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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 90-201-M
A.C. No. 04-05077-05501

v.

Docket No. WEST 90-261-M
A.C. No. 04-05077-05502

JVAL INCORPORATED,
RESPONDENT

Stewart Mine

DECISION

Appearances: Susan Gillett, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
Charles H. Schultz, Superintendent, Pro Se
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration ("MSHA") charges Respondent JVAL, Incorporated ("JVAL") with violating safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (the "Act").

A hearing on the merits was held in Sacramento, California, on June 18, 1991. The Secretary of Labor filed a post-trial brief.

STIPULATION

At the commencement of the hearing, the parties stipulated as follows:

1. The Stewart Mine located at 10323 Adam Avenue, Grass Valley, California, is a mine within the meaning and interpretation of the Federal Mine Safety and Health Review Commission at 30 U.S.C. Section 802(h).
2. The Mine is subject to the coverage of the act within the meaning and interpretation of the Act at 30 U.S.C. 802(b).
3. The size of the respondent operator is approximately 488 man-hours per year.

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4. There has not been previous history of a violation at the Stewart Mine.

Citation No. 3464304

In this citation, the Secretary charges JVAL with violating 30 C.F.R. 57.3360.1

The citation reads as follows:

There were no timbered sets, nor sets of any kind at the portal "collar" of the underground drift to keep loose or thawing ground from releasing cracked ground or the cemented placer rock, or anything to keep the back from falling in when it (the face of the drift), is being blasted. The face of the drift being blasted & worked was less than 150 feet from the outside surface ground of the portal of the mine.

FRANK B. SEALE, an MSHA inspector experienced in mining, conducted a courtesy inspection (CAV) of the Stewart Mine on February 7-8, 1990. Mr. Schultz, Superintendent, and others were present. The inspector gave Mr. Schultz a copy of the CAV nonpenalty violations. (Tr. 12).

The 8-foot by 10-foot portal with a Roman arch lacked structural support. The inspector believed support was necessary as the ground was thawing. The inspector also saw a small rock tumble out of the side of the hill and almost strike miner Lee.

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The entry went 135 feet into the mountain without structural support. There could be a total and complete collapse. (Tr. 15). The condition was pointed out to Mr. Schultz. On March 6-7, 1990, at a regular MSHA inspection, the inspector did not see any change in the condition of the portal but they had dug an additional 12 or 14 feet into the shaft. Usually 7 or 8 sets would have been installed for 50 feet or so. (Tr. 16-18). Miner Jed Lee was present and they were blasting at the bottom of the drift (Tr. 17) at the time the moist earth was drying out. (Tr. 19). If a collapse of the ground occurred it was reasonably likely that a fatality would occur.

During the penalty inspection in March, Mr. Seale was accompanied by Messrs. Schultz, Lee and Morey. (Tr. 21). The inspector again pointed out the need for timbered sets. In the inspector's opinion, Mr. Schultz is very conscientious and had been an MSHA inspector. (Tr. 54). The company had two miners at the site. (Tr. 38). The inspector agrees that Mr. Schultz had ordered steel sets before the penalty inspection but they had not arrived. (Tr. 35). The tunnel, to a depth of 135 to 150 feet, had been there since the 1800s. JVAL had advanced it 12 feet. When the mine was shut down the total advance was 36 feet. (Tr. 37).

CHARLES H. SCHULTZ, a consulting engineer and experienced in mining and tunneling, testified for JVAL. (Tr. 45).

When the inspector arrived in February, the mining had progressed about 50 feet underground. (Tr. 46). All the CAV notices were correct and Mr. Schultz intended to comply. (Tr. 46-48).

After the CAV inspection, Mr. Schultz attempted to secure the necessary Douglas fir from three lumber companies. (Tr. 48). He believes timbered sets were necessary. (Tr. 57). All the companies indicated they would be cutting Douglas fir in a week or two. But in view of the delay in securing the timber, he ordered two steel sets. On March 6, employee Dwayne Davis bought some timber and steel sets. From March 6, the miners worked on the portal until completion. (Tr. 49; Ex. R-1, R-2, R-3, R-4).

Discussion

The evidence is uncontroverted that ground support was needed due to the thawing conditions in the area. No such ground support was provided.

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The Secretary further asserts the lack of ground support in the portal and tunnel was a significant and substantial violation. I agree. It has been noted that mine roofs are inherently dangerous and even a good roof can fall without warning. Consolidated Coal Co., 6 FMSHRC 3A, 37-38; Halfway, Inc. 6 FMSHRC 8, 13. The above cited cases involved underground coal mines and the requirements of 30 C.F.R. 75.200 but the reasoning is equally applicable here.

The testimony is clear that the roof could fall at any time. Further, if it fell a fatality could occur.

Citation No. 3464304 should be affirmed and a civil penalty should be assessed.

Citation No. 3464305

In this citation, the Secretary charges Respondent with violating 30 C.F.R. 57.11058.2

The citation reads as follows:

A mine, check-in check-out system had not been provided, so a person checking the shift attendance could tell whether a given miner was underground or out on the surface.

At the time of the CAV visit, Inspector Seale concluded there was no check-in, check-out tags, called "brass tags". Such a system is used by potential rescuers of any individual who may be in the mine. (Tr. 22-24). Such systems are usually located at the portal of the mine. The inspector told Mr. Schultz that he needed to develop such a system.

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On his penalty inspection the following month, the inspector did not see any kind of a check-in, check-out system. Messrs. Schultz, P.D. Morey, President, and Joel Lee were there. (Tr. 24). When the lack of brass tags was pointed out to Mr. Schultz, he said he was working on it. Mr. Schultz didn't tell the inspector where the system could be found. The failure to have such a system presents a danger to the men underground. (Tr. 25).

At the regular MSHA inspection, the inspector agrees he didn't know if he discussed the check-in, check-out system with Mr. Schultz. (Tr. 38-43). The citations issued in March came by mail a week later. (Tr. 40). When he sees a violation, it is the inspector's normal practice to point it out to the operator. (Tr. 43). Witness Schultz indicated the check-in, check-out board was known by the two miners to be located in the pickup truck (Tr. 47) but he and the inspector did not discuss the check-in, check-out system during the March inspection. (Tr. 47). Mr. Schultz believed he was in compliance and the inspector didn't know the check-out board was in the pickup and he automatically wrote the citations. (Tr. 48). According to Mr. Schultz it was very convenient to keep the check-out system in the truck because there are no buildings in the area. After the portal was rebuilt, the check-in, check-out system was hung at the portal. (Tr. 66).

Discussion

A credibility issue arises concerning this situation. I credit Mr. Schultz's testimony that the check-in, check-out system was available at the time of the penalty inspection in March. The inspector admits he didn't discuss the system with Mr. Schultz at the time of the penalty inspection. Mr. Schultz, who was described as a conscientious superintendent, should have been aware of the system and its location on the premises.

Citation No. 3464305 should be vacated.

In this citation, the Secretary charges JVAL with violating 30 C.F.R. 57.15001.3

The citation reads as follows:

Neither a stretcher nor blankets or first-aid supplies of any kind were available at the mine site for use in the event of a mine emergency.

At the CAV inspection, the inspector did not see a stretcher or any first-aid material. (Tr. 26). Such materials are usually kept in a small nearby office or an old truck or in something immobile. (Tr. 26). The materials shouldn't be in a location where they could be removed at the end of the shift. They had one or two trucks present during the CAV. There were no small buildings. A trailer was up the road about a mile. (Tr. 27). There were no first-aid materials around the mine. (Tr. 28).

In March, at the penalty inspection, the inspector did not see any first-aid supplies in the truck. Messrs. Schultz, Morey and Lee were also present. (Tr. 28). The company representatives stated the materials would be provided. During the termination of the citation on March 7th, they stated they were in a nearby trailer. The trailer must have been in the watchman's house up the road. The inspector would not have written the citation if the material had been there on March 6. (Tr. 29). When he returned for the March inspection, he remembered discussing the first-aid materials. (Tr 40).

Witness Schultz indicated the inspector didn't leave the citation with JVAL. Before they were received he had produced a stretcher and blankets. The first-aid kit itself was always in

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the pickup truck. (Tr. 46). At the end of the shift, the truck goes "home" but it is returned the next day. (Tr. 47). Witness Schultz testified that during the March inspection he and the inspector did not discuss the first-aid supplies. Miner Davis brought the stretcher and blanket in the pickup truck. (Tr. 47). Mr. Schultz believes he was in compliance because the inspector didn't know a stretcher and blanket were in the pickup and he automatically wrote the citation. (Tr. 48). Mr. Schultz did not tell the inspector that the first-aid materials were in the truck. (Tr. 65).

Discussion

A credibility issue arises in connection with this citation. I credit Inspector Seale's testimony to the effect that he would not have written this citation if the first-aid supplies had been present. Mr. Schultz agrees he did not advise the inspector that the materials were in the truck. In view of the previous CAV notice he had received, one would anticipate Mr. Schultz would discuss this matter with the inspector.

Citation No. 3464306 should be affirmed and a penalty assessed.

CIVIL PENALTIES

Section 110(i) of the Act, 30 U.S.C. 820(i) mandates the criteria for assessing civil penalties.

JVAL does not have an adverse prior history (Stipulation). The proposed penalties appear appropriate since the operator's size is small, only 488 manhours per year (Stipulation). The lack of ground support at the portal was open and obvious. Further, the lack of first-aid supplies should have been known to JVAL personnel. These factors establish the company's negligence was moderate.

In the absence of any facts to the contrary, I find that the payment of the proposed penalties will not cause JVAL to discontinue its business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974). The gravity for the lack of ground support at the portal is high but the gravity due to lack of first-aid supplies is moderate. JVAL demonstrated good faith in abating the violative condition. On balance, I deem that the penalties affirmed in the order of this decision are appropriate.

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For the foregoing reasons, I enter the following:

ORDER

In WEST 90-261:

- 1. Citation No. 3464304 is AFFIRMED and a penalty of \$50 is ASSESSED.
- 2. Citation No. 3464305 and all penalties therefor are VACATED.

In WEST 90-201:

- 3. Citation No. 3464306 is AFFIRMED and a penalty of \$40 is ASSESSED.

John J. Morris
Administrative Law Judge

AA
FOOTNOTES STAT HERE

- 1. The cited regulation reads as follows:

57.3360 Ground support use.

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

- 2. The cited regulation reads as follows:

57.11058 Check-in, check-out system.

Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine. These records shall be kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazards. Every person underground shall carry a positive means of being identified.

- 3. The cited regulation reads as follows:

57.15001 First aid materials.

Adequate first-aid materials, including stretchers and blankets shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

