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MSHA V. INTERNATIONAL ANTHRACITE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 92-230
Petitioner	:	A.C. No. 36-01781-03549
v.	:	
	:	B & M Tunnel
INTERNATIONAL ANTHRACITE CORP.	:	
Respondent	:	

DECISION

Appearances: Gayle M. Green, Esq. and Linda Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania; Mr. Ronald Lickman, International Anthracite Corporation, Pottsville, Pennsylvania, pro se.

Before: Judge Weisberger

This case is before me based on a petition for assessment of civil penalty predicated upon the issuance of 3 Section 104(g)(1) orders alleging violations of various training requirements set forth in Part 48, Sub-Part B, of volume 30, Code of Federal Regulations. Pursuant to Notice, the case was scheduled and heard in Reading, Pennsylvania on July 14, 1992. Harold Glandon testified for the Secretary of Labor (Petitioner), and Ronald Lickman testified for the Operator (Respondent). It was agreed by the parties that Lickman's testimony and arguments set forth in Harriman Coal Corporation, Docket No. PENN 92-305, heard on the same date, are to be incorporated by reference herein.

Findings of Fact and Discussion

I. Order No. 3080095

On May 13, 1991, Harold Glandon, an MSHA Inspector, inspected Respondent's B & M Tunnel operation. Respondent had purchased that operation on April 26, 1991, and had never mined coal there. At the date of the inspection, there was no mining taking place at the operation and it was temporarily abandoned. However, Respondent's representative indicated Respondent "never abandoned the mine". (Tr.93) On the day of Glandon's inspection,

one of Respondent's employees, David Labenski, was operating a caterpillar bulldozer loading coal on trucks. Two other employees, Robert Searles and Ron Lickman, Jr., were observed operating a bulldozer and backhoe, respectively, grading and filling in various voids.

a. Applicability of Part 48, subpart B, supra to Respondent's Operation

Respondent argues in its brief, in essence, that it is not subject to the requirements of Part 48, inasmuch as no coal was being mined, or produced on the dates the citations herein were issued. I reject Respondent's argument for the following reasons.

Essentially, Part 48 Subpart B, supra, requires certified training for miners working at surface mines and surface areas of underground mines. Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 defines a mine, inter alia as "..lands, excavations, ... used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits ... ." Respondent's employees were engaged in filling voids which had resulted from the extraction of coal (Tr.10, 14, 88). As such, the site at issue falls within the statutory definition of a mine.

b. Violation of 30 C.F.R. 48.25

According to Ronald Lickman, Respondent's President, Ron Lickman, Jr., had been operating construction equipment for 15 years. Ron Lickman, Jr., told Glandon that he was experienced with the 245 backhoe as he had performed construction work. Further, Glandon indicated that he appeared to know how to operate the backhoe, and that the equipment and the work practices looked good. Also, Ron Lickman, Jr., had received 8 hours training at another site. However, he informed Glandon that he was not certified as an experienced miner, and that he had not received 16 hours training, nor had he received 8 hours training on the site.

Glandon issued an Order pursuant to Section 104(g)(i) of the Federal Mine Safety and Health Act of 1977, which, provides as follows:

> If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and

to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 C.F.R. 48.25 provides as follows:

> (a) Each new miner shall receive no less than 24 hours of training as prescribed in this section. Except as otherwise provided in this paragraph, new miners shall receive this training before they are assigned to work duties. At the discretion of the District Manager, new miners may receive a portion of this training after assignment to work duties: Provided, that no less than 8 hours of training shall in all cases be given to new miners before they are assigned to work duties. (Emphasis added)

30 C.F.R. 48.22(c) defines a "new miner" as a miner who is not an experience miner. Section 48.22(b) supra defines an "experienced miner" as either a miner who was employed as a miner on the effective date of the regulations i.e. October 13, 1978, or one who has received training from an appropriate state agency within the preceding 11 months, or one who has had a least 12 months experience working in a surface mine or surface of an underground mine during the preceding 3 years, or one who has received the training for a new miner within the proceeding 12 months.

Section 48.22(a)(1) defines a "miner", inter alia as a person working in a surface mine or surface areas of an underground mine and "regularly exposed to mine hazards."

Inasmuch as Ron Lickman, Jr., was engaged in operating heavy equipment, he clearly was exposed to the hazard of operating this equipment at the mine site in question. Accordingly he is to be considered a "miner" within the purview of Section 48.22 supra. Although he indicated to Glandon that had received 8 hours training at another site, there is no evidence that he had either received training acceptable to MSHA from an appropriate state agency within the preceding of 12 months, or had received training for a new miner within the preceding 12 months. Also, there is no evidence that he was employed as a miner as of the date the regulation was made effective i.e. October 13, 1978. Further, although he had experience operating heavy equipment, there is no evidence that he had at least 12 months experienced working in a surface mine or surface area of an underground mine during the preceding three years. Hence, I conclude that he was not an experienced miner within the purview of Section 48.22(b), and accordingly must be considered a new miner.

Section 48.25 supra, unequivocally provides that a new miner shall be given "no less than eight hours of training... before they are assigned to work duties." Ron Lickman, Jr., did not receive 8 hours of training before he was assigned to work duties at the subject mine. Hence, he was not given the training provided for in Section 48.25 supra. Accordingly, I conclude that Order No. 3080095 was properly issued.

c. Significant and Substantial

According to Glandon, an accident was highly likely to have occurred as a consequence of Lickman not having been provided with new miner training pursuant to Section 48.25 supra, and that in the event of a accident there could be a serious injury. He thus concluded that the violation was "significant and substantial". In this connection he noted that slope of the area in question was approximately 20 degrees, there was loose earth from the grading operation, and the earth was unstable. He opined that if the earth would shift, the equipment being operated could roll down the void.

However, Lickman was experienced operating the 245 backhoe in question, and according to Glandon, appeared to know how to operate that equipment. Also, Lickman and had experience at operating heavy equipment at construction sites. Based on these factors, I conclude that it has not been established that there was a reasonable likelihood that the hazard contributed to by the lack Section 48 training would have resulted in an event in which there is an injury. (See U.S. Steel Mining Company, 6 FMSHRC 1834, 1836 (August 1984).

Accordingly I conclude that it has not been established that the violation herein is significant and substantial (Mathies Coal Company, 6 FMSHRC 1 (January 1984).

d. Penalty

Respondent's management should have been aware that it had the responsibility of providing Lickman with 8 hours training prior to his being assigned work duties. However, the gravity of the violation herein is mitigated by Lickman's experience in operating the equipment in question at construction sites. I find that a penalty of $100 is appropriate for this violation.

II. Order No. 3080096

On May 13, 1991, Glandon observed David Labenski operating a caterpillar front end loader loading trucks with coal. According to Glandon, he "talked to Mr. Labenski and his certification his annual refresher training, had expired five months previously" (Tr.24) (sic). Glandon issued an Order pursuant to Section

104(g)(1) supra, citing a violation of 30 C.F.R. 48.28.

Section 48.28(a) supra, provides, as pertinent, that "each miner shall receive a minimum of 8 hours of annual refresher training". Inasmuch as Labenski had not received this annual training, Glandon's order was properly issued.

Labenski was observed operating the loader in question on level terrain. According to Glandon, if the loader turned over with the bucket in a raised position, Labenski could have become injured, even though the loader had roll-over protection. However, according to Lickman, Labenski had worked on this site several years and was quite proficient with the loader. Based on Labenski's experience, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event contributed to by Labenski's lack of annual refresher training. I thus conclude that it has not been established that the violation was "significant and substantial" (See U.S. Steel, supra.).

Considering the terrain on which the vehicle in question was being operated by Labenski, and experience on the site, I find that the gravity of the violation herein to be considerably mitigated. I find that a penalty of $50 is appropriate for this violation.

III. Order No. 3080097

On May 14, 1991, Glandon observed Roberts Searles operating a Caterpillar bulldozer. Glandon asked him if he had received newly employed experience miner training, and he indicated that he had not. Searles, who appeared to Glandon to know what he was doing and was operating the dozer safely, informed Glandon that he had worked at another of Lickman's job sites where he had received training and a certificate.

Glandon issued Order No. 3080097 alleging a violation 30 C.F.R. 48.26. Section 48.26 supra requires a newly employed experienced miner to receive training, "...before such miner is assigned to work duties." This training includes, inter alia, an introduction to the work environment which includes "...a visit and tour of "the mine", as well as instruction concerning the ground control plans "at the mine", and procedures for working safety in areas of pits and spoil banks. (Emphasis added). It is clear that Section 48.26 supra, requires instruction regarding conditions at the mine where the experienced miner is "newly" employed, and currently working. Inasmuch, as Searles was not provided with such training before he was assigned to his work duties at the subject site, Respondent herein did violate Section\

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48.26 supra.(Footnote 1)

Since Searles appeared to know what he was doing, was operating safely, and had received training at another Lickman's jobs sites, I conclude that the violation herein was not "significant and substantial". I find that a penalty of $75 is appropriate for this violation.

ORDER

It is ORDERED that Order Nos. 3080095, 3080096 and 3080097, be amended to reflect the fact that the violations cited therein are not "significant and substantial". It is further ORDERED that Respondent pay a civil penalty of $225 for the violations found herein, and that such penalty be paid within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

Distribution:

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1In light of this decision, I deny Respondent's Motion, made at the hearing, to dismiss the order issued for Searle's lack of training. Since he had not been provided with the proper training before he was assigned to his work duties, as required of Section 48.26 supra, Glandon properly withdrew Searles.