

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001- 416
Petitioner	:	A.C. No. 15-15851-03515
	:	
v.	:	
	:	
JORDAN CONSTRUCTION,	:	
Respondent	:	Mine No. 1

DECISION

Before: Judge Schroeder

Appearances: Brian Dougherty, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for the Petitioner;
Larry Jordan, Owner, Jordan, Construction Company,
Box 230, Blaine, Kentucky, *pro se*.

This case is before me on a Petition by the Secretary to assess a Civil Penalty for alleged violations of mine safety regulations. The Petition alleges three violations for which the Secretary seeks a total Civil Penalty of \$4,000.00. After prehearing development, a hearing was held in Prestonburg, Kentucky on March 12, 2002. An opportunity for post hearing written arguments was given to the parties. After careful study of the record and arguments, I have reached the factual and legal conclusions discussed below.

Issues Presented

The hearing held in this case concerned the alleged violation of safety regulations that are directed at the segment of the mining industry known as auger mining. This is an activity in which the extracted material is removed from the ground using a large rotating bit, usually driven horizontally from a prepared work site that appears similar to a strip mine. The regulations at issue are the following:

30 C.F.R. § 77.1503(b) **Overhangs**

(b) No work shall be done under any overhang and, when a crew is engaged in connecting or disconnecting auger sections under a highwall, at least one person shall be assigned to observe the highwall for possible movement. (Emphasis added)

30 C.F.R. § 77.1000 **Ground Control Plan**

Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability. (Emphasis added)

30 C.F.R. § 77.1006(b) **Escape**

(b) Except as provided in paragraph (c) of this section, men shall not work between equipment and the highwall or spoil bank where the equipment may hinder escape from falls or slides. (Emphasis added)

(c) Special safety precautions shall be taken when men are required to perform repair work between immobilized equipment and the highwall or spoil bank and such equipment may hinder escape from falls or slides. (Emphasis added)

The basic jurisdictional facts were stipulated at the hearing. Exhibit JX-1 My task now is to determine whether the Secretary has established in the record each of the elements of a violation of one or more of these regulations and if so, the appropriate penalty for each such violation. The issue of appropriate penalty amount raises the further issue of whether any particular penalty sum would make it impossible for the Respondent to continue in business as the Respondent now conducts it.

Factual Findings

Auger mining is generally defined as a mining method used by strip-mine operators when the overburden gets too thick to be removed economically. Large-diameter, spaced holes are drilled up to 200 feet into the coal bed by an auger. Like a bit used for drilling into wood, this consists of a cutting head with screw like extensions. As the auger turns, the head breaks the coal and the screw carriers the coal back into the open work area where it is loaded onto a truck or a conveyor. (See, Dictionary of Mining, Mineral and related terms, Department of the Interior)

Auger coal mining as conducted by the Respondent is quite similar to this general definition. Johnson Construction does not perform strip mining but has a long term relationship with a strip miner. Johnson Construction has one drilling machine which requires two people to operate. Johnson Construction has only two employees. The machine is not self propelled. It must be pulled from place to place to drill successive holes into a coal seam. When operating, the auger machine is typically located 10 to 15 feet from the highwall face. In this gap the coal is carried away from the hole and the machine helper works to add or remove segments of auger.

The auger process begins with removal of overburden to expose the coal seam and create a bench upon which the auger machine can be operated. Removal of the overburden typically involves drilling a line of holes to contain explosives to shatter the overburden. Testimony differed significantly on the capability of the drill rig used here. The MSHA Inspector, Ms. Wanda Hinkle, testified that the older model drill rig present could only drill perpendicular holes since it did not have hydraulic lifts to tilt the drill. Mr. Johnson testified the use of jacks and blocks enabled the drill to be offset a significant amount from the perpendicular. I credit Mr. Johnson's testimony because of his greater familiarity with the equipment and my experience with the extent to which field ingenuity can expand the rated capacity of equipment. This issue is of significance only because the ground control plan applicable to Johnson Construction required the highwall to be inclined at 95 degrees, apparently an attempt to reduce overhangs on the highwall. I will assume that the highwall observed by Ms. Hinkle during her inspection on November 14, 2000, was created using drilled shot holes placed at approximately 95 degrees.

Ms. Hinkle testified she arrived at the Johnson Construction site when no work was being performed. She observed the auger machine in place at the bottom of the highwall. On the wall she observed 18 drilled holes facing the machine and above these holes she observed an overhang that she considered dangerous. She did not observe any large quantity of fallen rock at the base of the highwall. She took the time to measure several of the web structures between the holes. Tr. 27 - 30.

Ms. Hinkle testified she observed an overhang of rocky materials about half way up the 40 foot highwall. The overhang seemed to her to protrude approximately 6 feet and to extend across the highwall approximately 40 feet. Tr. 41 - 44. This overhang was observed to be directly above approximately 18 auger holes drilled by Johnson Construction on a previous day. Ms. Hinkle used a tape to measure the horizontal extent of the holes and measured several of the webs between holes. She determined the 18 holes and the related 17 webs totaled 39 feet. She determined the webs varied from 3 to 8 inches. These measurements apparently prompted her to make reference to the Johnson Construction Ground Control Plan. Secretary's Exhibit 7.

Mr. Johnson's testimony on the presence of an overhang differed from Ms. Hinkle's testimony only as a matter of emphasis. He indicated the highwall had been drilled and excavated properly but that rock had fallen out of the highwall to create a cave inset into the highwall. Accepting the testimony of either witness it is undisputed that a substantial mass of material in the highwall had no vertical support, i.e the "cave" ceiling. Material above the work

area without vertical support is the practical definition of an overhang. I find as a matter of fact that a substantial overhang existed on the highwall at the place Johnson Construction conducted auger mining operations.

The presence of a substantial overhang on the highwall illustrates the importance of the spacing of auger holes under the Ground Control Plan.¹ As the auger holes are drilled, the vertical support for the highwall is gradually weakened. Unless the spacing of the holes leaves sufficient web material between the holes, the vertical support for the highwall will fail and portions of the wall will fall. The Ground Control Plan is Secretary's Exhibit 5. On page 6, the Plan clearly specifies that 26" holes will be drilled so as to assure a minimum of 8" of web material between holes. Mr. Johnson testified, and I accept this part of his testimony, that the vibration encountered in boring a hole means that a hole bored with a 26" bit will be significantly wider than 26". This enlargement of the auger hole will always be at the expense of the thickness of the web material. This means that each hole and web requires three feet of the highwall (26" + 8" + 2" = 36"). At this rate, 18 holes with related web would consume 54 feet, not the 39 feet measured by the MSHA inspector. This means one or both of two things would need to be true; (1) the holes are less than 26", or (2) the webs average less than 8" thick. Mr. Johnson testified that both things were true. In addition, Mr. Johnson testified the holes were drilled in a "fan" pattern rather than parallel to each other. Resp. Ex. G. This had the effect of making the web material thinner at the surface of the highwall but thickening farther into the highwall. The justification for the "fan" pattern was to reduce the number of times the auger machine would need to be moved rather than rotated. A consequence of this "rotation" of the auger would be that for some holes the machine would have a significant incline to the face of the highwall. Whether that incline would interfere with the opportunity to escape material falling from the highwall is the subject of another claim.

Mr. Johnson testified that at the time of the MSHA inspection his auger machine was running a 22" bit rather than a 26" bit. He produced sales receipts for materials used in the subsequent fabrication of a 26" bit. The sales receipts were dated after the MSHA inspection. The MSHA inspector had measured the thickness of some of the webs between holes but did not indicate she had measured the dimensions of the holes. The lack of direct evidence of the size of the holes makes it necessary to examine credibility of the competing witnesses.

The MSHA investigator relied upon the ground control plan for the size of the holes. Her concern was to determine whether the web material was adequate to support the highwall, particularly in light of her conclusion that the highwall contained an overhang. The industry standard for web thickness is expressed in terms of a percentage of the diameter of the adjacent

¹The Ground Control Plan appears to be a regulatory control document whose function and importance was largely lost as time past. Two entries on document are total duplication. The plan used by Johnson Construction was approved by MSHA almost 6 years prior to the events at issue here and never updated. Mr. Johnson testified many of the requirements of the plan had been long forgotten.

auger hole. The bigger the hole the thicker the web must be to meet the standard. To the contrary, Mr. Johnson is motivated to find smaller auger holes since that would only require thinner webs under the standard.

Mr. Johnson is caught on the horns of a real dilemma. He must argue he has complied with his Ground Control Plan. But his Plan contemplates the use of a 26" auger bit. If he contends he has used a 26" bit then his webs are clearly too thin. If I accept the testimony of the MSHA inspector on only the lateral measurement of 18 auger holes, i.e. 18 holes covered 39 feet, then I must conclude that even if Mr. Johnson was using a 22" bit then the average web dimension was less than 5". That probably means a few webs were more than 5" but many were not that thick. On both grounds I conclude the Respondent was not complying with the terms of the applicable Ground Control Plan. I believe the thinness of the webs at the entrance to the holes was probably a result of the "fan" drill method, an issue not addressed in the Ground Control Plan. Hence the webs were probably of adequate thickness within several feet of the highwall surface. But those few feet are critical for stability of the highwall.

On the issue of whether the placement of the auger machine constituted an unacceptable impairment of the ability of the crew to escape a rock fall from the highwall, the testimony was only ambiguous in small details. There is no dispute that the auger machine was placed so as to form an acute angle with the highwall to perform repair work on the machine in the space between the highwall and the machine. What is not clear is whether the repair work required the efforts of one person or two. This is important because the regulation contemplates that when such a machine placement is required, special safety precautions are required. These precautions can be as simple as detailing one person to watch the highwall for signs of impending falls. If Johnson Construction took such precautions, then no violation would have occurred. I find the record is insufficient to resolve that question.

Analysis

It is well settled that the Secretary has the initial burden of proof of each element of a claim for assessment of a Civil Penalty. Satisfaction of that burden of proof imposes upon the Respondent the obligation of going forward with evidence in rebuttal or face judgment in favor of the Secretary. Only when it has been determined that the Secretary has met that burden without persuasive rebuttal does it become necessary to determine an appropriate amount of Civil Penalty. With this framework in mind I will now consider each of the claims made by the Secretary.

1. Overhang under 30 C.F.R. § 77.1503(b)

As discussed above, I have found as a fact that an overhang existed in the highwall above the location at which Johnson Construction performed work as an auger miner. The Respondent has offered no evidence in rebuttal of this charge other than to question the seriousness of the risks involved for the two miners involved. The Secretary has proposed a Civil Penalty of

\$1,000.00 for this violation because of the direct supervision of the work by the owner, a mine operator of significant experience.

Mr. Johnson testified he has operated his auger mining business in essentially the same way for 20 years without a serious accident. He appears to be more complacent with the risks than willful in his violations. The Civil Penalty imposed for this violation should be no more than the economic consequence necessary to call Mr. Johnson's attention to the need for compliance.

2. Failure to Follow Ground Control Plan under 30 C.F.R. § 77.1000

As discussed above, I have found as a fact that the Respondent failed to follow the approved Ground Control Plan in failing to allow adequate web material between holes. That the thickness of the web material several feet into the highwall may have satisfied applicable industry standards is not rebuttal to the claimed violation. Support of the highwall at the point of fracture for rock falls is the purpose and objective of the requirement for adequate web material. The Secretary has proposed a Civil Penalty of \$1,500.00 for this violation because of the direct supervision of the work by the owner, a mine operator of significant experience.

Mr. Johnson argued this violation amounts to no more than "paper work" technicality. The consequences of this violation need to be severe enough to persuade Mr. Johnson that the regulatory requirement to plan his work and work to his plan is significant and substantial.

3. Failure to Secure Escape Route under 30 C.F.R. § 77.1006(b)

As discussed above, I found that the Secretary has failed to prove that the Respondent failed to take special precautions against hazards during maintenance work for which the auger machine might represent an impairment of escape routes from a rock fall. Because of this failure of proof, I will dismiss this claim.

Amount of Civil Penalty

Jordon Construction is a very small mine operator. Testimony was undisputed that total net income from mine operations in the year 2000 was \$37,500.00. Tr. 271. The Secretary has proposed Civil Penalties that total \$2,500.00 for the two violations I have accepted. If I agreed with the Secretary's proposal, the Civil Penalty would represent almost seven percent of net income for that year. I consider that rate to be excessive. If applied to larger producers in this industry it would be considered confiscatory.

In that light I conclude that a Civil Penalty of \$250.00 is appropriate for the Overhang violation and a Civil Penalty of \$500.00 is appropriate for a violation of the Ground Control Plan requirement. This makes a total Civil Penalty in this case of \$750.00.

ORDER

For the reasons stated above, I find the Respondent has violated mine safety regulations contained in 30 C.F.R. §§ 77.1000 and 77.1503(b) but has not been shown to have violated the mine safety regulation in 30 C.F.R. § 77.1006(b). Respondent is directed to pay a Civil Penalty of \$750.00 for these violations within 40 days of the date of this Order.

Irwin Schroeder
Administrative Law Judge

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