CCASE:
SOL (MSHA) V. EASTERN ASSOCIATED COAL
DDATE:
19790621
TTEXT:

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

v.

EASTERN ASSOCIATED COAL CORP.,
RESPONDENT

Civil Penalty Proceeding

Docket No. HOPE 78-607-P
Assessment Control
No. 46-01271-02023V

Harris No. 1 Mine

DECISION

Appearances: Edward H. Fitch IV, Esq., Office of the Solicitor, Department of Labor, for Petitioner
Robert C. Brady, Legal Assistant, Pittsburgh, Pennsylvania, for Respondent

Before: Administrative Law Judge Steffey

A hearing was convened in the above-entitled proceeding on December 5, 1978, in Charleston, West Virginia, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. At the hearing, petitioner's counsel and respondent's legal assistant moved that a settlement agreement with respect to an alleged violation of 30 CFR 75.603 be approved. Although MSHA's Petition for Assessment of Civil Penalty in Docket No. HOPE 78-607-P seeks assessment of civil penalties for two alleged violations, namely, a violation of 30 CFR 75.603 and a violation of 30 CFR 75.200, the parties asked that I approve a settlement only with respect to the alleged violation of section 75.603 because I had previously received evidence with respect to the alleged violation of section 75.200 in a proceeding involving an Application for Review filed by Eastern Associated Coal Corp. in Docket No. HOPE 78-109. In my decision issued May 30, 1978, in Docket No. HOPE 78-109, I stated that I would decide the civil penalty issues raised with respect to the alleged violation of section 75.200 when MSHA filed a Petition for Assessment of Civil Penalty with respect to the violation of section 75.200 alleged in the withdrawal order which was under review in Docket No. HOPE 78-109.

This decision will first consider the settlement agreement reached by the parties with respect to the alleged violation of section 75.603 and thereafter will dispose of the alleged violation of section 75.200 on the basis of the record heretofore made in Docket No. HOPE 78-109.

The Settled Penalty

Order No. 1 BRB (7-150) 9/14/77   75.603

The violation of section 75.603 involved in the parties' settlement agreement was alleged in Withdrawal Order No. 1 BRB (7-150) issued September 14, 1977, under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. Order No. 1 BRB alleged that there were two temporary splices and one damaged place in the trailing cable to Joy Shuttle Car No. ET9864 and one temporary splice in the trailing cable to Joy Shuttle Car No. ET9366. It was further alleged that the insulation on the temporary splices was inadequate and that a bare wire showed in one of the splices. It was also alleged that the trailing cables were not properly secured by the strain clamp at the cable reels.

The Assessment Office proposed that a penalty of $10,000 be assessed for the alleged violation of section 75.603. That proposed maximum penalty was based on a waiver of the normal assessment formula provided for in 30 CFR 100.3 and the making of findings which stressed that the order had been issued under the unwarrantable failure provisions of the 1969 Act. MSHA's counsel agreed to accept respondent's offer of $5,000 on the basis of several considerations which indicate that, while a high degree of gravity was associated with existence of several inadequately insulated places in the trailing cables, the inadequate insulation did not expose the miners to a grave danger at the time the poor insulation was observed.

First, the likelihood of a shock or electrocution hazard was diminished by the fact that the poor insulation was observed during the maintenance shift at a time when the trailing cables were not energized. Second, the poor insulation was located at a point outby the working faces near the power center where it was not likely that miners would have to handle the cables. Third, there were no coal accumulations or other conditions which might have been likely to cause a fire or explosion if a spark had come from the exposed wire in the cable. Fourth, all of the wires in the splices had been connected, including the ground wire, so that it was improbable that a miner would have been exposed to a shock hazard if he had touched the frame of one of the shuttle cars at a time when its trailing cable was energized. Finally, since the poor insulation was discovered on a maintenance shift, there was at least a possibility that the poor insulation on the trailing cables would have been corrected before the shuttle cars were energized at the commencement of the next production shift.

The mitigating circumstances described above warrant a finding that the violation of section 75.603 was not so hazardous as to justify the assessment of the maximum penalty of $10,000 proposed by the Assessment Office. Therefore, I find that respondent's agreement to pay a penalty of $5,000 is reasonable and should be approved.

The Contested Penalty

Order No. 1 EW (7-183) 11/17/77   75.200

Issues. The issues raised by the Petition for Assessment of Civil Penalty in the contested portion of this proceeding are whether respondent violated 30 CFR 75.200 and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the 1977 Act or section 109 of the 1969 Act.

Occurrence of Violation. Section 75.200 requires each operator of a coal mine to prepare and file with MSHA a roof-control plan applicable to the conditions in his mine. After the plan has been approved by MSHA, the operator is required to follow its provisions. Respondent's roof-control plan requires that a total of four temporary supports shall be installed within 5 minutes after the loading machine is removed from the face of an entry. The placement of the temporary supports in accordance with respondent's roof-control plan requires that two supports shall be installed no more than 5 feet inby the last permanent supports with one temporary support located on the left side and the other on the right side of the entry. Two additional supports are required to be installed no more than 5 feet inby the first two temporary supports and in line with the first two supports (Drawing No. 2, Exh. 2; Tr. 19; 123. NOTE: All transcript and exhibit references are to the record in the Eastern Associated case in Docket No. HOPE 78-109.)

Respondent violated section 75.200 because the inspector observed the operator of the roof-bolting machine and his helper installing roof bolts near the face of the No. 3 entry. The miners were in violation of the roof-control plan because only one of the four required temporary supports had been installed and the operator of the roof-bolting machine had already placed two headers against the roof with only a single bolt inserted in the center of each of the two headers. Both headers were located inby the last permanent roof support.

Gravity. The installation of roof bolts with use of only one safety jack was a hazardous act, but there was no indication that the roof was in any immediate danger of falling because the inspector saw no visible cracks or breaks in the roof and he believed that respondent's Harris No. 1 Mine generally had fair roof conditions. Nevertheless, the inspector said that when miners work without using adequate supports, they are always exposed to a possible roof fall (Tr. 21-22). Therefore, I find that the violation was serious.

Negligence. The operator of the roof-bolting machine and his helper were experienced miners and they said that they knew better than to install roof bolts without using the required number of temporary supports (Tr. 23). The section foreman had had a great deal of difficulty in getting the roof bolter and his helper to follow orders. The section foreman had caught them violating the provisions of the roof-control plan from time to time despite the fact that the section foreman explained the provisions of the roof-control plan to the miners on his shift every Wednesday morning (Tr. 148-151; 153). Although the section foreman knew

that the roof bolter and his helper had a strong tendency to ignore the provisions of the roof-control plan, he had gone to check a sump pump in an adjacent entry at the time the inspector found the roof bolter and his helper violating the plan. The section foreman had seen the roof bolters ready to enter the No. 3 entry to begin roof bolting when he made his last inspection of the face areas, but he made a check of the pump instead of remaining in the vicinity of the roof bolters so as to assure that they would follow the provisions of the roof-control plan. Therefore, I find that respondent was negligent in failing to see that the provisions of the roof-control plan were followed.

Although my decision in Docket No. HOPE 78-109 affirmed the inspector's order as having been properly issued under section 104(c)(2) of the 1969 Act, the parties agreed that the issue of unwarrantable failure was to be determined under the former Board of Mine Operations Appeals' holding in Zeigler Coal Co., 7 IBMA 280, 295 (1977). In the Zeigler case, the Board held that a high degree of negligence does not have to exist to support the issuance of an unwarrantable failure order.

Size of Operator's Business. The evidence shows that in 1977, when Order No. 1 EW was issued, respondent employed 1,334 management persons and 5,731 contract laborers to produce 6.15 million tons of coal. The mine which is involved in this proceeding is respondent's Harris No. 1 Mine which, in 1977, produced 625,441 tons of coal and employed 71 management persons and 334 contract laborers (Exh. B). The Harris No. 1 Mine has eight working sections, three of which use conventional mining procedures, three of which produce coal with continuous-mining machines, and two of which use longwall methods to produce coal (Tr. 12).

On the basis of the foregoing information, I find that respondent operates a large coal business and that the penalty to be assessed in this proceeding should be in an upper range of magnitude to the extent that the penalty is based on the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business. Respondent's representative at the hearing in Docket No. HOPE 78-109 stated that payment of penalties would not cause respondent to discontinue in business (Tr. 172). Therefore, I find that the assessment of the penalty herein imposed will not cause respondent to discontinue in the coal business.

Good Faith Effort To Achieve Rapid Compliance. A period of only 12 minutes was required for respondent to achieve compliance with its roof-control plan after Order No. 1 EW was issued. Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance and that mitigating factor is hereinafter taken into consideration in assessing the penalty.

Assessment of Penalty. As the above discussion of five of the six

criteria has shown, the violation of section 75.200 exposed the miners to a possible roof fall, but there were no visible signs to indicate that a roof fall was any more than a potential hazard in the circumstances observed by the inspector. Since it is always possible for an unsupported roof to fall without warning, the violation was still serious and warrants a substantial penalty from the standpoint of gravity. Although respondent was negligent in permitting the miners to install roof bolts without using the proper number of temporary supports, some consideration should be given in assessing a penalty to the fact that respondent was explaining the provisions of the roof-control plan to its miners on a weekly basis. Moreover, consideration should be given for the fact that the two miners concerned were recalcitrant and were difficult to supervise.

When the foregoing considerations are added to the fact that a large operator is involved and that respondent immediately achieved compliance, I conclude that a penalty of $2,000 is warranted in light of all the mitigating factors discussed above. The Assessment Office proposed that a penalty of $8,000 be assessed for this violation, but the Assessment Office reached that large amount primarily by placing an undue emphasis on the fact that the order was issued under the unwarrantable failure provisions of the Act.

History of Previous Violations. Exhibit 13 indicates that there have been 36 prior violations of section 75.200 at respondent's Harris No. 1 Mine. Three violations occured in 1971, 2 in 1972, 4 in 1973, 2 in 1974, 8 in 1975, 14 in 1976, and 3 in 1977 by July 13, 1977. The statistics show that an increasing number of violations of section 75.200 have occurred during the past few years. It is encouraging to note that only three violations of section 75.200 had occurred by July of 1977 which may indicate that respondent is beginning to achieve a reduction in the number of violations of section 75.200. Nevertheless, I believe that respondent's history of previous violations is sufficiently unfavorable to require that the penalty otherwise assessable of $2,000 be increased by $250 to $2,250 under the criterion of respondent's history of previous violations.

Summary of Assessments and Conclusions

(1) The parties' settlement agreement under which respondent has agreed to pay a civil penalty of $5,000 for the violation of section 75.603 cited in Order No. 1 BRB (7-150) dated September 14, 1977, should be approved and respondent will hereinafter be ordered to pay a penalty of $5,000 pursuant to the settlement agreement.

(2) On the basis of all the evidence of record in the proceeding in Docket No. HOPE 78-109, and the foregoing findings of fact, respondent is assessed a civil penalty of $2,250 with respect to the violation of section 75.200 cited in Order No. 1 EW (7-183) dated November 17, 1977.

(3) Respondent was the operator of the Harris No. 1 Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The settlement agreement described in paragraph (1) above is approved.

(B) Respondent Eastern Associated Coal Corp. is assessed civil penalties totaling $7,250.00 for the violations described in paragraphs (1) and (2) above. The penalties shall be paid within 30 days from the date of this decision.

Richard C. Steffey
Administrative Law Judge