FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 7, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 95-451
	:	A.C. No. 15-16508-03594
v.	:	
	:	Docket No. KENT 95-671
J B D MINING COMPANY, INC., Respondent	:	A.C. No. 15-16508-03600
	:	
	:	Docket No. KENT 95-728
	:	A.C. No. 15-16508-03601
	:	
	:	Mine: Harlan No. 1

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee; Tommy D. Frizzell, Conference and Litigation Representative, Mine Safety and Health Administration, Barbourville, Kentucky; Ronnie R. Russell, Conference and Litigation Representative, Mine Safety and Health Administration, Barbourville, Kentucky, for Petitioner; Jefferson B. Davis, President, J B D Mining, Pathfork, Kentucky, Pro Se, for Respondent.

Before: Judge Amchan

Docket No. KENT 95-451

On November 17, 1994, MSHA representative Billy Parrott conducted an inspection of Respondent's No. 1 Mine in Harlan County, Kentucky. When he arrived at the mine's only working section, Parrott noticed that a center line, drawn on

the roof of a crosscut to guide the continuous mining machine, extended inby the last row of bolts (Tr. I: 14-16)[1].

This line could not have been drawn without a miner walking under an unsupported portion of the roof (Tr. I: 23). Going into an area in which the roof is unsupported is very dangerous and could result in a miner being killed or seriously injured by a roof fall. Parrott issued an imminent danger order and Citation No. 4246900. The citation alleges a violation of MSHA regulation 30 C.F.R. §75.202(b). This regulation generally forbids work or travel under unsupported roof.

The citation alleges a significant and substantial (S&S) violation due to moderate negligence on the part of the Respondent. It also alleges that it was highly likely that an injury resulting in permanently disabling injuries might occur due to the violation. MSHA proposed a $2,000 penalty for the violation.

Respondent does not deny that the violation occurred. It argues that the proposed penalty is much too high given the circumstances. When proposed penalties are contested, the Commission assesses civil penalties independently of the proposal made by MSHA. Section 110(i) of the Act requires that the Commission assess civil penalties after giving consideration to six factors. These are the size of the operator, the gravity of the violation, whether the operator was negligent, whether the operator demonstrated good faith in promptly abating the violation, the operator's history of previous violations and the effect of the penalty on the operator's ability to stay in business.

Respondent is a small operator and it has not offered evidence that payment of the proposed penalties would affect its ability to stay in business. Respondent appears to have been cooperative in trying to prevent recurrences of the violation (Exh. G-2, Block 17). As to Respondent's prior history of violations, the Secretary's computerized list of citations between November 17, 1992 through November 16, 1992 (Exh G-1), reveals no reason to assess either a higher or lower penalty. It does indicate that Respondent pays few of the uncontested penalties proposed by MSHA. However, I do not regard this as a basis for increasing the penalty for the instant violations. The mechanism for addressing a failure to pay civil

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[1]I will refer to the transcript for Docket No. KENT 95-451 as Tr. I, the transcript for Docket No. KENT 95-671 as Tr. II and the transcript for Docket No. KENT 95-728 as Tr. III.

penalties is the institution of a collection proceeding in U.S. District Court pursuant to § 110(j) of the Act.

The record in this case requires resolution of conflicting evidence regarding the negligence of the operator in violating the Act and the gravity of the violation. As to negligence, Charles Farmer, a repairman and sometime section foreman, admits he drew the center line in the area cited by Inspector Parrott (Tr. I: 66). He stated that he thought he was still under supported roof because he did not realize that the person installing roof bolts had not finished the row of bolts closest to the face (Tr. I: 69, 72, also see Respondent's Answer of May 23, 1995).

Farmer contends that there were two bolts on the right side of the unfinished row of bolts in the crosscut and that the red reflective marker was on the one closest to the middle of the crosscut (Tr. I: 67, 69; Exh. R-1). Inspector Parrott contends that the marker, which indicates the last row of bolts, was attached to one of the bolts in the last completed row (Tr. I: 38; Exhibit R-1). Moreover, he states that only one bolt had been installed inby that row (Exh. G-5[2]).

I credit the testimony of Inspector Parrott and find that the reflective marker was in the last full row of bolts and that there was only one bolt in front of this row. I do so because he is likely to have focused his attention much more on the location of the bolts and marker than did Farmer, who was also

[2]Exhibit G-5 was drawn on acetate and used on an overhead projector at hearing. It was also copied on paper. The paper version of G-5 contains marks made by the witnesses which are not on the acetate version.

concerned with his production responsibilities. Moreover, Parrott committed his recollections to paper by making a sketch of the area within 10 or 15 minutes of his observations (Tr. I: 39, 43).

Since I conclude that Farmer went beyond the red reflective marker, I find his negligence to be somewhat greater than if the marker had been on the bolts closest to the face. Nevertheless, I accept Respondent's claim that the violation was due to inadvertence.

The coal seam at this point is only 30 inches high. Miners are not able to stand up, and it is thus more likely that Farmer did not appreciate the fact that the row of bolts closest to the face had not been completed. On the other hand, it is incumbent upon Respondent to insure that all its employees are trained sufficiently so they recognize when a row of bolts has not been completely installed.

I therefore conclude that this violation was due, in part, to a moderate degree of negligence on the part of Mr. Farmer in failing to determine whether the roof under which he traveled was supported. Mr. Farmer's negligence is imputed to Respondent for liability and penalty purposes. He generally was given supervisory responsibilities and there is nothing in the record which indicates that Respondent had taken reasonable steps before this incident to avoid such a violation, Nacco Mining Company, 3 FMSHRC 848, 850 (April 1981).

I also find Respondent was negligent for creating a situation in which a miner might not realize that the row of bolts closest to the face had not been completely installed. Nothing in the record indicates that there was anything unprecedented in the circumstances leading to the violation. The bolts were apparently left out of the row closest to the face due to the presence of cap coal (coal left on the roof by the continuous miner). The record does not indicate that Respondent had taken any precautions to insure that miners would not travel under a portion of the roof where bolts had not been installed for this reason. Thus, I conclude it was foreseeable that they might do so.

MSHA considered the instant violation to be highly likely to result in an accident, in part because the Harlan No. 1 Mine has 2 to 12 inches of draw rock in many places and has experienced a number of roof falls (Tr. I: 54-61). Mr. Farmer, on the other hand, does not recall encountering any draw rock in the cited area (Tr. I: 70).

Regardless of whether this area contained draw rock, I find that the violation was "S&S" as alleged by the Secretary. The Commission test for "S&S," as set forth in Mathies Coal Co., supra, is 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: (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.

The Commission, in United States Steel Mining Co., Inc., FMSHRC 1573, 1574 (July 1984), held that S&S determinations are not limited to conditions existing at the time of the citation, but rather should be made in the context of continued normal mining operations. Applying this test, I conclude the violation was as reasonably likely to occur in an area with draw rock as in one with no draw rock. Therefore, I conclude that a serious accident was reasonably likely, and thus the violation was properly characterized as "S&S." Further, given the considerations discussed herein, I conclude that a $500 civil penalty is appropriate for this violation.

Docket No. KENT 95-671

MSHA representative Roger Dingess inspected the Harlan No. 1 mine on April 19, 1995 (Tr. II: 5-7). After inspecting the face area he walked outby four crosscuts along the belt line and found a fresh cigarette butt. He continued walking approximately 300 feet outby to a power center where he found a second fresh cigarette butt (Tr. II: 6-8).

As a result of these discoveries, Dingess issued citation No. 4478078 to Respondent alleging a violation of 30 C.F.R. §75.1702. The cited regulation prohibits anyone from smoking underground or carrying any smoking materials underground. It also requires a mine operator to institute a program, approved by the Secretary, to insure that nobody carries smoking materials

underground.

The citation alleges this standard was violated in that the operator did not comply with its smoking program (Exh. G-8, Block 8). MSHA characterizes the violation as S&S and due to the operator's moderate degree of negligence. A penalty of $2,500 was proposed for this violation.

The only evidence of fault on Respondent's part is Inspector Dingess' testimony that Charles Farmer, Respondent's foreman, was working only 100 feet inby from the location of the first cigarette butt found and therefore should have immediately detected the smoke from this cigarette (Tr. II: 13-14). However, there is no direct evidence that Farmer knew anyone was smoking in the mine, and insufficient evidence to infer such a fact.

The airflow along the belt line is of relatively low velocity, but it would have carried cigarette smoke outby and away from Farmer, rather than towards him (Tr. II: 17-18). Moreover, it is not certain that the cigarettes were smoked at the locations at which they were found (Tr. II: 18).

There is also no evidence that Respondent's smoking program was defective or improperly implemented (Tr. II: 13,17,21). Negligence on the part of J B D management cannot be inferred simply from the fact that smoking materials were found underground. Further, the negligence of non-supervisory personnel in bringing smoking materials into the mine cannot be imputed to the Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459 (August 1982).

Despite the fact that Inspector Dingess has never detected methane at the No. 1 mine, I conclude that the instant violation is S&S. Congress would not have specifically prohibited the presence of such materials and provided for penalties for individual miners unless it considered that such materials are reasonably likely to result in serious injury.

Nevertheless, in spite of the high gravity of the violation, I assess only a $200 civil penalty. Paramount in this decision is the absence of evidence of Respondent's negligence and its good faith abatement of the violation. Respondent took steps to prevent a recurrence of the violation by discharging the miner who most likely brought the smoking materials into its mine (Tr. II: 22-24).

Docket No. KENT 95-728

On April 20, 1995, while inspecting the surface area of the Harlan No. 1 mine, Mr. Dingess observed Bobby Taylor get out of his haul truck and load coal into it with a front end loader (Tr. III: 5-7, 12). Inspector Dingess asked Taylor for documentation regarding his hazard training at this mine. While Taylor had training slips for other mines he had worked at, he did not have any for Respondent's mine (Tr. III: 7, 10).

Taylor was employed by Kincaid Coal Co., a contractor operating on Respondent's property (Tr. III: 7, Answer). Nevertheless, since MSHA deems it the operator's responsibility to insure that all contractor employees have the requisite site-specific training, Dingess issued Citation No. 4478079 to Respondent.

The citation alleges an S&S violation of 30 C.F.R. §48.31(a). MSHA has proposed a $2,000 penalty. It contends that the violation was highly likely to result in a fatal injury (Citation, block 10). This conclusion is predicated on the fact that the No. 1 mine is located on the side of a mountain and that coal is dumped into a chute that sits on a 200 foot embankment (Tr. III: 11-13).

The area in which Mr. Taylor was observed loading his truck is located next to the bottom of the chute. Inspector Dingess believes miners in the area could be injured by objects coming through the windshield of their vehicles (Tr. III: 13).

Respondent argues that this is simply a paper violation. Taylor has worked at this site intermittently for four years (Tr. III: 23). Moreover, he had received training from two other operators (Tr. III: 17). Finally, Respondent contends that it abated the violation in 15 minutes merely by reviewing information of which Taylor was already aware and completing the MSHA form 5000-23.

I conclude that the Secretary has not established an S&S violation with regard to this citation. Given Mr. Taylor's familiarity with the worksite and recent training by other operators it would be unlikely that his lack of training would result in an injury. For the same reasons, I deem the gravity

of the violation to be relatively low.

However, I find Respondent negligent in not complying with the training requirements for Mr. Taylor. In conjunction with the other penalty criteria in section 110(i), I conclude that a civil penalty of $200 is appropriate.

ORDER

Docket KENT 95-451: Citation No. 4246900 is affirmed and a $500 civil penalty is assessed.

Docket KENT 95-671: Citation No. 4478078 is affirmed and a $200 civil penalty is assessed.

Docket Kent 95-728: Citation No. 4478079 is affirmed and a $200 civil penalty is assessed.

The total civil penalties of $900 shall be paid within thirty (30) days of this decision.

Arthur J. Amchan
Administrative Law Judge

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