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MSHA V. AMERICAN MINE SERVICES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5266/FAX (303) 844-5268

December 30, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 91-563
	:	A.C. No. 05-03672-03508 X02
v.	:	Docket No. WEST 91-624
	:	A.C. No. 05-03672-03509 X02
AMERICAN MINE SERVICES, INCORPORATED, Respondent	:	West Elk Mine

DECISION

Appearances: Susan J. Eckert, Esq., Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Michael Schultz, AMERICAN MINE SERVICES, INC., Aurora, Colorado, for Respondent.

Before: Judge Morris

The Secretary of Labor, in these civil penalty proceedings charges American Mine Services, Inc., ("AMS") with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., (the "Act").

A hearing on the merits commenced in Denver, Colorado, on March 10, 1992; a further hearing was on May 29, 1992.

The parties waived the filing of post-trial briefs.

Stipulation

At the commencement of the hearing, the parties stipulated as follows:

American Mine Services, Inc. is engaged in providing services as such services relate to the mining of coal and its mining operations affect interstate commerce.

American Mine Services, Inc. is an operator at the West Elk Mine, MSHA ID number 05-03672-03509 X02.

American Mine Services, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., Section 801, et seq., hereafter called the Act.

The subject citations and orders were properly served by a duly authorized representative of the Secretary upon an agent of the Respondent on the date and place stated therein and may be admitted into evidence for purposes of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

The exhibits offered by the Respondent 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.

The proposed penalties will not affect the Respondent's ability to continue business.

The operator demonstrated good faith in abating the violations.

American Mine Services, Inc. is a medium-sized contractor with total control hours worked for all contracts of 80,872 in 1991.

A 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 citations and orders.

West 91-563

This case involves imminent danger Order No. 3583894 issued under section 107(a) of the Act. The order was followed by Citation No. 3583895 issued under section 104(a) of the Act.

Order 3583894 stated as follows:

> The following condition was obsrved, (sic) an employee was observed useing (sic) a cutting torch at eye level. The employee was appoximately (sic) 12" inch away and cutting molten metal the molten metal was traving (sic) in all direction in the face area. The employee had no protective equipment on, no faceshield or goggles were being worn by the employee doing the work. This type of hazard could of been serious consequence or caused serious physical harm. (Separate citation will be issued for the violation)

Citation No. 3583895, issued under section 104(a) of the Act alleges AMS violated 30 C.F.R. 77.1710(a). (Footnote 1)

The evidence: as MSHA Inspector David Head, an experienced electrical inspector and a certified welder, crossed the West Elk parking lot he saw AMS employee Jones using a cutting torch at eye level. Jones was welding with an oxygen acetylene torch without a face shield or eye protection. (Tr. 16, 28).

The inspector didn't know if he could reach Jones in time to stop an accident. He reached Jones as quickly as he could. (Tr. 20).

The molten metal from half inch thick iron was being blown back into Jones' face. The welding light can be harmful to the eyes in the absence of properly tinted lens.

When he observed the situation, Inspector Head stopped Jones. In five minutes they located Jones' supervisor and AMS furnished a pair of welding goggles with tinted glass. (Tr. 19).

Jones had been wearing a pair of regular eye glasses with wire frames. Inspector Head did not consider the glasses the proper protective equipment since there was no shielding around the sides. In addition, the regulation requires a face shield or goggles.

The above facts justify the imminent danger order under section 107(a) of the Act since an imminent danger is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" 30 U.S.C. 802(j), Rochester & Pittsburgh Coal Co. 11 FMSHRC 2159 (1989), (R&P).

See also Wyoming Fuel Company, 14 FMSHRC 1282, 1290-92 (August 1992).

In R&P as well as in Utah Power & Light Co. 13 FMSHRC 1617, 1621 (1991), the Commission stated the inspector must be accorded considerable discretion in determining whether an imminent danger

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1 77.1710 Protective clothing; requirements.

> Each employee working in a surface coal mine or in the surface work areas of an unerground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> (a) Protective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist.

exists because an inspector must act with dispatch to eliminate conditions that create such danger. In the instant case loss of sight certainly involves serious physical harm justifying the inspector's quick action.

AMS argues Jones merely made a bad judgment call and no imminent danger existed. For the above reasons and the cited case law, I find this argument without merit. The imminent danger order was properly issued. Order No. 3583894 should be affirmed.

On the merits of the subsequent welding citation, AMS's witness G. Wayne Jones generally confirmed the inspector's testimony. He also indicated that the company provided goggles and a face shield.

Mr. Jones has used a cutting torch for 17 years. He claimed he was protected from sparks by his welding technique and his regular eye glasses. I am not persuaded since Mr. Jones agreed molten metal could bounce back in his face. In addition, he indicated his technique controlled the sparks only about 95 percent of the time. (Tr. 36).

The Secretary contends the violation was significant and substantial. In this regard the Commission has ruled that a violation is properly designated as being S&S" if, based on the particular facts surrounding the violation, there exists a rea-sonable 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:

> In order to establish that a violation of a mandatory standard is significant and sub-stantial under National Gypsum the Secretary 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.

See also Austin Power Co. v. Secretary 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987)(approving Mathies criteria). The question of whether any specific viola-tion is S&S must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988);

Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2011-12 (December 1987).

In connection with the welding citation, and for the above reasons the evidence of the parties supports all the S&S criteria.

In assessing any civil penalties AMS should be considered as moderately negligent since it did not insist its employees use goggles.

The likelihood of a severe eye injury or possible loss of sight establish a high level of gravity.

Citation No. 3583895 should be affirmed.

WEST 91-624

Citation No. 3584059, issued under section 104(d)(1) of the Act, alleges AMC violated 30 C.F.R. 1400-3. (Footnote 2)

The citation reads as follows:

> The day shift hoistman Charles Treadwell under the supervision of George Willis - mine Foreman, failed to conduct the required daily safety examinations of the hoisting equipment located at x-cut 93 of the southmains intakes to insure that the hoisting equipment was maintained in a safe condition pryer (sic) to transporting 3 persons down the ventilation shaft. Mr. Treadwell stated that he had had a rather busy and hectic morning and had neglected to conduct the required safety checks on the hoist equipment. As a result of this, equipment failure 3 men Bob Hales-miner, Mike Lane-engineer and Tom Anderson-engineer were trapped approximately 200 feet below the collar deck in the ventilation shaft for about 2 1/2 hours.

Discussion

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2 75.1400.3 Daily examination of hoisting equipment.

> Hoists and elevators shall be examined daily [list of required examinations] and such examinations shall include, but not be limited to, the following:

AMC agrees that an examination of the hoisting equipment was not conducted prior to transporting three persons down the shaft. However, the operator insists and its evidence establishes that an inspection was conducted during the last working day and the day shift. As a result AMS contends the hoistman had until the end of the day of the inspector's visit to conduct an inspection and enter it into the log book.

The issue presented is whether the "daily" inspections required by 30 C.F.R. 75.1400-3 are to be made at the beginning of the shift or at any time during the shift.

Congress considered this regulation and stated that hoisting equipment should be "examined daily." Further, Congress stated that "[t]his standard should keep mine hoist accidents to a mini-mum and impart to mine management and workers the essential ele-ments that enter into safe installation and maintenance of hoist-ing equipment. Hoisting of men and materials is an essential operation in many mines and has become so commonplace that some ignore day-to-day inspections or become lax in the operating phases. Where shaft or slope accidents have occurred because of failure of the hoisting equipment, they have been due almost always to lack of inspections and to lack of proper maintenance of the equipment." See S. Rep. No. 91-411, 91st Congress, 1st Session, (1975) reprinted in Senate Subcommittee on Labor Legis-lative History of the Federal Mine Safety and Health Act of 1977 at 207 (Legis. Hist.).

The views of the Secretary, who is charged with the protec-tion of the safety of the nations' miners, are entitled to due deference. Missouri Rock, Inc., 11 FMSHRC 136 (1987); Secretary of Labor on behalf of John W. Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (1989).

Accordingly, the daily inspections required by C.F.R. 75.1400-3 are to be made at the commencement of the shift or at least prio to beginning of any hoist functions. (Tr. 57, 101, 102).

The inspector concluded this was in S&S violation. The applicable case law as to S&S is set for the previous citation.

Under the Mathies formulation there was a violation of 30 C.F.R. 75.1400-3 in that the hoist was not examined. A measure of danger was contributed to by the violation. There was also a reasonable likelihood that the hazard would result in an accident since an examination would have disclosed a deficiency of the equipment. Finally, the evidence established that there was a reasonable likelihood that the accident would be of a reasonably serious nature. The three workers trapped in the bottom deck work platform could have been struck by any falling debris from the derailed collar doors.

The S&S allegations should be affirmed.

UNWARRANTABLE FAILURE

The Secretary contends this violation was due to the unwarrantable failure of AMS to comply with the regulation.

The special finding of unwarrantable failure, as set forth in section 104(d) of the Mine Act, 30 U.S.C. 814(d), may be made by authorized Secretarial representatives in issuing cita-tions and withdrawal orders pursuant to section 104. In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987), the Commission defined unwarrantable failure as "aggrava-ted conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery examined the meaning of unwarrantable failure and referred to it in such terms as "indifference," "willful intent," "serious lack of rea-sonable care," and "knowing violation." 9 FMSHRC at 2003. In Emery, the Commission also pointed out that in Eastern Associated Coal Co., 3 IBMA 331 (1974), the Interior Board of Mine Opera-tions Appeals ("Board") had defined unwarrantable failure as "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." 9 FMSHRC 2003, citing Eastern, 3 IBMA at 356 n.5 (emphasis added).

To establish unwarrantable failure the Secretary relies on the fact that Inspector Gutierrez issued a citation for a violation of 30 C.F.R. 75.1400-4 (certification by examiner) apparently five minutes before he issued the contested citation (compare P-2 and P-3). Without further evidence I do not find that the described unrelated circumstances constitute aggravated conduct as required by Emery. The failure to check the hoist before lowering the men was mere negligence, not aggravated conduct.

The allegations of unwarrantable failure should be stricken.

In assessing any civil penalties AMS should be considered as moderately negligent. Even though the operator had checked the hoist on the previous shift, the company was nevertheless as a minimum required to check the hoist before lowering the three miners.

The previous S&S discussion herein indicates a high level of gravity on the part of AMS.

Citation No. 3584059, as modified, should be affirmed.

Order No. 3584060, issued under section 104(d)(1) of the Act, alleges AMC violated 30 C.F.R. 75.220(a)(1). (Footnote 3)

The citation reads as follows:

> This contractor operator has experienced a hoisting accident which resulted in having 3 persons trapped 200 ft. below the shaft collar of the ventilation shaft located at x-cut 93 of the southmains intakes for approximately 2 1/2 hours George Willis-mine foreman and Charles Treadwell admitted that just pryor (sic) to the hoisting accident that Bob Hales-miner, Mike Lane-engineer and Tom Anderson-engineer were lower from the shaft collar on the man-cage approximately 30 ft. down onto the work platform at which time the man-cage was released. These men were then lowered via riding on to of the workdeck another 170 ft. to an area approximately 20 ft. below the collar where the work platform stopped. The hoist operator for some unknown reason decided to bring the man cage up to the collar area. The metal doors at the collar area were in a closed position and the cage rammed right through the doors resulting in derailing the two doors, the impact in turn caused the man-cage and crosshead frame to bind on the guide ropes at a right angle determined to be approximately 30 degrees. As a result of the cage and crosshead binding on the guide ropes and jammed on the doors 3 persons on the work platform were trapped in side the shaft for approximately 2 1/2 hours because the same guide ropes that were bind-ing on the man cage and cross frame are the same ropes that lower and raise the work platform.
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> The approved agreement between American Mine Services Inc. and MSHA sections 75.220(a)(1) and 75316 in page 11 states and strictly prohibits the use of the work

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3 75.220 Roof control plan.

> (a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological condi-tions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

platform to transport workers/miners up or down the shaft.

The roof control plan provides, in part that, "[u]nder normal operating conditions the work platform will not be moved with workers on board." (Tr. 137, Ex. P-5, page 11).

DISCUSSION

AMS admits it violated the roof control plan (Tr. 12) in transporting workers on the work platform. However, AMS denies that the violation was severe.

The issue of severity, under the Mine Act, should be properly discussed in assessing a civil penalty. In view of the uncontroverted evidence that these workers were lowered on the work platform and in view of AMS's admission of liability I conclude that Order No. 3584060 should be affirmed.

In assessing civil penalties AMS should be considered negligent since the company knew the roof control plan requirement. It nevertheless lowered the miners in the bottom deck work platform instead of in the man cage. It is not an excuse that the miners were inspecting the shaft at the time of the accident.

The gravity of the violation is high. In arriving at this conclusion, I find the three miners were trapped for 2 1/2 hours in the shaft. They were in a precarious position and the derailed collar doors could have fallen and caused severe injuries.

A portion of this case deals with the cause of the accident. In short, was there a defective limit switch as Mr. Gutierrez contends or was there no switch as MSHA's witness Mr. Taylor and AMS's witness Mr. Hancock stated. Mr. Hancock has considerable experience with shafts and hoists. I credit his testimony together with MSHA's witness Mr. Taylor. In short, the hoist was not equipped with an upper limit switch. (See also Ex. P-7). However, the failure to have such a switch would only render the situation more hazardous rather than less hazardous.

The S&S allegations, in view of the uncontroverted evidence should be affirmed.

For the above reasons Order No. 3584060 should be affirmed.

Further Civil Penalties Criteria

AMS's negligence and the gravity of the violations have been previously considered as to each citation.

Additional criteria for assessing civil penalties is contained in section 110(i) of the Act.

According to the stipulation AMS is a medium sized contractor and the penalties assessed herein are appropriate.

The stipulation further provides that the proposed penalties will not affect the company's ability to continue business.

The operator's prior history is favorable since only 21 violations were assessed against the company in the two years ending December 17, 1990. Further, AMS had four violations assessed in the two years ending January 22, 1991.

AMS is entitled to statutory good faith since it abated the violations. (Ex. P-1, P-8).

Based on the statutory criteria for assessing civil penalties and for the above reasons I enter the following:

ORDER

West 91-563

1. Order No. 3583894 is AFFIRMED.

2. Citation No. 3583895 is AFFIRMED and a penalty of $600 is ASSESSED.

West 91-624

3. Citation No. 3584059, as modified, is AFFIRMED and a civil penalty of $400 is ASSESSED.

4. Order No. 3584060 is AFFIRMED and a civil penalty of $600 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

Susan J. Eckert, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Michael Schultz, AMERICAN MINE SERVICES, INC., 14160 East Evans Avenue, Aurora, CO 80014-1431 (Certified Mail)
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