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SOL (MSHA) v. C.W. MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

C.W. MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 91-245
A.C. No. 42-01697-03627

Bear Canyon #1

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
Petitioner;
Carl E. Kingston, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of
civil penalties under Section 105(d) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. 801 et seq. the "Act." The
Secretary of Labor on behalf of the Mine Safety and Health
Administration, (MSHA), charges the Respondent, the operator of
the Bear Canyon #1, an underground coal mine, with a 104(d)(1)
violation of a mandatory regulatory standard 30 C.F.R.
75.1101-23(a).

The operator filed a timely answer contesting the alleged
104(d)(1) violation, its characterization as serious and
significant (S&S) and as unwarrantable failure, and the
appropriateness of the proposed penalty.

Pursuant to notice, a hearing on the merits was held before
me at Salt Lake City, Utah, on January 28, 1992.
Stipulations

At the hearing, the parties entered into the record the
following stipulations which I accept as established fact.

1. C.W. Mining Company is engaged in mining and selling of
bituminous coal in the United States and its mining operations
affect interstate commerce.

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2. C.W. Mining Company is the owner and operator of Bear Canyon #1 Mine, MSHA I.D. No. 42-01697.

3. C.W. Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation and order were properly served by a duly authorized representative of the Secretary upon an agent of C.W. Mining Company on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by C.W. Mining Company and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalty will not affect C.W. Mining Company's ability to continue business.

8. C.W. Mining Company is a medium size mine operator with 361,826 tons of production in 1989.

9. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citation.

The Evidence Presented

On September 6, 1990, MSHA issued Section 104(d)(1) Citation No. 3414130 at the Bear Canyon No. 1 Mine operated by C.W. Mining Company. The operator was cited for a violation of 30 C.F.R. 75.1101-23(a) because the operation on at least one occasion had not complied with the approved plan for the storage of self-contained self-rescuers.

At the hearing the Secretary presented credible evidence that supported a finding that the operator violated the cited safety standard as alleged in the citation. The citation reads in part as follows:

The currently approved self-contained self-reserve storage plan was not being complied with by the operator.

The 2nd East working section crew and foreman who observed exiting the mine at the end of their shift in a mantrip which did not have a "SCSR" unit for every person riding the mantrip. The mantrip did not have any "SCSR" units for any of the riders.

On questioning the foreman, it was learned that "SCSR" units were not taken into the mine at the start of the shift. The foreman did not check any of his crew members for "SCSR" units nor did he obtain a unit for himself.

The foreman stated, "he was familiar with the storage plan" but did not check on units.

The violation was promptly abated within 1/2 hour by providing the mantrip with a sufficient number of SCSR units for persons that would be riding the mantrip.

Respondent presented evidence that each of the mantrips it normally used to carry men in and out of the mine had the required number of SCSR units. On September 6, 1990, the foreman checked the SCSR units on the mantrip intended to be used before the men left to go underground. As the mantrip was readied to go underground, it was discovered that the transmission in the mantrip would not operate properly, so the foreman obtained a spare pickup, parked nearby, and used it to haul the men underground. He did not check to see if this mantrip, the spare pickup, had the required SCSR units.

Respondent also presented evidence that each man in the crew was wearing a filter type self rescuer throughout the shift and extra SCSR units were stored throughout the mine underground including enough SCSR units for all of the men stored at the underground area, which was within 300 feet of the site where the men were working. The men were less than 2,000 feet from the nearest portal. The travel time while riding the mantrip from the surface to the working section was ten minutes, and there were locations along the mantrip travelway where SCSR units were stored and available for use if needed.

Respondent asserts that the mantrip is not required to stay in the working section and very often leaves after delivering the

men to their work station. There has never been an occasion in the history of this mine when a miner has had to use a SCSR for any reason. Respondent contends there were no fire hazards existing at the time of the violation.

Discussion and Disposition of the Issues

At the hearing, after all issues were fully litigated and both sides rested, the Judge with consent of the parties and in open court with the respective attorneys and all witnesses present, stated his impressions of what the evidence presented established. The Judge stated that there was a violation of the mandatory safety standard 30 C.F.R. 75.1101-23(a) as alleged in the citation, the gravity of the violation was serious with a potential of very serious injury and possible death, that negligence was high and that the violation could well have resulted from the operator's unwarrantable failure. The Judge also stated the evidence established that the violation was not S&S. Even though the violation caused a discrete safety hazard that could result in serious injury or death, the evidence was insufficient to establish that as a result of this isolated violation, there was a reasonable likelihood, evaluated in terms of continued normal mining operation, that the hazard contributed to would result in serious injury.

The parties, nevertheless, at the conclusion of the hearing requested time to prepare and file written post-hearing briefs. Within the 20 days allowed for filing of post-hearing briefs, the parties reached and filed a settlement agreement covering all issues and moved for approval of the settlement agreement. The parties propose to modify the citation from a Section 104(d)(1) citation to a 104(a) non-S&S citation and amend the proposed penalty to \$500.

Based upon the evidence presented at the hearing, I find the provision of the settlement agreement are appropriate, supported by the evidence and consistent with the criteria in Section 110(i) of the Act. The amended proposed penalty of \$500 is assessed. It will not affect the operator's ability to remain in business.

ORDER

1. Citation No. 3414130 is modified to delete the characterization "significant and substantial" and, as so modified, the citation is AFFIRMED and a penalty of \$500 is ASSESSED.

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2. Respondent is ORDERED TO PAY to the Secretary of Labor a civil penalty in the sum of \$500 in satisfaction of the citation in question within forty (40) days of the date of this decision and order, and upon receipt of payment by the Petitioner, this proceeding is DISMISSED.

August F. Cetti
Administrative Law Judge