CCASE:
SOL (MSHA)  V.  HARMAN MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceedings<br><br>Docket No. NORT 79-14-P<br>A.C. No. 44-03613-03001 |
| v. | |
| HARMAN MINING CORPORATION,<br>RESPONDENT | No. 5-A Mine<br><br>Docket No. NORT 79-51-P<br>A.C. No. 44-04559-03001<br><br>No. 3-A Mine<br><br>Docket No. NORT 79-57-P<br>A.C. No. 44-03614-03004V<br><br>No. 5-B Mine |

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Robert M. Richardson, Esq., and Peter Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent

Before: Administrative Law Judge Michels

On June 19, 1979, a hearing was held in Abingdon, Virginia, for the above-captioned cases, at which both parties were represented by counsel. At this hearing, the following action was taken on the cases:

NORT 79-14-P

In this case, counsel for Petitioner moved to withdraw its petition for the assessment of civil penalties regarding the alleged violations docketed therein (Tr. 4). (FOOTNOTE 1) As grounds for the proposed action, Petitioner stated the following:

Your Honor, Docket Number NORT 79-14-P consists of four alleged violations of 30 CFR 75.1710 issued in April, 1978. As the result of facts uncovered prior to this hearing, MSHA moves at this time to withdraw the petition for the assessment of civil penalty for each of these violations on the basis that a technical investigation of the mine conducted on May 5th, or prior to May 5th and reported to MSHA on May -- excuse me, on May 5, 1976, a petition for modification under Section 30, seeking to be released from the requirements of 75.1710. The technical investigation was subsequently conducted, in which it was determined that the mining heights ranged from thirty-seven to forty-eight inches, and that the mine consisted of undulating bottom conditions. In each of the instances involved in the allegations here, they were terminated on the basis that the application was withdrawn and the mines permanently sealed and abandoned in May, 1978. In a letter from the district office to the MSHA national office, received in May, 1978, this was verified, and that the bottom conditions were undulating and the mine mining heights did range below the minimum forty-two inches requirement. Because of the large number of petitions for modification which were currently under consideration and because of the change over from the Interior to Labor, the decision was not issued until November, 1978, at which time the petition was granted and the proceeding was dismissed. Further investigation with the MSHA field office determined that at the time violations were issued, the mine mining heights did range to a low of thirty-seven inches, below the mandatory requirement of forty-two inches, and the bottom was continually undulating at that height. And that MSHA felt it could not sustain the burden of proof required under 75.1710, and moves to withdraw the petition. (Tr. 4-6).

Respondent did not object to the proposed action. Thereupon, a decision was issued from the bench granting Petitioner's request to withdraw its petition for assessment and the proceeding was dismissed (Tr. 8). I hereby AFFIRM that ruling.

NORT 79-51-P

This docket involves one violation of 30 CFR 75.400. The regulation provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

After considering the evidence which both parties placed on the record, a decision was issued from the bench which sets forth findings

as to the fact of the violation and the statutory criteria. This decision from pages 84-91 of the transcript, with grammatical corrections and some changes where the text is garbled, is set forth below:

> The first matter that I have to decide, of course, is whether or not there was a violation and if there is found to be a violation, then I have to make findings from this record on the criteria in order to assess the appropriate penalty.
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> Much was made of the Old Ben decision, that is, 8 IBMA 98, (1977), and that was by the Board of Mine Operations Appeals, which reviewed the case coming up under the Coal Mine Act. Now then, I have had the opportunity to review this particular decision and I won't say that the words that I am now going to state are the last word on the matter, but here is my belief: that the decision lays down certain criteria for the inspectors to follow and I am going to hold at least for now, that this is to be discretionary and advisory. I don't say it isn't important, that maybe the inspector should follow that and perhaps by failing to follow it, maybe the Secretary takes the risk of not sustaining its case when it gets into court. But I am going to hold that the mere fact of the failure to follow that would not mean that MSHA could not have a sustainable case.
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> There are, however, certain other requirements which the Board has laid down and I believe those are requirements which I would have to follow in assessing this case. And the first one is that an accumulation of a combustible material existed in the active workings and on electrical equipment in the active workings of a coal mine. My finding on that is that there were combustible accumulations here. I will give you the reason. First, I want to state, however, that none of these findings at this point bear on either the seriousness or the degree of negligence. I am dealing merely with the fact of the violation. My reason for finding that there was an accumulation is based on the inspector's testimony. I accept his testimony that there was relatively fine dust in an area, covering I guess anywhere from ten by ten to fifteen feet around the tail piece, and up to three inches in depth and tapering off. I don't suppose that this would be a large accumulation, but I think that it is a pile of dust and it did accumulate. The mere fact that he didn't see it accumulating at the time, I don't think is important. It was there and it had accumulated, at least insofar as whether it was an accumulation within the meaning of the Act. And certainly it was of a combustible material since it was coal and coal dust.

The next requirement -- this is again according to the Board -- that the coal mine operator was aware and by exercise of due diligence and concern for safety of the miners should have been aware of the existence of such accumulation. To continue on the question of awareness, my finding would be that the operator should have been aware of this. And I will try to give my reasons here if I can. The inspector was the only witness that testified that saw or was near this accumulation until after it was cleaned up. Nobody testified as to having seen it beforehand, so the question of awareness it seems to me, depends to a degree on how long it was there. And whether, therefore, it should have been observed by the preshift inspector or onshift inspector or other people that normally inspect this area of the mine. And the length of time that it was there again depends to a degree on the inspector's testimony, or at least I accept his testimony as to the fact that it had been there for sometime and probably before that shift. In other words, it existed from the prior shift.

I recognize that others did testify there was a cleanup plan and it was regularly complied with and that, and the presumption being then, therefore, that the accumulation could not have been there that long. But you see, nobody else had been at the site around this mine. The inspector made his evaluation based on the looks of it, the way in which it appeared to him that it had accumulated. It is possible that even though there is a plan in effect, it had been cleaned up within a reasonable time. It is difficult to say. But there was nobody that testified that he was there on that shift or on the end of the last shift and that it wasn't there at that time. Any evidence like that I think would have certainly been sufficient to rebut the inspector's testimony, but on the basis of the record as I have it, I believe that I would have to give his testimony weight and I accept that I find, therefore, that it was there for sometime and should have been noted.

Furthermore, even if the plan was being followed there was an accumulation that, again accepting the inspector's testimony, did create a potential hazard. It was up to the belt. It is true it wasn't over the roller, but it was up to the belt. It was being kicked up. If it was up that far, that it could be blown into the air, it seems to me that it certainly had the potential for a hazard there. So, therefore, even if the plan was being followed on a daily basis, it appeared to me, and I would say it was the kind of thing that should have been cleaned up on an accelerated basis or sometime during the course of the shift.

That brings us down then to the third and final requirement which the Board has laid out, and that is the operator failed to clean up the accumulation or failed to undertake to clean it up within a reasonable time after discovering or within a reasonable time after discovery should have been made. I believe I have already addressed that in my comments on how long the accumulation apparently existed I have made some notes here, and this may be somewhat repititious, but it is based on the inspector's testimony that this was comparatively fine dust even if not float coal dust, and it was being picked up by the belt. It was an accumulation that would need to be cleaned up, perhaps on an accelerated basis more than once a shift or without waiting for the normal once-a-shift cleanup. I recognize that Mr. O'Quinn did testify that this was not, in his view, a real bad accumulation and it probably would not need to be cleaned up, in his view, until it had reached the roller, in which case it would create a hazard. And I am going to take that kind of testimony into account as far as the gravity is concerned, but I do not give his testimony on that a great deal of weight otherwise insofar as the hazard involved is concerned. I conclude, therefore, that, that this accumulation did constitute a violation of 30 CFR 75.400.

The criteria for the assessment of a penalty are: First, the history. As I previously indicated, there is no indication of a significant history, and I would so find. There apparently was no other violation that would involve this particular standard.

Secondly, the company is small, based on the production of 700 tons a day and the employment of twenty or so miners.

Good Faith. The mine operator did abate this violation promptly and in good faith. Based on G-2, which the inspector wrote, the coal dust and fine coal was removed promptly.

There is another criterion; that is, whether the fine that would be assessed here would affect the operator's ability to continue in business and there was nothing adduced which would indicate any reasonable fine here would affect the operator's ability. So I so find. There are two other criteria; the first is negligence and I have already somewhat indicated, I believe, my finding on that in my finding on the fact of the violation. I believe that this operator should have known of an accumulation which has been shown had existed for sometime. I accept the statements that an oral cleanup plan was in

> effect and was being followed and so therefore, it would mean this might have been an oversight or somehow it was overlooked. Also, I recognize the fact that there is some dispute that this was a pile or an accumulation which needed to be cleaned up immediately. It is to that extent, perhaps, partly a judgment proposition, and so I would find as the result, small or little negligence in the failure to clean up.
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> Insofar as gravity is concerned I would find, based on the fact that it was a comparatively small accumulation, that it was not serious. I don't believe that I have ever had a matter in which an accumulation was of this relatively small size. I don't mean for a moment that this doesn't mean it couldn't be hazardous, depending on the conditions. And I have already indicated that I accept the inspector's statement. He was there and he saw it and he was able to make the judgment on the spot and I accept that. But I do have to agree that it was not very large, and as indicated by the fact that it was cleaned up in a very short time.

(Tr. 84-91).

Respondent was assessed a penalty of $25 for the violation (Tr. 92). I hereby AFFIRM the above decision and penalty and it is ORDERED that Respondent pay the sum of $25 for the violation in NORT 79-51-P within 30 days of the date of the issuance of this decision.

NORT 79-57-P

This docket involves one violation of 30 CFR 75.200 which covers roof-control programs and plans. The pertinent portion of this standard reads:

> 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.

On the basis of the evidence which Petitioner and Respondent introduced at the hearing, a decision was issued from the bench which sets forth findings as to the fact of the violation and the statutory

criteria. The decision found on pages 124-130 of the transcript, with grammatical corrections and some changes where the transcript is garbled, is set forth below:

> The first point that I must decide, obviously, is whether or not there was a violation as alleged. In looking at this, I tend to agree with Mr. Richardson, but don't go as far as he goes. Most of this can be reconciled between the testimony of Mr. Owens and the inspector, with the exception of Mr. Owens' testimony that he was there. Now, I don't know how I can reconcile that; the testimony just differs. [While] Mr. Tipton did say it was to the best of his knowledge, it was possible that he at the moment was not aware of the presence of Mr. Owens. In any event, as I see it, I just think the problem here is that we are looking at a sketch that's not to scale, so it puts everything out of proportion. [See Exhibit G-3.] If we could see this as it really was, with that to scale, with the actual feet there, and the roof bolter, the size of the roof bolter, how it went in that entry and how far it would extend out, and so forth, I think I would get a much different perspective. That's the kind of perspective I want to try to elaborate on here, and it will be the basis for my decision. The basis for it, of course, is the area of unsupported roof. I think it is admitted that's not to scale and surely was smaller than this, and therefore, nearer the right rib.
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> The testimony certainly is [not] conflicting on a number of points; that is, that a bolt was being installed. There was a bolt being installed; there were no jacks set. The witnesses agree on that. The jacks were laying down, located away from the face. There is some real difference as to where exactly they were located, but they were not set. It could have been that those jacks were originally set at that face possibly across or maybe just on the left side, I don't know. They could have been set -- that's one possibility -- and then removed because of the plan to come in there and to drill an additional hole in that unsupported roof. But I don't look at the allegation that narrowly. It said safety posts were not installed. I look upon that as being not set then, with miners working under unsupported roof. There was no disagreement there was some unsupported roof. And if there are miners working in there, the plan, as I understand it, would have required those [jacks] to be set and not only to be set but to remain there, until -- that is, as long as somebody was working in that area.
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> Now, we come to the second [point], and there is an apparent disagreement as to where that roof bolter was located and what the bolter was actually doing. And this

is where the lack of scale really throws us. It is possible that both men were saying the same thing; that what looked to the inspector like bolting in that series, might have been [bolting] the brow, or vice versa. We don't exactly know what it was, but the inspector did testify in spite of all that, [that] this bolter -- and this is the important thing -- was working there in nonsupported roof, where the jacks were not located; that is, not set where they should have been set. That they had been there originally, I don't think is too material. If the roof bolter was working there and bolting a brow and was still close up to that unsupported roof, it was, as I would construe it, a violation of that plan, which requires those jacks to be installed. Furthermore, [they are] to remain there in sequence as I read the plan, until the permanent supports are put in.

I grant you there possibly could be some variation for this additional bolting that was contemplated, but it certainly wouldn't permit a roof bolter to work in there. So, weighing all the testimony and attempting as I can to reconcile the two different witnesses who testified, I simply find that there was a bolting taking place without the jacks being in place at the time and leaving a miner in nonsupported roof. This, I think is in violation of the plan, and therefore, in violation of 30 CFR 75.200.

That leads me to the assessment of the penalty and various criteria which I must find on that. The first item, of course, is the history and the print-out does show [prior] citations or notices, starting in 1976 and up through March of 1978, six prior violations of 30 CFR 75.200. These could be, of course, any kind of a roof violation, not necessarily the failure to set the posts. It does show some history, however, and I will take that into account. The company, based on the testimony, is a small company, producing 400 tons daily and employing twenty-eight men. There is no evidence on the effect of the operator's ability to continue in business, based on the penalty to be assessed. So, I need not take that into account. There was no evidence that I recall of good faith efforts to achieve rapid compliance. I will find -- well, I will just leave that then as a neutral or a criteria on which there's no particular evidence to take into account.

That leaves the seriousness, as well as the negligence. But insofar as the seriousness is concerned, this does constitute a roof violation. And I believe it is practically self-evident that a failure to follow that plan, and particularly working under nonsupported roof, is a serious violation and I find it to be serious.

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> The negligence -- on this counsel for the Government has asked me to find ordinary negligence -- I think there is some negligence in the sense that the mine foreman and the section foreman were there and were aware or should have been aware of what was going on. There is a difficulty, though, and it may be that there was good faith involved in what you could describe as [an] unusual or different situation and they were attempting to adjust it; namely, a portion of the roof that was, that was scaling, I guess, was the term, or falling and had to be bolted or blasted out. So in connection with that deviation, you might say, from the plan, they were not actually following it strictly, but had left an area of roof unsupported. I find some negligence at least, if not ordinary negligence. So, I believe that completes then, all of the criteria.

(Tr. 124-130).

> The Government had previously asked for $1,000.00 for this alleged violation which I found to be a violation. I think this amount, in the circumstances as revealed here in the course of this hearing now, is somewhat high. In reviewing the amounts assessed for the previous citations of roof control, they are considerably lower, and the highest being $150.00 payment. I recognize, though, that we are dealing now with a history and in that context I believe that a somewhat higher assessment is justified. So, I would add another $100.00 to that, making the assessment for this violation $250.00.

I hereby AFFIRM the above decision. It is ORDERED that Respondent pay the sum of $250 for the violation in NORT 79-57-P within 30 days of the date of the issuance of this decision.

Franklin P. Michels
Administrative Law Judge

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~FOOTNOTE_ONE

1 Exhibit "A" of the petition for assessment of civil penalties listed 13 other citations besides the four involving 30 CFR 75.1710. At the hearing, Petitioner advised that these other alleged violations had been settled at the assessment conference level and that the petition had been incorrect in so listing these (Tr. 6-7).