CCASE:
SOL (MSHA) v. LJ'S 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	CIVIL PENALTY PROCEEDINGS Docket No. VA 90-47 A. C. No. 44-05668-03577
v.	
LJ'S COAL CORPORATION, RESPONDENT	Docket No. VA 90-60 A.C. No. 44-05668-03579 Docket No. VA 90-62 A.C. No. 44-05668-03580 No. 1 Mine

DECISION

Appearances: Ronald E. Gurka, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;
Carl E. McAfee, Esq., LJ's Coal Corporation, St. Charles, Virginia for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based on three Petitions for Assessment of a Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations of various mandatory safety standards. Pursuant to notice, these cases were scheduled for hearing March 25 - 28, 1991. On March 14, 1991, Petitioner filed a Motion to Continue Hearings. The Motion was subsequently granted, and the cases were rescheduled for July 8, 1991. On March 17, 1991 Petitioner filed a Motion to Reschedule, which was not opposed by the Operator (Respondent). The hearing set for July 8-11, 1991, was adjourned and rescheduled for July 23-25, 1991. A hearing was held on July 23, 1991 in Bristol, Virginia. Fred L. Buck, Clarence Slone, and Ewing C. Rines testified for Petitioner. Respondent did not call any witnesses, nor did it offer any documents in evidence.

Finding of Fact and Discussion

I. Docket No. VA 90-47

A. Citation No. 2968870.

Fred L. Buck, an MSHA Inspector inspected the Mine Technology Mine Rescue Station ("Mine Technology") on April 11, 1990. According to Buck, the records of Technology Mine contain dates of inspections performed on Mine Technology apparatus, and indicate what was done on each inspection. Buck testified that the records indicated that an inspection had not been performed within the preceding 30 day period. According to Buck, MSHA records indicate that Respondent filed with the MSHA District Manager a "request" indicating that Mine Technology is to perform mine rescue services at the Respondent's Mine No. 1. (Tr. 19) Buck issued a Citation alleging a violation of 30 C.F.R. 49.6(b) in that "the mine rescue apparatus was not being tested within the 30 day interval."

As pertinent, Section 49.6(b) supra provides that a trained person shall "inspect and test" mine rescue apparatus at intervals not exceeding 30 days. At best, the evidence establishes that the records at Mine Technology did not contain an entry listing an inspection of rescue apparatus within a 30 day period prior to April 11, 1990. This evidence by itself is insufficient to establish that, in fact the apparatus itself was not tested within a 30 day interval. Accordingly, Citation No. 2968870 is to be dismissed.

B. Citation No. 3146288

On April 17, 1990, Clarence Slone, an MSHA Inspector, inspected Respondent's No. 1 Mine, and observed a high voltage cable in the No. 2 drive of the track and belt entry that was not guarded. The cable, which carried 4,160 volts, was suspended within 6 to 8 inches from the roof. In this area, the distance from the floor to the ceiling was 60 inches. The cable itself was insulated, and had a protective jacket or cover. According to Slone, the area in question is examined daily, and that, in general, 2 to 3 times a shift persons would work under the cable "handling materials such as maybe a slate bar, a shovel . . . " (Tr.37). He also indicated that if coal is produced and the belt is in operation, it must be examined and maintained, which requires miners to shovel. Slone issued a Citation alleging a violation of 30 C.F.R. 75.807.

Section 75.807 supra provides, as pertinent, that a high voltage cable ". . . shall be covered, buried or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6 1/2 feet or more above the floor or rail, securely anchored, properly insulated, and guarded at ends and covered, insulated, or placed to prevent contact with trolley wires and other low-voltage circuits." The testimony of Slone established that the cable in question carried high voltage, was unguarded, and was suspended in an area where men regularly work or pass under. Also Slone's testimony has established that the cable was less then 6 1/2 feet above the

floor. Hence, I find that the Respondent herein did violate Section 75.807 as alleged.

Slone further indicated that air containing oxygen ventilates the surface of the roof in the area in question. He said that in the normal course of mining, the air flow would cause the roof consisting of firm shade to become soft and fall off. Since the cable in question was not protected by a guarding, a roof fall could damage the cable. If a cable is thus damaged, voltage could leak out causing a person in proximity to the cable to be electrocuted even without contact. Although the cable in issue did not have any observable defects and was protected with a jacket or cover, I find, based on the testimony of Slone, that the lack of a guarding contributed to a hazard of a miner suffering an electrical shock. Thus, given the further fact that the mine was wet as testified to by Slone, and considering the condition of the roof as testified to by Slone, I conclude that an injury of a reasonably serious nature was reasonably likely to have occurred, given continued mining in the absence of a guarding. Hence, it has been established that the violation herein was significant and substantial (See Mathies Coal Co. 6 FMSHRC 1 (1984)).

The violation herein could have led to a miner being electrocuted, and hence was of a high level of gravity. On direct examination, Slone was asked whether the violative condition was one that "appeared" to him "to have existed there for some time" (Tr.43). Slone answered "that's correct" (Tr. 43). This testimony is the only evidence adduced with regard to Respondent's negligence. I conclude that it has not been established that the degree of Respondent's negligence herein was more than a low level. I conclude that a penalty of $100 is proper for this violation.

C. Citation No. 3146289

On April 17, 1990, when Slone inspected the subject mine, he examined the No. 3 belt transformer. An AC receptacle approximately 6 x 8 inches, is located on the side of the transformer, approximately a foot to 18 inches off the floor. The receptacle contains fingers or prongs that are exposed, and stick out approximately a half inch beyond the surface. The fingers receive cable plugs in order beyond supply power outby to belt drives, pumps and other equipment. When Slone observed the receptacle, a protective cover, which is designed to snap in place, was not in place, and the fingers were exposed. According to Slone, the breaker for this equipment was tested and was found to be not working. He indicated that the fingers were energized, and accordingly, if a miner were to plug in or unplug equipment and come in contact with the energized receptacle, he could be injured. He also indicated that it is easy to come in contact with the receptacle if one is next to the power center. He said

that contact with the energized receptacle would at least produce an electrical shock, and at the most would lead to a fatality. Slone issued a Citation alleging a violation of 30 C.F.R. 75.1725.

Section 75.1725 supra provides, in essence, that machinery and equipment ". . . shall be maintained in safe operating condition and the machinery or equipment in unsafe condition shall be removed from service immediately." Webster's Third New International Dictionary, (1986 edition) ("Webster's") defines "safe" as "2. Secure from threat of, danger, harm or loss:", Webster's defines "free from" as "(a) lacking: without." "Danger" is defined in Webster's as "3. liability to injury, pain, or loss: PERIL, RISK. . . . " I find that the exposed energized prongs of the receptacle exposed miners to the risk of injury by way of electrical shock. As such, applying the common usage of the term "safe" as defined in Webster's, infra, I conclude that the receptacle was not safe, and as such, I find that Respondent herein did violate Section 75.1725, supra.

According to Slone, equipment must be plugged into the receptacle in question at least once a shift. In addition, if the belt requires repair work, it must be unplugged from the receptacle in question in order to stop the belt. Hence, considering the location of the receptacle, being only a foot to 18 inches off the floor, and the fact that, as testified to by Slone, the area was wet, and the fact that the breaker did not operate, I conclude that it was reasonably likely that the violation herein would have resulted in contact with the exposed energized prongs, and that it was reasonably likely that such contact would have led to a reasonably serious injury. As such I find that the violation herein was significant and substantial.

I find the violation herein to be of a high level of a gravity inasmuch it could have resulted in a fatality. Also, I find support for Slone's testimony that the lack of a protective cover being in place should have been noticed, taking into account the size of the receptacle, its location, and, the fact that the cover was at the side of the power center within arms reach of the receptacle. I conclude that a penalty of $100 is appropriate for this violation.

D. Citation No. 3146290

According to Slone, when observed by him on April 17, 1990, the No. 3 Belt Drive breaker box contained an accumulation of dry float coal and dust at a depth of a quarter of an inch throughout the floor of the box. Slone issued a Citation alleging a violation of 30 C.F.R. 75.400, which, as pertinent, provides that coal dust including float coal dust shall be cleaned-up and not be permitted to accumulate in active workings or on electrical equipment therein. Based on Slone's

uncontradicted testimony, I find that there was an accumulation of coal dust especially considering its depth, and therefore section 75.400 supra was violated.

Although Slone indicated on cross examination that generally the mine is wet, it is significant that there was no contradiction to his testimony that the accumulation in question was dry. There also was no contradiction to his testimony that float dust is most volatile. There also was no contradiction to Slone's testimony that the belt in question is stopped and started 2 to 3 times a shift, and that these actions cause an arc in the circuit box which could cause an explosion, given the presence of the accumulation at issue. According to Slone, should such an explosion occur, the box would be blown apart. Since the box is located 10 feet from the belt drive, in the event of an explosion at the box, there would be a reasonable likelihood of injuries to miners who frequently come to the area to clean and inspect the belt drive. Hence, I find that the violation herein to be significant and substantial.

Inasmuch as the violation herein could have resulted in an ignition and hence injury to miners, I conclude that the gravity of the violation is moderately high. Slone's opinion that it took approximately 2 to 3 shifts for the accumulation herein to have occurred was not contradicted. I find a reasonable basis for this opinion taking into account the depth and extent of the accumulation inside the box. Hence I find that the violative conditions should have been noted on a preshift examination and should have been cleaned-up. Hence Respondent's negligence herein is of a moderately high degree. I conclude that a penalty of $100 is appropriate for this violation.

E. Citation No. 3146292.

On April 18, 1990, Slone observed wet float coal dust on previously dusted surfaces beginning at the No. 2 belt drive, extending inby 180 feet, and extending into the crosscuts. The float coal dust which was black in color, was located on the floor, and both ribs. Since Slone's testimony was not contradicted, I find that the Citation he issued, alleging a violation of Section 75.400 supra was properly issued, and that Respondent herein did violate section 75.400 supra. Inasmuch as the accumulations herein were approximity 5,000 feet from the face and were wet, I conclude that the violation was of a low level of gravity. Slone opined that it took 2 to 3 shifts for the accumulations to have occurred. Due to the extent of the accumulations, I find a basis for his conclusion. Hence, Respondent's negligence herein was of a moderate level. I conclude that a penalty of $50 is appropriate for this violation.

F. Citation No. 3146293

Slone testified that on April 19, 1990, he observed an accumulation of wet, loose, coal dust of a depth of 2 to 8 inches commencing at the portal, and extending inby approximately 800 feet under the No. 1 conveyor belt. He said that, in the area in question, the accumulation was under all of the belt's idlers, and extended for the width of the belt. Inasmuch as Slone's testimony was not contradicted, I find that Respondent herein did violate section 75.400 supra as alleged in the Citation that he issued.

Although the accumulation was wet, according to Slone, over a period of time it will dry out and the idlers could roll in the coal. Should these idlers then become hot there is a possibility of a fire. Hence, the violation was a moderate level of gravity. According to Slone, the area in question is subject to daily examinations, and the cited accumulation was "obvious" (Tr. 169). This opinion has not been contradicted, and hence I find that Respondent was moderately negligent in not having cleaned up the accumulation. I find that a penalty $50 is appropriate for this violation.

G. Citation No. 3146294

Slone testified, in essence, that on April 19, 1990, he issued Citation No. 3146294 alleging a violation of Safeguard No. 2969259 dated May 6, 1987, which requires, as pertinent, as follows: ". . . crossover facilities be provided on all belt conveyors in the mine hereafter where men are required to crossover them to do work." [sic]. According to Slone, belts 1, 2, and 4 were provided with crossovers. However, belt No. 5, located more than 1,000 feet from the face, did not have any crossover facilities to allow persons to cross the belt. When Slone made his observations the belt was in operation, and he estimated that the closest crossover to belt No. 5, was approximately 3,000 feet away. According to Slone, persons are required to cross the belt to clean it, and to maintain the rollers and remove dust. He said that crossing the belt while it is in motion without the use of a crossover facility is a hazard.

Slone's testimony was not contradicted, and accordingly I find that the No. 5 belt was not provided with a crossover in violation of Safeguard No. 3146294.

Inasmuch as persons desiring to cross the belt to clean it could either wait until the belt is turned off, or walk to the closest crossover, I find that the violation herein to be only a moderate level of gravity. No facts were adduced with regard to Respondent's negligence, and hence that I cannot find that it was more than a low level. I conclude that a penalty of $30 is appropriate for this violation.

G. Citation No. 3146300

On May 3, 1990, Respondent utilized a miner and two bridge carriers hooked to one another, to remove coal. The bridge carriers are moved in tandem with the miner and operated from the side of the bridge carrier. (Footnote 1) The location of the panel containing the controls for the operation of the bridge carrier requires the miner operating it to crawl alongside the carrier. The operator of the miner is not able to see either the bridge carriers or their operators. Hence, the bridge carriers are provided with a switch which allows the operator of the carrier to de-energize the miner, so as to prevent it, in an emergency, from running into the carrier and possibly crushing its operator. The miner itself does not contain an automatic shut off in the case an emergency.

On May 3, 1990, when the system was observed by Slone, the switch at the bridge carrier to stop the miner in the event of an emergency did not operate, although the switch to stop the carrier itself did function. Slone issued a Citation alleging a violation of Section 75.1725 supra. Slone's testimony that the emergency switch did not operate was not contradicted. Due to the failure of the switch, there was a danger of the miner running into the carriers and thus injuring their operators. I thus conclude that the haulage system at question was not in a safe condition, and hence Section 75.1725 was violated.

Slone testified that in 1977 a fatality had occurred when an operator of a bridge carrier was crushed against the rib by a miner. Slone testified that in backing up the miner, its operator could not see the bridge carriers or their operators. This testimony was not contradicted. Hence, since the emergency switch of the bridge carrier herein did not function, I find that there was a reasonable likelihood of a reasonably serious injury to the operator of the carrier. I thus conclude that the violation was significant and substantial.

Inasmuch the violation herein could have resulted in a fatality it is of a high level of gravity. According to Slone's uncontradicted testimony, Gary Williams, Respondent's superintendent, informed him when he discussed the violation with him that he knew that the switch was out. There were no facts presented at the hearing to mitigate Respondent's negligence. I find that the degree of Respondent's negligence was of a high level. I conclude that a penalty of $300 is appropriate for this violation.

II. Docket No. KENT 90-60

A. Order No. 3146287

In essence Slone testified that when observed by him on April 16, 1990, a portable sanitary toilet located on the surface of Respondent's mine was locked with a padlock. He said that inside the shop a key was hanging on a nail 12 feet above the floor, and a sign indicated that it was a toilet key. Slone issued an Order alleging a violation of 30 C.F.R. 75.500.

Respondent did not contradict Slone's testimony. Hence, I find that Respondent herein did violate Section 75.500 supra which requires the provision of a sanitary toilet.

I find that the level gravity of this violation was low. According to Slone, Williams did not give him any reason why the toilet was locked. There were no facts adduced to mitigate Respondent's negligence. I find that the violation herein resulted from Respondent's intentional act. I find that a penalty of $500 accordingly is appropriate.

B. Citation No. 3146291

At the hearing, Respondent moved to withdraw its Answer with regard to this citation. Accordingly, judgment is entered in favor of the Secretary based on the pleadings. Respondent shall pay a civil penalty of $50, the amount sought in the Secretary's Petition.

III. Docket No. VA 90-62

At the hearing, the Respondent moved to withdraw its pleading in regard to this docket number. The motion was granted, and accordingly judgment is entered on the pleadings in favor of the Secretary. Respondent shall pay a civil penalty of $364, the amount sought in the Secretary's Petition.

ORDER

It is ORDERED that Citation No. 2968870 be DISMISSED. It is further ORDERED that Judgment be entered in favor of the Petitioner with regard to Citation No. 3146291, and regard to Docket VA 90-62. It is further ORDERED that Respondent pay, within 30 days of this Decision, $1,644 as a civil penalty.

Avram Weisberger
Administrative Law Judge

Footnote starts here:

1. Each carrier has its own operator.