

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 16, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-642
Petitioner : A.C. No. 05-03455-03626
 :
v. : Docket No. WEST 93-643
 : A.C. No. 05-03455-03627
ENERGY FUELS COAL INC., :
Respondent : Southfield Mine

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Phillip D. Barber, Esq., Dufford & Brown, P.C.,
Denver, Colorado,
for Respondent.

Before: Judge Cetti

I

These consolidated cases are before me upon petitions for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act" or "Act"). The Secretary of Labor (Secretary) seeks civil penalties from Respondent, Energy Fuels Coal Inc. (Energy Fuels), pursuant to section 105(d) of the Act for the alleged violation of three regulatory safety standards found in Parts 75 and 77, Title 30, Code of Federal Regulations.

STIPULATIONS

1. Energy Fuels is engaged in mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. Energy Fuels is the owner and operator of Southfield Mine, MSHA I.D. No. 05-03455.

3. Energy Fuels is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of respondent on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondent and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Energy Fuels is a mine operator with 330,568 tons of production in 1993.

10. The certified copy of the MSHA Assessed Violations History accurately reflects the history of this mine for the two years prior to the date of the citations.

Citation No. 3589183

Ned Zamarripa, a federal mine inspector, issued this 104(a) citation following his inspection of the mine site. The citation reads as follows:

No guard was provided for the conveyor head pulley that is located on the top floor of the coal preparation plant. The conveyor transports coal from the row coal storage area to the prep plant.

The citation charges Energy Fuel with the violation of a mandatory safety standard 30 C.F.R. § 77.400(c). That standard reads as follows:

(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person

from reaching behind the guard and becoming caught between the belt and the pulley.

Thus the standard not only requires a guard for the conveyor head-pulley but specifically requires that the guard must "extend a (sufficient) distance" that a person cannot reach behind the guard and become caught between the contact or pinch-point between the belt to the pulley.

The guard observed by the inspector was, at best, in the nature of a perimeter or area guard rather than one that extended a sufficient distance to guard the specific contact points that a person could contact by reaching behind the guard.

It is undisputed that the purported guard consisted of a single short length of chain with a hook at the end of the chain. This unlocked chain was hooked across the 9-foot high access ladder leading to the platform where the head-pulley is located. The pulley-head is located four or five feet above the walkway of the platform and four or five feet away from the chain that was hooked across the access ladder. Wired at the middle of the chain was a "Danger" sign.

On cross-examination, Mr. Acre, the mine manager, testified that the duties of some employees requires that they get up into the area of the head-pulley to adjust the pulley, lubricate bearings and inspect or clean the area. The mine manager on cross-examination also testified as follows:

Q. And there's nothing preventing someone from moving the chain that's between the ladder and the pulley?

A. That is correct.

Q. There's not a lock on that, or anything like that?

A. There is not.

Q. Approximately how high is that chain?

A. The chain is approximately three feet high.

Q. So it would be possible for someone to even step over that chain very easily?

A. Certainly would be.

Q. It would be possible for someone to stub their toe while they were stepping over that chain and come close to the pulley, wouldn't it?

A. That's a possibility.

Thus it is clear from the record that to access the head-pulley a person could simply unhook the chain or just step over it or under it without even bothering to unhook the chain.

Respondent asserted (and also presented some evidence) that it complied with a mandated lock-out procedure in its maintenance of the head-pulley.

Even assuming full compliance with mandated lock-out procedures when work of any kind is done on the head-pulley, such compliance does not relieve an operator from full compliance with the provision of the cited guarding standard. Compliance with both safety standards is required.

On review and evaluation of the evidence presented and the provisions of the cited standard, I find that the unlocked chain, with a cautionary danger sign strung across the access ladder, is insufficient to meet the requirements of the cited safety standard.

The mitigating factors, such as the remote location of the head-pulley, the chain with a danger sign strung across the access ladder, and the asserted compliance with lock out procedures have been taken into consideration by MSHA by its modification of the citation. Prior to the hearing, MSHA modified the citation by changing the injury finding "reasonably likely" to "unlikely", and deleting the significant and substantial finding. MSHA also reduced the proposed penalty to a single assessment penalty of \$50.00.

I conclude that a violation of the cited safety standard was established. Upon taking into consideration the statutory criteria in section 110(i) of the Act, I find the MSHA proposed \$50.00 penalty is appropriate for this violation.

Citation No. 2930830

This citation is the first of three citations issued concerning the preshift examinations of the mine. This citation was

issued on June 22, the first day of the inspection. It alleges a non-significant and substantial 104(a) violation of 30 C.F.R. § 75.360(a). MSHA proposed a \$50.00 civil penalty. The cited safety standard reads as follows:

Within 3 hours preceding the beginning of any shift and before anyone on the oncoming shift, other than certified persons conducting examinations required by this subpart, enters any underground area of the mine, a certified person designated by the operator shall make a pre-shift examination.
(Emphasis added).

Clearly and plainly this regulatory safety standard requires a certified person to make the preshift examination within three hours "preceding the beginning of any shift".

Upon evaluation of the conflicting evidence, I find that at the Southfield Mine on June 22, the beginning of the day shift was 5 a.m. and at that time the men entered the mine. (Tr. 139). The preponderance of the evidence also established that the pre-shift examination required by 30 C.F.R. § 75.360(a) was not completed until 6:20 a.m. (Resp. Ex. 2A, Tr. 138-139).

I do not question the fact that the pre-shift examination was performed by John Gribben, a certified person, nor the fact that a certified person is permitted to perform a supplemental examination of his own working areas after the beginning of a shift, as long as no other person is scheduled to enter that area before this supplemental examination occurs. One difference between the two types of examinations is that a preshift examination, unlike a supplemental examination, must be recorded in a book on the mine surface before a non-certified person may enter the inspected underground area. [75.360(g)]. It is also undisputed that there is no need to require inspections of areas of the mine where persons are not scheduled to work or travel.

In this case I am persuaded by the documentary evidence, Resp. Ex. 2A, and my evaluation of the testimony of the certified examiner, that on the day the citation was issued the preshift examination required by 30 C.F.R. § 75.360(a), was not completed before the "beginning of the shift".

The 104(a) non-S&S violation of the cited safety standard was established. Taking into consideration the criteria of section 110(i) of the Act, I find the \$50.00 civil penalty proposed by MSHA is appropriate for this violation and it is affirmed.

Citation No. 2930831

This citation was vacated by MSHA at the beginning of the hearing. (Tr. 6).

Docket No. WEST 93-643

Citation No. 3077128

This 104(a) S&S citation charges the operator with inadequate preshift examination of the mine on June 23, the second day of the inspection. It alleges that the examiner performing the preshift examination on June 23 should have "detected" an improper direction of an air current.

The citation reads as follows:

An inadequate pre-shift examination was conducted for the day shift of 6-23-93, on the 2-North "d" east working section. The air current (coursed) through the belt haulage entry was being used to ventilate the working faces at a rate of 9000 cfm. This violation was obvious in the area of the feeder breaker and should have been detected and immediately corrected, prior to mining coal at the working faces. (See also citation no. 3077127). ¹

The cited safety standard 30 C.F.R. § 75.360(b) reads as follows:

The person conducting the pre-shift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

There is no dispute that the time the air current reversal was first detected by the inspector and mine management was just after midday on June 23. At that time a citation was issued for an obvious air current flowing in the wrong direction. The operator agreed, accepted and paid the MSHA penalty assessment for that violation. That citation was never contested. The

¹ Citation No. 3077127 (Govt. Ex. 6B) issued for air not moving in its proper direction was accepted by Energy Fuels and never contested.

instant citation that the operator is contesting is the additional citation issued for the alleged failure to detect the obvious wrong direction of the air current at the time of the June 23 preshift examination.

As I will discuss in more detail below, I find the preponderance of the evidence failed to establish that the air current in question was moving in the wrong direction at the time of the preshift examination which was conducted 4 a.m. to 5 a.m. on June 23.

On June 23 the second day of his inspection, the inspector arrived at feeder-box area about 12:30 p.m. He testified that "as soon as I got there, it was immediately obvious" that the air current (9000 cfm) was moving in the wrong direction (belt air going inby to the face). The inspector testified "The air was coming at me. It was in my face and I could feel the air current." The inspector assumed that this obvious wrong direction of air current had existed for several days. (Tr. 175, 183).

On cross examination the inspector admitted that on the day before (June 22) he and others stood at the same place for 10 to 20 minutes where on June 23, he "immediately" noticed the "quite obvious" air current reversal. (Tr. 188). With the inspector on his earlier inspection of June 22 at the same identical location was MSHA's Bill Reitze, the supervisor in charge of the ventilation group in the MSHA district office, and Andy Franklin, production superintendent. Neither the inspector, Reitze nor Franklin noticed any air reversal at that time. (Tr. 183, line 16-19).

The preshift examination on June 23 was conducted by Mr. Randy Acre, mine manager of the Southfield Mine. Mr. Acre has had "boss papers" continuously since 1978 which allows him to make preshift examinations. On June 23 he conducted the preshift examination between 4 a.m. and 5 a.m. He traveled to the Feeder Breaker area and did not detect any air current traveling in the wrong direction. Air traveling at 9000 cubic feet per minute is a significant volume of air. Mr. Acre testified, if the air had been traveling in a reverse direction at that time, he would have noticed it just as Inspector Zamarripa and others immediately noticed it later that same day. Inspector Zamarripa conceded on cross-examination that Mr. Acre was a prudent, competent miner, who takes his job seriously.

Andrew Franklin, production superintendent, has fire boss papers. He was with Inspector Zamarripa and Mr. Acre at the feeder box on June 22 and again on June 23. He testified there was no air reversal on June 22 but on June 23 at the time of

further inspection of the area, it was obvious there was an air reversal. He stated, "You could feel it on your face."

I credit the testimony of the mine manager, Randy Acre. On the basis of his testimony, I find that the cited "obvious" air reversal of 9000 cubic feet of air did not exist at the time of the preshift examination conducted by Mr. Acre at 4 a.m. to 5 a.m. on June 23.

I find the air reversal was indeed obvious and would have been detected by Mr. Acre during his preshift examination if it had existed at that time. I credit Mr. Acre's testimony and vacate the citation.

Conclusion

In view of the foregoing, I affirm the two 104(a) Citation Nos. 3589183 and 2930830. Upon consideration of the statutory criteria in section 110(i) of the Act, I find that the MSHA proposed penalty of \$50.00 is the appropriate penalty for each of the affirmed citations.

ORDER

It is **ORDERED** that:

Docket No. WEST 93-642

Citation No. 2930831 be **VACATED** as requested by Petitioner at the hearing.

Citation No. 3589183 and its related \$50.00 proposed civil penalty are **AFFIRMED**.

Citation No. 2930830 and its related \$50.00 proposed civil penalty are **AFFIRMED**.

It is further **ORDERED** that the **RESPONDENT SHALL PAY** a civil penalty assessment of \$100.00 to MSHA within 30 days of the date of this decision and order, in satisfaction of the two established violations in this docket, and upon receipt of payment, Docket No. WEST 93-642 is dismissed.

Docket No. WEST 93-643

Citation No. 3077128 and its related proposed penalty are **VACATED** and Docket No. WEST 93-643 is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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