

CCASE:  
SOL (MSHA) V. RITA COAL  
DDATE:  
1980305  
TTEXT:

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. KENT 79-52  
Assessment Control  
No. 15-04053-03004 V

v.

Mine No. LA-6

RITA COAL COMPANY,  
RESPONDENT

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor,  
U.S. Department of Labor, for Petitioner  
Lee F. Feinberg, Esq., Spilman, Thomas, Battle &  
Klostermeyer, Charleston, West Virginia, and  
William T. Watson, Esq., Pikeville, Kentucky,  
for Respondent

Before: Administrative Law Judge Steffey

Pursuant to notice of hearing issued September 7, 1979, as amended, October 22, 1979, a hearing in the above-entitled proceeding was held on November 8, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the bench decision which is reproduced below (Tr. 218-228):

This proceeding involves a petition for an assessment of penalty filed on June 15, 1979, by the Secretary of Labor, alleging a violation of 30 CFR 75.200 by Rita Coal Company.

The issues, of course, in any civil penalty case are whether a violation occurred, and if so, what civil penalty should be assessed under the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

The first point that has to be determined is whether a violation of Section 75.200 occurred. The violation that was alleged was set forth in Order of Withdrawal No. 72701 dated October 31, 1978, alleging that the roof control plan was not being followed, and that safety posts had not been installed in the working face of the number 8 pillar block before roof bolting had started.

I find that a violation of Section 75.200 occurred, because respondent's roof control plan provides in Sketch A of the roof control plan, which is Exhibit 2 in this proceeding, that safety posts shall be set as shown on that sketch before roof bolting is started.

Based on certain credibility determinations that I shall hereinafter explain, I find that the safety posts were not installed, and, therefore, that there was a violation of Section 75.200.

Perhaps before explaining the basis for my finding, I should indicate that I am denying the Motion to Dismiss made by respondent on the ground that I believe the inspector heard enough and saw enough to support his finding that violation of Section 75.200 had occurred.

We have testimony in the case by the inspector that he heard the sound of a roof bolting machine installing bolts as he came into the mine, and we have his testimony that when he was close to the working face, he observed the section foreman make a movement toward the men who were working in the face area, and by moving his cap light back and forth, give a signal that they should stop working. At that signal, the inspector states that the roof bolting machine was turned off, and when the inspector got to the face area, he found that no safety posts had been set as required by the roof control plan.

Respondent's section foreman testified that it was his practice always to signal the men on his section to stop working when an inspector appeared, so that the inspector, at his option, could watch whatever activities he wished to see performed. The section foreman also stated that the men satisfactorily explained to him, that is the roof bolter and his helper, their reasons for not having safety posts erected at the time the inspector came upon the scene.

The section foreman's explanation was that the roof bolter had observed some loose draw rock on the left side of the entry, and that he was in the process of barring that down when the inspector arrived, and although he had set safety posts before he started roof bolting, he took them down in order that he might get the loose rock down before finishing the installation of the roof bolts.

The roof bolter himself testified that he had installed two roof bolts on the left side, which

on the sketch in the exhibit 2, sketch A, would be roof bolts 1 and 2.

The roof bolter stated that he had then decided to bar down the loose roof which was on the left side, between those two roof bolts, and the working face. Before he did that, he took down the temporary supports which he had already put up.

After listening to the testimony of the roof bolter and the section foreman, I conclude that there are a number of discrepancies in their testimony, which causes me to give their testimony less credibility than I do that of the inspector.

Among other things that disturbed me about the [in-] consistency of their testimony, was the fact that the section foreman, for example, said that the temporary supports were lying beside the roof bolting machine, whereas the roof bolter, who was there and who was doing the work, stated that two of the temporary supports were on the machine, and that the third one was being put on the machine when the inspector got there. The inspector had testified that the temporary supports were on the roof bolting machine. I find that the section -- that the roof bolter is consistent with the inspector's testimony, in that respect.

The other aspect of the roof bolter's testimony, which is inconsistent with that of his section foreman, is that the section foreman said that there was a lot of material on the left side of the entry, it was too thick for the roof bolting machine to go up over it and bolt, whereas the inspector said that there was very little material on the floor, on the left side, and the roof bolter agreed with the inspector on that.

Additionally, the roof bolter stated that he had decided to knock out three temporary supports in order to bar down some loose material which was located solely on the left side of the entry, and inby the two roof bolts which he had already installed.

Now, the roof bolter had indicated it was always his practice to follow the roof control plan precisely, and that he always installed the roof bolts from left to right. Now, that being the case, there was no reason for him to be worrying about loose roof inby the first and second roof bolts which he had already installed, until he had already installed roof bolts three and four, because he didn't indicate that there was any

loose roof at all over at the place where roof bolts three and four would have been installed.

Therefore, there is no reason for him to have taken down those temporary supports until after he had put in roof bolts 3 and 4. Then at that point he would have been moving forward and could have been worried about taking down loose roof, if there had been any in advance of the roof bolts that he would have put in Nos. 5, 6, 7, and 8.

The roof bolter stated that it was his practice to sound the roof when he was still under supported roof in order to determine whether to bar down any loose roof.

Consequently, it is my conclusion that the roof bolter never had put up any temporary supports, and had put in two bolts without any temporary supports, and that when the inspector came on the scene, he endeavored to justify the fact that he had not put up any temporary supports.

Consequently, those are the primary reasons for my belief that the inspector's testimony is entitled to a greater amount of weight than the section foreman's or the roof bolter's.

Having found that a violation occurred, it is necessary now to consider the six criteria. It has been my consistent practice to consider from the standpoint of history of previous violations, whether an operator has violated a given section of a regulation a number of times, or any time prior to the violation alleged in the case before me.

In this instance, the parties stipulated before the hearing began that the respondent had not previously violated Section 75.200 except for a couple of violations which were observed by the inspector during the same inspection which was here involved.

In light of the fact that those violations were practically simultaneous with the one that is here before me, and, therefore, would have given the operator no opportunity to perhaps prevent additional violations before the one before me was observed, I find that there is no history of previous violations which should be taken into consideration.

Consequently, the penalty will neither be increased nor decreased under that criterion. The question of the

operator's size is also the subject of some stipulations by the parties. First of all in 1978, the No. 3 or LA-6 Mine here involved, produced about 25,000 tons of coal, which if divided by 250 days of production would only be about 100 tons a day. According to the testimony of Mr. Childress, the Rita Coal Company is owned by Russell Fork Company, and that entire group of companies, in 1978 produced 256,000 tons of coal, which would amount to about 1,024 tons per day.

The evidence also indicates that the mine which is before me today, or in this proceeding, is not now in operation because of the simple economic fact that the present market is not sufficient to justify the costs which the company has recently experienced for producing coal. The fact that Russell Fork is in turn owned by A.T. Massey enables the Rita group of mines to hold onto their reserves at about a loss of \$100,000 a month, in hopes that the market will someday be profitable enough that it can resume coal operations.

Since the situation as it now exists is that A.T. Massey is having to pick up the tab for all of the holding operations, that is holding onto the reserves and keeping the mines in such a fashion that they could be operated again, it is quite obvious that we have an uneconomic enterprise before us. While I agree with Mr. Taylor and Mr. Feinberg also, as indicated, that A.T. Massey would really pay any penalty that might be assessed, I still think that under the criterion of whether the payment of penalties would cause the operator to discontinue in business, that some weight should be given to the fact that we are confronted here with an uneconomic situation, and also, I should give some consideration to the fact that even in 1978 when the instant violation occurred, Rita Coal Company experienced a loss of between \$400,000 and \$700,000.

So, although I find that this is a moderate size business, and while I do not think that any one penalty would cause A.T. Massey to cease holding onto its mines in the hope that it might, within a reasonable period, have a profitable operation, again, I still am giving some weight to the fact that at this point in time it is not a -- certainly a remunerative operation.

It was stipulated, I believe, and if it were not, it is certainly shown by the short time that it took the operator to comply with the section here involved, after it was noted by the inspector, the evidence indicates that there was at least a normal good faith effort to

achieve compliance, so that factor should also be considered in assessing a penalty.

The two remaining criteria which are to be considered are first as to how serious the violation was, and on that, the inspector considers the failure to install temporary supports to be a serious violation; on the other hand, the inspector did not see any loose roof on the right side where the bolts were still to be installed, and, consequently, I believe that the violation was not of an extreme gravity, and in other words, it is not of such a hazardous nature that I feel that a really large penalty would be required.

From the standpoint of negligence, I have constantly run into situations where I have every reason to believe and find that much to my amazement that the very men who are doing the installation of roof bolts are failing to put in the temporary supports. I have even had cases involving fatalities in which the very men who were supposed to be putting up temporary supports, didn't do it. And they were killed, simply because they didn't put up supports.

This to me, is always astounding, but it seems to continue, so I find that it is gross negligence for men to work in a coal mine and fail to take care of themselves properly, and that is what section foremen are supposed to do, and yet this section foreman was out worrying about the the fact that there was some moisture on the section, and wasn't even around to take a methane check before this roof bolting machine began to operate. So, he didn't know what his men were doing, and I think that was gross negligence on his part.

If it were not for the fact that I have found that this is an uneconomic enterprise at the moment, I would be inclined to assess a very large penalty, but taking that factor into consideration, I believe that a penalty of \$1,000 is reasonable in the circumstances.

#### Ultimate Findings and Conclusions

(1) Respondent should be assessed a civil penalty of \$1,000.00 for the violation of section 75.200 cited in Order of Withdrawal No. 72701 dated October 31, 1978.

(2) Respondent, as the operator of record of the LA-6 Mine, is subject to the Act and to the regulations promulgated thereunder.

~658

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of \$1,000.00 for the violation described in paragraph (1) above.

Richard C. Steffey  
Administrative Law Judge  
(Phone: 703-756-6225)