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SOL (MSHA) V. HUNTINGTON PIPING
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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 PROCEEDING
	:	Docket No. WEVA 93-57
	:	A.C. No. 46-01602-03502
v.	:	
	:	Mine: Kermit Coal Company
HUNTINGTON PIPING INCORPORATED, Respondent	:	Mine No. 1

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
S.M. Hood, President, Huntington Piping, Incorporated, Huntington, West Virginia, for Respondent.

Before: Judge Barbour

In this proceeding, arising under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 and 820, the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA) petitions for the assessment of civil penalties against Huntington Piping, Incorporated (Huntington), for two alleged violations of certain mandatory safety standards for surface coal mines found at 30 C.F.R. Part 77. In addition, the Secretary asserts the violations were significant and substantial contributions to mine safety hazards (S&S violations) and were the result of Huntington's unwarrantable failure to comply with the cited standards. The proceeding was the subject of an evidentiary hearing in Huntington, West Virginia, at which Heather Bupp-Habuda represented as counsel for the Secretary and S.M. Hood, president of Huntington, represented the company.

STIPULATIONS

At the commencement of the hearing, counsel for the Secretary read into the record the following stipulations:

> 1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide [this] penalty proceeding ....

2. Huntington ... is not the owner or operator of Mine No. 1 which [was] operated by the Kermit Coal Company at the time the [c]itation [and] [o]rder at issue in this case [were] written.

3. Huntington ... is an independent contractor pursuant to [Section] 3[d], [30 U.S.C. 802(d)] of the Mine Act.

4. The actions of Huntington ... on August 4, 1992 at ... Mine No. 1 are subject to the jurisdiction of the Mine Act.

5. Huntington ... may be considered a small [,] independent contractor as defined by 30 C.F.R. [ ] 100.3(b), Table Five, as the number of hours worked at all mines per year [was] 2,158.

6. [MSHA] Inspector Billy R. Sloan was acting in an official capacity as an authorized representative of the Secretary ... when he issued Order [No.] 3729920 and Citation [No.] 3725795.

7. MSHA Inspector Birkie Allen was acting in his official capacity as an authorized representative of the Secretary ... when he issued Citation [No.] 3729927.

8. True copies of Order [No.] 3729920 and Citation [Nos.] 3729927 and 3725795 were served on Huntington ... [as] required by [the] Mine Act.

9. Order [No.] 3729920, marked [Gov. Exh. 1], is authentic and needs to be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements therein.

10. Citation [No.] 3729927, marked [Gov. Exh. 2], is authentic and may be admitted into evidence for [the] purpose of establishing the issuance and not ... the accuracy of any statements therein.

11. Huntington ... abated Citation [No] 3729227 and Order [No.] 3729920 in a timely manner.

12. Citation [No.] 3725759, marked [Gov. Exh. No. 4], is authentic and may be admitted into evidence for the purpose of establishing its issuance and not ... the accuracy of any statements asserted therein.

13. The only issues before the [Administrative Law Judge] are[:] [A] whether the condition described in the body of Order [No.] 3729920 ... is accurate and constitute[d] a violation of ... [s]ection 75.205(a); ... [B] whe[ther] the conditions described in the body of Citation [No.] 3729927 ... [are] accurate and constituted a a violation of ... [s]ection 77.1710(g); ... [C] what degree of gravity is associated with the [alleged] violations found in the above-referenced [o]rder [and] ...[c]itation, including whether the [alleged] violations were [S&S]; ... [D] what degree of negligence is associated with the violations found the ... [o]rder and the [citation]; ... [E] whether the [alleged] violation in Order [No.] 3729920 was the result of an unwarrantable failure by ... [Huntington] and the amount of civil penalties for the [o]rder and [c]itation.

14. MSHA's proposed assessment data sheet, marked [Gov. Exh. 7] accurately sets forth three as the number of assessed ... violations charged to Huntington ... from the period January 1989 through May 1992.

15. MSHA's narrative findings for assessment, marked [Gov. Exh. 8] set forth [the] formula pursuant to 30 C.F.R. [ ] 100.5, for assessing the proposed penalties for Order [No.] 3729920 and Citation [No.] 3729927.

16. MSHA's assessed violations history report and R-17, marked [Gov. Exh. 9], may be used in determining the appropriate civil penalty assessments for the alleged violations.

Tr. 7-12.

RELEVANT TESTIMONY

THE SECRETARY'S WITNESSES

Birkie Allen

Birkie Allen, a MSHA inspector for the past 23 years, inspects construction sites at coal mines. On August 4, 1992, Allen, along with MSHA inspector Billie Sloan, conducted such an inspection at the No. 1 Mine of Kermit Coal Company, an underground coal mine located in Mingo Country, West Virginia. Huntington was constructing a bathhouse at the mine.

At approximately 9:00 a.m., Allen and Sloan parked their car facing the bathhouse and as they looked through the windshield observed Fred Crockett, Huntington's project foreman, and Kenny Walters and Jimmy Bantam, two Huntington employees under Crockett's supervision, on the bathhouse roof. Tr. 20, 53, 64. Allen estimated he and Sloan were from 50 feet to 75 feet away from the employees. Tr. 21.53. Crockett and the other men were on the right side of the roof as the inspectors faced the building. All were within 6 to 8 feet of one another. They were about 3 feet from the edge of the roof. Tr. 24-25, 48.

The men were in the process of installing metal roofing on the steel frame of the bathhouse. Allen testified he could see that none of the employees was wearing a safety belt. Tr. 20-21.

When the men saw the government car in which the inspectors were riding they scrambled down from the roof. Crockett climbed down an I beam on the front side of the building. Tr. 22. Walters and Bantam came down in back of the building, out of the inspectors' sight. Tr. 21.

Allen and Sloan got out of the car, spoke with Crockett and walked around the bathhouse. They did not notice a ladder or other device for gaining access to the roof. They assumed, therefore, the two employees that they could not see getting down from the roof had come down on I beams. Tr. 23.

Allen maintained that once down from the roof, Walters and Bantum put on their safety belts. Tr. 55. Crockett did not put on his safety belt. Id.

Allen identified a drawing he made of the bathhouse. Gov. Exh. 10. He testified that he and Sloan measured the bathhouse with a 50 foot tape and determined that on the side of the building where the men had been working the roof line started 21 feet 7 3/8 inches above the ground. Tr. 24; Gov. Exh. 10. The peak of the roof was 23 feet 9 inches above the bathhouse floor. Id. (Huntington's representative stated that Huntington agreed the distance was "somewhere around 20 feet." Tr. 32.)

According to Allen, he and Sloan orally issued the subject citation and order of withdrawal to Crockett. Tr. 21. They also asked Crockett to convene a meeting of all of the employees. At the meeting, Allen and Sloan discussed the hazards of working without safety belts and lines and reviewed with the employees a memorandum issued by MSHA on August 14, 1978, regarding the requirements of section 77.1710(g), the mandatory safety standard requiring the wearing of safety belts and lines where there is a danger of falling. Tr. 38; Gov. Exh. 5. Allen stated Crockett had been given a copy of the memorandum on May 28, 1992, during an inspection, when Sloan had issued a previous citation to Huntington for a violation of section 77.1710(g). Tr. 40, 50, 52.

Allen believed that if Crockett or one of the other employees had suffered a muscle cramp or a dizzy spell or had slipped, he could have fallen from the roof and been fatally injured. Tr. 43. The men were not working close enough to grab one another, so it was most likely that only one would have fallen. Tr. 48.

Allen believed further that the violation was the result of unwarrantable failure on Huntington's part because Crockett was involved, and Crockett was on notice regarding the need for safety belts and lines. Tr. 49. According to Allen, Crockett explained the lack of safety belts and lines by stating it was "just a stupid mistake." Tr. 52. Allen agreed, however, that Huntington was not habitually unsafe or habitually in violation of the mandatory standards and he stated that he continued to have a good working relationship with Crockett. Tr. 58.

Billy R. Sloan

Sloan, who also is a MSHA inspector, testified that on May 28, 1992, he conducted an inspection of another Huntington construction project at Mine No. 1. During that inspection he observed an employee walking on a metal beam about 30 feet above the ground. While he was walking on the beam the employee was "snapping and unsnapping his safety belt." Tr. 71. Sloan stated, "any time ... [persons] are moving from one place to another and they have any kind of an obstacle in their path if they're not using two lanyards then they unsnap." Tr. 101. Thus, Sloan believed that although the person had on a safety belt and lines, he was not using them properly because at times the lines were unattached. Tr. 102, 107. As a result, Sloan served Crockett with a citation for a violation of section 77.1710(g). Id., Gov. Exh. 4. To abate the citation, Sloan discussed with Crockett and the employees, under Crockett's supervision, MSHA's policy regarding the use of safety belts. In addition, he gave Crockett a copy of the MSHA memorandum regarding section 77.1710(g). Tr. 72.

Turning to August 4, 1992, Sloan stated that even though there was a manlift in the bathhouse that could have been used to get the men down from the roof, Crockett, Walters and Bantam reached the ground by descending on the I beams. Tr. 76, 81. He speculated the men came down because they recognized him and Allen as inspectors. Tr. 77. He explained that section 77.205(a) requires a safe means of access to be provided to all work areas and that climbing down on the frame of the building subjected the men to the danger of falling to the concrete floor of the building or to the surrounding ground. Tr. 86. He considered it highly likely that a fall would have resulted in an injury. Id.

Because Crockett was one of the persons who had climbed down and in so doing had violated the regulation, Sloan believed there was "high" negligence on Huntington's part. Tr. 88.

HUNTINGTON'S WITNESS

Fred Crockett

Crockett was asked about the August 4 incident and he admitted that he was not wearing a safety belt. He stated, however, he believed Walters and Bantam were wearing such belts, but he agreed that they were not using them, they were not tied off. Tr. 123. Crockett explained that on August 4, 1992, he and the men were putting steel sheets over the building's structure in order to finish the roof. The sheets were 38 inches wide and 30 to 31 feet long. Tr. 124. The area being roofed was advancing across steel roof support beams. The area ahead of the sheets was open to the floor, but Crockett maintained that workers did not approach the open area and always laid the sheets of metal ahead of them. Tr. 147-148, 155. (On cross-examination, however, he agreed that when a sheet of steel was laid, those doing the task stood "close to the edge." Tr. 158.) The slope of the roof was 2 inches per foot. Tr. 149.

Crockett stated that safety belts were not used because he did not think they were required. Tr. 125, 127. Use of the belts would have resulted in the lanyard trailing behind and would have created a tripping hazard. Tr. 126. However, since receiving the citation Crockett stated he had come to believe that failure to use safety belts under the subject circumstances "definitely [was] a violation." Id.

When asked why he and Walters and Bantam had hurried off the roof when they saw the inspectors, Crockett responded that "everybody on the job ... [is] scared of the federal inspectors." Tr. 127. He also stated that he told Walters and Bantam to get off of the roof because he was nervous about having the inspectors visit the site. Tr. 127-128. As for himself, he admitted, "I did come down wrong." Tr. 138.

Crockett testified he and the employees reached the roof by going up in the manlift and they planned to use it to come down but they had "panicked" when they saw the inspectors. Tr. 128-129, 131.

He stated that after the May 28 citation he was present at a meeting with the MSHA inspectors who explained how and when to wear safety belts and lines so as to comply with the regulations. Tr. 151. He also was told by his supervisor he should make certain all employees wore safety belts in similar situations and that he had done so, except on August 4. Tr. 145.

Following the incident of August 4, he was told by mine management that he was wrong, that safety belts and lines, as well as a safe means of access, should have been used, but he was not disciplined. Tr. 137.

DISCUSSION AND FINDINGS

CITATION NO.	DATE	30 C.F.R. .	PROPOSED PENALTY
3729927	8/4/92	77.1710(g)	$300

THE VIOLATION

Citation No. 3729927 states:

> A foreman and two workmen were observed working on top of the bathhouse being constructed without being protected from a fall of about 20 feet. The equipment and materials to stay tied off were present on the job site.
>
> The foreman was Fred Crockett and the workmen were Kenny Walters and Jimmy Bantam.

Gov. Exh. 2. Section 77.1710(g) requires in pertinent part that "Each employee working in a surface mine ... shall be required to wear protective ... devices [including] [s]afety belts and lines where there is danger of falling."

All of the witnesses agree that Crockett, Walters and Bantam were working on the roof of the bathhouse when they were observed by Sloan and Allen. Further, there is no real disagreement about the distance from the edge of the roof to the ground being approximately 20 feet. Also, it is agreed that Crockett was not wearing a safety belt or lifeline and that if Walters and Bantam were wearing safety belts, they were not tied off.

Thus, the question is whether there was a danger of falling, and I conclude there was. Admittedly, the roof had but a slight slope to it. Nonetheless, I infer from the testimony that laying

the steel plates over the beams supporting the roof required Crockett, Walters and Bantum not only to occasionally be near the side edge of the roof, but as the roof advanced, to also be near the edge of the plates already laid. In particular, I note Crockett's testimony that this part of the job required the workers to stand "close to the edge." Tr. 158.

A number of things, including a slip, stumble or a simple inattentive misstep, could have caused any one of the three to lose his balance. Had this happened at the roof's side edge or at the edge of the plates there was nothing to have prevented Crockett, Walters or Bantum falling to the rock or concrete below. Therefore, I find that on August 4, 1992, the three men were in danger of falling and their failure to wear and use safety belts and lines violated the standard.

S&S

The test set forth by the Commission in Mathies Coal Co. for determining whether a violation is S&S is by now well known:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum [3 FMSHRC 822, 825 (April 1981], 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.

6 FMSHRC 1, 3-4 (January 1984). I have concluded the violation of mandatory safety standard 77.1710(g) existed as charged. Moreover, the evidence establishes a discrete safety hazard contributed to by the violation in that there was a possibility of one or more of the three employees falling a distance of approximately 20 feet to the hard surfaces below the roof. Any such fall could have caused a serious injury or death.

The remaining question is whether the Secretary established the reasonable likelihood of a fall. In other words, if normal roofing operations had continued, would there have been a reasonable likelihood of "an event in which there [would have been] an injury?" U.S. Steel Mining Co., 6 FMSHRC 1834, 1864 (August 1984).

I conclude, the answer is yes. I recognize that the day the violation was cited the circumstances were not unduly conducive

to one of the employees stumbling or tripping and falling from the roof. It was not windy and the roof was dry. Nonetheless, I must view the violation in the context of continued normal roofing operations and certainly, in that regard, I must consider the effects of sudden and unexpected wind gusts and/or rain, both of which would increase the likelihood of a fall. I do not doubt, as Huntington maintains, that it is a fundamental construction practice never to lay sheet steel on a breezy day, but I also recognize that weather conditions are not fully predictable and are subject to sudden and unexpected change. I conclude that sooner or later an employee would have slipped on a wet and slick roof, lost his or her balance due to the wind or taken a misstep and that the result would have been a disabling or fatal fall.

Moreover, I take judicial notice of the recent report of the National Institute for Occupational Safety and Health that 26 percent of all construction deaths are fall-related. 23 O.S.H. Rep. (BNA) 216 (July 28, 1993). Obviously, full compliance with section 77.1710(g) will go far to eliminate the cause of such deaths in the mining industry.

Given the fact that in the context of continued normal construction an errant slip, stumble or misstep was almost bound to occur at some time and given the statistical prevalence of falls as a cause of death, I cannot help but find the failure of Huntington's three employees to wear safety belts and/or use of safety lines made it reasonably likely a serious injury or fatality would have resulted and therefore that Allen properly found the violation to be S&S.

UNWARRANTABLE FAILURE

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). The Commission has explained that this determination is derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent, careful person would use, characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Eastern Associated Coal Corporation, 13 FMSHRC 178, 185 (February 1991), citing Emery, 9 FMSHRC at 2001.

I conclude the violation was the result of conduct that was not justifiable or inexcusable and was properly found by Allen to have been caused by Huntington's unwarrantable failure to comply. The violation not only occurred in the presence of the foreman, he participated in it. A foreman is held to a high standard of

care. It is the foreman who gives on-site direction to the workforce. It is the foreman's duty to assure compliance with mandatory safety standards and his is the initial responsibility for safety. Any breach of his duty is attributable to the operator.

While situations may exist in which a foreman and miners under his direction violate a standard and the foreman's conduct is justifiable or excusable, this is not one. I credit Allen's and Sloan's testimony, and indeed Crockett's corroborating testimony, that the use of safety belts and lines was discussed with the foreman on May 28, 1992. Further, I find that the MSHA Memorandum of August 14, 1978, regarding the use of safety belts and lines at all times where there is a danger of falling, was brought to Crockett's attention. While Crockett, by virtue of his position already was on notice of the requirements of the standard, these events should have reinforced in his mind the necessity for its observance.

It may be true, as Crockett maintains, that because the May citation concerned a miner working on an elevated steel structure Crockett did not think the standard applicable to miners working on a relatively flat roof, but if such was his interpretation of the standard, it was woefully inadequate. As the MSHA memorandum makes clear, the standard applies where there is a danger of falling and Crockett and the others were working under that very condition. Allen testified that Crockett stated the failure to wear safety belts and lines was "just a stupid mistake." Tr. 58. It also was an unwarrantable failure to comply.

Order No.	Date	30 C.F.R.	Proposed Penalty
3729920	8/4/92	77.205(a)	$300

THE VIOLATION

Order No. 3729920 states:

> Safe means of access to the roof top of the new building being constructed at the shaft site was not provided for the two workers and foreman observed working about 20 feet off the ground. These workers were observed climbing on and around the support beams to get to the work area.

> The necessary equipment and materials needed to provide safe access were on the job site but were not being used when this condition was observed.
>
> Foreman - Fred Crockett
> Workers - Kenny Walters, Jimmy Bantam

Gov. Exh. l. Section 77.205(a) states: "Safe means of access shall be provided and maintained to all working places."

Despite the fact that the citation states that the workers were observed climbing on and around the support beams to get to the work area, the testimony makes clear that if there was a violation it consisted of the lack of a safe means to leave the work area, for I fully credit Crockett's testimony that the manlift was used by the men to reach the roof. While Sloan could have been more precise in describing the alleged violation, there is no doubt that Huntington understood the allegation underlying the order. All witnesses agreed that Crockett and the employees hurriedly left the roof by climbing down the steel I beams of the building upon seeing the inspectors and Huntington at no time expressed objection or surprise at MSHA's assertion that their exit from the roof violated section 77.205(a).

While the standard is written in terms of access, which connotes a way by which a work area may be approached or reached, to be effectively implemented, the standard also must be interpreted to include the way by which the work area is left. Thus, the issue is whether use of the I beams was safe, and I agree with Sloan that it was not. The beams did not contain hand or toe holes and, as Sloan testified, climbing down on the metal framework in itself created the hazard of a fall to the floor or ground below. Tr. 86. The manlift had provided a safe means of access to the roof. In failing to maintain the manlift in a position where it could have been used and in failing to provide other safe means to leave the roof, Huntington violated section 77.205(a).

S&S

I further conclude that Sloan properly found the violation to be S&S. The evidence supports the Mathies criteria in that there was a violation of a mandatory safety standard which greatly contributed to the danger of one or more of the three employees falling from heights of up to 20 feet to the concrete floor of the unfinished building or to the rock surrounding it. Had such a fall occurred there was a reasonable likelihood the resulting injuries would have been serious, indeed, even fatal. In addition, in the context of continued mining operations it was reasonably likely such a fall or falls would have occurred. As I have noted, there were no hand or toe holes on the beams and the

very reason such beams are not acceptable as a means of access is because they are conducive to falls. It is just common sense. Further, as referenced above, I again note the prominence of falls as a cause of death in the construction industry.

UNWARRANTABLE FAILURE

I also conclude that Sloan was correct in citing Huntington for an unwarrantable violation. Crockett was on the scene. The manlift was in the unfinished building. As I have observed, Crockett was responsible for assuring compliance with all applicable safety standards and his lapses in this regard are attributable to Huntington. Crockett told the employees to get off the roof when he knew their only way to coming down was via the beams. Tr. 127. (The manlift was in a folded position and was not ready for use.) His "excuse" that "everyone on the job [is] scared of the federal inspectors" is no excuse. If true, it indicates a dangerous failure of communication at the mine. It certainly does not warrant putting in danger himself and others for whom he is responsible. The violation of section 77.205(a), like the violation of section 77.1710(g), was not justifiable.

OTHER CIVIL PENALTY CRITERIA

Gravity and Negligence

The potential injuries to miners that could have resulted from falls off of the roof or the beams and the likelihood of the falls occurring made both violations serious.

Crockett's failure to use the care required of him as foreman to assurance he and his men complied with the cited standards was negligence on his part and thus on that of his employer, Huntington.

Abatement, Size, Ability to Continue in Business

The parties have stipulated that Huntington abated the citation and order in a timely manner and I therefore find that Huntington exhibited good faith in abatement. Stipulation 11. They have further stipulated that Huntington is a small, independent contractor with a small history of previous violations. Stipulations 5 and 14. Finally, the record lacks any evidence to indicate that the assessment of civil penalties for the violations will have an effect on Huntington's ability to continue in business and I find they will not.

CIVIL PENALTY ASSESSMENTS

The Secretary has proposed civil penalties which I conclude are appropriate. I therefore assess a civil penalty of $300 for the violation of section 77.1710(g) and a civil penalty of $300 for the violation of section 77.205(a).

I will add that while I have found the violations to have been caused by Crockett's unwarrantable failure to ensure compliance with the cited standards, I do not believe he sought deliberately to act and to have the other miners act in defiance of the law. Rather, the violations represent Crockett's impulsive and unthinking disregard of his and his mens' safety. Allen emphasized that he has a good working relationship with Crockett and that Huntington is not an habitually unsafe employer or in repeated violation of the standards, as the company's history of previous violations establishes. Crockett must be more mindful of his responsibilities as a person on the front line of safety and of his obligation under the Mine Act to ensure compliance with the regulations both by his man and by himself. The assessments, which are approximately three times larger than the highest penalty assessed previously for Huntington, are imposed with that goal in mind.

ORDER

Huntington IS ORDERED to pay civil penalties of three hundred dollars ($300) for the violation of section 77.1710(g) as cited in Citation No.3729927 and three hundred dollars ($300) for the violation on section 77.205(a) as cited in Order No. 3729920. Payment is to be made within thirty (30) days of the date of this proceeding and upon receipt of payment, this proceeding is DISMISSED.

David F. Barbour
Administrative Law Judge

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