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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. BARB 78-453-P Assessment Control No. 15-08799-02021V
v.	
LEECO, INC., RESPONDENT	Mine No. 18

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, Department of Labor, for Petitioner
A. Douglas Reece, Esq., Manchester, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 1, 1978, a hearing in the above-entitled proceeding was held on November 14, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Issues

The Petition for Assessment of Civil Penalty in Docket No. BARB 78-453-P was filed on June 13, 1978, and raises the issues of 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 Act.

Occurrence of Violation

The violation of section 75.200 alleged by MSHA's Petition for Assessment of Civil Penalty is based on Order No. 1 HM (7-12) issued June 2, 1977. That order states that respondent was not in compliance with its roof-control plan because the No. 3 supply roadway in the 002 Section was from 17 to 21 feet wide for a distance of 1,000 feet, whereas the roof-control plan provides that the supply roadway may not exceed 16 feet in width. The roof-control plan provides for respondent to support its roof by a combination of roof bolts and timbers (Tr. 84; 87). Page 14 of the roof-control plan requires the installation of two rows of timbers on 4-foot centers down the right side of the entry and one row of timbers on 4-foot centers down the left side of the entry (Exh. M-2). The row of timbers next to the rib on each side of the entry is erected 3 feet from the rib, whereas the second row of timbers on the right side is erected 4 feet from the first row of timbers (Tr. 11). The result of erecting

two rows of timbers 3 feet from each rib and a third row of timbers 4 feet from the first row on the right side is to narrow the entry to 16 feet, that is, the 26-foot entry is narrowed to a 16-foot roadway by timbers which occupy a total width of 10 feet of the entry (Tr. 29). The roof over the roadway is, of course, required to be supported by three rows of roof bolts which are installed on 4-foot centers (Exh. M-2, p. 14; Tr. 21).

The inspector's testimony supports a finding that the roadway was excessively wide because from 250 to 300 timbers had been knocked down along the roadway for a distance of 1,000 feet and had not been reset (Tr. 11; 45). Respondent's witnesses largely corroborated the inspector's testimony with respect to the fact that timbers had been knocked down by the battery-powered tractor when it hauled men and supplies along the haulageway. The operator of the tractor stated that he had knocked down timbers along the roadway because the floor of the mine was uneven and wet. The slippery and uneven floor caused the tractor to fishtail so that the trailer pulled by the tractor would slide from one side of the roadway to the other and would knock down timbers on both sides of the roadway (Tr. 52). Whereas the inspector estimated that the number of timbers which had been knocked down and not reset was between 250 and 300, the operator of the tractor estimated the number of timbers that had been knocked down to be between 100 and 200 (Tr. 11; 34; 41; 53).

Although respondent's witnesses agreed that a considerable number of posts had been knocked down and not reset (Tr. 55; 64), they all disagreed with the inspector's claim that they were following the roof-control plan shown on page 16 of the plan. All three of respondent's witnesses testified that they were following the roof-control plan shown on page 14 of the plan (Tr. 70-71; 79-80). The violation cited in the inspector's order is not affected by a determination of which plan was being followed because regardless of whether respondent was following the plan shown on page 16 or the plan shown on page 14, the roadway was required to be no more than 16 feet wide and the knocked-down timbers rendered the roadway at least as wide as the 17 to 21 feet set forth in the inspector's order (Tr. 30-35).

The basic difference between the plan shown on page 16 and the plan shown on page 14 is that all of the timbers are required to be set on the right side of the entry under the plan on page 16, whereas under the plan on page 14, one row of timbers is required to be installed on the left side and two rows of timbers are required to be set on the right side. Under both plans, the roadway is required to be narrowed down to a width of no more than 16 feet. There are two other primary differences between the two plans. First, the plan on page 16 provides for the entries to be no more than 28 feet wide, whereas the plan on page 14 provides for the entries to be no more than 26 feet wide. Second, the plan on page 16 provides for both timbers and roof bolts to be 4 feet from both ribs and from each other, whereas the plan on page 14 provides for the

first row of timbers on each side of the entry to be 3 feet from the ribs (Exh. M-2).

The inspector stated that respondent was prohibited from having an entry wider than 26 feet and he stated that the timbers were required to be within 3 feet of the ribs (Tr. 11; 29). Thus, the inspector was at all times discussing the provisions of the plan on page 14 while claiming that respondent was following the plan on page 16 of the roof-control plan (Tr. 22-24). Therefore, I find that the testimony of respondent's witnesses to the effect that they were following the plan shown on page 14 of the roof-control plan is more credible than that of the inspector.

I find that the testimony of all witnesses indicates that the violation of section 75.200 alleged in the inspector's order occurred.

Gravity. Even though a large number of timbers had been knocked down along the roadway, the roof over the roadway was well supported by bolts. The timbers which had been knocked down and not reset were near the ribs over a portion of the entry which was not traveled by the tractor and trailer hauling men and supplies. The only time that a person could be hit by a rock falling from the area where posts had been knocked down would be at a time when the trailer might slip sideways and be momentarily under an expanse of roof near a rib where a post had been dislodged. Respondent's witnesses stated that the roof in the 1,000-foot area cited in the inspector's order appeared to be in good condition (Tr. 51; 57; 62-63; 83).

Although the inspector stated that about 50 percent of the places he tested sounded loose and drummy, he said that that was not an abnormal condition for a slate roof (Tr. 13). While the inspector estimated that a total of about 250 posts had been knocked down in an area where 750 posts were required to be set, he stated that at none of the 4-foot intervals were there ever more than two posts missing at any one place (Tr. 31). During each shift the tractor passed over the roadway no more than three times, that is, one trip in with the miners at the beginning of a shift, one trip to deliver supplies to the section during a shift, and one trip out of the mine with miners at the end of the shift (Tr. 47; 56). Consequently, the evidence supports a finding that the violation was only moderately serious in the circumstanes described by the inspector and respondent's witnesses.

Negligence. The operator of the tractor which was used to haul supplies and men along the roadway stated that it was his duty as tractor driver to reinstall any timbers which he knocked down along the roadway. He stated, however, that he did not stop and reset timbers when he was in the process of hauling supplies to the face because the supplies were needed to enable the mine to continue to produce coal on an uninterrupted basis. The operator of the tractor stated that he reset timbers only when it happened to be convenient for him to do so (Tr. 55; 57-58).

Respondent's safety inspector testified that he was in the

same 1,000-foot area cited in the inspector's order on May 31, 1977, just 2 days prior to June 2, 1977, when the inspector's order was written. On May 31, 1977, respondent's safety inspector saw about 80 to 100 posts

knocked down. Some of them were within the 1,000-foot area cited in the inspector's order. Respondent's safety inspector said that he instructed the section foreman on May 31, 1977, to take some men to the area where the posts had been knocked down and replace them (Tr. 64; 69). Despite the fact that approximately 100 posts had been reinstalled on May 31, respondent's tractor operator said that he saw from 100 to 200 posts down on June 2 when the order was written (Tr. 53; 55).

I find that respondent was grossly negligent in allowing such a large number of posts to be knocked down and not reset within a period of only 2 days.

Good Faith Effort To Achieve Rapid Compliance. The inspector testified that respondent replaced all of the knocked-down timbers within a period of about 3-1/2 hours (Tr. 16). Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance.

Size of Operator's Business. Respondent's No. 18 Mine produces about 350 tons of coal per day from the Hazard No. 4 coal seam which is from 28 to 34 inches thick (Tr. 8). The No. 18 Mine has three coal-producing sections and all of them use Wilcox continuous-mining machines equipped with continuous-belt haulage systems. Respondent operates three underground coal mines in addition to the No. 18 Mine. The production from all four mines amounts to approximately 800 tons of coal per day (Tr. 68). Exhibit M-3 shows that respondent is controlled by "Kaneb Services", but there is nothing in the record to show how large a company "Kaneb Services" may be. The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198 (1975), that it is error for a judge to go outside the record and consult reference books for the purpose of making findings as to an operator's size. Based on the evidence in this record, I find that respondent operates a medium-sized business.

Effect of Penalties on Operator's Ability To Continue in Business. Counsel for respondent did not present any evidence at the hearing with respect to respondent's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1975), the former Board of Mine Operations Appeals held that when a respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

History of Previous Violations. Exhibit M-3 shows that 37 previous violations of section 75.200 have occurred at respondent's No. 18 Mine since November 1975. Three of the violations occurred in 1975, 21 violations occurred in 1976, and 13 violations had occurred in 1977 by May 5, 1977. Roof falls still are the primary cause of injury and death in underground coal mines. I consider violations of section 75.200 to be a matter which should receive respondent's utmost

attention. The statistics do not indicate that respondent is making progress in being able to reduce

the number of violations of section 75.200 which are occurring at its No. 18 Mine. Therefore, I shall increase by 20 percent any penalty assessed under the other criteria because of respondent's unfavorable history or previous violations of section 75.200.

Assessment of Penalty

The findings hereinbefore made show that respondent is a medium-sized operator. Any penalty assessed for the violation of section 75.200 cited in Order No. 1 HM should, therefore, be in a medium range of magnitude. As previously shown, the violation was only moderately serious because the roof of the supply roadway showed no signs of falling and was considered to be in relatively good condition. Nevertheless, the knocking down of about 250 posts along a 1,000-foot roadway would have a deteriorating effect on the roof, particularly when it is considered that the timbers were being knocked down by the hundreds within a period of only a few days. Consequently, a penalty of $750 should be assessed under the criterion of the gravity of the violation.

The largest portion of the penalty should be attributable to the fact that the violation involved a high degree of negligence. A large number of posts had been knocked down on May 31 and an even larger number had been knocked down and not replaced within a further period of only 2 days. The tractor operator was supposed to reset the timbers, but he was not doing so. In such circumstances, the penalty should be increased by $3,000 under the criterion of negligence to a total of $3,750.

As indicated above, respondent's unfavorable history of previous violations requires that the penalty of $3,750 be increased by 20 percent, or $750, to $4,500. If a large-sized company or operator had been involved, I would have assessed a larger penalty than $4,500. It has been my practice to decrease the penalty assessable under the other criteria when the operator shows an outstanding effort to achieve rapid compliance. The evidence does not show that respondent's abatement of the violation was other than a normal abatement. Therefore, the penalty will not be decreased nor increased under the criterion of good faith effort to achieve rapid compliance.

Conclusions

(1) On the basis of all the evidence of record and the foregoing findings of fact, respondent is assessed a civil penalty of $4,500.00 for the violation of section 75.200 cited in Order No. 1 HM (7-12) dated June 2, 1977.

(2) Respondent was the operator of the No. 18 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:

For the violation of section 75.200 described in paragraph (1) above, Leeco, Inc., is assessed a civil penalty of $4,500.00 which it shall pay within 30 days from the date of this decision.

Richard C. Steffey
Administrative Law Judge