CCASE:
SOL (MSHA) V. PYRAMID MINING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 92-543
	:	A. C. No. 15-11620-03531
v.	:	
	:	Hall No. 2 Mine
PYRAMID MINING, INCORPORATED, Respondent	:	

DECISION

Appearances: Darren L. Courtney, Esq., U.S. Department of Labor, Office of the Solicitor, 2002 Richard Jones Road, Nashville, Tennessee, for Petitioner; Frank Stainback, Esq., Holbrook, Wible, Sullivan, & Mountjoy, P.S.C., Owensboro, Kentucky for Respondent.

Before: Judge Weisberger

Statement of the Case

At issue in this civil penalty proceeding is whether the operator (Respondent) violated 30 C.F.R 48.27(a) as alleged by MSHA inspector Darrel N. Gamblin in an order he issued under section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act")(Footnote 1). Pursuant to notice, a hearing in this matter

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1In the 104(g)(1) Order (Order No. 3416888, Government Exhibit No. 1, Page 1), Gambling referred to a Citation issued the same date alleging a violation of 30 C.F.R. 48.27. Subsequently, on December 23, 1991, the order was amended to delete this reference and in its place, an addition to the order was made indicating a violation of 30 C.F.R. 48.7. At the hearing in this matter on December 8, 1992, Petitioner served the Respondent with a written modification of the original 104(g)(1) order amending it to indicate a violation of 30 C.F.R. 48.27, rather than 30 C.F.R. 48.7. Respondent's counsel accepted service, but argued tha this modification "comes to late". However, Respondent's counsel indicated, in essence, that he was not alleging prejudice if this modification were to be allowed. He also stated that he was not surprised by the amendment. Also, at the hearing, evidence presented by both parties pertained to the issue of a violation under Section 48.27 supra rather than Section 48.7 supra.

was held in Evansville, Indiana, on December 8, 1992. Darryl N. Gamblin testified for Petitioner and Ricky Stone, Curtis J. Bryant and Mike Hollis testified for Respondent. On February 17, 1993, Respondent's brief was received. Petitioner's Proposed Findings of Fact and Post Hearing Brief was received on February 22, 1993. Respondent's Reply Brief was received February 25, 1993. On February 29, 1993, Petitioner's Reply Brief was received.

Findings of Fact and Discussion

I.

The auger mining site at issue is operated by Westlo, Inc., ("Westlo") under contract with Respondent. On May 29, 1993, at 7:00 a.m., Respondent instructed one of its employees, Ricky Stone, to go and work at the subject site. Stone arrived at the site at approximate 7:10 a.m. He was assigned to operate a bulldozer that had been modified with a conveyor ("stacker"). Prior to that time, Stone had never operated a stacker although he had 12 years experience operating heavy equipment including bulldozers.

Gamblin asked Stone if he had received any type of training, and Stone indicated that he had not. Gamblin also asked Curtis J. Bryant, the Westlo on-site supervisor, about training. Bryant told him that he was showing Stone around. According to Gamblin, Bryant did not indicate that Stone was being task trained. There was no record of Stone having been task trained for this piece of equipment, and Stone did not have any certificate regarding task training.

Gamblin issued an order requiring the withdrawal of Stone pursuant to Section 104(g)(1) of the Act on the ground that he had not received task training. Gamblin explained that the prime hazard of operating a stacker is getting caught between the conveyor system and the rollers.

Gamblin indicated that subsequent to the issuance of the order, he discussed the order with Charles Kennedy, Respondent's mine superintendent, and the latter did not indicate that Stone was task trained. Also, Gamblin spoke to Mike Hollis, Respondent's safety director, over the telephone regarding the order. According to Gamblin, Hollis, did not indicate that Stone was task trained, but indicated that he had been trained on a bulldozer.

Stone testified that before he operated the stacker at issue, Curtis J. Bryant, the Westlo supervisor on the site,

showed him how to operate the stacker. He said that Bryant showed how to "kick" the conveyor in and out of gear, how to move it, and how back it under the auger. He said that Bryant spent about one hour providing the training.

According to Stone, when Gamblin asked him if he had task training, he did not know what Gamblin was talking about, and said "what is task training" (Tr. 71). Stone indicated that Gamblin did not respond, but started to write the citation.

Bryant testified that when Stone arrived on May 29, 1991, the first day of operations, he took him to the stacker, and explained the function of each lever on the equipment. Bryant said that he showed Stone how to hook the stacker to the conveyor, and Stone then did this procedure 2 or 3 times while Bryant stood there to see that Stone was operating the stacker properly. According to Bryant, he then spent about an hour working with Stone showing him the operation of the stacker. Bryant remained approximately 30 to 40 feet away when Stone operated the equipment. Bryant explained that when Gamblin issued the 104(g) withdrawal order on May 29, 1991, he had not yet filled out the paper work on Stone's training, and that he still had to train Stone on some additional matters. Bryant explained that he still had to train Stone in further operations such as aligning the "tail piece of the stacker underneath your conveyor on your the auger correctly". (Tr. 103) [sic]. He also had to train Stone to direct the alignment of coal trucks under the stacker.

According to Stone, on June 4, 1991, he returned to the premises and, in front of Gamblin, Bryant showed him the same things that he had shown him before on May 29. He said this training lasted about 3 to 5 minutes, and the order was then abated. He then received a certificate.

The Commission, in Southern Ohio Coal Co., 14 FMSHRC 1781, 1785, (November 23, 1992) set forth the following with regard to the burden of proof regarding the violation of a safety standard as follows: "The Mine Act imposes on the Secretary the burden of proving a violation of a safety standard. See Garden Creek Pocahontas Company, 11 FMSHRC 2148, 2152 (November 1989); Consolidation Coal Company, 11 FMSHRC 966, 973 (June 1989)." Hence, in order for the challenged 104(g)(1) order to be sustained, the Secretary must establish, a violation by Respondent of 30 C.F.R. 48.27 supra which, in essence, requires the following task training:

a. Instruction in the health and safety aspects and safe operating procedures related to stacker operation given in an on the job environment (30 C.F.R. 48.27(a)(1)); and

b. Supervised practice during non-production (30 C.F.R. 48.27(a)(2)(i)); or

c. Supervised operation during production (30 C.F.R. 48.27(a)(2)(ii)).

It is incumbent upon the Secretary to establish that Stone did not receive such training. There is no record of Stone having received such training. Stone was not given a certificate certifying that he had received such training, and neither Bryant nor Stone indicated to Gamblin that Stone had received "task training". However, I observed the demeanor of Stone and Bryant, and found their testimony credible that Bryant had in fact, prior to Gamblin's arrival, provided Stone with approximately an hour of instruction and supervision regarding the operation of the stacker. (c.f., L.J's Corporation, 14 FMSHRC 1278 (1992)). However, the training was not complete, as Bryant still had to train Stone to line up the stacker and the auger, and to direct the alignment of coal trucks under the stacker. Nonetheless, Stone operated the stacker until the transmission "hung" between two gears and it became inoperative. (Tr.69) Section 48.27 supra provides, in this connection, that a miner shall not perform new work tasks until training "has been completed." Since Stone operated the stacker before training was completed, Section 48.27 supra was violated by Respondent. (Footnote 2)

Gamblin, in his order, indicated that the violation herein was significant and substantial. However, no testimony was offered in support of this conclusion. In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (l) 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 reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

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2I do not find that Respondent was still in the process of training Stone when cited. Once Stone began to operate the loader after the one hour instruction, there is no evidence that Bryant provided any further instruction. Bryant remained in the area, and had told Stone that "if he had was having any problems or did not understand anything just holler at me" (Tr. 91). However, there is no evidence that Bryant took any action to actively direct or observe Stone operating the stacker.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

Although injuries can result from lack of training in operating a stacker, the record is devoid of any proof that there was a reasonable likelihood of the occurrence of an injury of a reasonably serious nature that was contributed to as a result of the violation herein. (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). To the contrary, the record indicates that Stone had 12 years experience operating heavy equipment including bulldozers. Also, I find the testimony of Bryant and Stone credible regarding the extent of training provided to Stone. I also accept their testimony, based on observations of their demeanor, that on June 4, approximately five minutes of training was provided to Stone which was accepted by Gamblin in abating the order at issue. They also indicated that this training did not include anything in addition to the training previously given on May 29, when cited. I thus find that Respondent was in substantial compliance with Section 48.27 supra when cited. For all these reasons I conclude that the violation was not significant and substantial. For the same reasons I conclude that the violation was of a low level of gravity, and that Respondent was negligent to only a slight degree in connection with the violation. Considering all remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $20 is appropriate for the violation found herein.

ORDER

It is ORDERED that Order No. 341688 he amended to indicate a violation this is not significant and substantial. It is further ORDERED that Respondent pay $20 within 30 days, as a civil penalty for the violation found herein.

Avram Weisberger
Administrative Law Judge

Distribution:

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