOAL USA, INC.
DDATE:
19910612
TTEXT:

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	CIVIL PENALTY PROCEEDING Docket No. KENT 90-207 A.C. No. 15-06268-03538
v.	
AGIPCOAL USA, INC., RESPONDENT	Pevler Preparation Plant

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
C. Gregory Ruffennach, Esq., Smith, Heenan & Althen, Washington, D.C., for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This civil penalty case is before me, initiated by the petitioner against the respondent pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". Respondent is contesting both a section 104(a) citation and a related, subsequent section 104(b) order of withdrawal issued by the Mine Safety and Health Administration (MSHA).

Pursuant to notice, a hearing on this matter was held in Paintsville, Kentucky, on January 17, 1991. The parties have both filed posthearing briefs and I have considered their respective arguments in the course of my adjudication of this case.

STIPULATIONS

The parties stipulated to the following (Govt. Ex. No. 1):

1. The operator processes approximately 1.35 million tons of coal per year at the preparation plant.

2. The operator employs 16 active hourly employees.

3. The civil assessment will not affect the operator's ability to continue in business.

4. Citation No. 3365153 and Order No. 3365158 were issued by an authorized representative of the Secretary.

5. The presiding administrative law judge has jurisdiction to hear and decide this case.

The Underlying Section 104(a) Citation

Section 104(a) Citation No. 3365153, issued on December 21, 1989, charges a violation of the mandatory standard found at 30 C.F.R. 77.202 and alleges:

> The No. 3 dump has an accumulation of loose coal and float coal dust up to about 1/2" in depth on the floor, wall stringers, motors, electrical cabinets, and conduits, which can create a fire/explosion hazard in the event of an electrical defect or short.

The facts surrounding the issuance of this citation are essentially undisputed. On December 21, 1989, Inspector Reed, accompanied by John Dillon, the Plant Superintendent, inspected the No. 2 and 3 Coal Dumps as a part of his regular Triple A inspection at the Pevler Preparation Plant Complex. After inspecting the dumps, the inspector cited both as violating the standard at 30 C.F.R. 77.202. He found the violative conditions throughout the entire dump on all three floors of the facility (in this case, however, we are concerned with the No. 3 Dump only).

The No. 3 Dump is a raw coal dump large enough for two 10-wheel coal trucks to dump simultaneously. It holds 500 to 550 tons of coal and it is primarily a bypass dump to run coal into the No. 3 silo bypassing the preparation plant.

Inspector Reed testified that all three floors of the dump had loose coal and float coal dust on the floors and walls, as well as on the motors and electrical conduits. Further, the most significant accumulations were found in the breaker room of the dump. In his opinion, these accumulations presented two hazards; a stumbling and tripping hazard, which I discount, and a danger of explosion.

The breaker room at the dump contained a great deal of electrical equipment, such as motor controllers, circuit breakers and contactors. The inspector was particularly concerned with the contactors. They constantly open and close each time a piece of equipment is energized or deenergized and thereby create a danger of igniting the float coal dust by the arcing and sparking that is produced.

The company essentially admits the basic violation existed on December 21, 1989. The plant superintendent himself conceded the dump was dusty, but he didn't perceive any immediate danger to anyone. He maintains that there is a lot of ventilation throughout the dump and that none of the employees are physically in the dump when it is operating. Mr. Dillon also opined that a fire or explosion hazard was unlikely since there are no exposed sources of ignition. The greatest potential source of ignition was the contactors in the breaker room, but they were all sealed inside metal boxes in order to minimize contact between any potential source of ignition and any existant float coal dust. Furthermore, all the wiring to the various motors and starter components in the breaker room is enclosed in metal conduit.

The company, therefore, contests Inspector Reed's "significant and substantial" finding in the original section 104(a) citation.

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).

There is no doubt that there was a violation of the mandatory safety standard cited, 30 C.F.R. 77.202, and I concur with the existence of an enhanced measure of danger to safety caused by the dust accumulations. However, the Secretary must also establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. This latter she has failed to do. The No. 3 Dump is an unmanned facility. It is remotely controlled from an operator's room on the side of the No. 2 Dump some 100-150 feet away. There are no employees needed in the dump while it is operating and indeed the employees are instructed not to enter them while they are in operation. I therefore find that the instant violation does not meet the "S&S" criteria because it is unlikely that any injury to anyone would occur as a result of this violation, and the citation will be so modified.

In assessing a civil penalty in this case, I have considered the foregoing stipulations, findings and conclusions and the requirements of section 110(i) of the Act. I concur with the inspector's negligence finding of "moderate". Under these circumstances, I find that a civil penalty of $100 is appropriate.

The Subsequent Section 104(b) Order

Section 104(b) Order No. 3365158, was issued on January 2, 1990 and alleges:

> The cited float coal dust is still present on the electrical conduits & tops of the electrical component cabinets. Additional cleaning is still required on the cabinet faces, wall beams & the floor.

The original citation set a date of December 24, 1989 as the time when the violation was to be abated. On January 2, 1990, Inspector Reed returned to the preparation plant to inspect and terminate the citations written for both the No. 2 and No. 3 Dumps. He found the No. 2 Dump cleaned to his satisfaction and abated the citation. The instant problem, however, arose in the No. 3 Dump.

Although the majority of the No. 3 Dump had been cleaned to the inspector's satisfaction, he was not satisfied with the cleanup of the breaker room. The breaker room is the electrical

room for the No. 3 Dump and is approximately 8 feet by 12 feet (96 square feet) in area located on the second level of the dump. It constitutes a small but significant portion of the total area originally cited.

The breaker room contains the electrical components for the machinery in the Dump. At the center of the breaker room are metal cabinets which enclose the breakers and starters. The breakers and starters are thus enclosed and covered by metal doors with two lock-in type screws. These cabinets are designed to minimize the amount of coal dust entering the metal cabinets from the outside and to contain the arcing or sparking of the breakers and starters inside. There is virtually no potential for an ignition in the breaker room when these cabinets are clean and closed.

All the wiring to the motors and to the starter components in the breaker room is enclosed in conduit. These conduits are located near the ceiling of the breaker room approximately 10 feet high.

The greater part of the accumulations of coal dust which the inspector found on January 2, 1990 were located on top of these cabinets and conduits.

When Inspector Reed returned on January 2, he was accompanied by Mr. Don Hall, the company safety director and Mr. Fannin, the union representative. After Inspector Reed indicated that the breaker room needed additional cleaning, Mr. Hall left the dump and went to find Mr. Cantrell (the Mine Manager) to inform him that the area had not been cleaned to Inspector Reed's satisfaction. Cantrell went to the No. 3 Dump to meet with Inspector Reed. When he arrived, Inspector Reed indicated to him at that time that he was going to shut down the No. 3 Dump because the breaker room needed additional cleaning. In an attempt to avoid the threatened "b" order, Hall, Cantrell and Fannin quickly cleaned up the coal dust which the inspector had found in the breaker room. It took the three men about fifteen minutes to clean it to his satisfaction, and involved wiping the dust off the top of the conduits and cabinets and sweeping the floor of the breaker room.

The company had previously made a considerable effort to abate the citation. A contractor's cleaning crew worked approximately 19 man-hours to clean the No. 3 Dump on December 23, 1989. At this time, Mr. Cantrell inspected the dump and specifically inspected the breaker room and in his opinion, as of December 23, 1989, the breaker room was sufficiently cleaned to abate the citation.

On the next regularly scheduled cleanup day, December 31, 1989, after another week of operation, the No. 3 Dump was cleaned

again. On December 31, 1989, the cleanup crew worked approximately 18 hours. Cantrell again inspected and was generally satisfied that the breaker room was clean. However, he did find some dust inside the electrical cabinets where the breakers and starters are located. He ordered the cleanup crew to turn off the power and blow the dust out of the cabinets and reseal the doors.

The coal dust later found by the inspector on top of these cabinets and on top of the overhead conduits was above eye level and was admittedly missed by the clean up crew as well as by Mr. Cantrell.

It is the operator's position that Inspector Reed, in these circumstances, should have extended the abatement period to allow them a quick clean-up rather than issue the section 104(b) order.

Section 104 of the Mine Act provides in relevant part:

> (a) If, upon inspection or investigation, the Secretary. . . believes that an operator. . . has violated this Act, or any mandatory health or safety standard, rule, order, or regulation. . . he shall. . . issue a citation. . . . The citation shall fix a reasonable time for the abatement of the violation. . .
>
> (b) If, upon any follow-up inspection. . . an authorized representative of the Secretary finds (1) that a violation described in a citation. . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall. . . promptly issue an order requiring the operator. . . to immediately cause all persons. . . to be withdrawn from, and to be prohibited from entering, such area. . . .

The inspector is thus required to make a finding as to whether or not the abatement period should be extended prior to issuing a section 104(b) withdrawal order. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976).

Three factors are generally considered or at least should have been considered by Inspector Reed to determine whether the abatement period should have been extended:

> (1) The degree of danger that any extension would have caused to miners;

(2) The diligence of the operator in attempting to meet the time originally set for abatement; and

(3) The disruptive effect an extension would have had upon operating shifts.

Of these, the first two are the most pertinent to the case at bar.

I have already found and concluded earlier in this decision that the condition cited by Inspector Reed in the original section 104(a) citation was not a "significant and substantial" violation of the mandatory standard and I now find that the "left-over" condition he found on January 2, 1990, did not pose any particular hazard to miners. In this case, the additional cleanup to fully abate the citation to his satisfaction took only fifteen minutes and since no miners actually work in the No. 3 Dump, no miners were in fact withdrawn by the order. It appears to me that the inspector issued the order for record purposes only.

In assessing the company's good faith in attempting to abate the original citation it is necessary to take into account the totality of the company's efforts. The original citation, as issued, applied not only to the breaker room but also to the entire No. 3 Dump. Moreover, the original citation was issued in conjunction with another Section 104(a) citation issued for accumulations in the No. 2 Dump.

The company's efforts in abating these citations, set out earlier, within the prescribed abatement period were substantial and, with the exception of the breaker room, Inspector Reed was satisfied with the company's abatement efforts. The employees assigned to clean the breaker room apparently missed the coal dust on top of the conduit and cabinets. And although Mr. Cantrell personally inspected the breaker room afterwards he also did not notice these accumulations of coal dust. The tops of the conduit and cabinets are obscured from view by their position above eye level, and although this is no excuse for not cleaning up there, I believe it was the reason these accumulations were left behind.

I therefore find that the accumulations remaining in the breaker room on January second did not represent a lack of diligence on the part of the company's cleanup effort but rather were an understandable "oversight", that was capable of being corrected in a mere fifteen minutes without causing any particular hazard to miners.

Inspector Reed himself testified that if he had believed that a truly diligent effort had been made to clean the room he would have extended the time for abatement of the citation.

After reviewing the evidence in this case, I do believe the company made a truly diligent effort to clean the breaker room and I also believe that Inspector Reed failed to give due and serious consideration to their efforts to abate or to extending the period for abatement.

Furthermore, I find that his failure to extend the period for abatement was unreasonable and contrary to section 104(b) of the Act. Accordingly, the subject order will be vacated herein.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Citation No. 3365153 IS AFFIRMED as a non-S&S violation of 30 C.F.R. 77.202.

2. Section 104(b) Order No. 3365158 IS VACATED.

3. The respondent IS HEREBY ORDERED TO PAY a civil penalty of $100 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge