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SOL (MSHA) v. UNITED STATES STEEL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-73 A.C. No. 46-05868-03541
v.	
UNITED STATES STEEL MINING COMPANY, INCORPORATED, RESPONDENT	Pinnacle Prep Plant

DECISION

Appearances: Javier I. Romanach, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Billy M. Tennant, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for the Respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment of $46 for an alleged violation of mandatory safety standard 30 C.F.R. 77.200. The respondent filed an answer contesting the alleged violation and a hearing was held in Beckley, West Virginia. The parties filed posthearing briefs and I have considered their arguments in the course of my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent has violated the safety standard as alleged in the proposal for assessment of civil penalty (2) whether the violation was "significant and substantial," and (3) the appropriate civil penalty that should be assessed based on the civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. 30 C.F.R. 77.200.

4. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated in relevant part as follows (Exhibit ALJ-1):

1. The presiding judge has jurisdiction to hear and decide this matter.

2. The inspector who issued the contested citation was acting in his official capacity as a Federal coal mine inspector.

3. The citation was properly issued to the respondent's agents.

4. The cited conditions were timely abated.

5. Payment of the proposed civil penalty assessment of $46 will not adversely affect the respondent's ability to continue in business.

The contested section 104(a) "S&S" Citation No. 2736728, issued by MSHA Inspector Michael T. Dickerson on September 10, 1990, cites an alleged violation of mandatory safety standard 30 C.F.R. 77.200, and the cited condition or practice is described as follows:

> The concrete floor at the feed end of (exterior) thermal dryer bed has deteriorated. Leaks at floor level are allowing live embers and small amounts of float coal dust to escape dryer bed area, and allowing loss of small amounts of fluidizing air current.

Petitioner's Testimony and Evidence

MSHA Inspector Michael T. Dickerson testified that he issued the contested citation during a regular inspection of the responddent's preparation plant on September 10, 1990. He stated that during his inspection of the thermal coal dryer he observed hot

coal embers and coal dust coming through the "fractured" concrete floor at the feed end of the dryer bed. He believed that a loss of drying fluidizing air current could cause coal dust to settle and become hot and this would pose a hazard of fire or explosion. He explained that his main concern was over the loss of air current which could cause coal to settle on the drying bed, and that any coal in suspension above the drying bed could be ignited.

Mr. Dickerson stated that dryer explosions were not unusual events, and he believed that it was reasonably likely that a fire or explosion would occur as a result of the cited conditions, and that the dryer attendant would be exposed to these hazards. He confirmed that the violation was the result of "low negligence" on the part of the respondent because the conditions were difficult to see. He also confirmed that the violation was abated by repairing the concrete floor area and welding a split in the dryer wall. He did not know whether any work was done inside the refractory (Tr. 133-139).

On cross-examination, Mr. Dickerson described the thermal dryer as "six stories high" and he stated that the cited conditions were located at "floor level". He identified a drawing of a "Typical Thermal Coal Dryer" (Exhibit P-6), as similar to the cited dryer facility in question. He stated that the deteriorated concrete floor area was exposed to the air but was not a walkway. He stated that he was in the area for approximately 30 minutes and observed the floor from approximately 5 to 6 feet away and then closer as he approached the area immediately adjacent to the dryer feed bin. He stated that the "crumbled concrete" floor condition began a few inches from the dryer and extended over an area approximately 8 to 10 feet long.

Mr. Dickerson stated that he found no methane hazards present at the cited area, but he observed hot embers and coal dust coming from the deteriorated floor. He agreed that it was not unusual to see deteriorated concrete floor areas around a thermal coal dryer. He stated that there was a "constant flow" of embers from the floor and that he could see at least 10 embers present at any one time. Mr. Dickerson was shown two photographic exhibits (R-1 and R-2), showing a deteriorating concrete floor area, but he could not definitely confirm whether they were the areas which he cited (Tr. 140-144).

Mr. Dickerson stated that the dryer building was washed down on a regular basis. He did not observe any accumulations of coal embers or coal dust, and he did not believe that the presence of hot embers presented a hazard (Tr. 145). He stated that a small area where the coal dust was coming through the floor was "cloudy, and he believed that it was float coal dust in suspension. However, he did not believe that the amount of coal dust which he observed posed any hazard (Tr. 147).

Mr. Dickerson stated that he could "feel air" coming through the floor and that when he lifted a small piece of broken concrete he felt an air current. He believed that the air current would blow away any float coal dust, but he was concerned that the loss of fluidizing air current would allow coal dust to settle on the dryer bed itself, and if left unattended, it could cause a fire. He was concerned that the conditions could deteriorate further, and for these reasons, he believed that the violation was "significant and substantial" (Tr. 151).

Mr. Dickerson stated that he was told that the dryer wall was damaged and that a seam had to be sealed to correct the conditions in question. He confirmed that if the dryer wall were not damaged and there was no leakage, the deteriorated concrete would not have caused a problem and the deteriorated concrete condition was not in and of itself something that was "out of disrepair" under the cited mandatory standard (Tr. 150).

Mr. Dickerson confirmed that he was familiar with MSHA's policy manual (Exhibit P-5), and he stated that section 75.200 of the manual does not specifically address thermal dryers. He believed that he cited the appropriate section 77.200, because the loss of fluidizing air, coal dust, or embers, which is addressed in section 77.305, requires tight ceiling doors to prevent these conditions. He explained that "since I was not addressing a door, I couldn't use that section at all and had to go to section 77.200" (Tr. 153). He further confirmed that the deteriorated floor played no part in the violation, and that he only included the condition of the floor to describe what he observed. The violation pertained to the loss of hot embers and coal dust that floated out in the air, and this was caused by the split in the metal lining of the dryer. The purpose of the floor area was not to enclose the leakage from the dryer bed. The metal which split was used for that purpose (Tr. 153).

In response to further questions, Mr. Dickerson stated that the dryer leak was significant enough to cause loss of air current, which posed a hazard (Tr. 154). He granted the respondent two weeks to abate the conditions because he knew that any abatement work would involve the damaged dryer wall. Although he indicated that the deteriorated floor would affect the air current and any potential hazard, he also stated that the deteriorated floor did not contribute to the hazard and that it was "just a tattle tale sign" (Tr. 155).

Mr. Dickerson stated that he was concerned with the loss of fluidizing air current inside the dryer. He explained that the fluidizing air current moves the coal across the dryer bed inside the dryer and that the deteriorated concrete floor area was the location where the dryer was leaking (Tr. 157). If the floor had not deteriorated he would not have been able to see the escaping

fluidized air current, and the concrete floor would not have allowed the air to escape (Tr. 159).

Mr. Dickerson confirmed that the escaping coal dust and escaping coal embers did not pose a hazard, and if the facility were washed down regularly, as he believed it was, any escaping fluidizing air current would only be hazardous internally to the dryer system, and not externally. The small amount of fluidizing air current coming through the deteriorated concrete would only pose a hazard if it restricted the air flow inside the dryer (Tr. 150).

Mr. Dickerson confirmed that a split in the metal lining of the dryer was the cause of the escaping fluidizing air current, and that at the time he viewed the conditions he did not know that the dryer wall was constructed solely of metal or whether the concrete floor was part of the dryer wall. He also confirmed that the purpose of the floor which had deteriorated was not to enclose or encompass the fluidizing air current, and he stated as follows at (Tr. 160-161):

A. To clear this up, if they had fixed the wall of the dryer and said, "Mike, the floor had nothing to do with it," and I had went and looked and the floor was still cracked up along there, that they had fixed the metal and no air currents were escaping, I would have terminated the paper.

* * * * * * *

Q. If the floor had been properly maintained and there would not have been any leaks coming out from the floor, would there have been leaks into the atmosphere going from somewhere else or another source?

A. No, because that seam was against the floor. The floor was poured against that seam.

Q. The reason that the embers and the air current leaks were coming out into the atmosphere was because of the deteriorated floor?

A. That was part of it, yes.

Respondent's Testimony and Evidence

David T. Walters, shift foreman, testified that he became aware of the cited conditions on the afternoon of the day Mr. Dickerson issued the citation. Mr. Walters stated that he took photographs of the area where he observed sparks being emitted from the broken concrete floor area cited by the

inspector, and he confirmed that there were no operational changes from the time the inspector saw the conditions (Exhibits R-1 and R-2; Tr. 165-167).

Mr. Walters stated that he observed "a puff" of air, and a "gentle constant flow" of small burning embers coming through the floor. He stated that he observed an "ashy" colored product, rather than float coal dust, and he described the material as "fine pulverized coal" which had gone through the combustion process. He stated that the material was leaking through a 3 to 4 inch crack in the stainless steel dryer wall and that the condition was abated by welding the crack and pouring a new concrete floor for "cosmetic purposes". Mr. Walters characterized the effect of the three-to-four inch split in the dryer lining as "a spit in the ocean", and he believed that it would take a large hole to short circuit the two 400 and 1,000 horsepower fans which were shoving from the bottom and pulling from the top. He also confirmed that the area in question is washed down more than once a day, and that people are there three shifts a day. (Tr. 168-171).

Mr. Walters stated that the deteriorated concrete floor condition extended for a distance of approximately three and one-half feet by one-foot, and in his opinion this condition presented no hazard of any accident or injury to anyone. He stated that leakage has occurred in the past because the metallic dryer joint reacts to heat and splits, and when this occurs it is necessary to weld the joint. In order to reach the joint, the concrete floor is broken up in order to access the joint seam, and it is then repaired. However, if the seam splits again, the floor must again be broken in order to make the repairs (Tr. 172-172).

In response to further questions, Mr. Walters stated that he is concerned about "sparks being emitted everywhere" and the leak in the dryer wall. However he did not consider the condition an imminent danger or something that would require shutting down the plant. (Tr. 176).

Discussion

The mandatory safety standards dealing with thermal dryers are found in Subpart D, Part 77, Title 30, Code of Federal Regulations. Sections 77.300 through 77.315, cover the operation and maintenance of thermal dryers, and section 77.305 requires drying chambers and associated ductwork to be equipped with tight sealing access doors which are required to be latched during dryer operation to prevent the emission of coal dust and the loss of fluidizing air. In this case, the respondent has not been charged with a violation of any of these dryer standards, nor has it been charged with any violations of section 77.202, which covers accumulations of coal dust on surface structures,

enclosures, or other facilities, or the surface travelway requirements found in section 77.205. The respondent is charged with an alleged violation of section 77.200, which covers surface installations in general, and it provides as follows:

> All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

MSHA's July 1, 1988, and the most current April 1, 1991, Program Policy Manual reference to section 77.200, (Exhibit P-5), states as follows:

> This section does not apply to housekeeping. It is to be used for keeping surface facilities in good repair relative to safety.
>
> Inspections of surface facilities, structures, and enclosures should include an examination of all load-carrying members and related bracing. When such members or bracing are substantially warped, bent, deteriorated due to corrosion or weathering, or otherwise damaged or missing, the structure may be unstable or have a reduced load-carrying capacity. These conditions can cause or contribute to serious accidents and injuries, and appropriate enforcement action must be taken pursuant to this Section to require the structure, enclosure, or other facility to be maintained in good repair.
>
> The district engineering staff should be consulted to evaluate the condition of a surface structure where assistance is needed in determining whether the condition causes instability or reduces the load-carrying capacity of the structure.

During oral arguments on the record, and in his posthearing brief, the respondent's counsel took the position that the cited section 77.200 requirement for maintaining surface installations "in good repair" is intended to apply to the structural stability of surface facilities, rather than the conditions cited by the inspector. Counsel asserted that the "structural stability" interpretation is specifically covered and discussed in MSHA's policy guideline (Exhibit P-5, Tr. 177-178). Counsel also suggested that since the inspector allowed two weeks to abate the conditions, they did not constitute a significant and substantial violation (Tr. 151).

Respondent's counsel conceded that the respondent would be concerned about a deteriorating thermal dryer wall that allowed material to escape into the atmosphere "if there is not

sufficient air current to continue to move that coal across the dyer bed" (Tr. 162). Counsel asserted that it was his understanding that the metal lining, rather than the dryer wall itself, was cracked, and that the lining did not provide any structural support for the dryer. Counsel agreed that the equipment "was not designed to leak like that" (Tr. 164).

Petitioner's counsel took the position that although there is no specific regulation addressing the particular problem posed by the conditions which the inspector believed were hazardous, the inspector necessarily relied on the more general requirements found in the cited section 77.200 (Tr. 177).

In his posthearing brief, petitioner's counsel asserted that since the damaged floor was causing a loss in the fluidizing air current in the dryer chamber, a violation of section 77.200, occurred since this scenario could potentially result in an unplanned ignition or explosion.

Inspector Dickerson confirmed that he was familiar with MSHA's policy guidelines concerning the application and interpretation of section 77.200, and the sections dealing with thermal dryers. He still believed that he cited the proper standard, and he explained that although the loss of fluidizing air or coal dust and embers is addressed in section 77.305, that section requires tight ceiling doors to prevent the conditions. Since he was not addressing a door, he believed that he could not rely on section 77.305, and had to rely on section 77.200. (Tr. 152-153). The inspector also confirmed that if he had seen only the ruptured lining and the two-inch opening exposed above the level of the floor he would still cite a violation of section 77.200 (Tr. 177).

Findings and Conclusions

Although I agree with the respondent's contention that the primary purpose and intent of section 77.200, as explained by MSHA's policy manual, is to assure the physical and structural integrity of surface coal preparation structures such a thermal dryer, I believe the language of the standard is broad enough to cover a damaged and unrepaired dryer bed enclosure lining which allows dangerous levels of coal dust or float coal dust to escape and remain on equipment structures where it could be ignited by escaping hot embers and sparks flowing from the damaged enclosure. The standard requires that such structures be maintained in good repair to prevent accidents and injuries to employees.

I conclude and find that the dryer bed enclosure was not maintained in good repair. While it may be true that the metal lining, rather than the dryer wall itself was cracked, the fact remains that the cracked or ruptured lining, which I find was an

integral part of the enclosure, allowed materials to escape or leak out of the enclosure. The respondent has not rebutted the fact that the damaged lining was in fact causing the leakage, and it conceded that the enclosure was not designed to leak and that it would be concerned about a deteriorating dryer wall that allowed material to escape.

Although I have found that the dryer bed enclosure was not maintained in good repair, I conclude that given the language "to prevent accidents and injuries to employees" found in the standard, in order to establish a violation it must be established that the disrepair, or condition of the cited equipment presented a hazard to miners. Based on the evidence adduced in this case, I cannot conclude that the petitioner has established that the leaking dryer bed enclosure lining presented a hazard to miners.

Inspector Dickerson conceded that the escaping coal dust and coal embers did not pose a hazard, and he detected no hazards from any methane. Although he expressed concern that coal dust could settle on the drying bed and that coal dust in suspension could be ignited, he confirmed that the air current would blow away any float coal dust, and he did not believe that the amount of coal dust which he observed posed any hazard. The inspector also conceded that the deteriorated floor condition described in the citation did not contribute to any hazard, and he did not believe that the floor area in question was a walkway. As noted earlier, no citations were issued for accumulations of coal dust on surface structures or enclosures, or for any unsafe surface travelways, and the inspector confirmed that he found no accumulations of coal dust or embers.

The inspector's testimony reflects that he was primarily concerned about the loss of a fluidizing air current inside the dryer, and his concern that any loss of air current could cause coal dust to settle on the drying bed itself and pose a potential ignition or fire hazard. However, he conceded that if the facility were washed down regularly, as he believed it was, any hazard resulting from any escaping fluidizing air current would be limited to the inside of the dryer and not the outside. Given the small amount of fluidizing air current coming through the cracked dryer lining, the inspector further conceded that it would only pose a hazard if it restricted the air flow inside the dryer. However, there is no evidence that this was the case. Under all of these circumstances, I conclude and find that the petitioner has failed to establish a violation. Under the circumstances, the contested citation IS VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. Section 104(a) "S&S" Citation No. 2736728, September 10, 1990, citing an alleged violation of 30 C.F.R. 77.200, IS VACATED.

2. The petitioner's proposed civil penalty assessment for the vacated citation IS DENIED AND DISMISSED.

George A. Koutras
Administrative Law Judge