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

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. HOPE 78-679-P(FOOTNOTE 1)<br>(Assessment Control No.<br>46-03467-02069V) |
| v. | |
| SEWELL COAL COMPANY,<br>RESPONDENT | Meadow River No. 1 Mine |

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, Department of Labor, for Petitioner
Robert C. Kota, Esq., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Steffey

The Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P seeks assessment of civil penalties for 11 alleged violations of the mandatory health and safety standards. Three of the 11 alleged violations pertain to three withdrawal orders which were the subject of Applications for Review filed in Docket Nos. HOPE 78-44, HOPE 78-71, and HOPE 78-73. When the hearing in the consolidated review proceeding in Docket Nos. HOPE 78-44, et al., was held, evidence was received with respect to any civil penalty issues which thereafter might be raised if MSHA should subsequently file a petition for assessment of civil penalty with respect to the violations alleged in the three orders which were the subject of the review proceeding. A decision with respect to the issues raised by the Applications for Review in Docket Nos. HOPE 78-44, et al., was issued on March 30, 1978. That decision deferred all rulings on the civil penalty issues until such time as a petition for assessment of civil penalty might be filed by MSHA requesting that civil penalties be assessed for the violations alleged in the three withdrawal orders which were under review in Docket Nos. HOPE 78-44, et al.

The Petition for Assessment of Civil Penalty in Docket No. HOPE 78-679-P asks that civil penalties be assessed with respect to the violations alleged in the three withdrawal orders involved in the

review cases in Docket Nos. HOPE 78-44, et al. This decision, therefore, will dispose of the civil penalty issues which were deferred at the time my decision in Docket Nos. HOPE 78-44, et al., was issued. This decision will, of course, be based on the record made in Docket Nos. HOPE 78-44, et al.

The order accompanying this decision will sever from the Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P all civil penalty issues with respect to the three withdrawal orders which were involved in the proceeding in Docket Nos. HOPE 78-44, et al., so that a hearing can hereafter be scheduled for the purpose of making a record to resolve the issues which remain to be decided with respect to the violations alleged in the other eight withdrawal orders which are the subject of MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P.

Issues

The issues to be considered with respect to each of the three orders are whether a violation of a mandatory health or safety standard occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

General Considerations

Section 110(i) of the Act provides that civil penalties shall be assessed after giving consideration to the six criteria. Four of those six factors may usually be given a general evaluation, while the remaining two, namely, the gravity of the violation and whether the operator was negligent, should be considered specifically in reviewing the evidence introduced with respect to each violation. The criteria which may be given a general review will be evaluated first.

History of Previous Violations

Exhibit 13 is a computer printout of 26 pages which was introduced by counsel for MSHA for the purpose of showing respondent's history of previous violations. Exhibit 13 shows that respondent has previously violated the three mandatory safety standards here under consideration. Therefore, when penalties are hereinafter assessed, I shall give specific consideration to respondent's history of previous violations and the penalty otherwise assessable under the other five criteria will be increased if the facts warrant an increase under the criterion of respondent's history of previous violations.

Appropriateness of Penalty to Size of Operator's Business

Respondent operates five underground mines and four preparation plants. The mine which is involved in this proceeding is the Meadow

River No. 1 Mine which employs 191 men underground and 38 on the surface to produce 750 tons of coal per day. The mine has six sections or units which utilize continuous-mining machines. All six units are operated on two shifts per day and two units are additionally operated on the midnight-to-8 a.m. shift. The Meadow River No. 1 Mine is entered by means of two shafts and one slope. Part of the coal produced from the mine is shipped overseas and part of it is used for blending with other coal. Respondent is a Division of the Pittston Company.

On the basis of the facts given above, I find that respondent operates a large coal business and that any penalties which are hereinafter assessed should be in the upper range of magnitude to the extent that the penalties are based on the size of respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

Counsel for respondent in the proceedings in Docket Nos. HOPE 78-44, et al., stated that payment of penalties would not cause respondent to discontinue in business (Tr. 256). On the basis of counsel's statement, I find that payment of penalties will not cause respondent to discontinue in the coal business.

Good Faith Effort to Achieve Rapid Compliance

As to Order No. 3 HSG issued October 17, 1977, it will hereinafter be necessary for me to discuss the criterion of good faith effort to achieve rapid compliance in the part of this decision which assesses a penalty for the violation of section 75.316 because the circumstances surrounding that violation require a specific explanation to show why the criterion of respondent's good faith effort to achieve rapid compliance is not applicable to Order No. 3 HSG.

The inspector testified that respondent demonstrated a good faith effort to achieve rapid compliance with respect to the violation of section 75.200 alleged in Order No. 1 HSG issued October 26, 1977 (Tr. 177). Respondent will hereinafter be given full credit for having shown a normal effort to achieve rapid compliance when a penalty is assessed for the violation of section 75.200.

The inspector said that respondent's cleaning up the loose coal and coal dust accumulations cited in Order No. 1 HSG issued October 27, 1977, by 10:10 a.m. of the following day was so rapid that it surprised him. Therefore, he rated respondent's abatement of Order No. 1 HSG as being better than average (Tr. 201). It is rare for me to find that an operator has abated a given violation with greater speed than an inspector had anticipated. Therefore, when a

penalty is hereinafter assessed with respect to the violation of section 75.400 alleged in Order No. 1 HSG, I shall reduce the penalty by 10 percent because of the operator's unusual effort to achieve rapid compliance.

Consideration of Remaining Factors

As indicated above, two of the six criteria set forth in section 110(i) of the Act, that is, gravity of the violations and whether the operator was negligent, must be specifically considered in reviewing the evidence presented by MSHA and respondent with respect to each violation. When violations are hereinafter found to have occurred, findings as to gravity and negligence will be made and penalties will be assessed accordingly.

Order No. 3 HSG (7-499) 10/17/77 75.316

Findings. Section 75.316 requires that each operator of a coal mine shall file with MSHA and adopt an approved ventilation system and methane and dust control plan. Respondent violated section 75.316 because it failed to comply with paragraph 13 on page 3 of its ventilation plan which requires that a crosscut shall be provided at the face of each entry or room before the place is abandoned.(FOOTNOTE 2) The crosscuts in the No. 2 Unit at the face between Nos. 2 and 3 and 5 and 6 entries had been developed for a distance of approximately 40 feet without completing them. All equipment had been removed from the No. 2 Unit in order to start development of a left panel.

The violation was serious. Respondent intended to return to the No. 2 Unit within a period of about 2 months. The evidence showed that respondent was not properly ventilating the abandoned unit during the interim period. The inspector had never found anything other than a zero quantity of methane in the mine when he tested for methane at a distance of 12 inches from the face or rib, or when an air sample was taken in the returns or at the fan (Tr. 23-25). Nevertheless, the inspector believed that failure to complete the crosscuts was hazardous. He said that a buildup of methane could have occurred in the "dead-ended" areas because respondent's mine is below the water table and the No. 2 Unit is 2,500 feet from the intake air shaft (Tr. 57; 69-70).

Respondent was negligent in failing to complete the crosscuts because respondent is required to know the provisions of its ventilation plan and the mine foreman agreed with the inspector that the crosscut should have been completed before equipment was moved from the No. 2 Unit to the left panel (Tr. 62).

Assessment of Penalty. I find that the criterion of good faith effort to achieve rapid compliance is not applicable in assessing a penalty in this instance. The reason for that conclusion is that inspectors normally base their evaluation of good faith abatement on the question of whether respondent corrected the condition cited in the notice of violation within the period of time given by the inspector for abatement. In this instance, a withdrawal order was issued after the equipment had been removed from the No. 2 Unit. Under respondent's mining method, its equipment would normally have been moved back to the No. 2 Unit and the crosscut would have been completed before the hearing in the review proceeding was held, but a major strike by UMWA occurred on December 6, 1977, and did not end until March 26, 1978. Therefore, respondent had not abated the violation at the time the hearing was held in January 1978, because the strike was still in progress. If normal operations had been in effect, the crosscuts would have been completed by approximately December 14, 1977 (Tr. 84-85).

It has already been found that respondent is a large operator and that assessment of penalties will not cause respondent to discontinue in business. The violation of section 75.316 was serious because respondent was not ventilating the No. 2 Unit properly at the time the order was written. The inspector returned to the No. 2 Unit on January 19, 1978, or about 6 days before the hearing was held, and found that respondent had installed a line curtain, but the required check curtains were still missing. Respondent's failure to ventilate the No. 2 Unit properly increased the possibility of a dangerous methane accumulation in the "dead-ended" crosscuts between the time that equipment was removed and the time that mining was reinstated in the No. 2 Unit.

There was some merit for respondent's claim that it had not actually abandoned the No. 2 Unit in the dictionary sense of the word, as compared with the technical definition of "abandoned areas" contained in 30 CFR 75.2(h). Therefore, in assessing a penalty for the violation of section 75.316, I do not believe that a large amount should be attributed to the criterion of negligence.

In view of the mitigating circumstances discussed above, I conclude that a penalty of $2,000 is warranted. The Assessment Office based its proposed penalty of $10,000 on a waiver of the assessment formula provided for in 30 CFR 100.3 and on giving an excessive amount of weight to the fact that the order was issued under the unwarrantable failure provisions of the 1969 Act. The Assessment

Office did not have the benefit of the extensive testimony presented by the parties in Docket No. HOPE 78-44. That testimony does not show the magnitude of seriousness and the degree of negligence which I think are necessary to justify assessment of a maximum penalty of $10,000.

Exhibit 13 indicates that there have been 34 prior violations of section 75.316 at respondent's Meadow River No. 1 Mine. One violation occurred in 1974, 7 occurred in 1975, 17 occurred in 1976, and 9 had occurred in 1977 by June 14, 1977. The statistics show, therefore, that respondent is continuing to violate section 75.316 to an increasing extent each year. In such circumstances, the penalty of $2,000 will be increased by $500 to $2,500 because of respondent's unfavorable history of previous violations.

Order No. 1 HSG (7-527) 10/26/77 75.200

Findings and Conclusions. 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 temporary supports be installed on 5-foot maximum centers to within 5 feet of the ribs and the face or the nearest permanent support. The plan also requires that the temporary supports be installed within 1 hour after the completion of the mining cyle and prior to roof bolting (Tr. 104-105). Respondent violated section 75.200 because the distance from the permanent supports to temporary supports was 8 feet (Exh. 7; Tr. 103).

The violation was serious for several reasons. The Meadow River No. 1 Mine has hazardous roof conditions, especially in the No. 4 Unit where the violation occurred. The longer that a roof is allowed to remain in an unsupported condition, the more fragile and adverse it will become. Several falls of rock 3 or 4 feet thick have occurred in the No. 4 Unit. Additionally, with no supports in the No. 4 entry of the No. 4 Unit, no miner could lawfully go inby the 8 feet of unsupported roof for the purpose of installing line curtains used for controlling ventilation at the face of the No. 4 entry (Tr. 106; 110).

Respondent was negligent in permitting the violation to occur because the hazardous condition had been reported in the preshift examiner's record book. The section foreman on the day shift had read the preshift report before going to the No. 4 Unit to work, but he assigned other work to the men on his section without giving priority to installation of the required temporary supports (Tr. 133-134; 172).

Assessment of Penalty. Although the violation was serious and respondent was negligent in failing to install the required temporary supports, the facts show that several mitigating factors were

associated with the occurrence of the violation. Respondent's section foreman on the 4 p.m.-to-midnight shift on October 25, 1977, had had temporary supports properly installed, but the continuous-mining machine had become inoperable on his shift. A maintenance crew came to the No. 4 Unit and repaired the machine on the midnight-to-8 a.m. shift. After they had completed their repairs, they pulled the machine away from the face, and in doing so, knocked down some temporary supports. When the preshift examiner saw the timbers lying on the mine floor, he posted a danger board outby the unsupported area and reported the existence of the unsupported roof to the oncoming section foreman for entry in the preshift book. Therefore, the unsupported roof existed for a period of from 4-1/2 to 5 hours before the temporary supports were replaced (Tr. 184).

Respondent correctly claimed that the preshift examiner could not have been expected to replace the temporary supports which had been knocked down by the maintenance crew. There was some merit to respondent's claim that the young men on the maintenance crew could not have been expected to replace the temporary supports since they are not trained in that type of work, but I cannot condone the maintenance crew's failure to report to the mine foreman or some other responsible person the fact that they had knocked down the supports and had not replaced them.

The primary hazard which resulted from the failure to reset the temporary supports immediately lay in the fact that respondent's roof-control plan requires the supports to be installed within 1 hour after the coal is removed. The posting of a danger board by the preshift examiner, while very helpful, did not assure that a miner would not go inby the board and be injured or killed by a roof fall.

Even though there were several mitigating factors which contributed to the occurrence of the violation, the fact remains that only one area of unsupported roof is needed for a fatality to occur. Therefore, I believe that a substantial penalty is required in order that respondent will be encouraged to insist that maintenance crews report any occurrence which might decrease safety to their superiors so that corrective action may be taken immediately. For the foregoing reason, a penalty of $4,000 will be assessed for this violation of section 75.200. I believe the Assessment Office's proposed penalty of $8,000 was excessive because of its undue emphasis on the fact that the violation was cited in an order issued under the unwarrantable failure provisions of the 1969 Act. Additionally, the Assessment Office did not have the extensive testimony showing the mitigating factors discussed above when it proposed a penalty of $8,000.

Exhibit 13 indicates that there have been 110 prior violations of section 75.200 at respondent's Meadow River No. 1 Mine. Nine violations occurred in 1974, 27 in 1975, 54 in 1976, and 20 had

occurred in 1977 by June 15, 1977. Violations of section 75.200 are increasing to a substantial degree each year. I believe that the criterion of history of previous violations is intended to act as a deterrent for operators who do not appear to be making a sufficient effort to reduce repetitious violations. Therefore, the penalty of $4,000 will be increased by $2,000 to $6,000 because of respondent's extremely unfavorable history of previous violations.

Order No. 1 HSG (7-539) 10/27/77 75.400

Findings and Conclusions. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electrical equipment. Respondent violated section 75.400 because it had permitted two different and distinct accumulations to occur. The first one was located beneath the conveyor belt drive and extended 65 feet inby under the belt conveyor. It ranged from 0 to 15 inches in depth. The shallowest accumulation was at the belt drive and the accumulations had become sufficiently compacted in places to force the bottom of the conveyor belt up off the rollers so that the bottom belt moved across the accumulations. About 50 percent of the coal was very wet, but the wet coal was located at the belt drive and the belt was dragging at the place where the coal was dry (Tr. 190; 218-219). The second accumulation was along and under the No. 4 crossbelt from the dumping point inby for a distance of 25 feet to the tail pulley of the No. 4 crossbelt. The accumulation was from 8 to 10 feet wide and from 0 to 7 inches in depth. Spillage at the dumping point caused the bottom belt to carry the coal back so as to be ground between the tail pulley and the belt. The majority of the second accumulation was made up of float coal dust and was all dry (Tr. 193-194; 218).

The accumulations were serious because they exposed the miners to the possibility of a mine fire as there was a source of ignition in the form of friction of the belt running in dry coal dust and there were electrical wires carrying from 440 to 550 volts and some of the wires were not suspended on insulators. If the float coal dust had been thrown into suspension at the time of an ignition, it would have exposed the miners to the possibility of an explosion as the float coal dust was very dry. The loose coal and coal dust accumulations were located within 50 to 75 feet of each other (Tr. 194-195; 214-215).

In my decision in Docket No. HOPE 78-73 (pp. 21-24), I explained in detail why I believed that MSHA had proven a violation of section 75.400 under the criteria set forth by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). I do not think it is necessary for me to repeat in this decision the extensive

discussion which is available in that decision. I upheld the inspector's citation of a violation of section 75.400 in the prior decision primarily on the inspector's belief that respondent knew, or should have known, that the accumulations existed because the loose coal and coal dust had been permitted to accumulate for 2 or 3 weeks. He based his conclusion as to the length of time that the accumulations had been allowed to form on the fact that the coal dust had become very compacted to the point that it caused the belt to be pushed up off the rollers so as to ride on the coal accumulation. He also based his opinion as to the length of time of accrual of the accumulation on the fact that a large amount of rust had formed around some of the rollers (Tr. 192; 202-203; 248). If the loose coal accumulation had been cleaned up during a recent period prior to the inspection, the rust would, of course, have been removed along with the loose coal.

Respondent was negligent in permitting the violation to occur because its belt examiner checked the belts daily and should have made certain that the accumulations were cleaned up. One of the primary reasons for the belt cleaners' failure to remove the loose coal and coal dust from under the belt was attributable to the fact that when the belt conveyor was installed, its frame was placed on a 2-inch support, instead of a preferable 6-to-8-inch support, so that it was difficult to clean under the belt. In fact, it was dangerous to clean under the belt drive while it was moving and the coal was removed after being cited in the inspector's order by washing the accumulation away with a water hose (Tr. 213; 237).

Assessment of Penalty. The inspector stated that he issued an unwarrantable failure order instead of an imminent danger order because a part of one of the accumulations was so wet that water could have been squeezed from the coal (Tr. 215; 218). Coal with that much water in it would be noncombustible. The second accumulation, however, was dry and consisted largely of float coal dust. The accumulations were not in suspension and no methane existed along the beltline, but there were high voltage wires in the area and some were not on insulators. Respondent had several kinds of firefighting equipment in the vicinity of the accumulations, including a fire extinguisher, a water hose, and a water line. Additionally, there were water sprays at the belt feeder. Of course, no type of firefighting equipment can prevent an explosion of float coal dust if the dust should become suspended at a time when an ignition occurs (Tr. 208; 222-223; 228). The fact that the belt was running in dry coal and the existence of the wires without insulators support a conclusion that the violation was serious. It should be borne in mind that the wires without insulators had no bare places on them which would have been a serious ignition hazard.

In addition to the negligence involved in respondent's having constructed the belt in such a manner as to make it difficult to clean under the belt, respondent was using only three miners to clean along nine sections of belt conveyor. The assistant mine superintendent did

not realize, until the inspector's order was written, that respondent was using only three belt cleaners (Tr. 198; 203). Respondent's safety director stated that additional workers were assigned to cleaning along the belt if any special problems arose (Tr. 226-227; 244-247). Regardless of respondent's intention about use of additional miners to clean along the belt, the fact remains that the accumulations occurred. Consequently, either the three cleaners were not able to keep up with the rate of spillage from the belts, or respondent had failed to assign additional men to assist in belt cleaning at the time the order was written.

When all the facts surrounding the violation are considered, I believe that a penalty of $2,500 is warranted. As indicated, supra, under the heading of "Good Faith Effort to Achieve Rapid Compliance", the penalty of $2,500 will be reduced by 10 percent, or $250, to $2,250 because of respondent's unusually rapid achievement of compliance.

I believe that the penalty of $7,500 proposed by the Assessment Office was based on an excessive reliance on the fact that the order was issued under the unwarrantable failure provisions of the Act. The coal accumulations were not serious enough and respondent's negligence was not great enough to justify assessment of a penalty of $7,500.

Exhibit 13 indicates that there have been 157 prior violations of section 75.400 at respondent's Meadow River No. 1 Mine. One violation occurred in 1974, 33 in 1975, 77 in 1976, and 46 had occurred in 1977 by June 15, 1977. The statistics here again show an alarming annual increase in the number of violations of section 75.400. Therefore, the penalty of $2,250 will be increased by $2,500 to $4,750 because of respondent's extremely unfavorable history of previous violations.

Summary of Assessments and Conclusions

(1) On the basis of the evidence of record in the consolidated proceeding in Docket Nos. HOPE 78-44, HOPE 78-71, and HOPE 78-73, respondent is assessed the following civil penalties:

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| Order No. 3 HSG (7-499) 10/17/77 | 75.316 | $ 2,500.00 |
| Order No. 1 HSG (7-527) 10/26/77 | 75.200 | 6,000.00 |
| Order No. 1 HSG (7-539) 10/27/77 | 75.400 | 4,750.00 |
| Total Assessments in This Severed Proceeding | | $13,250.00 |

(2) Respondent was the operator of the Meadow River 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.

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(3) The orders listed in paragraph (1) above should be severed from the proceeding in Docket No. HOPE 78-679-P so that the remaining eight violations alleged by MSHA's Petition for Assessment of Civil Penalty may be disposed of on the basis of a hearing to be scheduled in the near future.

WHEREFORE, it is ordered:

(A) Sewell Coal Company is assessed civil penalties totaling $13,250.00 which it shall pay within 30 days from the date of this decision.

(B) The orders listed in paragraph (1) above are severed from further consideration with respect to MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-679-P.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. The civil penalty issues in this decision have been decided on the basis of the record previously made in Docket Nos. HOPE 78-44, et al.

~FOOTNOTE_TWO

2. There are some technical aspects as to whether respondent had actually abandoned the No. 2 Unit. Those matters are considered in my decision in Docket No. HOPE 78-44 on pages 5 to 9 and need not be reconsidered here. As explained in that decision, respondent had violated section 75.316 by failing to complete the crosscuts as alleged in Order No. 3 HSG.