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SOL (MSHA) V. KENTLAND-ELKHORN COAL
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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. PIKE 79-44-P<br>Assessment Control<br>No. 15-02097-02020V |
| v. | |
| KENTLAND-ELKHORN COAL<br>CORPORATION,<br>RESPONDENT | Feds Creek No. 1 Mine |

DECISION

Appearances: John H. O'Donnell, Esq., U.S. Department of Labor, for Petitioner
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Steffey

A hearing was held in the above-entitled proceeding on May 15, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977 pursuant to a written notice of hearing dated April 12, 1979.

The proceeding involves a Petition for Assessment of Civil Penalty filed by MSHA on November 21, 1978, as amended on May 8, 1979, seeking assessment of civil penalties for alleged violations of 30 CFR 75.200 and 30 CFR 77.506. When the hearing was convened on May 15, 1979, counsel for the parties stated that they had entered into a settlement agreement with respect to the alleged violation of Section 75.200, but that each party would present evidence with respect to the alleged violation of Section 77.506 (Tr. 3).

The Settlement Agreement

Under the settlement reached with respect to the alleged violation of Section 75.200, respondent would pay a civil penalty of $8,000 instead of the penalty of $10,000 proposed by the Assessment Office (Tr. 4).

It was stipulated that respondent is a subsidiary of The Pittston Company Coal Group, that the Feds Creek No. 1 Mine produces about 600 tons of coal daily and, at the time the order here under consideration was written, employed 10 miners on the surface and 145 underground. The Feds Creek Mine extracts coal from the Pond Creek seam which averages 60 inches in thickness (Tr. 4-5). Those facts support a finding that respondent is a large operator, is subject to the provisions of the Act, and that civil penalties in an upper range of magnitude are appropriate under the criterion of the size of respondent's business. In the absence of any financial evidence to the contrary, I find that

payment of penalties will not cause respondent to discontinue in business.

The settlement agreement specifically concerns a violation of Section 75.200 alleged in Order No. 2 CC dated March 17, 1977, which stated that unsupported shale roof was present on the runaround on the Jackson Rowe Section beginning at the overcast and extending inby for a distance of 43 feet. Two posts were the sole means of roof support (Exh. 2).

The background circumstances leading up to the occurrence of the violation were that the track entry being used at the time Order No. 2 CC was written ran parallel to an old track entry which had been cut about 20 years prior to 1977. Respondent had made a crosscut to connect the old and new track entries, but the crosscut had never been bolted. The inspector who wrote the order observed the mine foreman walking through the unsupported crosscut. The inspector also walked through the crosscut to take measurements, knowing that the crosscut was unsupported. The inspector explained that he had walked through the crosscut because its roof consisted of blue slate and that he felt the roof was perfectly safe even through it had never been bolted. The inspector believed that the operator's failure to support the roof, despite the inspector's having walked under it, was a serious and a very negligent violation because respondent's roof-control plan requires all roof to be supported and the inspector claims that respondent had had ample time within which to install supports (Tr. 5).

Counsel for respondent defended the operator's failure to have installed supports by explaining that there was a drop in elevation between the two tracks and that the delay in supporting the roof was caused by the necessity of respondent's having to construct a ramp for the purpose of moving a roof-bolting machine into the crosscut (Tr. 5-6).

Respondent corrected the alleged violation by 11:00 a.m. of the day following issuance of Order No. 2 CC (Exh. 4). Therefore, I find that respondent demonstrated a normal good faith effort to achieve rapid compliance.

The facts set forth above indicate that the violation was not serious enough to warrant imposition of a maximum penalty of $10,000. A large penalty is warranted on the basis of negligence because respondent succeeded in supporting the roof within a 24-hour period once the order was issued. Additionally, Exhibit 1 shows that respondent has violated Section 75.200 on 48 prior occasions. That is an unfavorable history of previous violations and requires that a relatively large penalty be imposed for the instant violation of Section 75.200. For the foregoing reasons, I find that a penalty of $8,000 is reasonable and that the parties' settlement agreement with respect to the violation alleged in Order No. 2 CC dated March 17, 1977, should be approved as hereinafter ordered.

The Contested Violation

Order No. 1 VEH (7-79) 4/27/77  77.506 (Exhibit 5)

Findings. Section 77.506 requires that automatic circuit breakers or fuses of the correct type be used to protect all electric equipment and circuits against short circuit and overloads. Respondent violated Section 77.506 because a piece of heavy copper wire had been substituted for a fuse in

the nip which was used to obtain power from the trolley wire for the car-repair shop located on the surface of the mine. The violation was serious because the use in the nip of a piece of wire, instead of a proper fuse, destroyed short circuit and overload protection on the power circuit which supplied electricity to the lights, electric heater, and electric welder in the shop where track haulage equipment was repaired (Tr. 11-12; 48). If a short circuit had occurred in the equipment used in the shop, the two men working there could have been exposed to shock or electrocution (Tr. 25). Heat generated by a short circuit could also have caused electrical insulation to ignite and produce a fire (Tr. 31). Since the shop was on the surface, a fire would have been less hazardous to the men working in the shop than exposure to electrical shock (Tr. 49). The gravity of the shock hazard was reduced by the fact that the resistors used for space heating were frame grounded and the frame ground would have had to have been burned in two by overheating before the resistors would have become a shock hazard (Tr. 47). The substitution of a wire for a fuse was an act of gross negligence in view of the fact that one of the men working in the shop had repeatedly tried to obtain fuses from the chief electrician and the supply shop without success. He had advised the supply personnel that he was substituting a wire for a fuse because of his inability to obtain a fuse at the shop (Tr. 89-91; Exh. 8).

Discussion and Conclusions. Respondent's chief electrician testified that he was present when the inspector found the wire in the nip during an inspection of the repair shop on Wednesday, April 27, 1977 (Tr. 62; 70). Consequently, respondent does not dispute that a violation of Section 77.506 occurred. Respondent's defense was that the negligence associated with the violation was not great enough to warrant the inspector's issuance of an order of withdrawal under the unwarrantable failure provisions of Section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. As the Commission held in MSHA v. Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, issued March 26, 1979, 79-3-11, and in Pontiki Coal Corp. v. MSHA, Docket No. PIKE 78-402-P, issued October 25, 1978, 79-10-13, the validity of the order citing respondent for a violation of Section 77.506 is not an issue in a civil penalty proceeding arising under the 1969 Act, but it is necessary to evaluate respondent's defense in order to determine the degree of negligence which was associated with the violation of Section 77.506.

Respondent's defense to MSHA's claim of gross negligence was exclusively based on the testimony of respondent's chief electrician who testified that he had held the position of respondent's chief electrician for only about 1 month before the violation occurred. He stated that he had examined the circuit in the repair shop shortly after his being hired by respondent and that he had determined on the basis of his initial examination that the No. 1 cable being used to supply power in the shop was undersized for its intended purpose. Therefore, on Saturday,

April 23, he had replaced the No. 1 cable in the shop with No. 4 cable. He said that he had found on Saturday that a wire was being used in the nip instead of a fuse and that he had removed the wire but had not inserted a fuse because no work was being done on Saturday and therefore no power was needed in the repair shop (Tr. 58; 64-65).

The chief electrician said that he did not get to the repair shop until 10:00 or 11:00 a.m. on the following Monday, April 25, 1977. By that time the two men who normally worked in the shop, Alson Thornbury and Fonso Hatfield, were already working. When the chief electrician examined the nip, he found that a wire had again been installed in the nip instead of a fuse. The chief electrician, at that time, replaced the wire with a fuse. The chief electrician said that he was, therefore, surprised when the inspector found a wire in the nip on the following Wednesday which was just 2 days after he had inserted a fuse in the nip (Tr. 70; 77-79).

The inspector who wrote the order stated that if the electrician had explained the above-described steps which he had taken to insure that the power circuit in the shop was protected with adequate overload and short circuit protection, he would have issued a notice under Section 104(b) of the 1969 Act. Such a notice would have been considered to involve a lower degree of negligence than is usually associated with an unwarrantable failure order (Tr. 37-40).

If no evidence controverting the testimony of the chief electrician had been introduced, the record would have supported a finding of a low degree of negligence. The inspector, however, expected that his order might become the subject of a hearing and therefore he took the unusual precaution of asking one of the shop workers, Mr. Thornbury, for a written statement of the facts surrounding the issuance by the inspector of the order here involved (Tr. 32; 93). That written statement was introduced as Exhibit 8 in this proceeding and it indicates that Mr. Thornbury admitted having substituted the piece of trolley wire for a fuse, but Mr. Thornbury said that he had used a wire because the fuses frequently blew and neither the chief electrician nor the supply house would provide him with an adequate number of fuses for the nip.

Additionally, Mr. Thornbury was called as a witness and testified as follows: (1) He had been able to obtain only a couple of fuses from the chief electrician. They soon blew out because the use of the electric welder in the shop overloaded the circuit and blew out the 200-amp fuses which were the largest ones he could get (Tr. 90; 96). (2) Mr. Thornbury tried repeatedly to obtain fuses from the supply shop, but the supply shop personnel claimed they did not have any. In such circumstances, Mr. Thornbury said he was forced to substitute a wire for a fuse because he had a lot of repair work to do and had no other way to obtain electricity (Tr. 90-91). (3) Mr. Thornbury worked in the shop for about 1%p1/2%p years and he said that they used "the same old wire" to supply power all the time he was there and that it was not replaced a short time before the inspector's order was written (Tr. 95-96). (4) Mr. Thornbury said a wire or a fuse was always in the nip when they started to work on Monday after each weekend and that he had never come to the shop on any Monday and found the nip inoperative because of a

lack of either a wire or a fuse in the nip (Tr. 96). (5) Mr. Thornbury said that he had never been told by the chief electrician to refrain from using a piece of trolley wire in the nip, but he said he had told the chief electrician and supply house that he was using a wire in the nip and that using a wire might cause trouble if it were to be discovered by an inspector (Tr. 90-91).

It is obvious from the foregoing review of the conflicting testimony that a determination must be made as to whether Mr. Thornbury's testimony should be considered as more or less credible than that of the chief electrician. I believe that the circumstances surrounding the two witnesses' conflicting testimony support a finding that Mr. Thornbury's testimony is more credible than that of the inspector. Mr. Thornbury submitted a written statement of the events associated with the inspector's issuance of the order here involved. Subsequently, Mr. Thornbury retired because of ill health and appeared at the hearing in response to a subpoena. His testimony at the hearing was entirely consistent with the written statement given to the inspector prior to the hearing. Mr. Thornbury had not been present in the hearing room when the chief electrician testified and had no reason to believe that the facts he was giving were different from those stated by the chief electrician. Moreover, the chief electrician stated that no reprimand or other disciplinary action was taken against Mr. Thornbury even though Mr. Thornbury had readily admitted that he had substituted the wire for a fuse in the nip. In such circumstances, there is no reason to believe that Mr. Thornbury would have testified adversely to respondent's position out of personal animosity toward respondent's management.

For the reasons given above, I find that respondent's management was aware of the fact that the wire had been substituted for a fuse and had failed to do anything about it.

Assessment of Penalty. It has already been found above that respondent is a large operator, that payment of penalties will not cause respondent to discontinue in business, and that respondent demonstrated a normal good faith effort to achieve rapid compliance. The violation was serious because it was accompanied by a potential shock hazard and a fire. The fire would have been on the surface where no one would have been exposed to a lethal amount of carbon monoxide or other noxious fumes. The inspector stated that he observed no defects in the wire supplying power to the resistors and welder. Additionally, the equipment in the shop was frame grounded so that the use of the wire in the fuse nip would have had to have been accompanied by a breakdown of the frame ground before anyone would have been shocked by coming in contact with the resistors or welder.

The violation was the result of gross negligence because respondent had declined to obtain fuses as often as they were needed even though one of the shop repairmen had advised the chief electrician and the supply department that he was using a wire instead of a fuse because of their indifference to the fact that he needed fuses. No reason was given for respondent's failure to provide adequate circuits to carry the power required to operate both the resistors and the welder. In such circumstances, I find that respondent was grossly negligent in allowing the violation to occur. Consequently, a penalty of $4,000 will be assessed for this violation of Section 77.506.

Exhibit 1 shows that respondent has violated Section 77.506 on three prior occasions in three different years. While that is not a significant previous history, it should not be ignored. Consequently, the penalty of $4,000 will be increased by $50 to $4,050 in view of respondent's history of previous violations.

WHEREFORE, it is ordered:

(A) The motion for settlement made at the hearing is granted and the settlement agreement under which respondent has agreed to pay a penalty of $8,000 for the violation of Section 75.200 alleged in Order No. 2 CC (7-36) dated March 17, 1977, is approved.

(B) Respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $14,050 of which $8,000 will be attributed to the settlement agreement described in paragraph (A) above and the remaining sum of $4,050 will be allocated to the violation of Section 77.506 alleged in Order No. 1 VEH (7-79) dated April 27, 1977.

Richard C. Steffey
Administrative Law Judge