CCASE:
SOL (MSHA) V. EASTERN COAL CORP.
DDATE:
19791102
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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 Nos. Assessment Control Nos. |
| | PIKE 79-42-P 15-14315-02012V |
| v. | Stone No. 7 Mine |
| EASTERN COAL CORPORATION,<br>RESPONDENT | PIKE 79-43-P 15-04316-02013V<br>Stone No. 8 Mine |

DECISION APPROVING SETTLEMENT

Counsel for the Mine Safety and Health Administration filed on October 22, 1979, in the above-entitled proceeding motions for approval of settlements. Under the settlement agreement reached by the parties in Docket No. PIKE 79-42-P, respondent has agreed to pay civil penalties totaling $30,000 instead of the penalties totaling $77,000 proposed by the Assessment Office. Under the settlement agreement reached by the parties in Docket No. PIKE 79-43-P, respondent has agreed to pay a civil penalty of $3,000 instead of the penalty of $10,000 proposed by the Assessment Office. The Assessment Office arrived at its proposed penalties in both dockets by waiving the formula provided for in 30 CFR 100.3 and making findings with respect to the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977. All of the nine violations involved in this proceeding are based on orders of withdrawal written under the unwarrantable failure provisions of Section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. The Assessment Office determined that exorbitant penalties of $10,000 should be assessed for eight of the alleged violations and and that a penalty of $7,000 should be assessed for the ninth alleged violation. As will hereinafter be shown, respondent's agreement to pay a total of $33,000 in both dockets instead of the $87,000 proposed by the Assessment Office is an appropriate settlement which should be approved.

General findings with respect to four of the six criteria can be made and those findings will be considered to be applicable for determining penalties with respect to all nine of the alleged violations. The remaining two criteria, namely, the negligence and gravity associated with the alleged violations, should be specifically considered with respect to each alleged violation. Respondent demonstrated a good faith effort to achieve rapid compliance with respect to all of the orders of withdrawal because the violations cited in the nine orders were abated on the same day the orders were written with respect to seven orders and the violations cited in the remaining two orders were abated by the next day after the orders were written. The computer printouts accompanying the motions for approval of settlement show that respondent is controlled by the Pittston Company. On the basis of that information, I find that respondent is a large operator

and that penalties should be assessed in an upper range of magnitude insofar as they are based on the criterion of the size of respondent's business. Since there are no data in the file showing otherwise, I find that payment of penalties will not cause respondent to discontinue in business. The computer printouts show that respondent has a significant history of previous violations and that criterion was taken into consideration by the parties in arriving at the large penalties which respondent has agreed to pay in settling the two cases involved in this proceeding.

Docket No. PIKE 79-42-P

Order No. 1 RHH (6-28) dated August 19, 1976, cited respondent for a violation of Section 75.400 because oil, grease, loose coal, and coal dust had been allowed to accumulate on the continuous-mining machine. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.400. In order for a penalty of $10,000 to be warranted, the evidence would have to show that larger accumulations than the ones described in the order existed and there would have to be an indication that a very hazardous ignition source existed, such as a bare wire. Additionally, the presence of methane should be shown. Finally, in order to prove that a violation of Section 75.400 existed, the inspector's testimony would have to satisfy the tests established by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), namely, that the accumlations had existed for an unreasonable period of time and that the operator had failed to clean them up within a reasonable time after becoming aware of the existence of the accumulations or after the operator should have become aware of them if the operator had been duly diligent in inspecting its equipment. The fact that the parties agreed to settle the issues raised with respect to this alleged violation of Section 75.400 is a fair indication that the inspector would not have been able to show the existence of all the serious factors required to sustain the assessment of a maximum penalty of $10,000. Respondent's agreement to pay a penalty of $3,000 for accumulations of combustible materials on the continuous-mining machine is a reasonable amount to pay for the violation of Section 75.400 alleged in Order No. 1 RHH.

Order No. 3 RHH (6-50) dated August 23, 1976, cited a violation of Section 75.518 because the fuse for a water pump had been bridged over with a piece of copper wire with the result that the pump was not provided with short circuit or overload protection. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.518. I have always looked upon the bridging of fuses as being a matter of gross negligence because the person who bridges a fuse knows that he is destroying the protection against shock and fires which a fuse is designed to provide. The gravity of the violation, however, depends on whether an actual shock hazard existed at the time the order was written and on the likelihood

that a fire would have occurred. In view of the fact that the order shows only potential hazards, the degree of gravity associated with the alleged violation is not so great as to

warrant assessment of a maximum penalty. Therefore, I find that respondent's agreement to pay a penalty of $5,000 is reasonable and should be approved.

Order No. 1 CGW (6-55) dated August 19, 1976, cited respondent for a violation of Section 75.400 because loose coal, coal dust, grease, and oil had been allowed to accumulate on a continuous-mining machine. The Assessment Office proposed that a penalty of $10,000 be assessed for this violation of Section 75.400. Order No. 1 RHH, supra, alleged the occurrence of an identical violation in a different section of the mine at the same time on the same day as the instant order was written. The observations made with respect to the violation of Section 75.400 cited in Order No. 1 RHH are equally applicable to the violation cited in the instant order. There is no explanation in the motion for approval of settlement for the fact that respondent has agreed to pay only $2,000 in settlement of the violation of Section 75.400 alleged in the instant order, but agreed to pay $3,000 for settlement of the violation of Section 75.400 alleged in Order No. 1 RHH. The conditions which existed in one section of the mine probably were more hazardous than those which existed in the other section and I am concluding, in the absence of any information to the contrary, that the inspector who wrote the prior order would have been able to show greater negligence or gravity, or both, than the inspector who wrote the instant order. In any event, I would not normally assess more than $2,000 for an alleged violation of Section 75.400 when the accumulations were cited on a single piece of mining equipment. Therefore, I find that respondent's agreement to pay a penalty of $2,000 for having a dirty mining machine is reasonable and should be accepted.

Order No. 2 CGW (6-57) was written on August 19, 1976, and cited respondent for a violation of Section 75.400 because loose coal, coal dust, grease, and oil were allowed to accumulate on a roof-bolting machine. The accumulations here involved are alleged to have occurred on the same day and in the same section as the accumulations which were cited on the continuous-mining machine in Order No. 1 CGW, supra. The existence of accumulations on two different pieces of equipment in the same section of the mine on the same day adds to the hazards to which respondent's miners would have been exposed. Nevertheless, in the absence of any showing of actual ignition hazards and the possibility that the inspector would not have been able at a hearing to prove the elements constituting a violation of Section 75.400 as they were set forth by the former Board in the Old Ben case, supra, I find that respondent's agreement to pay a penalty of $2,000 for this alleged violation of Section 75.400 is reasonable and should be approved. It should be noted that when Order No. 2 CGW was written, it also alleged the occurrence of other violations, but the order was subsequently modified by the inspector to allege a violation of only Section 75.400. Consequently, there is no need for me to consider in this case the other violations which were originally cited by the inspector.

Order No. 1 FIJ (6-92) dated October 12, 1976, cited respondent for a violation of Section 75.200 because the roof-control plan was not being complied with in that the operator of the continuous-mining machine had advanced 4 feet inby permanent support and because the pillar was being split from both the side and the end. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation of Section 75.200. Violations of the roof-control plan are generally the most hazardous of all violations because roof falls kill and injure more miners than any other single occurrence in underground mines. I am willing to accept respondent's agreement to pay a penalty of $4,000 in this instance in the absence of any facts showing that there were broken places in the roof or other signs indicating that the roof was in immediate danger of falling.

Order No. 2 FIJ (6-94) dated October 12, 1976, cited respondent for a violation of Section 75.601 because the fuse for the hoist at the loading ramp had been bridged over with wire. The comments made with respect to Order No. 3 RHH, supra, apply to the violation of Section 75.601 alleged in the instant order. Respondent has agreed to pay $5,000 for this alleged violation in lieu of the penalty of $10,000 proposed by the Assessment Office. In both instances, respondent has agreed to pay a penalty of $5,000 which should be approved on the basis of the comments which have already been made in considering Order No. 3 RHH above.

Order No. 3 FIJ (6-96) dated October 12, 1976, cited respondent for a violation of Section 75.701-3 because the roof-bolting machine had not been provided with a frame ground in that the frame ground wire was disconnected in two poorly made temporary splices and was disconnected in the cable reel. The primary hazard to which miners are exposed by the nonexistence of a frame ground is electrocution. The Assessment Office proposed that a penalty of $10,000 be assessed for this alleged violation. There are no facts in the file which show that the floor in the vicinity of the roof-bolting machine was damp or that there were bare wires which would almost certainly have exposed the miners to electrocution. In the absence of specific facts showing that the alleged violation was extremely grave, I find that respondent's agreement to pay a penalty of $4,000, instead of the penalty of $10,000 proposed by the Assessment Office, should be approved.

Order No. 1 FIJ (6-112) dated October 27, 1976, cited respondent for a violation of Section 75.301 because a volume of only 6,375 cubic feet of air per minute was reaching the last open crosscut instead of the minimum volume of 9,000 cubic feet per minute required by Section 75.301. The Assessment Office proposed that a penalty of $7,000 be assessed for this alleged violation. The fact that respondent was providing over 2/3 of the required volume of air would not have made the circumstances associated with this violation serious enough and would not have involved enough negligence, to warrant a proposed penalty of

$7,000 unless there had been in existence a combustible concentration of methane. In the absence of

any factors showing that the violation was unusually hazardous, respondent's agreement to pay a penalty of $5,000, instead of the $7,000 proposed by the Assessment Office, is reasonable and should be approved.

Docket No. PIKE 79-43-P

Order No. 1 FIJ (7-31) dated May 2, 1977, cited respondent for a violation of Section 75.200 because respondent was not complying with the provisions of its roof control plan in that roadway posts were not being set, the proper sequence of mining was not being followed, and reflectorized devices were not being used to warn miners of the existence of unsupported roof. The comments which have been made above in considering Order No. 1 FIJ (6-92) in Docket No. PIKE 79-42-P are applicable to the instant order. The Assessment Office proposed that a penalty of $10,000 be assessed for this violation. The fact that the operator of the continuous-mining machine had advanced 4 feet inby permanent support makes the violation of Section 75.200 alleged in Order No. 1 FIJ (6-92) more serious than the violation of Section 75.200 alleged in the instant order and justifies respondent's agreement to pay $3,000 for the violation of Section 75.200 alleged in the instant order in lieu of the payment of $4,000 agreed upon with respect to the violation of Section 75.200 alleged in Order No. 1 FIJ (6-92), supra. Therefore, respondent's agreement to pay a penalty of $3,000 should be approved.

WHEREFORE, it is ordered:

(A) For the reasons hereinbefore given, the motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement, Eastern Coal Corporation, shall, within 30 days from the date of this decision, pay civil penalties totaling $33,000 which are allocated to the respective alleged violations as follows:

Docket No. PIKE 79-42-P

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| Order No. 1 RHH (6-28) 8/19/76 | 75.400 ..... | $ 3,000.00 |
| Order No. 3 RHH (6-50) 8/23/76 | 75.518 ..... | 5,000.00 |
| Order No. 1 CGW (6-55) 8/19/76 | 75.400 ..... | 2,000.00 |
| Order No. 2 CGW (6-57) 8/19/76 | 75.400 ..... | 2,000.00 |
| Order No. 1 FIJ (6-92) 10/12/76 | 75.200 ..... | 4,000.00 |
| Order No. 2 FIJ (6-94) 10/12/76 | 75.601 ..... | 5,000.00 |
| Order No. 3 FIJ (6-96) 10/12/76 | 75.701-3 ..... | 4,000.00 |
| Order No. 1 FIJ (6-112) 10/27/76 | 75.301 ..... | 5,000.00 |
| Total Settlement Penalties in Docket No. PIKE 79-42-P | ..... | $ 30,000.00 |

Docket No. PIKE 79-43-P

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| Order No. 1 FIJ (7-31) 5/2/77 | 75.200 | $ 3,000.00 |
| Total Settlement Penalties in Docket No. PIKE 79-43-P | | 3,000.00 |
| Total Settlement Penalties in This Proceeding | | $ 33,000.00 |

Richard C. Steffey
Administrative Law Judge