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SOL (MSHA) V. AMERICAN COAL
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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), PETITIOENR	Civil Penalty Proceeding Docket No. DENV 78-525-P A.O. No. 42-00121-02042V
v.	Deer Creek Mine
AMERICAN COAL COMPANY, RESPONDENT	

DECISION

Appearances: James H. Barkley and Phyllis K. Caldwell, Trial Attorneys, Regional Office of the Solicitor, Department of Labor, for Petitioner
Patrick Garver and James B. Lee, Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent

Before: Judge Littlefield

Introduction

This is a proceeding for assessment of a civil penalty against the Respondent and is governed by section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Act), P.L. 95-164 (November 9, 1977), and section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), P.L. 91-173 (December 30, 1969). Section 110(a) provides as follows:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may consititute a separate offense.

Section 109(a)(1) provides as follows:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who

> violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

Petition

On August 2, 1978, the Mine Safety and Health Administration (MSHA),(FOOTNOTE 1) through its attorney, filed petitions for assessment of civil penalties charging 2 violations of the Act.

Response

On August 17, 1978, Respondent filed a detailed answer denying the allegations and requesting hearing thereon.

Tribunal

Hearings were held in Salt Lake City, Utah, on April 11, 1979. Both Petitioner and Respondent were represented by counsel (Tr. 3). Posthearing briefs were submitted by both counsel.(FOOTNOTE 2)

Issues Presented

1. Whether the conditions observed in Respondent's Deer Creek Mine on August 31, 1977, and October 27, 1977, constituted violations of 30 CFR 75.200.

2. Assuming a violation of 30 CFR 75.200 is established in either or both notices, what is the appropriate penalty to be imposed?

Discussion

A. 1 LJG, August 31, 1979

The first notice charges a violation of the roof control plan in that:

> The approved roof control plan was not being complied with in the right entry in the 4 East Section in that temporary supports were not installed to within 5 feet of the face to provide protection to the miners making required tests. The roof bolting machine was present in the working place and roof bolting had been performed.

The roof control plan is incorporated as a mandatory standard through 30 CFR 75.200 which provides:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking to into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent s upport unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The relevant portion of the plan is Exhibit D (Govt. Exh. G-1; Brief of MSHA at 1). The thrust of Petitioner's argument is that a man must have entered inby permanent support to make required methane tests (Brief of MSHA at 2-3). MSHA has no eyewitnesses who testified that anyone went inby support. Instead MSHA draws an inference that because methane testing is required, before electrical equipment is energized, that the tester must have entered inby permanent support to make the test. (Brief of MSHA at 3).

The provision which MSHA believed required testing in an area that was unsupported is 30 CFR 75.307-1 which states:

> Methane examination at face. An examination for methane shall be made at the face of each working place during each shift and immediately prior to the entry of such electrical equipment into any working place. Until December 31, 1970, a permissible flame safety lamp may be used to make tests for methane required by the regulations in this part. On and after December 31, 1970, a methane detector approved by the Secretary shall be used for such tests and a permissible flame safety lamp may be used as a supplementary testing device.

Respondent introduced Respondent's exhibit No. 3 a policy directive received by the Price Office of MESA on December 10, 1976, and received by the Respondent on October 7, 1974 (Tr. 151-152). There was no evidence that such directive was not in force at the mine. The directive provides:

> Tests for methane in working places shall be made as near the face as possible, but without exposing the examiner beyond permanent roof support or temporary roof support that was set for another purpose. If it is determined that the potential for face ignitions or explosions in a mine require that such tests be made closer to the face than described above, the gas testing procedure will be described in the approved ventilation plan, and the roof control plan will provide for special support to protect the examiner. [Emphasis supplied.]

(Respondent's Exh. 3).

As the directive states that the methane tester is not required to go inby support, no inference will be drawn that he did go inby support. Therefore, MSHA must show that what would appear to a reasonable tester to be supported roof was in fact unsupported roof.

The question, in effect, is whether the hydraulic system of support is or was approved by MSHA (Brief of Respondent 8-10). The initial question is what type of approval was given the Lee-Norse bolter (see Brief of Respondent at 12). The issue with reference to this approval assumed by Petitioner, is whether each individual roof bolter, ATS, (Automated Temporary Support System) must be approved for the purposes of being used for temporary roof support and/or whether it must show such approval on an attached plate. (Brief of Respondent at 12-15).

MSHA asserts that the machine was not approved (Brief of Petitioner 3-4). In its brief MSHA quotes Mr. Winder, the former

inspector supervisor, as saying that he would not question as policy a requirement that a plate or label had to be attached to the machine (Tr. 120). However, he specifically stated that it was not necessary on this machine (Tr. 121).

MSHA's brief argues the wrong point. The question is not whether MSHA had a policy of requiring stamps or plates marking ATS approval. The issue is whether the roof control plan, approved by MSHA, required such individual plated approvals. See 30 CFR 75.200-7 through 75.200-14 (Brief of Respondent at 3-14). The answer to this question is specifically contained in letter of September 12, 1975. It states in relevant part:

> We also request permission to change our procedure of installing temporary supports before the roof bolt cycle is started, and to include the hydraulic safety booms of the bolters as a means of temporary support. It is understood that if the hydraulic boom is not used that a timber or jack would have to be installed. Your assistant in the approval of this supplement is greatly appreciated.

(Respondent Exh. No. 1).

On January 9, 1976, after a period of review which ran 4 months, MSHA approved the requested change in the following letter:

> Dear Mr. Crawford:
>
> Your requests to change the procedure of installing temporary supports and to install resin bolts have been reviewed and are approved. Both procedures are appended to the approved roof control plan for the mine. [Emphasis added.]

(Respondent's Exh. No. 2).

If MSHA had wished to require Respondent to get approval for each machine, it had only to tell Respondent in the above letter.

The above discussion of hydraulic safety booms makes no mention of individual machine approval. As MSHA specifically approved the proposed change (Respondent's Exh. No. 2), and as it could only be implemented by using a bolter machine, and as there was no reference to plate approval, it can not be concluded that such a plate was necessary. In fact the opposite analysis is requisite. As the only way the hydraulic temporary support system could be implemented was by using a machine, and as no machine has been demonstrated as approved pursuant to the MSHA theory of ATS plates on individual bolters (but see, Tr. 71-72), the District Manager, Mr. Barton, would have been in

the ridiculous position of approving a nullity. Therefore, as of January 9, 1976, the bolter system was generally approved. As MSHA has not shown any other policy decision made subsequent to that date to have been communicated to Respondent and made a part of its roof control plan, the policy directives within MSHA can not be made binding on the operator. Thus the presence or absence of a MSHA policy of individual bolter approval is not relevant.

MSHA's argument that the bolters needed to be approved as stated in Government Exhibit G-2 is of little momment. On its face the exhibit is merely on internal memorandum between Mr. Winder and the District Manager. It is not part of the roof control plan and it does not even appear to have been transmitted to Respondent (Govt. Exh. G-2; But see, Brief of MSHA at 3-4). Thus it is not binding. Further, the approval letter of January 9, 1976 (Respondent's Exh. No. 3), can easily be viewed as over-ruling an internal objection of Mr. Winder. Finally, the exhibit does not specify the type of approval envisioned (Govt. Exh. G-2). Therefore, even if the letter were viewed as modifying the approval, a view which I specifically reject, MSHA has still not demonstrated a requirement of placing the plates on the bolter.

As there is no evidence that the methane tester advanced beyond the area supported by the hydraulic system of temporary support (See supra), and as that system was approved MESA (see Respondent's Exh. No. 3), I conclude that MSHA has failed to demonstrate a violation of the roof control plan on August 31, 1977. Therefore, that part of the petition regarding 1 LJG, August 31, 1977, is hereby DISMISSED.

B. 6 JODL, October 27, 1977

The 104(c)(1) notice herein at issue, alleges a violation of 30 CFR 75.200 in that:

> The approved roof control plan was not being complied within the 4th East section in the belt and track entry from the feeder breaker into the face in that, approximately 13 timber were missing at spot locations on the right side of the entry looking in the direction of the face. The entry width averaged approximately 24 feet. There were 2 timbers out between crosscut No. 12 and 13, and there were 5 timbers out between crosscut No. 13 and No. 14, 4 timbers out between crosscut No. 14 and No. 15, and 2 timbers out between crosscut No. 15 and the face. The approved roof control plan calls for timbers to be set 4 foot from the rib and on 5 foot centers in a combination belt and track entry that has a 24 feet entry width in order to bring the entry width into the recommended 20 foot width roadway. (Govt. Exh. G-3).

Initially respondent argues that the roof control plan (Govt. Exh. G-1) is not in evidence. (See Brief of Respondent note at 10-11).(FOOTNOTE 3)
As the above alleged violations are charged in a single petition, Respondent's argument is without merit and rejected.

The issue presented is whether Respondent complied with the roof control plan, not whether a safer system might arguably exist. Respondent's argument, that the roof control plan does not logically require replacement of knocked out support, (Brief of Respondent at 13) is not supported. Under Respondent's theory, there would be no way that the mine could be inspected to determine whether the plan had been complied with. Further, under Respondent's theory, a roof control plan would never constitute a standard by which control of the roof could be evaluated. It is rejected. Therefore, if the plan required timbers, and such were not maintained, a violation is established.

For purposes of compliance with the roof control plan, the most important factor is whether the entry was cut 24 feet or 20 feet wide. It is conceded by Respondent's witness Mr. Johnson that the area may have measured 24 feet (Tr. 230). However, such width is asserted to have been the result of permissible sloughage (Tr. 230; Brief of Respondent at 12)

There is testimony as to the width of an entry being cut 24 feet, found in the following colloquy:

BY MS. CALDWELL:

> Q. Mr. Lemon, with regard to the cut that we are referring to in the August 31 notice, how wide was that cut?
>
> A. The cut was 24 feet wide, and I measured the cuts from the bit marks in the top, and it was not rib sloughage. Your Honor, the measurement from the bit marks on the left rib in the top to the bit marks on the right side was 24 feet wide, and I measured this entry in four places up to the place that was cut 20 feet wide, which was inby the last open cross-cut in the face of this entry. That's where they starting narrowing this entry down to, and this had been heave [sic] sloughed to 24 feet wide. (Tr. 242).

(See Brief of MSHA at 6).

In a letter dated June 20, 1979, counsel for MSHA states that she misspoke herself by referring to the August 31, 1977, notice, in the above quoted colloquy.(FOOTNOTE 4)

MSHA counsel refers to a letter of May 30, 1979, written by counsel for Respondent, which pointed out that no "cut to cut" reference was made on the page cited in her brief. There in counsel for MSHA attacks counsel for Respondent, for a failure to have "%y(3)5C understood the intent of that testimony." As counsel for MSHA failed to cite the proper transcript page, Tr. 167 vs. Tr. 242, it is not surprising that counsel for Respondent did not understand the intent of the testimony.

As this testimony is the only cited testimony on the issue of a measured "bit mark to bit mark" width, the issue of whether it applies to the August 31 or October 27 notice must be resolved.

Supporting a determination that it applies to the August 31, notice, are the facts, that: (1) MSHA counsel refers to the August 31 notice in the question (Tr. 242); and that (2) there followed, in order, a general evidential summary for both notices (Tr. 242-et seq.).

Supporting the conclusion that it applied to the October 27 notice are the facts that (1) the August 31, notice did not involve entry width directly; (2) the testimony came at the end of the testimonial evidence on the October 27 notice and (3) the witness referred to a specific narrowing down of entry width inby the measured area. I conclude that the above-referenced testimony referred to the October 27 notice.

Therefore, Respondent needed to meet the requirements of Exhibits G, figures 1-3, not merely the requirement of Exhibit B (Govt. Exh. G-1).

The unrebutted evidence establishes that timbers which should have been in place pursuant to Exhibit G were not in place (Tr. 163, 195). It follows that Respondent violated the roof control plan and 30 CFR 75.200 (see, supra). That part of the petition pertaining to notice 6 JODL, October 27, 1977, and asserting a violation is hereby upheld.(FOOTNOTE 5)

C. Penalty Criteria

> Subsection 110(i) provides, in relevant part:
>
> In assessing civil penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The primary criteria issues argued by Respondent are gravity, negligence, and prior history. (Brief of Respondent at 13-16).

1. Size of Business

Deer Creek mine produced about 1,205,576 tons annually and American Coal Company, about 1,521,238 tons annually (Tr. 246). I conclude that the company is medium to large.

2. Ability to Stay in Business

A penalty will not affect the operators ability to remain in business (Tr. 246).

3. Good Faith

The operator abated the condition with in about 45 minutes to an hour (Tr. 225). The operator demonstrated exceptional good faith by unnecessarily shutting down production to remedy the violation (Tr. 223-224).

4. Negligence

Both Mr. Lemon and Mr. O'Brien stated that the foreman knew of the problem (Tr. 170; 223-224). However, as the entire theory of Respondent was that it did not believe that it was required to maintain the timbering in the entry (see supra.),and as this argument appears, on its face, to be made in good faith, the operator can not be found to have been negligent.

5. Gravity

The gravity of the violation is reduced by the following factors: extra roof bolts had been installed (Tr. 228) and the entry averaged 24 feet (Tr. 166-167). The fact that the entry averaged 24 feet indicates that even without timbering and extra roof bolts the entry

was very close to meeting the requirements of the plan as no significant sloughage appears to have occurred (Govt. Exh. G-1, Exh. B). The MSHA arguments on significant gravity are unpersuasive (see Brief of MSHA at 7).

I conclude that the violation was nonserious.

6. History of Prior Violations

The mine has a substantial history of prior violations including 10 prior violations of this section. (See Submission of MSHA, May 7, 1979). This history aggravates the size of the penalty to be assessed.

Findings of fact

All proposed findings of fact not adopted herein are specifically rejected. Upon consideration of the record as a whole, I find:

1. The Judge has jurisdiction over the subject matter and the parties in this proceeding;

2. A system of temporary hydraulic support using a hydraulic boom was approved pursuant to the roof control plan of the mine for use prior to August 31, 1977. (Respondent Exh. No. 1 and No. 2);

3. The evidence does not show that methane testing was done under unsupported roof (Respondent's Exh. No. 3);

4. MSHA failed to establish the fact a violation of 30 CFR 75.200 with respect to Notice No. 1 LJG, August 31, 1977;

5. A preponderance of the evidence does establish the fact of a violation of 30 CFR 75.200 with respect to notice No. 6, JODL, October 27, 1977;

6. Respondent has a substantial history of previous violations;

7. The mine in medium to large in size;

8. Respondent was not negligent;

9. A penalty will not affect Respondent's ability to continue in business;

10. The violation found was nonserious.

11. Respondent exercised exceptional good faith in abating the condition.

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Conclusions of Law

All proposed conclusions of law not adopted herein are specifically rejected.

1. This case arises under the provisions of section 110(a) of the 1977 Act and 109(a)(1) of the 1969 Act.

2. All procedural prerequisites established in the statutes cited above have been complied with.

3. Respondent has violated the provisions of the statute noted above.

4. A civil penalty must be assessed in accordance with the provisions of the statutes cited above.

Application of Penalty

Assessment of a penalty in accordance with the criteria shown in section 110(a) of the Act is mandatory. That section of the law as well as all the evidence in the record bearing on the criteria and mitigating circumstances have been considered fully.

Accordingly, Respondent is assessed the following penalty:

Notice No.	Date	Section	Penalty
6 JODL	10/27/77	30 CFR 75.200	$ 250
		Total	$ 250

ORDER

WHEREFORE IT IS ORDERED that Respondent pay the above-assessed civil penalty in the amount of $250 within 30 days from the date of this decision.

WHEREFORE IT IS FURTHER ORDERED that Notice No. 1 LJG, August 31, 1977, be and hereby is, DISMISSED.

Malcolm P. Littlefield
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Statutory successor-in-interest to the Mining Enforcement and Safety Administration (MESA).

~FOOTNOTE_TWO
2. The briefs of Petitioner and Respondent are sufficiently well detailed and specific in transcript citation support to preclude the necessity of a general presentation of evidence here. It should be noted that Respondent actually filed two separate briefs one on each violation.

~FOOTNOTE_THREE

3. As referred at note 2, supra, references here are to brief of Respondent on October 27, 1977, notice of violation.

~FOOTNOTE_FOUR

4. Counsel's above-reference letter also refers to an "October 31 citation." No such citation is at issue.

~FOOTNOTE_FIVE

5. As there is no evidence that Respondent filed an Application for Review, the due process issue is moot. cf. Energy Fuels Corp., FMSHRC No. DENV 78-410 (May 1, 1979).