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January 28, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-210
	:	A.C. No. 42-01697-03635
v.	:	Docket No. WEST 92-211
	:	A.C. No. 42-01697-03636
C.W. MINING COMPANY, Respondent	:	Bear Canyon No. 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

These cases are before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charging C.W. Mining Company (C.W. Mining) with four "significant and substantial" (S&S) violations of mandatory safety standards and six non S&S regulatory standards found in 30 C.F.R. Part 75 entitled "Mandatory Safety Standards - Underground Coal Mines."

C.W. Mining filed a timely answer contesting the existence of each of the alleged violations, the significant and substantial designation of the alleged violations and the appropriateness of the proposed penalties.

Federal coal mine inspector Donald F. Gibson was the only witness called to testify for the Petitioner. Messrs. Kenneth Defa, mine superintendent, Nathan Atwood, the mine production supervisor and Ted Farmer, federal coal mine inspector were called to testify by C.W. Mining.

Stipulations

The parties stipulate to the following:

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.

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

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 citations and orders were properly served by duly authorized representatives of the Secretary upon agents 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 551,084 tons of production in 1990.

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.

Docket No. WEST 92-210

Citation Nos. 3582644, 3582646 and 3582650 VACATED

This docket consists of seven citations based upon Inspector Gibson's inspection of the mine on July 18, 1991. At the hearing the parties on the record advised that because of insufficient evidence, the Secretary was vacating three of the seven citations in Docket No. WEST 92-210. The vacated citations are Citation Nos. 3582644, 3582646 and 3582650. The proposed penalties for those alleged violations are also vacated.

Citation Nos. 3582540, 3582645 and 3582579 AFFIRMED

C.W. Mining has accepted and withdraws its contest with respect to three of the remaining four citations. Consequently Citation Nos. 3582540, 3582645 and 3582579 are AFFIRMED.

On consideration of the statutory criteria in section 110(i) of the Act, I find the appropriate penalty for each of these violations is the Secretary's proposed penalties which are respectively $20, $20, and $192.

The remaining citation in this docket, Citation No. 3582643, was vigorously contested and is discussed below.

Citation No. 3582643

Federal coal mine inspector Donald E. Gibson inspected the Bear Canyon Mine on July 18, 1991. Based upon this inspection, Mr. Gibson issued Citation No. 3582643 charging the operator of the mine with a 104(a) non S&S violation of 30 C.F.R. 75.1103-4(a)(1) for the operator's failure to have a "heat type fire sensor located at the end of the belt flight."

The citation describes the violation as follows:

> The heat type fire sensors being used on the 2nd East South conveyor belt was not located at the end of the belt flight.
>
> The sensor was located at cross cut 27 and the tail piece (end of the belt flight) was located at cross cut 29, approximately 160-170 feet inby the sensor.
>
> There was no one observed advancing the heat sensor when condition was observed.
>
> The sensor appeared to be functioning.
>
> The belt was suspended from the mine roof and was not observed rubbing against oily material.

The relevant safety regulations 30 C.F.R. 75.1103-4(a)(1) and 75.1103-4 provide for the minimum installation requirements for automatic fire sensor and warning devices for each belt unit operated by a belt drive. The relevant regulations read as follows:

> 75.1103-4 Automatic fire sensor and warning device systems; installation; minimum requirements.
>
> (a) Automatic fire sensor and warning device systems shall provide identification of fire within each belt flight (each belt unit operated by a belt drive).
>
> (1) Where used, sensors responding to temperature rise at a point (point-type sensors) shall be located at or above the elevation of the top belt, and installed at the beginning and end of each belt flight (tail-piece) , at the belt drive, and in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section.
>
> * * * * *
>
> (3) When the distance from the tail-piece (end of the belt flight) at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached. ... .

The Secretary's position is that the regulation requires that a sensor responding to temperature (point type sensor) must be in place over the end (tailpiece) of the belt flight at all times when the belt is in service. Under the Secretary's interpretation and enforcement of the regulation after the belt is moved (extended) the operator must install a heat sensor over the tailpiece before the belt is operated and cannot, as the operator contends, legally wait and install the sensor over the tailpiece later, within 24 production shift hours. It is undisputed in this case that less than 24 production hours had expired since the belt (including its tailpiece) had been extended inby over 160 feet past the last sensor.

The Secretary presented evidence that it has interpreted and enforced the regulation in this manner since 1969.

Under the Secretary's interpretation of the regulation the exception set forth in paragraph (a)(3) of 30 C.F.R. 75.1103-4(a)(3) that allows sensor to be installed within 24 production hours, applies only to those sensors that must be installed in increments not to exceed 75 feet along each belt flight (belt haulageway) and not to the sensor that must be installed at the

beginning and end of each belt flight. Thus the Secretary's counsel in the post-hearing brief states the Secretary's position as follows:

> It is necessary to carefully examine the wording of both the regulation and its exception to understand why the heat-type sensor must be placed over the tailpiece after the belt move and not some 24 production shift hours later as C.W. Mining contends. Section 75.1103-4(a)(1) requires that sensors responding to heat be located as follows:
>
> (a) at or above the elevation of the top belt, and
>
> (b) installed at the beginning, and
>
> (c) end (tail piece) of each belt flight,
>
> (d) at the belt drive, and
>
> (e) in increments along each belt flight...not to exceed 125 feet.
>
> Sensors are to be located over the top of the belt and at the beginning (belt discharge roller) and end (belt tail piece) of the belt flight and at 125 feet maximum spacings along the length of the belt flight. It is abundantly clear that sensors are required at the beginning and end of the belt prior to putting the belt in service. Section 75.1103-4(a)(3) allows an Operator some 24 production shift hours for the sensor to be installed over the belt when the distance from the tail piece at the loading points to the first outby sensor (i.e., the sensor over the top of the belt) not the sensor at the end of the belt flight as per Section (a)(1) reaches 125 feet. As Inspector Gibson noted MSHA has enforced the regulation in this manner since 1969. (TR-26). See also Exhibit G-4. Inspector Gibson and at least one other inpector have informed Ken Defa, Mine Superintendent, previously that the sensor had to be placed over the tailpiece immediately after a belt move. (TR-35).

It is the operator's position that the last phrase of

subsection (a)(1) "except as provided in paragraph (a)(3) of this section," applies to each clause of subsection (a)(1) joined by conjunctive commas and the word "and." The operator contends that had the drafters intended to limit the exception in (a)(3) to sensors installed in increments along the belt flight, they would have put a period after the clause "at the belt drive" and begun a new sentence, thus:

> Sensors shall also be located in increments along each belt flight so that the maximum distance between sensors does not exceed 125 feet, except as provided in paragraph (a)(3) of this section.

Conclusion and Rationale

I concur and uphold the Secretary's interpretation that the regulation requires that a sensor must be located over the end of the belt flight (tail piece) as soon as the belt begins to operate.

It is clear from a reading of the relevant standards that the purpose of the automatic fire sensor system is to give warning automatically when a fire occurs on or near the belt that will result in rapid location of the fire (75.1103-1). The specific regulation in question must be construed in the light of its underlying purpose - the protection of miners working underground.

It is well established that the Mine Act and the standards promulgated thereunder are to be interpreted to ensure, insofar as possible, safe and healthful working conditions for miners. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F.2d 417, 419-20 (4th Cir. 1979); Old Ben Coal Co., 1 FMSHRC 1954, 1957-58 (December 1979). Section 75.1103-4(a)(1), like most coal mine safety standards, is aimed at the elimination of potential dangers before they become present dangers.

The regulation in question, therefore, should be construed in a manner that is consonant with the fundamental protective ends of the Mine Act as set forth in section 2 of the Mine Act. See 30 U.S.C. 801(a), (d) and (e).

Logically the appropriate function of an exception in a regulation is to make certain the specific exception or exceptions to its general provisions. It is generally accepted that the exception be construed strictly and all reasonable doubts be resolved in favor of the general rule and against the exception.

In this case if the construction urged by the operator is followed, the exception set forth in paragraph (a)(3) of the

section allowing installation "within 24 protection shift hours" would become the general rule rather than an exception to the general provision of the regulation.

Furthermore it is well established courts accord great deference to an agency's construction of regulations which it has drafted and continues to administer. Udall v. Tallman, 380 U.S. 1 (1965); Sec. of Labor v. Western Fuels-Utah, Inc. 900 F.2d 318 (D.C. Cir. 1990); Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318 (D.C. Cir. 1990). To uphold the agency's interpretation, a court need not find the agency's interpretation to be the only or the most reasonable one. City of Aurora v. Hunt, 749 F.2d 1457, 1462 (10th Cir. 1984). "A regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements." Emery Mining Corp. v. Secretary of Labor (MSHA), 744 F.2d 1411, 1414 (10th Cir. 1984); (quoting, Trustees of Indiana University v. United States, 618 F.2d 736 (1980).

Penalty

This difference of interpretation of the regulation in this case may be due to the somewhat imprecise draftmanship of the regulation. With this in mind I find on considering the statutory criteria in section 110(i) of the Act that the $20 penalty proposed by the Secretary is the appropriate civil penalty for this non S&S violation.

Docket No. WEST 92-211

Citation No. 3582543 VACATED

This docket consists of three citations. The Secretary has moved to vacate one of the citations, Citation No. 3582543, on the grounds there was insufficient evidence to proceed. The motion was granted. The citation and its related proposed penalty are VACATED.

The two remaining citations in this docket were vigorously tried. Both of these citations allege a significant and substantial (S&S) violation of 30 C.F.R. 75.202(a). This safety regulation provides as follows:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The two citations alleging a violation of this safety standard are discussed below.

Citation No. 3582544

This citation alleges a violation of the mandatory safety standard 30 C.F.R. 75.202(a) quoted above.

The citation in question, Citation No. 3582544, under item 8 condition or practice, reads as follows:

> The mine roof was not adequately supported or otherwise controlled to protect persons from the hazards related to falls of roof in the 3rd West Section. There was a slip located in the crosscut between the #1 and #2 entry. Loose rocks were observed in the slip. These rocks were scaled down and measured 24-30 inches long x 4-16 inches wide x 1-1/2 inches thick. Another rock measured 24-30 inches long x 18-22 inches wide x 2-3 inches thick. These rocks were located over the roadway. In this condition (it) poses the hazard of injury related to falling materials.

Inspector Donald Gibson issued this citation on September 24, 1991, after his spot inspection (CAA) of certain portions of the mine. Inspector Gibson testified that in the 3rd West Section between the No. 1 and No. 2 entry he observed a "slip" which he defined as a separation from the immediate roof.

Inspector Gibson testified there were loose rocks in the slip. At Mr. Gibson's request, Mr. Defa, the mine superintendent, scaled down the rocks with a pry bar. After the rocks were scaled down, Mr. Gibson measured the rocks and obtained the measurements set forth in his citation quoted above. Inspector Gibson described the slip as approximately 10 to 12 feet long (Tr. 52) and on cross-examination as 8 feet wide and 2 feet long. (Tr. 71). He stated that the bulk of the slip was over the middle of the entry. There was conflicting testimony as to the time required for Mr. Defa to scale down the rocks. Mr. Defa said it took him one half hour of vigorous prying to scale down the rocks. Inspector Gibson stated that it took Mr. Defa only about 10 minutes to scale the rocks down.

There was also conflicting evidence as to the height of the roof. Mr. Gibson testified as follows:

> "it runs in my mind that the mining height or the height of the coal seam was six feet, seven feet high." (Tr. 55). Later on cross examination when asked again the height of the roof he testified "Well, I think I've stated between seven feet and eight feet. I

> didn't measure it. I don't know exactly."
> (Tr. 65).

Mr. Defa, the mine superintendent, testified in a positive manner that the roof in the area in question was exactly 5 feet 8 inches high. He measured the height on the day of inspection and again just the day before he testified at the hearing.

Mr. Defa also testified that he saw a crack but did not see any slip. He stated that in the area in question there was a "laminated roof strata" which was roof bolted to hold the layers of rock strata together. The crack was between two layers of rock strata.

Mr. Atwood, the mine production supervisor, testified that when he observed the roof the day before the citation was issued, the roof was fully bolted and adequately supported in the area cited and that the height of the roof in that area was five feet 8 inches high.

Another federal coal mine inspector, Ted Farmer, was conducting a regular full AAA inspection of the mine during the time, as well as before and after Inspector Gibson's spot inspection of the mine. Inspector Farmer's AAA inspection included the roof and ribs in the area spot-checked by Gibson. Inspector Farmer testified that he had inspected the roof area in question a week or two before Mr. Gibson arrived and that he did not issue any roof or rib control citation because he did not observe any roof or rib hazard.

On evaluation of the testimony of each of the witnesses I find that Inspector Gibson did observe some loose rock in the roof in the cited area in violation of the cited standard. I am satisfied from Mr. Defa's testimony that the roof in the cited area was five feet eight inches high, that he had to duck down to get into the area, and that he had to work vigorously with his scaling bar to bring the disputed rock down.

Under these circumstances, summarized above, I find that there was a non S&S violation of 30 C.F.R. 75.202(a) rather than a S&S violation. The evidence presented did not establish an S&S violation because the preponderance of the evidence did not prove a reasonable likelihood that the hazard contributed to would result in reasonably serious injury.

Considering that statutory criteria in section 110(i) of the Act I find the appropriate penalty for this 104(a) non S&S violation under the facts established at hearing is $80.

Citation No. 3582545

Based upon his spot roof inspection of September 24, 1991 Inspector Gibson issued a second citation alleging a S&S violation of 30 C.F.R. 75.202(a). Citation No. 3582545 reads as follows:

> The roof was not being supported or otherwise controlled to protect persons from hazards related to falls from roof in the return entry on the 3rd West Section beginning 80 feet outby crosscut 16, the left rib was taking weight, (rib cutter) causing the rib to spall. The roof was tested, and when sounded was found to be drummy and cracked. The loose drummy roof was measured to be 6 feet wide and 18 feet long. This area was in the designated escapeway. The area was not barricaded to impede travel. Pieces of the mine roof were observed to have fallen onto the mine floor. It measured 20 inches wide times 40 inches long times 1 to 2 inches thick. This condition poses the hazard of persons being struck by falling material.

Inspector Gibson testified as to his observations of the roof in the cited area as set forth in the citation quoted above. He stated the roof was 6 to 6 1/2 feet high at this location and the roof was supported by bolting. The area first inby this location had already fallen and the operator had cribbed it off. The weekly examiner or anyone he might bring in to fix a faulty condition would be exposed. The area in question was not a primary entryway or exit. It was the secondary or alternate escapeway.

On cross-examination Mr. Gibson testified that the roof area in question was roof bolted on five foot centers or better and some roof material had fallen between the last row of bolts and the rib and had fallen on the floor next to the rib.

Mr. Defa testified the section in question was an inactive section. He was with Inspector Gibson during his inspection. He pointed out to Mr. Gibson that he "couldn't see a violation there, that the roof was bolted and there was no loose rock between the rib and the bolts." He also testified that since setting the timber to abate the alleged violation over one year ago the timbers are taking no weight, no material has had to be barred down and none has fallen.

Federal coal mine inspector Donald Farmer testified that he inspected the roof and ribs of the area in question during his regular AAA inspection a week or two before Inspector Gibson's

spot inspection. Inspector Farmer testified that he did not see any conditions to cite. The day after Mr. Gibson issued the citation, Inspector Farmer again inspected the area to abate Mr. Gibson's citation. Inspector Farmer testified that at neither inspection did he see any rock or material that had fallen onto the roadway. He did see some material that had fallen on the floor next to the rib. It was not in an area "where you normally expect people to walk." The section was idle. However, he would expect the weekly examiner to walk through this area during their weekly inspection.

Inspector Farmer further testified that he carefully inspected the cited area of the roof and stated "as I looked at it and observed and abated the citation, I couldn't see where it would have been an S&S citation." Inspector Farmer testified that had he seen the rib cutter described in the citation he would have issued a citation but he "couldn't see that it was S&S citation."

I credit Inspector Farmer's testimony and concur in his evaluation and opinion that the violation was not S&S.

Considering the statutory criteria in section 110(a) of the Act I find the appropriate penalty for this non S&S violation is $80.

ORDER

1. Citation Nos. 3582544 and 3582545 are modified to delete the "significant and substantial" designation and, as modified, the citations are AFFIRMED.

2. Citation Nos. 3582643, 3582540, 3582645 and 3582579 are AFFIRMED.

3. Citation Nos. 3582644, 3582646, 3582650 and 3582543 are VACATED.

4. C.W. MINING SHALL PAY to the Secretary of Labor a civil penalty in the sum of $412 within 30 days of the date of this decision for the violations found herein.

August F. Cetti
Administrative Law Judge

Distribution:

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