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SOL (MSHA) V. MACK ENERGY
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 91-142 A. C. No. 46-06887-03522
v.	Montague Mine
MACK ENERGY COMPANY, RESPONDENT	

DECISION

Appearance: Pamela S. Silverman, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
Gerald P. Duff, Esq., Hanlon, Duff & Paleudis Co., LPA, St. Clairsville, Ohio, for the Respondent.

Before: Judge Maurer

This civil penalty proceeding concerns proposals for the assessment of civil penalties against the respondent, Mack Energy Company (Mack) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), for four alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. At hearing, the parties proposed a settlement concerning three of these section 104(d)(2) orders. Concerning Order No. 3476017, the Secretary proposes to modify it to a section 104(a) citation and reduce the civil penalty from $850 to $395. With regard to Order No. 3476019, the Secretary proposes to also modify that order to a section 104(a) citation and likewise reduce the proposed penalty from $850 to $395. Finally, the Secretary also proposes to modify Order No. 3476030 to a section 104(a) citation and reduce the proposed civil penalty from $1000 to $395. Taking into account the six statutory criteria for civil penalty assessment contained in section 110(i) of the Act, I conclude that the proposed settlements are reasonable, proper and in the public interest. They are therefore approved and will be incorporated into my final decision and order herein.

The issues contained in one section 104(d)(2) Order -- Order No. 3476018 were tried before me on May 30, 1991, in Wheeling, West Virginia. Both parties have filed posthearing briefs, which I have duly considered in making the following decision.

STIPULATIONS

The parties stipulated to the following, which I accepted (Tr. 10-11):

1. Mack Energy Company is the operator of the Montague Mine which is the subject of this proceeding.

2. Operations at the Montague Mine are subject to the Mine Safety and Health Act.

3. The undersigned Administrative Law Judge has jurisdiction to decide this case.

4. MSHA Inspector Sherman Slaughter was acting in an official capacity as a duly authorized representative of the Secretary of Labor when he issued Order No. 3476018 on July 12, 1990.

5. A true copy of Order No. 3476018 was properly served on the operator or its agent.

6. The violation history constitutes 57 assessed violations on 49 inspection days which is an average of 1.165 violations per inspection day.

7. The violation was abated within the time set for abatement.

8. The operator is a moderate sized operator, and the mine is a moderate sized mine. The operator produced 222,000 tons and this mine produced 209,000 tons in 1989.

DISCUSSION

Section 104(d)(2) Order No. 3476018 was issued by MSHA Inspector Sherman Slaughter on July 12, 1990. The inspector cited a violation of the mandatory safety standard found at 30 C.F.R. 77.1004(b)1 and the cited condition or practice is described as follows:

> Loose, cracked, unconsolidated, overhanging rocks existed in the approx. 35 foot highwall of the Pittsburgh 8 pit where an end loader and two rock trucks were loading spoil directly under the rocks and hauling it back along the highwall. The rocks existed in the wall approximately 20 feet above the floor of

> the pit and extended along the wall approximately 120 feet. The affected area was not posted and this was an unsafe ground condition with overhanging highwall. Jack Wilfong, Superintendent, examined this pit area and highwall and directed the end loader and rock trucks to work in the pit. He knew this condition existed. It was raining and had rained during the night previous to this shift.

On July 12, 1990, Inspector Sherman Slaughter conducted an inspection of the Montague Mine. He arrived at the mine site at approximately 6:00 a.m., and met with miner safety representative Larry Curtis, maintenance foreman Bud Conner, and mine superintendent Jack Wilfong. However, only Larry Curtis accompanied Inspector Slaughter on the ensuing inspection.

During that inspection, the inspector examined the highwall in the Pittsburgh Eight Pit and found what he described as loose, cracked rock and two areas of overhanging rock extending out from the wall a distance of approximately 6 and 8 feet, respectively. The overhangs and cracked rock encompassed a distance of approximately 120 feet along the wall.

The 8 foot overhang was supported by a rock which was cracked on both sides and was identified by the inspector as the "No. 1" rock. [The rock the inspector was most concerned with -- see Govt. Ex. Nos. 3 and 4]. On one side of the "No. 1" rock, the crack had widened into an 8 to 10 inch vertical gap filled with loose rock. The cracked gap extended up the wall and curved around toward the overhang where it intersected with another vertical crack. This crack had also widened into a gap of approximately 6 inches and extended up the overhang from where the overhang met the highwall. In addition, another crack extended down the wall behind the "No. 1" rock and the cap rock on top of the overhang consisted of layered or fractured sandstone which was not consolidated with the wall.

Significantly, neither of the aforementioned overhangs were posted as required by 30 C.F.R. 77.1004(b). That fact alone, without more, substantiates a violation of the cited standard. That settled, the next issue to consider is whether the failure to take down the overhangs or post the area is a "significant and substantial" violation of the cited mandatory standard.

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).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Slaughter testified that due to the condition of the highwall and the fact that he observed an end loader and two rock trucks working in the area around the highwall, he believed there to be a significant rock fall hazard if the condition was not abated. Furthermore, I believe the inspector properly

considered the effect of continuing mining operations on the gravity of the situation. The overhanging rocks were large and because of the existing cracks in the wall, reasonably likely to fall if the overhanging conditions were allowed to persist.

Respondent Mack raises two substantive issues in defense of this point. First, they contend that the highwall was safe. They know this because they tried to scale the entire highwall a day or two prior to the citation being issued and no loose material could be brought down. But this defense fails to take into account the dynamics of the environment the highwall exists in. Changes in the weather occur for instance. It was raining at the time the citation was issued and it certainly is in the realm of possibility that it could rain for several days running. A lot of running water could loosen a rock that just a few days before could not be scaled down. The inspector testified from his experience that he has observed many occasions where a rock could not be scaled down off a highwall only to have it fall out of the wall at some later time because of changing pressures in the highwall or because of weather-related deterioration of the highwall.

Secondly, Mack contends that the inspector must be mistaken or even lying about seeing the end loader and rock trucks operating at 11:00 a.m., underneath the overhanging rocks. Upon reflection, it is my view that it is not necessary to belabor the issue of exactly what time the equipment was in service or out of service. Nor is it essential to prove that the equipment was operating directly underneath the overhanging rocks. What is clearly in the record is the inspector's sworn testimony, which I do credit, that he personally observed the equipment working in the area of the overhanging highwall that morning between 10:00 and 11:00 a.m. He testified that he saw the situation at approximately 10:30 a.m. and issued the order at 11:00 a.m. More specifically, he observed the two rock trucks working within 12 to 15 feet of the highwall at that time. Given the condition of the highwall that morning, that was too close in his opinion, and a serious or even fatal injury could reasonably have resulted if any of this overhanging rock material had fallen down on them.

The important features at this stage of the proceeding are that the overhanging highwall had not been taken down or posted and men were working in that area that morning. It is not so important exactly what time it was, or if the equipment that was operating was ever observed directly underneath the overhangs. The rock trucks passing 12 to 15 feet from the wall as they backed in front of the overhang is close enough to make this an "S & S" violation and I so find.

I fully realize that there is a conflict in the evidence. The respondent's witnesses state that the end loader broke down between 9:00 and 10:00 a.m. on the morning in question, whereas

the inspector insists that the two rock trucks were still operating at 10:30 a.m. Since there would be no use for the rock trucks without the end loader to load them, by implication, the respondent's evidence is that they also were not operating at that time. On the other hand, the inspector was at the mine site since 6:00 a.m. that morning. Maybe he saw the rock trucks in operation before 10:30 or even before 10:00 a.m. In any event, he was a very credible witness with no demonstrable bias against this operator. He testified very clearly on direct that he saw the rock trucks operating in the close vicinity of a potentially dangerous overhanging highwall. He was unshakable on cross-examination and I simply believe him. He has no reason to lie about it and I believe the trucks were operating where he says they were that morning at approximately 10:30 a.m., give or take 30 minutes.

The Secretary also urges that I find this violation to be an "unwarrantable failure."

It should be pointed out here that Order No. 3476018 was issued by Inspector Slaughter as a section 104(d)(2) order on July 12, 1990, relying on section 104(d)(1) Order No. 3334014 in the section 104(d) "chain" for its procedural validity. However, on March 15, 1991, Commission Judge George A. Koutras modified that (d)(1) order which had been issued on January 4, 1990, to a section 104(d)(1) citation. Mack Energy Company, 13 FMSHRC 432, 468 (March 1991).

Section 104(d)(1) authorizes the inspector to issue an unwarrantable failure order if, during the same inspection, or any subsequent inspection conducted within 90 days after the issuance of the initial unwarrantable failure citation, he finds another violation of any mandatory safety standard which he believes was also caused by an unwarrantable failure by the operator to comply.

In this case, however, since more than 90 days elapsed between the issuance of section 104(d)(1) Citation No. 3334014 on January 4, 1990, and the purported order issued by Inspector Slaughter on July 12, 1990, it cannot stand as a section 104(d) order. It must therefore necessarily be modified to either a section 104(a) citation or a section 104(d)(1) citation, depending on the unwarrantable failure finding which I make herein.

The Commission has held that an "unwarrantable failure" to comply with a mandatory standard means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghiogheny & Ohio Coal Company,

9 FMSHRC 2007 (December 1987); Secretary of Labor v. Rushton Mining Company, 10 FMSHRC 249 (March 1988). Referring to its prior holding in the Emery Mining case, the Commission stated as follows in Youghiogheny & Ohio, at 9 FMSHRC 2010:

> We stated that whereas negligence is conduct that is "inadvertent," "thoughtless" or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable." Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme.

Superintendent Wilfong was aware of the condition of the highwall, knew it was not posted or "dangered off," and knew men (rock truck drivers) were to be working in the immediate area of the highwall on the morning of July 12, 1990. I therefore find that the failure of Wilfong to either promptly take down the overhanging portions of the highwall or post the dangerous area exposed miners to a falling rock hazard and constitutes negligence of such an aggravated nature so as to establish an "unwarrantable failure" in this case. Under these circumstances, the inspector's "unwarrantable failure" findings will be affirmed herein.

With regard to the assessment of a civil penalty for the violation, the parties have stipulated to the operator's violation history, good faith abatement, and moderate size and I concur in the inspector's high negligence and "S & S" findings. I also find the violation to be a serious one.

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of $700 is reasonable and appropriate.

ORDER

1. Order Nos. 3476017, 3476019, and 3476030 ARE MODIFIED to section 104(a) citations, with "S & S" findings, and as modified, they ARE AFFIRMED.

2. Order No. 3476018 IS MODIFIED to a section 104(d)(1) citation, with an "S & S" finding, and as modified, it IS AFFIRMED.

3. Mack Energy Company is ORDERED TO PAY the sum of $1885 within 30 days of the date of this decision as a civil penalty for the violations found herein.

Roy J. Maurer
Administrative Law Judge

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FOOTNOTES START HERE

1. This section of the standards requires that overhanging highwalls and banks be taken down or in the alternative, the area posted.