

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 29, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 94-530
Petitioner : A.C. No. 36-00830-03556
v. :
: Kerry Coal Strips
KERRY COAL COMPANY, :
Respondent :

DECISION

Appearances: Pamela W. McKee, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner;
Bruno A. Muscatello, Esq., Kerry Coal Co., Butler,
Pennsylvania, for Respondent.

Before: Judge Fauver

This civil penalty case concerns two citations and a related imminent danger order issued under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq.

Order No. 3663273 alleges that:

The 988-B front end loader s/n [serial number] 50w2486 was observed working under a working overhang in the Lower Kittanning pit at pit 034.

The loader was working under a 45-foot spoil bank and due to mining operations a[n] overhang was created which was actively working, sending rocks and spoil material down around the machine. [Language added on February 18, 1994:] The following conditions, which collectively constitute an imminent danger, were observed in the lower Kittanning pit of Pit 034. 30 C.F.R. 77.1002 [N]ecessary precautions to minimize spoil material from rolling into the pit were not taken. 30 C.F.R. 77.1004(b) [C]orrective action to remove an overhang in the spoil bank [was] not taken. Men and equipment were permitted to work under these conditions.

The crux of the controversy is whether an overhang existed at the time of the inspection, whether proper sloping precautions were taken with respect to the left spoil bank and box end spoil bank, and whether these conditions constituted an imminent danger and violations of the cited safety standards.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. On February 17, 1994, Federal Mine Inspector Randy P. Myers inspected the Kerry Coal Strips Mine, which produces coal for sale or use in or affecting interstate commerce.

2. Upon arrival Inspector Myers went to the Lower Kittanning 034 coal pit, where the mine operator was using the box end method of surface mining.

3. At the end of the box cut was a spoil bank, described as the ~~A~~box end spoil bank. Perpendicular to the box end spoil bank were the right side highwall and the left side spoil bank.

4. The box end spoil bank was 90 feet long, 45 feet high. The left side spoil bank was 94 feet long, 25 feet high. The right side highwall was 45 feet long, 35 feet high.

5. Inspector Myers observed that the toe of the left spoil bank and the box end spoil bank had been substantially removed and the two spoil banks were not sloped at a 60 degree angle, as required by the operators ground control plan. Instead, they were cut close to a 90 degree angle.

6. The operator did not measure the slope of the left spoil bank or the box end spoil bank.

7. In the pit, the inspector observed an employee, Robert Jeffries, operating a front-end loader at the right hand corner of the box end spoil bank.

8. The front-end loader was removing spoil from the toe of the box end spoil bank to expose the coal seam, while extending the bucket of the machine to about 20 feet. In the process, rock and debris were falling towards the front-end loader from a height of about 45 feet. The material falling included two to three-foot rocks and other unconsolidated spoil material.

9. Enough material was falling that Mr. Jeffries leaned over the steering wheel in an effort to look up and see where the material was coming from.

10. While removing material from the toe of the box end spoil bank, the front-end loader was cutting into the wall of the spoil bank. Through the spoil removal operations, the front-end

loader and other equipment had created an overhang extending about two to four feet from the wall. The overhang was about 30 feet long, 20 feet high. At the time of the inspection, the overhang was ~~A~~working, @ i.e., dropping loose rocks and other spoil material.

11. When the equipment operator backed away from the box end spoil bank to load a rock truck, Inspector Myers issued an order ' 107(a) withdrawal order and directed that Mr. Jeffries and the front-end loader be removed from the pit.

12. The inspector then went to the top of the spoil banks, where he observed three large cracks: two on top of the box end spoil bank and one on top of the left side spoil bank.

13. The dimensions of the two cracks on top of the box end spoil bank were as follows: the first crack averaged about six inches wide and was about four feet back from the edge of the spoil bank. It extended from the corner of the spoil bank about 25 feet toward the center of the bank. The second crack averaged about seven inches wide and was about 30 feet long.

14. When Inspector Myers stood behind the first crack, he could look through the crack into the pit where the front-end loader had been operating.

15. While Inspector Myers observed the crack on the top of the box end spoil bank, material was falling into the pit in the area in which the front-end had been operating. He could see the two cracks settling toward the pit.

16. Inspector Myers measured the third crack on top of the left side spoil bank. This crack ranged from 7 to 12 feet wide, about 34 feet long.

17. The cracks on top of the box end spoil bank and the left side spoil bank indicated to the inspector that the banks were unstable and improperly sloped.

18. Between the time that Inspector Myers issued the imminent danger order and the time that Respondent took photographs of conditions in the pit, one of the box end spoil bank cracks and the overhang apparently had either fallen into the pit or were taken down by the operator. It is more probable that they fell into the pit since a large amount of spoil material was falling into the pit during Inspector Myers inspection.

19. At the time of the inspection, miners had been working in the pit over several shifts.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Citation No. 3663274

Citation No. 3663274 alleges a violation of 30 C.F.R. ' 77.1002 based on the following condition or practice:

[T]he operator ... failed to take the necessary precautions to minimize spoil material from rolling into the pit. The operator was utilizing the box cut mining method and removed the toe of the spoil on the left spoil bank and box end spoil bank.

Section 77.1002 provides that:

When box cuts are made, necessary precautions shall be taken to minimize the possibility of spoil material rolling into the pit.

As the front-end loader removed spoil material from the toe of the box end spoil bank, large quantities of spoil material fell into the pit from a 45 foot height in the bank. The falling material included two to three-foot rocks and other spoil material. The presence of large cracks in the spoil bank indicated that the bank was unstable and that it had not been properly sloped. The cracks permitted material to fall into the pit. The inspector could see through one crack down into the pit. He could also see other evidence of subsidence of the spoil bank.

The unstable condition of the spoil banks, with substantial quantities of rocks and other spoil material falling into the pit during the inspection, demonstrated that the operator had not taken ~~A~~necessary precautions to minimize the possibility of spoil material rolling into the pit. This was a violation of ' 77.1002.

In addition, Respondent was operating under an MSHA-approved ground control plan that specified that spoil banks were to be maintained at an angle of 60 degrees or less. The angle of the operators' spoil banks greatly exceeded the 60 degree limit in its ground control plan. The MSHA-approved ground control limit was plainly a ~~A~~precaution that the operator was required to observe under ' 77.1002. By failing to maintain the slopes at an angle of 60 degrees or less, Respondent violated both its ground control plan and ' 77.1002.

The citation alleges that the violation was ~~A~~significant and substantial. The Commission has held that this requires the Secretary to prove:

(1) [T]he 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 injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984). See also Cement Division, National Gypsum, 3 FMSHRC 822, 825 (1981); Southern Ohio Coal Company, 13 FMSHRC 912 (1991); Consolidation Coal Co., 6 FMSHRC 34, 36 (1984).

I find that the four elements of the Commission's test were present. First, the operator violated a mandatory safety standard when it failed to take necessary precautions to minimize the possibility of spoil material rolling into the pit. Its lack of precautions included removing the toe of spoil from both spoil banks and its failure to maintain a 60 degree slope as required by the ground control plan.

Second, the violation contributed to a discrete safety hazard -- falling material that could injure miners working in the pit. Jeffries was operating a front-end loader under the box end spoil bank as rocks and other material fell near his machine. Continued operations without abatement of the violation were reasonably likely to result in an accident.

Third and fourth, there was a reasonable likelihood that the hazard contributed to would result in serious injury. When the inspector arrived, material was falling from a height of 45 feet and landing near the front-end loader. The material falling included two to three-foot rocks and other unconsolidated material. Continued operations without abating the violation was reasonably likely to result in an accident causing serious injury. Given the amount of subsidence along the 30 foot crack in the box end spoil bank, there was a potential for a great deal of material to fall on the front-end loader and seriously injure the operator.

The citation alleges high negligence. I find that the evidence sustains this charge. The operator had a major role in formulating its ground control plan and therefore knew or should have known of the sloping requirements of the spoil bank. The dangerous angle of the walls was obvious and failure to correct this condition was due to high negligence.

Considering all the criteria for a civil penalty in' 110(i) of the Act, I find that a penalty of \$5,100 is appropriate for this violation.

Citation No. 3663275

Citation No. 3663275 alleges a violation of 30 C.F.R.

' 77.1004(b) based on the following condition or practice:

The operator at the Lower Kittaning Pit at Pit 034 failed to take corrective action to remove an overhang in the spoil Bank while permitting men and equipment to work under the hazardous condition. No abatement time is given because this condition is part of imminent danger order number 3663273.

Section 77.1004(b) provides:

Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted.

The inspector observed an overhang of loose spoil above the front-end loader. The overhang was about 30 feet long, 20 feet high, on the box end spoil bank. The front-end loader was removing spoil from the right hand corner of the box end. The process of removing the spoil had created the overhang.

The inspector observed that the overhang was ~~A~~working, @ i.e., dropping loose rocks and other spoil material that were bouncing off the spoil bank toward the machine.

During the hearing the judge asked Inspector Myers to look through his notes and point out any references to an ~~A~~overhang. @ The inspector testified that he used the term ~~A~~overhang @ in the imminent danger order and in Citation No. 3663275 but ~~AI~~ did not use the word overhang in my notes, but I did say that the bucket was inserted into the spoil bank. @ Tr. 232. The inspector apparently was limiting his reply to only a part of his notes, since his notes (Exhibit G-4) refer to ~~A~~overhang @ in a number of places. For example, at pp 32-34 his notes state that ~~A~~the overhang was created during mining operations of a D10 dozer side cutting the spoil bank down the level where a 988 front-end loader could load the overburden on to a R50 Euclid rock truck to expose the coal seam. In an effort to remove the toe of the spoil, the dozer operation had side cut the spoil and aided in the creation of the condition. As the loader worked below the wall the vibrations dislodged the loose material from the wall creating the overhang. @

I find that Inspector Myers' notes are explicit and reflect careful observations and attention to detail. His testimony and notes provide reliable evidence of the conditions he observed.

The inspector rated the operators' negligence as high because men had been working in the area for several shifts and the operator had made no effort to correct the hazards or to post

the hazardous areas. The failure to remove the overhang or to post it so employees would not work in proximity to it constituted aggravated conduct beyond ordinary negligence. The condition of the two spoil banks presented an imminent danger and the violations in Citation Nos. 3663273 and 3663274 combined to create an imminent danger. The failure to prevent violations that combine to create an imminent danger reflects high negligence.

Considering all the criteria for civil penalties in' 110(i) of the Act, I find that a penalty of \$5,100 is appropriate for this violation.

Imminent Danger Order No. 3663273

Section 107(a) of the Mine Act provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. . . .

Section 3(j) of the Mine Act defines **Imminent danger** as follows:

Imminent danger means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. . . .

The Commission and the courts have recognized that an inspector must act quickly when he or she perceives a condition to be dangerous and that the inspectors decision should be supported unless there was an abuse of discretion or authority.

For example, in Old Ben Coal Corp. V. Interior Board of Mine Operations Appeals, 523 F.2d 25, the Court of Appeals for the Seventh Circuit stated:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and

limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.

Similarly, in Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2164 (1989), the Commission stated: "Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists." This principle was re-affirmed by the Commission in Utah Power & Light Co., 13 FMSHRC 1617, 1627 (1991) and Island Creek Coal Company, 15 FMSHRC 339, 345 (1993).

The Commission held in Rochester & Pittsburgh, *supra*, that:

... an imminent danger is not to be defined in terms of a percentage of probability that an accident will happen. * * * Instead, the focus is on the potential of the risk to cause serious physical harm at any time. [quoting the legislative history of the Mine Act]. The [Senate] Committee stated its intention to give inspectors the necessary authority for the taking of action to remove miners from risk.

In Utah Power & Light, the Commission stated that "imminent danger" means the "hazard to be protected against must be impending so as to require the immediate withdrawal of miners." 13 FMSHRC at 1621. "Where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required." 13 FMSHRC at 1622.

In the litigation of a ' 107(a) order, the judge must determine whether a preponderance of the evidence shows that "the conditions or practices, as observed by the inspectors, could reasonably be expected to cause death or serious physical harm before the conditions or practices could be eliminated." Island Creek 15 FMSHRC at 346; Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (1992). The fundamental issue is whether "the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported issuance of the imminent danger order." Island Creek 15 FMSHRC at 346; Wyoming Fuel, 14 FMSHRC at 1292.

The inspector observed rocks and other spoil material falling into the pit near a front-end loader that was operating close to a dangerous overhang and an improperly sloped spoil bank. I find that the inspector made a reasonable investigation of the facts and that the facts known to him or reasonably available to him supported issuance of an imminent danger order.

His finding was confirmed by conditions he observed on top of the spoil banks. Large cracks indicated that the spoil banks

were unstable and too steeply sloped.

CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. Respondent violated the safety standards as alleged in Citation Nos. 3663274 and 3663275.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation Nos. 3663274 and 3663275 and Order No. 3663273 are AFFIRMED.

2. Within 30 days of this Decision, Respondent shall pay civil penalties of \$10,200.

William Fauver
Administrative Law Judge

Distribution:

Pamela W. McKee, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Bruno A. Muscatello, Esq., Kerry Coal Co., 228 S. Main St., Butler, PA 16001 (Certified Mail)

/lt