

CCASE:
SOL (MSHA) V. S & H MINING
DDATE:
19930405
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 92-393 |
| Petitioner | : | A.C. No. 40-02045-03574 |
| v. | : | |
| | : | Docket No. SE 92-394 |
| S & H MINING, INCORPORATED, | : | A.C. No. 40-02045-03575 |
| Respondent | : | |
| | : | Docket No. SE 92-395 |
| | : | A.C. No. 40-02045-03578 |
| | : | |
| | : | S & H Mine No. 2 |
| | : | |

DECISION

Appearances: Darren L. Courtney, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Imogene A. King, Esquire, Frantz, McConnell and Seymour, Knoxville, Tennessee, for Respondent

Before: Judge Melick

These consolidated proceedings are before me upon the petitions 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 S & H Mining, Incorporated (S & H), with violations of mandatory standards. The general issue before me is whether S & H violated the cited standards and, if so, what is the appropriate civil penalty to be assessed.

Docket No. SE 92-393

During hearings the parties moved to settle Citation Nos. 3383498, 3383499 and 3382595 proposing a reduction in penalties from \$471 to \$250. I have considered the representations and documentation submitted in this case, including supplemental information filed post hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of these penalties will be incorporated in the order accompanying this decision.

Citation No. 3382581 alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. 75.400 and charges as follows

Wet loose coal and coal dust black in color was allowed to accumulate under the suspended conveyor beltline starting at the No. 4 belt tailpiece and continuing to the belt head drive for a distance of approximately 800 feet in depths from 1 inch to 6 inches deep.

The cited standard, 30 C.F.R. 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

M. J. Hughett, an inspector for the Mine Safety and Health Administration (MSHA), testified that he discovered during the course of his inspection of the S & H No. 7 Mine on April 14, 1992, coal and float coal dust 1 inch to 6 inches deep over the entire 800 foot length of the cited beltline. He testified that he had traveled the entire length of the beltline at that time and noted that some of the coal was wet and in areas where it was not wet it had been rock-dusted. However, according to Hughett, even where there was rock dust there was some dry coal dust on top of that rock dust in areas near the face. No one was observed cleaning up the material at the time of his inspection. Hughett also noted that a number of permissibility violations existed on electrical equipment then operating in the mine, including a 506 Bridge Carrier in the immediate vicinity of the cited coal dust.

Cecil Broadus, lead man on the belt at the time the citation was issued did not observe the inspection party travel the entire length of the beltline. He maintains that when the inspector observed the coal dust, he stated "I guess the whole belt line is like this." Broadus conceded, however, that coal dust indeed lay along the belt line some 1/2 inch to 3/4 inch thick along with egg-size lumps of coal. Broadus maintains that at the time of the citation he already had a man shoveling coal about 150 feet from where the inspector was standing.

Within this framework of evidence, including the undisputed evidence that at least 1/2 to 3/4 inches of coal dust and egg-sized lumps of coal lay along the beltline, I am satisfied that a violation of the cited standard has been proven as charged. The fact that some of the coal dust lay on top of rock dust that admittedly had been laid down the week

~664

before also indicates that the coal dust may have been lying in the area for a significant period of time. I also note, however, the testimony of Mr. Broadus that at the time the inspector was issuing the citation he indeed already had assigned a cleanup man to work on the cited accumulation. Under the circumstances I find operator negligence to be only moderate.

In light of the existence, however, of impermissible electrical equipment operating in close proximity to the coal dust and loose coal, I find that the violation was clearly of high gravity and "significant and substantial." See Mathies Coal Company, 6 FMSHRC 1 (1984). It was indeed reasonably likely under the circumstances for reasonably serious injuries to occur to the men then working underground at the S & H Mine. Under the circumstances I find that the proposed penalty of \$157 is appropriate.

Docket No. SE 92-394

At hearing the parties moved for settlement of Citation Nos. 3382598 and 3382651 proposing a reduction in penalties from \$382 to \$100. I have considered the representations and documentation submitted in the case, including supplemental material submitted post hearing, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. An order directing payment of the penalty will be incorporated in the order accompanying this decision. At hearing the Secretary also moved to vacate Citation No. 3382600 for lack of evidence. The motion was granted and accordingly Citation No. 3382600 is vacated.

Citation No. 3382647 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.203(b) and charges that "a sightline [sic] or others [sic] method of directional control shall be used to maintain the projected direction of the mining in the No. 1 and 5 entries on the 001 working section."

The cited standard provides that "a sightline or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, cross-cuts and pillar splits."

According to MSHA Inspector Hughett this citation was issued because the entries were not completely straight and that no spads or other method of directional control were found in the Nos. 1 and 5 entries. Hughett acknowledged finding spads in the Nos. 2, 3 and 4 entries and finding no violations of the roof control plan.

According to Paul Smith, an owner and president of S & H, directional control in the Nos. 2, 3 and 4 entries is obtained

~665

by establishing a line with a transit and then marking that with spads in the roof. In the Nos. 1 and 5 entries 50 foot measurements are taken from the spads in the Nos. 2 and 4 entries and marked with either spray paint or chalk. According to Smith, the miner operator then lines up these marks to the face where an additional mark is made to insure that the mining is straight. Under this method, once the cut is made the chalk or paint on the face is obliterated. In addition, the marks on the roof may later be obscured by rock dusting. According to Smith, when the next cut is being prepared a new measurement and mark on the face is again made. Lonny Cardon, an employee of S & H, testified that he in fact measured and marked the sightlines for the Nos. 1 and 5 entries which were the subject of the instant citation.

Within this framework of evidence I conclude that no violation of the cited standard has occurred. The testimony of Smith and Cardon regarding the directional controls used in the Nos. 1 and 5 entries is undisputed. While this method of directional control may have resulted in some lack of precision and some irregularities in the entries there was admittedly no violation of the roof control plan and no apparent hazard.

In reaching this conclusion I have not disregarded the testimony of Inspector Hughett that he was unable to find chalk marks on the mine roof or at the face of the Nos. 1 and 5 entries. However this lack of observable evidence does not in itself lead to the conclusion that no directional control was being used. The credible evidence shows that such control is established when the continuous miner begins cutting coal and that the sightlines at the face will be obliterated by cutting the coal. Under the circumstances I do not find that the Secretary has sustained her burden of proving the violation as charged and Citation No. 3382647 must accordingly be vacated.

Citation No. 3382649 charges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1704 and alleges that "the No. 4 return air escapeway was not maintained in a manner that would permit miners to escape from the mine in that water has accumulated [sic] to a dept [sic] of 10 inches to 14 inches in the 11 crosscut of the No. 4 entry of first left."

The cited standard provides, in part, that "at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked."

The testimony of Inspector Hughett regarding this citation is not in dispute. According to Hughett, during the course of his inspection on April 16, 1992, in the No. 4 return air escapeway at the No. 11 crosscut of the No. 4 entry off first left, he and Mine Superintendent Charles White entered a section where the escapeway was obstructed by 10 to 14 inches of water. White slipped and fell in the water as he walked through it. Hughett opined that if someone was injured he would therefore have difficulty passing through this area. It was slippery and, according to Hughett, dangerous and would slow down the escape.

Charles White admitted that he had slipped in the water hole. He acknowledged that the floor sloped down into the hole and he had to bend to pass through it. He further admitted that it was "slick" under the water. He explained that the company tried to keep this area pumped out but on this occasion the pump had not been primed.

Within this framework of essentially undisputed evidence it is clear that the violation was committed as charged. I do not, however, find that the violation was "significant and substantial" or of significant gravity. The Secretary has failed to sustain his burden of proof in this regard. See Mathies Coal Company, supra. In particular, the Secretary has failed to sustain his burden of proving the third and fourth elements of the Mathies formula, i.e., the Secretary has failed to prove "a reasonable likelihood that the hazard contributed to will result in an injury and "a reasonable likelihood that the injury in question would be of a reasonably serious nature." Considering the absence of evidence regarding significant negligence and, I find that a civil penalty of \$180 is appropriate.

Citation No. 3382650 also charges a violation of the standard at 30 C.F.R. 75.400 and alleges that "loose coal was allowed to accumulate in depth of 1 to 12 inches in the Nos. 1, 2 and 3 entries on the 001 section for a distance of 70 feet."

Inspector Hughett testified that he observed these conditions on the 14th and 15th of April but did not then issue a citation because the area was inaccessible while work was being performed on the continuous miner. However, when he observed on April 21 that these accumulations had still not been cleaned up after the miner had been repaired, he cited the condition. He observed that the dust was dry and only partially rock-dusted. According to Hughett the energized power cables in the vicinity could cause an ignition so the violation was therefore "significant and substantial." In regard to this finding the following colloquy ensued:

~667

Q. [By Government Counsel] What is the danger that's associated with having that accumulated coal dust?

A. Catching fire and causing --- you know, it might cause combustible smoke and stuff like that there.

Q. Please be sure to articulate your sentences. What kind of --- is it reasonably likely that an injury would occur if there were a fire or explosion from this combustible material?

A. Yeah.

Q. And what kind of injuries could there be?

A. Could cause breathing or, you know, smoke accumulation this far down where you couldn't get out or anything of that nature.

Q. Could the injuries be fatal?

A. They could, yes.

(Tr. 104-105).

This testimony is simply too ambiguous to enable any finding that the Secretary has met her burden of proving that the violation herein was "significant and substantial." In addition, the fact that the inspector allowed the cited condition to exist for seven days before issuing a citation contradicts his finding that the violation was "significant and substantial." Based on evaluation of the criteria under Section 110(i) of the Act I find that a civil penalty of \$180 is appropriate.

Docket No. SE 92-395

At hearing, Petitioner filed a motion to approve a settlement agreement as to the one citation at issue in this docket. Respondent has agreed to pay the proposed penalty of \$50 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

~668

ORDER

Docket No. SE 92-393

S & H Mining, Inc. is hereby directed to pay civil penalties of \$100, \$100, \$157, and \$50 for Citation Nos. 3383498, 3383499, 3382581 and 3382595, respectively.

Docket No. SE 92-394

Citation Nos. 3382600 and 3382647 are hereby vacated. S & H Mining Co., Inc. is hereby directed to pay civil penalties of \$50 each for Citation Nos. 3382598, 3382259, and 3382651. Citation Nos. 3382649 and 3382650 are affirmed but without "significant and substantial" findings and S & H Mining, Inc. is directed to pay civil penalties of \$180 for each of those violations.

Docket No. SE 92-395

S & H Mining Company is directed to pay civil penalties of \$50 for the violation charged in Citation No. 3382641.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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