

CCASE:
SOL (MSHA) V. AMHERST COAL
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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 Proceedings Docket No. HOPE 79-128-P A/O No. 46-03773-03003V
v.	Docket No. HOPE 79-129-P A/O No. 46-03773-03004V
AMHERST COAL COMPANY, RESPONDENT	MacGregor No. 8 Mine

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
Edward I. Eiland, Esq., Eiland & Bennett, Logan,
West Virginia, for Respondent

Before: Judge Cook

I. Procedural Background

On November 22, 1978, the Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalty in the above-captioned proceedings pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act). The petitions collectively allege two violations of provisions of the Code of Federal Regulations. Answers were filed by Amherst Coal Company (Respondent) on December 12, 1978.

A notice of hearing was issued on June 5, 1979, scheduling the cases for hearing on the merits on July 19, 1979, in Beckley, West Virginia. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs and proposed findings of fact and conclusions of law was agreed upon after the presentation of the evidence. The briefing schedule was subsequently revised at the Petitioner's request. Under the revised schedule, posthearing briefs and proposed findings of fact and conclusions of law were due on September 28, 1979. Reply briefs were due by October 12, 1979. The Petitioner's brief was filed on September 28, 1979. The Respondent did not file a brief.

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II. Violations Charged

A. Docket No. HOPE 79-128-P

Citation No.	Date	30 CFR Standard
29736	4/4/78	75.1725

B. Docket No. HOPE 79-129-P

Order No.	Date	30 CFR Standard
29738	4/4/78	75.1725

III. Evidence Contained in the Record

A. Stipulations

The parties entered into various stipulations which are set forth in the findings of fact, *infra*.

B. Witnesses

The Petitioner called as its witness Henry J. Keith, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Ernest Marcum, company safety inspector for the Respondent; Shirley Adkins, a miner whose duties included the repair and inspection of electrical equipment at the subject mine in April 1978; Virgil Damron, chief electrician at the subject mine; Edward L. Chafin, a miner at the subject mine serving as chairman of the mine safety committee for his local union; and Charles Rhodes, a section foreman at the subject mine.

C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 29736, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-2 is a two-page document containing photographs of a scoop.

M-3-A is a copy of Order No. 29738, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-3-B is a copy of a modification of M-3-A.

M-4 is a diagram of a coal drill.

M-5 is a computer printout compiled by the Directorate of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning April 4, 1975, and ending April 4, 1978.

2. The Respondent introduced the following exhibits in evidence:(FOOTNOTE 1)

O-1 through O-8 are photographs of the subject scoop.

O-9 through O-15 are photographs of the subject coal drill.(FOOTNOTE 2)

O-17 is a document styled "Examination of Electrical Equipment."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations, (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The Amherst Coal Company is the owner and operator of the MacGregor No. 8 Mine and, as such, is subject to the jurisdiction of the 1977 Mine Act (Tr. 5, 8, 9).

2. The copies of the subject citation, order, termination and the modification of the order were properly served on Amherst Coal Company (Tr. 5, 8).

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3. Henry J. Keith is a duly authorized representative of the Secretary of Labor and was so during April, 1978 (Tr. 5, 8).

4. Amherst Coal Company exhibited good faith in attempting to rapidly abate the subject citation and order (Tr. 5, 8).

5. Amherst Coal Company is a large company (Tr. 5, 8).

6. The proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5, 8, 9).

7. Amherst Coal Company's total tonnage during 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

B. Opinion and Findings of Fact

1. Docket No. HOPE 79-128-P: Citation No. 29736, April 4, 1978, 30 CFR 75.1725

Occurrence of Violation

MSHA inspector Henry J. Keith arrived at the Respondent's MacGregor No. 8 Mine at approximately 8 a.m. on April 4, 1978, to conduct a spot inspection (Tr. 19). Mr. Ernest Marcum, the Respondent's safety inspector, accompanied Inspector Keith during the inspection (Tr. 20). At approximately 10:45 a.m., the subject citation was issued alleging a violation of mandatory safety standard 30 CFR 75.1725 in that the S & S scoop located in the 001 section:

[W]as not maintained in a safe operating condition in that the emergency switch on the control box was frozen and inoperative. The power lead to the battery was damaged with exposed wire. The inner parts of the rear light was missing with wire leads exposed. Exposed moving universal was not guarded, no fender over left drive wheel to protect persons from injury.

(Exh. M-1).

Mandatory safety standard 30 CFR 75.1725 provides, in part, that: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The inspector's testimony is in accord with the statements contained in the citation. His testimony establishes the existence of the four cited defects on the S & S scoop and also establishes that the defects rendered the machine unsafe within the meaning of the subject regulation (Tr. 22-26, 28-39, 73, 75-76, 79, 84-86, 91, 241-242). Additionally, the inspector observed the machine in operation (Tr. 22, 71, 92-96).

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The testimony of Inspector Keith is at variance with the testimony of the Respondent's witnesses on two key points: (1) the condition of the emergency switch, and (2) the condition of the power lead to the battery.

Messrs. Marcum and Chafin testified that the disconnect switch on the scoop was frozen and inoperative (Tr. 108-109, 195). The testimony of both witnesses collectively asserts that both the panic bar and the emergency switch were properly functioning (Tr. 129, 195).

The inspector testified that the power lead mentioned in the citation connected the battery to the power circuits (Tr. 76). According to the inspector, the power lead extended above the surface of the frame of the scoop on the operator's side. Some of the insulation had been torn off exposing the cable's metal wires (Tr. 31-32, 76-77).

Messrs. Marcum and Chafin disagreed, testifying that the exposed cable was inside the metal bell, or plug, which served to attach the cable to the battery. According to both witnesses, it was necessary to depress the cable and peer inside the bell in order to see the exposed cable (Tr. 113, 194, 204). Both witnesses testified that they did not see any exposed cable outside the bell (Tr. 113, 194) and indicated that Inspector Keith depressed the cable in order to see the exposed wire (Tr. 133, 204). However, the inspector testified that he did not have to depress the cable and peer under the bell in order to see bare wire (Tr. 79).

Numerous inconsistencies in the evidence presented by the Respondent serve to impeach the credibility of the Respondent's witnesses in those areas in which their testimony is at stark variance with the testimony of Inspector Keith. These inconsistencies cast a cloud over their testimony in all such areas depriving it of probative value. The major areas are set forth below.

First, Mr. Marcum, the company safety inspector, and Mr. Damron, the chief electrician, disagreed as to the identity of the disconnect switch on Exhibits 0-6 and 0-7 (Tr. 110-111, 172-173). Second, an inconsistency is present in the testimony of Mr. Marcum and Mr. Chafin as relates to the exposed universal. According to Mr. Marcum, the inspector issued this portion of the citation to obtain guarding on a rounded disc located near the universal, not to obtain a covering for the universal itself (Tr. 115, 138). However, Mr. Chafin indicated that this portion of the citation was issued because both the disc and the universal were uncovered (Tr. 208). Third, the conduct of Mr. Marcum at the time the citation was issued is inconsistent with his testimony on a crucial point. According to Mr. Marcum, the panic bar and emergency switch were in working order. He testified that Inspector Keith indicated that he was issuing citation for the frozen disconnect switch (Tr. 129-130). However, the citation served to Mr. Marcum clearly states that "the emergency switch on the control box was frozen and inoperative" (Exh. M-1).

(Emphasis added.) There is no indication that Mr. Marcum mentioned this to the inspector at the time and, in fact, he testified that he expected the inspector to give testimony at the hearing

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concerning the disconnect switch, not the emergency switch (Tr. 129). In view of the clear statement contained in the citation, I find it highly improbable that Mr. Marcum would not have sought a clarification from the inspector at the time as to why the emergency switch was cited when the alleged conversation at the machine clearly indicated that another switch was being cited. Additionally, Mr. Damron testified during cross-examination that the emergency switch was repaired on April 4, 1978, subsequent to the inspection (Tr. 180-181). However, he retracted this testimony during redirect examination (Tr. 182-183).

Although Messrs. Marcum, Damron, and Chafin all claimed that the panic bar and emergency switch worked properly there was considerable inconsistency in their testimony as to (1) whether the panic bar was checked at all, (2) who checked it, (3) who was present, and (4) whether the power was turned on when it was checked.

On the first and second points Mr. Chafin said first that he checked the panic bar with no power on (Tr. 195), then later he said that no request was made for a test of the panic bar and he saw no one test it (Tr. 218). However, Mr. Marcum said the inspector tested it (Tr. 146). On the other hand, Mr. Damron said that he himself tested it (Tr. 174).

On the third point, Mr. Marcum and Mr. Chafin said Virgil Damron came to the scoop and told the inspector that the frozen switch was a disconnect switch (Tr. 129, 195). However, Mr. Damron, the chief electrician, said that he did not know where the inspector was when he tested the panic bar. He said that the inspector could have been there but he had no idea who was there and that he did not know if the inspector was present (Tr. 184-186). The inspector had stated that he did not see an electrician at the time of the scoop inspection (Tr. 75, 237, 250-251).

As to the fourth point, Mr. Marcum and Mr. Chafin said no power had been used on the scoop during the test of the panic bar (Tr. 146, 195). However, Mr. Damron said he tested the panic bar and emergency switch with the power on (Tr. 174).

Accordingly, I conclude that the conditions set forth in the citation existed as alleged and rendered the S & S scoop unsafe within the meaning of the regulation. A violation of 30 CFR 75.1725 has been established by a preponderance of the evidence.

Gravity of the Violation

The MacGregor No. 8 Mine was wet and muddy and possessed an irregular bottom contour (Tr. 21). Float coal dust was suspended in the air due to dry drilling being performed with a coal drill in the nearby face (Tr. 30). The miners working in the area had wet hands and clothing (Tr. 32). Sparks were observed emanating from the broken rear light while the machine was in operation (Tr. 22, 33-34). The condition of the rear light and the condition of the battery cable could have resulted in miners

sustaining electrical burns or electrical shocks and, due to the float coal dust, could have

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resulted in a mine fire or explosion (Tr. 23, 30-35, 177-178, 181-182). Four miners were exposed to the former hazard while eight to nine miners were exposed to the latter hazard (Tr. 33, 35).

The inspector testified that the inoperative emergency switch exposed the machine operator and miners working in the vicinity of the machine to injuries ranging from lacerations to a fatality and that the wet and muddy conditions and irregular bottom contour could contribute to an occurrence (Tr. 25-29). However, it is significant to note that the machine was equipped with a footbrake (Tr. 74). Four or five miners were exposed to this hazard.

The inspector testified that it is customary in the mining industry for miners to transport rock dust, half headers, wedges, bolts, and bolt plates on the frames of scoops (Tr. 24, 36-37). He testified that materials of this type were observed on the body of the subject scoop on April 4, 1978 (Tr. 83, 97). According to the inspector, an object could fall against the universal during the operation of the scoop and become a flying projectile. This could result in the loss of an eye or other serious injury. Four miners were exposed to the hazard (Tr. 23-24, 35-36).

The inspector testified that the absence of a fender over the left rear wheel made it possible for a miner to maneuver his body between the wheel and the frame in order to connect the cable to the battery. A similar condition had resulted in a fatality at another mine (Tr. 24, 84-86).

Based on the foregoing, I conclude that the violation was very serious.

Negligence of the Operator

The cited conditions were readily observable and should have been detected by the section foreman (Tr. 52-60). Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

2. Docket No. HOPE 79-129-P: Order No. 29738, April 4, 1978, 30 CFR 75.1725

Occurrence of Violation

The subject order of withdrawal was issued by Inspector Keith during the course of his April 4, 1978, spot inspection of the Respondent's MacGregor No. 8 Mine (Tr. 259). The citation alleges, in pertinent part, that the coal drill in the 001 section "was not maintained in a safe operating condition in that %y(3)5C the stop and start switch was damaged and not connected

to the deenergizing device. The coal drill could not be deenergized quickly in the

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event of an emergency" (Exh. M-3-A), in violation of mandatory safety standard 30 CFR 75.1725. The coal drill was in operation at the time (Tr. 269-270, 298).

The testimony of the inspector differs radically from the testimony of the Respondent's witnesses as relates to the condition of the coal drill on the date in question. According to the inspector, the butterfly-type stop and start switch was damaged in such a manner that a piece of wire, extending from the top part of the switch to the leg of the coal drill's canopy, was being used to hold the switch in the "on" position (Tr. 261, 275, 294-295). Additionally, he testified that the deenergizing device, or panic bar, was supposed to be connected to the stop and start switch, but that it was not so connected (Tr. 262, 275, 277). According to the inspector, a bolt used to hold the panic bar in line down the side of the machine was missing, thus causing the end of the bar to drop (Tr. 289, 296). Accordingly, the end of the bar was lowered beyond the point where it made the connection with the start and stop switch (Tr. 351-352).

The Respondent's witnesses contradicted the inspector on both points. Mr. Marcum testified that he did not observe any wire around the panic bar (Tr. 315), and Mr. Chafin testified that the sole function of the wire observed by the inspector was to operate the light switch. Mr. Chafin also testified that wire was not used on the panic bar (Tr. 334-335). However, it is significant to note that the inspector's testimony addressed the presence of wire around the stop and start switch and not on the panic bar.

According to Messrs. Marcum and Damron, the panic bar was connected to the switch by an assembly consisting of a rod, a swivel sleeve and a spring. The rod was attached to the panic bar proper and the swivel sleeve was attached so as to operate the switch. The spring was located inside the swivel sleeve. The end of the rod was inserted into one end of the swivel sleeve and rested against the spring when the assembly was properly connected (Tr. 304-307, 329-330).

Messrs. Marcum and Chafin indicated that the panic bar had been rendered inoperative by the actions of Inspector Keith. According to Mr. Marcum, the inspector raised the panic bar causing the assembly to come apart. The swivel sleeve dropped and the spring fell out onto the deck of the machine. According to Mr. Marcum, the inspector thereupon indicated that the panic bar was not functioning adequately. Mr. Marcum also testified that Inspector Keith proceeded to replace the spring inside the sleeve and replace the panic bar in its proper position (Tr. 299, 308). This account was in accord with the testimony of Mr. Chafin (Tr. 333-334, 339).

Inspector Keith refuted this testimony. He testified that he did not touch or raise the bar in any manner because the defect was readily visible (Tr. 351). He testified that the spring and bar were already out when he commenced his inspection of the machine and that he did not repair it in any manner (Tr.

351). Additionally, he testified that he did not observe wire attached to the light switch (Tr. 352).

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I am unable to accord probative value to the testimony of the Respondent's witnesses insofar as it conflicts with the testimony of Inspector Keith. Some of Respondent's witnesses were not in a position to know exactly what the inspector first observed as to the condition of the panic bar. The witness who appears to have been in the best position to see showed a marked inconsistency in his testimony as to what actually happened. At one point his testimony actually substantiated the position of the inspector. An example of inconsistency in testimony is found in the following statements of Mr. Marcum during cross-examination wherein he momentarily admitted that the rod, swivel sleeve and spring assembly was apart when the inspector arrived:

Q. Didn't you state it by pulling it up in an upward motion that that would render it inoperative, and at that time the spring fell out?

A. Yes, ma'am.

Q. And you are not saying that by doing that Mr. Keith broke it?

A. It wasn't together in the first place.

Q. So the spring was not there prior to Mr. -- it was not intact with the entire panic bar and stop-start switch prior to the inspection; is that correct?

A. Yes -- no. It was there, because it fell out when he pulled it up.

Q. I said "intact," sir.

A. No, ma'am. It was not intact, no.

(Tr. 312).

Additionally, the credibility of the Respondent's witnesses is further weakened by the assertion that the inspector proceeded to repair the panic bar assembly. I find it inconceivable that a federal mine inspector would engage in such conduct instead of confining his activities to identifying violations of mandatory standards and ordering their abatement (Tr. 351).

Based on the foregoing, I conclude that the conditions cited by the inspector existed as alleged and that the conditions constituted a violation of 30 CFR 75.1725.

Gravity of the Violation

The cited conditions would have prevented the machine operator from stopping the machine quickly should it have become necessary to do so (Tr. 262-263). Anticipated injuries to persons outside the machine ranged

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from severe lacerations to death (Tr. 263-264, 266). An occurrence was classified as probable (Tr. 264).

Accordingly, I conclude that the violation was very serious.

Negligence of the Operator

The inspector testified that the missing bolt could have been removed by someone or could have simply fallen out during the shift due to machine vibration (Tr. 290). However, the conditions were readily visible (Tr. 265-266) and Mr. Charles Rhodes, the section foreman, was in the area (Tr. 223-224). Under these circumstances, the Respondent should have known of the conditions.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

History of Previous Violations

The history of previous violations at the Respondent's mines for which the Respondent had paid assessments between April 4, 1975, and April 4, 1978, is summarized as follows:

30 CFR Standard	Totals
All sections	1,961
75.1725	23

(Exh. M-5). (Note: All figures are approximations).

Size of the Operator's Business

The parties stipulated that Amherst Coal Company is a large company (Tr. 5), and that Amherst Coal Company's total tonnage for 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

Effect on Operator's Ability to Continue in Business

The parties stipulated that the proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5).

VI. Conclusions of Law

1. Amherst Coal Company and its MacGregor No. 8 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

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2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to these proceedings.

3. MSHA inspector Henry J. Keith was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citation and order of withdrawal which are the subject matter of these proceedings.

4. The violations charged in the subject citation and order of withdrawal are found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Petitioner filed a posthearing brief, the Respondent did not. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. HOPE 79-128-P

Citation No.	Date	30 CFR Standard	Penalty
29736	4/4/78	75.1725	\$1,000

B. Docket No. HOPE 79-129-P

Order No.	Date	30 CFR Standard	Penalty
29738	4/4/78	75.1725	\$1,000

ORDER

Respondent is ORDERED to pay the civil penalties in the amount of \$2,000 assessed in these proceedings within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1

Exhibit O-6, a schematic diagram of the controls of the scoop, was withdrawn by the Respondent (Tr. 365).

~FOOTNOTE 2

Exhibit O-11, a photograph of a coal drill, was not received from the reporter when the exhibits received at the hearing were forwarded with the transcript in this case. The attorney for the Respondent, who had introduced the exhibit, in a letter dated February 11, 1980, stated that he was willing to have the case decided in the absence of Exhibit O-11. The attorney for the Petitioner made a similar statement in a letter dated February 19, 1980.