

CCASE:

LAURA D COAL INC. V. SOL (MSHA)

SOL (MSHA) V. LAURA D COAL INC.

DDATE:

19941014

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

LAURA D COAL, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 94-238-R
	:	Citation No. 3711113; 2/11/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Stuft Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-384
Petitioner	:	A.C. No. 36-07661-03509
	:	
	:	Stuft Mine
	:	

DECISIONS

Appearances: John M. Strawn, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Respondent/Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania,
for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a Notice of Contest filed by the Laura D Coal Company pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the violation of mandatory safety standard 30 C.F.R. 77.1000. The civil penalty case concerns a proposed civil penalty assessment of \$1,800, for the alleged violation. A hearing was held in Somerset, Pennsylvania, and the parties appeared and participated fully therein.

Issues

The issues presented in these proceedings are whether the cited conditions or practices constituted a violation of the cited safety standard; whether the alleged violation was

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"significant and substantial"; whether the alleged violation resulted from an "unwarrantable failure" to comply with the cited standard; and the appropriate civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C. 301 et seq.
2. Section 104(d), and 110(a) and (i) of the Act.
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 9-11).

1. The Stufft Mine is owned and operated by Laura D. Coal Inc., and it is subject to the jurisdiction of the Act.
2. The presiding judge has jurisdiction in this matter.
3. The citation in question was properly issued and served by an authorized representative of the Secretary on an agent of Laura D. Coal, Inc., on the date and at the time and place stated therein, and may be admitted for the purpose of establishing its issuance.
4. The proposed civil penalty assessment will not affect Laura D Coal's ability to continue in business.
5. Laura D. Coal's, annual coal production for 1993, was 29,632 tons, and the Stufft Mine production for that year was 5,834 tons.
6. Laura D Coal, Inc., was assessed for three citations during six inspection days in the 24-month period preceding the issuance of the citation in issue in this case.
7. Laura D. Coal, Inc., is a small mine operator with a good compliance record.
8. Laura D. Coal, Inc., demonstrated ordinary good faith in obtaining compliance after the issuance of the citation.
9. The parties stipulate to the authenticity of their exhibits but not to the relevance or truth of the matters asserted therein.

Discussion

Section 104(d)(1) "S&S" citation No. 3711113, issued at 10:00 a.m., on February 11, 1994, cites an alleged violation of 30 C.F.R. 77.1000, and the cited condition or practice states as follow:

The operator did not establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks of the active coal pit. The operator's ground control plan calls for all loose material to be removed for a safe distance from the top of the highwall and for trees to be cleared for a distance of 50 feet. The plan also calls for benches to be provided where unstable conditions exist. This highwall is about 60 feet high and 300 feet long. The top 20 to 30 feet of this is unconsolidated material consisting of large rocks, trees, and old spoil material. On 2/10/94, this material failed and slid into the 002 pit. No benches were provided and trees still exist along the top of the highwall. A review of the daily exam book indicated that slides had also occurred on 2/3/94 and 1-26-94. No appropriate action was taken to prevent more slides.

In support of the alleged violation, the Secretary presented the testimony of MSHA Inspector Mark Ronan, who testified to the conditions that he observed, the reasons for issuing the citation, and his special "S&S" and "unwarrantable failure" findings (Tr. 15-114).

Laura D. Coal Company presented the testimony of its owner, James W. Stufft, who testified about the mine ground control plan and its relationship to the sediment pond that was under construction at the pit area in question. he also testified about the materials located on the spoil pile and the work being performed to remove and control this material. Mr. Stuff believed that the mine ground control plan did not apply to the pond in question because the coal that was remove from the pit was for the purpose of lining the pond with clay pursuant to State environmental guidelines (tr. 115-147).

The parties agreed to submit posthearing briefs, and without objection, the Secretary proposed to take the posthearing deposition of an expert witness, Dr. Kelvin WU, Chief of MSHA's Mine Waste and Technical Unit, Bruceton MSHA Technology Center, Pittsburgh, Pennsylvania (Tr. 155-156).

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The parties subsequently informed me that they proposed to settle the civil penalty matter, and in view of the settlement, the respondent agreed to withdraw its contest. The petitioner submitted a motion pursuant to Commission Rule 31, 29 C.F.R.

2700.31, seeking approval of the proposed settlement. In support of the settlement, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act and a full discussion and disclosure concerning the facts and circumstances surrounding the issuance of the citation.

The parties are in agreement that the respondent's negligence was not as high as initially determined. The petitioner states that it has no evidence to refute the respondent's assertion that it was not aware that its ground control plan applied to the pit in question since it was designed to serve as a pond. Further, the petitioner cannot rebut the respondent's evidence that it had taken steps to prevent employees from working under the highwall when conditions were unfavorable and that it was in the process of undercutting the spoil bank to reduce the hazard of falling material. Under the circumstance, the petitioner agrees that the section 104(d)(1) "S&S" citation should be reclassified to a section 104(a) "S&S" citation, and that a reduction of the proposed civil penalty assessment from \$1,800 to \$175, is warranted.

I take note of the fact that the record reflects that the respondent is a small mine operator, has a good compliance record, and demonstrated good faith in abating the violation.

Conclusion

After careful review and consideration of the pleadings, the testimony and evidence presented at the hearing, as reflected in the trial transcript, and the arguments presented in support of the proposed settlement, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.31, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Citation No. 3711113, February 11, 1994, citing a violation of 30 C.F.R. 77.1000, IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED.

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2. The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$175, in satisfaction of the violation in question. Payment is to be made to MSHA within thirty (30) days of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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