CCASE:
CONSOLIDATION COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 91-147-R
	:	Citation No. 3701661; 1/17/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 91-148-R
	:	Citation No. 3701662; 1/17/91
	:	Docket No. PENN 91-149-R
	:	Citation No. 3701663; 1/18/91
	:	
	:	Robena Preparation Plant
	:	
	:	Mine ID 36-04175
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 91-391
	:	A.C. No. 36-04175-03557
v.	:	
	:	Robena Preparation Plant
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Daniel E. Roger, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Consol;
Richard Rosenblitt, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Weisberger

At issue in these consolidated cases is the validity of a withdrawal order issued under Section 107 of the Federal Mine Safety and Health Act of 1977 ("the Act"). Also at issue are citations alleging violations of 30 C.F.R. 77.1605(k), and 30 C.F.R. 77.1713(a). Subsequent to notice, the cases were scheduled and heard in Washington, Pennsylvania, on September 22, 1992. At the hearing, George Rantovich, Robert W. Newhouse, and Robert L. Campbell testified for the Secretary (Petitioner). Edward F. Bodkin, Jr., testified for the Operator (Respondent). Also, subsequent to the hearing, Petitioner offered in evidence Government Exhibit No. 7 which was not

objected to by Respondent. Accordingly, Government Exhibit No. 7 is hereby admitted. Petitioner and Respondent filed post hearing briefs on December 7, 1992 and December 16, 1992, respectively.

Findings of Fact of Discussions

I. Citation No. 3701662 (Violation of 30 C.F.R. 77.1605(k))

On January 17, 1991, MSHA inspector George Rantovich issued Citation No. 3701662 alleging a violation of 30 C.F.R. 77.1605(k) in that at various locations along both sides of the elevated haulage road at Respondent's Robena preparation plant ("Robena")1 adequate berms were not provided.2 Section 77.1605(k) supra, provides as follows "Berms or guards shall be provided on the outer bank of elevated roadways".

The terrain at the Robena facility is hilly. A haulage road traverses this terrain from the plant to a refuse dump. The haulage road is at a 10 degree incline from the plant to a point where the road crosses railroad tracks. From there to a "Y" intersection the slope of the grade is 5 degrees. Terex haulage trucks regularly travel from the plant to the refuse dump and back.

On January 17, 1991, George Rantovich, an MSHA inspector, inspected Robena along with Robert Campbell, Robert W. Newhouse, and Edward F. Bodkin, Jr. Rantovich walked on the haulage road from the plant to the "Y" intersection. Rantovich testified that there was a "definite drop off" on both sides of the roadway up to 3 to 4 feet in some areas (Tr. 26).

1Robena is a facility that cleans coal. It is not physically connected to an underground mine, nor it is dedicated to one. The Dilworth Mine, ("Dilworth") operated by Respondent is located approximately eight miles away. Coal is normally transported from Dilworth mine to Robena, by way of barges that travel a river route. Dilworth and Robena have separate mine identification numbers and are required to maintain separate records.

2The citation issued by Rantovich alleges that adequate beams were not provided on the haulage road from the preparation plant, "..to the slate dump". Newhouse and Rantovich conceded that they walked on the haulage road only as far as the "Y" intersection and did not reach the slate dump. I find that the error in the citation with regard to the extent of the area cited is not fatal, inasmuch as Bodkin indicated that Newhouse had pointed out to him the area of inadequate berms, and Respondent does not allege any prejudice as a result of the error in the citation.

Newhouse, an MSHA supervisory inspector testified that he measured a 32 degree drop off on the left side of the roadway. He indicated that there was a zero to 20 degree drop off on the right side from the roadway to a ditch which ran alongside the roadway from the plant area up to the intersection with the railroad track. He said that from the railroad track to the "Y" intersection, the bed of the roadway was raised up to 20 to 25 feet above the natural terrain. Respondent did not impeach or rebut the testimony of Newhouse and Rantovich in these regards. Hence I conclude that the roadway was elevated.

Newhouse estimated that 50 percent of the berms on both sides of the road between the plant and the Y intersection were inadequate as they were only 25 to 26 inches high. In essence, Rantovich and Newhouse both indicated that the road was muddy and slippery, and that berms less than 42 inches high, the height of the axles of the terex vehicles in question, are not adequate to stop these vehicles from going over the embankment. Newhouse said that Bodkin, Robena plant foreman, agreed that there was an inadequate berm. Bodkin did not contradict the testimony of Rantovich and Newhouse with regard to the existence of areas where the berms were less than the axle height of 42 inches. Nor did Bodkin impeach or contradict the testimony of Newhouse that he (Bodkin) said that the berm was inadequate. Also, Respondent did not impeach or contradict the testimony of Petitioner's witnesses that the road was elevated in relation to the adjacent land.

Pursuant to Section 77.1605(k), supra berms must be provided on the outer bank of elevated roadways. A "berm" is defined in 30 C.F.R. 70.2(d), as ..."a pile or mound of material capable of restraining a vehicle;"

In Secretary v. U.S. Steel Corp., 5 FMSHRC 3 (1983), the Commission addressed what is meant by "restraining a vehicle".

> Restraining a vehicle does not mean . . . absolute prevention of over travel by all vehicles under all circumstances. Given the heavy weights and large sizes of many mine vehicles, that would probably be an unattainable regulatory goal. Rather, the standard requires reasonable control and guidance of vehicular motion.

The Commission in U.S. Steel, supra, at 5 held as follows:

> We hold that the adequacy of a berm or guard under section 77.1605(k) is to be measured against the standard of whether the berm or guard is one a reasonably prudent person familiar with all the facts, including those peculiar to the mining industry, would have constructed to provide the protection intended by

the standard.

Newhouse testified, in essence, that the protection intended by Section 77.1605(k) supra requires berms to be at least the height of the axle of the largest vehicle normally using the road in question. Rantovich measured a terex's axle height and noted it was 42 inches. MSHA has in the past notified operators of this height requirement.

Robert L. Campbell, Chairman of the Union's Health and Safety Committee, and an employee of the operator, testified that, for the last six years, during monthly inspections the union and the operator measure the berms to determine whether they are at least 42" high. According to Campbell, if a section of the berm is less than 42", the operator immediately builds the berm to at least the 42" level. This testimony was not inspected or contradicted by Respondent.

I conclude, considering all the above, that the berms less than 42" high were not adequate under Section 77.1605(k), supra, as they were not capable of restraining the vehicles in question.

Also, according to Rantovich, at 3 to 4 locations on both sides of the haulage road for distances between 15 to 20 feet, there were no berms at all. He indicated that in all these areas the roadway was elevated. He indicated that near the railroad track crossing and for approximately 15 feet there were no berms, there was an immediate drop off of 2 to 3 feet which tapered off towards the ditch. Newhouse estimated that 10 percent of the roadway did not have any berms.

Bodkin indicated that, for purposes of drainage, a bulldozer had cut through and eliminated approximately 12 to 15 feet of the berms on the right side of the roadway approximately 20 to 30 feet from the intersection with the railroad track in the direction the "Y" intersection.

Although the testimony of Bodkin is not congruent with that of Rantovich's testimony with regard to the area where there were no berms, his testimony does not contradict that of Rantovich and Newhouse with regard to the existence of at least one elevated area where there were no berms.

Based on all the above, I find that on elevated portions of the roadway, there were areas without berms, and other areas where the berms were not adequate. Therefore, it has been established that Respondent violated Section 77.1605(k) supra.

II. Order No. 3701661 (imminent danger withdrawal order)

Rantovich indicated that when he walked the haulage road at approximately 11:00 p.m., on January 17, 1991, it was slippery

and some of the mud on the road was ankle high. Rantovich stopped a terex driver who was coming down the haulage road toward the plant, and asked him if he had any problems. Rantovich said that the driver told him that he had problems controlling the vehicle as it was fish tailing. Rantovich had the terex driver turn around and head back up the roadway so that the roadway could be closed. According to Rantovich as the terex went back up the hill, its traction was "a little slippery but he (the driver) turned around and got started up once he got started up he was alright" (Tr. 41)

Bodkin indicated that he had been on the premises since approximately 2:30 p.m., and had not received any complaints with regards of the condition in the road. He indicated that, specifically, neither of the terex operators who were on duty during the night shift had complained of any problems with the roadway. I do not find this testimony sufficient to rebut the testimony of Rantovich as to what was told to him by one of the terex operators. Further, Bodkin did not specifically rebut the testimony of Rantovich as to his having observed that the traction of the terex vehicle was "slippery". According to Newhouse, if a vehicle would leave the road due to not being stopped by a berm, it could travel 20 to 25 feet on the right side before it hit something. In contrast, Bodkin testified that if a truck fell over the hill in the area where there was a cut in the berm it would only go 5 to 8 feet. He also said that vehicles travel on the left side of any 5 to 10 m.p.h., and that any danger is further minimized by the fact that the "bowl" of the terex can be dropped and "that would be like a brake" (Tr.154).

Rantovich took into account the muddy, slippery condition of the road as well as the inadequate berms, and issued a section 107 withdrawal order.

The Commission, in Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159 (November 1989), the Commission, at 2164 noted the recognition the seventh circuit accorded to the importance of the inspector's judgment as follows:

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives,and he must ensure that the statue is enforced for the protection of these lives. His total concern is the safety of life and limb.... We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority. (emphasis added) Old Ben Coal Corp. v. Interior Bd of Mine, Op. App., 523 F.2d 25, at 31 (7th Cir. 1975)

Recently, the Commission in Utah Power and Light Company,

13 FMSHRC 1617 at 1627 affirmed its holding in Rochester and Pittsburgh supra. that "...an inspector must have considerable discretion in determining whether an imminent danger exist." In its analysis of whether an inspector's discretion has been abused, the Commission, in Utah Power and Light Company, supra, at 1622 set forth as follows: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time".

Taking into account the slippery condition of the road, its grade, the degree of drop off at either side, the lack of adequate berms for significant distances, and the fact that the road had two curves, I conclude that Rantovich did not abuse his discretion in finding an imminent danger herein, and that his conclusion in this regard is affirmed.

III. Citation No. 3701662

A. Significant and Substantial

I find that the record establishes that, as alleged by Rantovich in the Citation that he issued, the violation was significant and substantial. Clearly, the lack of adequate berms contributed to the hazard of a truck leaving the slippery roadway, and sliding off the road. For the reasons set forth above in the discussion of the issue of imminent danger, II, infra, I conclude that there was reasonable likelihood that the hazard contributed to by the lack of adequate berms would result in a injury. Respondent did not impeach or contradict the testimony of Petitioner's witnesses that, in essence, there was a reasonable likelihood that the resulting injury will be of a reasonably serious nature. Thus I accept their testimony in this regard. For these reasons I conclude that the violation herein was significant and substantial (See Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984).

B. Penalty

Considering all the factors discussed in the analysis of the imminent danger issue infra, II, I conclude that the violation herein was of a high level of gravity. According to Bodkin he had been at the site since approximately 2:30 in the afternoon and no one had complained to him about the conditions of the berms. Also he indicated that the two terex operators on the night shift indicated that they were not having any problems traveling the roadway. On the other hand, Newhouse testified that on January 17, at approximately 9:30 p.m., he received a telephone call from a miner at the mine alleging a possible imminent danger in the haulage road. He then called Respondent's plant foreman and advised him of the same. Bodkin testified Newhouse called and advised him that a 103(g) inspection was

going to be made on the haulage way. According to Bodkin, Newhouse told him that the area in issue was "where the Terexes start up the hill" (Tr.140). Bodkin indicated that he was aware of the problem in that area, and had assigned persons to clean it up. Taking into account the phone call from Newhouse alerting Bodkin to possible problems in the haulage road, as well as the slippery conditions of the road, Bodkin was clearly moderately negligent in not inspecting the roadway at that point for adequate berms. Such an inspection would have revealed inadequate berms as per the testimony of Petitioner's witnesses and not rebutted by Bodkin.

Taking all the above into account, and considering the statutory factors set forth in Section 110(i) of the Act as stipulated to by the parties, I conclude that a penalty of $1,200 is appropriate for the violation cited in Citation No. 3701662.

IV. Citation No. 3701663

On January 18, 1991, Rantovich issued Citation No. 3701663 alleging a violation of 30 C.F.R. 77.1713 in that an examination during the last shift was not conducted on the haulage road for hazardous conditions.

On the night of January 17, 1991, the muddy nature of the road, and lack of adequate berms road, and created a hazardous condition as discussed above, infra, II. According to Rantovich, he asked Bodkin to provide him the record book wherein the examinations are noted. Rantovich testified that the record book did not indicate any inspection of the haulage road on January 17. Rantovich then looked at the records for the preceding "couple of weeks or months" (Tr.47), and there was no indication of an inspection of the haulage road. Rantovich said that no one explained to him why there was no indication in the record book of any inspection. Rantovich said that he asked Bodkin if an inspection was made of the roadway that day, and he said that he did not make one and that he was not aware of one.

Based on the above, I conclude that there was no indication in the Respondent's record book that the haulage road at issue had been inspected for hazardous conditions on or about January 17, 1991. I thus find that Petitioner has established a prima facie case of a violation (See L.J.'s Corporation, 14 FMSHRC 1278 (August 26, 1992)). I also find that Respondent has not established that indeed the roadway had been inspected on or about January 17, 1991. I thus find that Section 77.1713 was violated by Respondent.

Bodkin testified, as noted above, that, in essence, on January 17, Newhouse had advised him of a possible imminent danger in the area where the terex trucks start their trip up the haulage road, and that he was actively engaged in cleaning up the

slippery road at that point. He also testified that no employee including the two terex operators on the evening shift had told him of any problem with the road condition. However, taking into account the muddy slippery conditions of the roadway, the fact that Bodkin had been advised as of 9:30 p.m., of a possible hazardous condition with regard to the roadway, I conclude that Respondent's negligence herein was more than ordinary negligence and constituted unwarrantable failure.3 (See, Emery Mining Corporation, 9 FMSHRC 1997 (1987).

I conclude that a penalty of $1,000 is appropriate for the violation cited in this order.

ORDER

It is ORDERED that: (1) the Stay Order previously issued in Docket No. PENN 91-147-R is hereby lifted; (2) Respondent shall, within 30 days of this decision pay $2,200 as a civil penalty for the violations found herein; (3) Order No. 3701661 be affirmed; and (4) Docket Nos. PENN 91-147-R, PENN 91-148-R, and PENN 91-149-R, be DISMISSED.

Avram Weisberger
Administrative Law Judge

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3It appears to the Respondent's position, as set forth in its brief, that the management of Robena did not consider that 30 C.F.R. Part 77 was applicable to the facility. Respondent's position appears to be based on its assertions in its brief, that there is "confusion" in the Act concerning MSHA Jurisdiction over preparation plants not located at mine sites and the "confusing" lack of a definition in Part 77 regarding the applicability of that Part. As such, Respondent argues that its failure to inspect does not justify a findings of "unwarrantable failure". I do not accept this argument. Respondent has not proffered any evidence that its agents were "confused" as to the applicability of Part 77. I do not assign any probative weight in this regard to the arguments of counsel, as such are not evidence.