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SOL (MSHA) V. PEABODY 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 Proceeding Docket No. KENT 80-124 Assessment Control No. 15-05120-03022 H
v.		
PEABODY COAL COMPANY,	RESPONDENT	Ken No. 4 North Mine

DECISION

Appearances: Joseph M. Walsh, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent Joyce A. Hanula, Attorney, Washington, D.C., for United Mine Workers of America.(FOOTNOTE 1)

Before: Administrative Law Judge Steffey

In my decision issued October 29, 1979, in Peabody Coal Company v. Secretary of Labor (MSHA) and UMWA, Docket No. KENT 79-107-R, I stated that I would decide the civil penalty issues raised by Withdrawal Order No. 795972, which was under review in that docket, when and if MSHA thereafter filed a Petition for Assessment of Civil Penalty seeking assessment of a civil penalty for the violation of 30 C.F.R. 75.200 alleged by Order No. 795972 as modified on June 1, 1979 (Exhs. 1 and 11).(FOOTNOTE 2)

Counsel for MSHA filed a Petition for Assessment of Civil Penalty in Docket No. KENT 80-124 on January 31, 1980, and the existence of that Petition was called to my attention on February 15, 1980, by a letter to me from MSHA's counsel. On February 11, 1980, respondent's counsel filed an answer

to the Petition in Docket No. KENT 80-124. The answer notes that evidence concerning the civil penalty issues raised by the Petition filed in Docket No. KENT 80-124 was received at the hearing held in Docket No. KENT 79-107-R.

Issues

The issues raised by the Petition filed in Docket No. KENT 80-124 are whether a violation of section 75.200 occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Occurrence of Violation

Findings of Fact

1. Order No. 795972 alleged that a violation of section 30 C.F.R. 75.202 had occurred, but the order was modified on June 15, 1979, to allege a violation of 30 C.F.R. 75.200. The modification order (Exh. 11) states that the conditions described in Order No. 795972 constituted a violation of section 75.200 because there was inadequately supported roof in respondent's mine and because respondent had violated its roof-control plan (Exh. A).

2. Section 75.200 requires that the roof in each coal mine shall be adequately supported and also requires each operator to submit a suitable roof-control plan whose provisions will assure that a safe roof is maintained in each operator's coal mine.

3. Respondent violated section 75.200 because inadequately supported roof, as hereinafter described, existed in the No. 1 Unit ID 004 and respondent's top managerial staff had declined to take action to provide supplemental support, as required by respondent's roof-control plan, even though the dangerous roof conditions had been reported to managerial personnel by several operators of roof-bolting machines prior to issuance of Order No. 795972 (Tr. 34; 88; 106; 149-150; 168; 428-429).

The above findings support my conclusion that a violation of section 75.200 occurred. The six criteria will be evaluated below for the purpose of assessing a penalty.

Size of Respondent's Business

The parties stipulated that respondent is a large operator (Tr. 7). I find, therefore, that the penalty should be in an upper range of magnitude insofar as it is determined under the criterion of the size of respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

It was also stipulated that payment of penalties will not cause respondent to discontinue in business (Tr. 7-9).

History of Previous Violations

The computer printout submitted by MSHA's counsel shows that respondent violated section 75.200 at its Ken No. 4 North Mine on two occasions in 1977, six occasions in 1978, and one occasion in 1979 by February 15, 1979 (Exh. 10). I would have liked to see the trend of violations over a longer period than was shown by Exhibit 10, but I consider that nine violations of section 75.200 in a period of a little over 2 years show an adverse history of previous violations. Consequently, the penalty hereinafter assessed will be increased by $150 under the criterion of history of previous violations.

Respondent's Effort To Achieve Rapid Compliance

It was the inspector's opinion that the hazardous roof conditions he found could have been abated by the installation of crossbars and timbers in all areas in which he found separations in the roof strata to exist (Tr. 109). Respondent's management declined to install supplemental roof support in the No. 1 Unit because all of the top managerial personnel inspected the No. 1 Unit on the day after Order No. 795972 was issued and concluded that no imminent danger existed (Tr. 195). It was the position of mine management that if they had ordered the installation of supplemental roof support, they would have been conceding that hazardous conditions existed (Tr. 222; 255). Therefore, all miners were withdrawn from the area covered by the withdrawal order and all further effort to extract coal in that area was abandoned (Tr. 255-257).

Since all miners were withdrawn from the area covered by Order No. 795972 and the miners were to go back into that area to work, respondent's failure to install supplemental support did not expose the miners to any danger after the order was written. Respondent's decision to contest the validity of Order No. 795972 caused a delay in production which made it uneconomical to return to that area after the results of contesting the order became known. Respondent claims that its failure to produce the coal in the area cited by the order caused respondent to lose 22,280.5 tons of coal at a loss in income of $103,379 (Tr. 332; 341).

The order required that respondent withdraw miners from the hazardous area described in the order. Such orders do not provide a time within which alleged violations must be corrected. An operator has the option of abandoning the area or of making it safe for reentry. If the operator abandons the dangerous area, as was done in this instance, the order is terminated on the basis of abandonment.

In such circumstances, I find that the criterion of respondent's good faith effort to achieve rapid compliance is not applicable and that the penalty to be assessed should neither be increased nor decreased under the criterion of whether respondent demonstrated good faith effort to achieve rapid compliance.

Gravity of the Violation

The violation was very serious as is shown by the findings of fact set forth below:

1. When the inspector arrived in the No. 1 Unit of the Ken. No. 4 North Mine on May 21, 1979, the day Order No. 795972 was issued, all of the men stopped at the dinner hole for a while except for Mr. Brock, the unit foreman, who made an inspection of the face area. The inspector and his companion, Mr. Inman, a roof bolter, began examining conditions in the unit by walking up the No. 4 entry toward the face. When they reached the second crosscut outby the face, the inspector noticed a broken place in the mine roof near the outby rib and water was coming through the roof in steady drops. The broken place extended the entire length of the crosscut between the Nos. 4 and 5 entries. The crack was about an inch or less in width, but it extended along the bottom of a V-shaped ridge which projected downward from the roof for a distance of about 3 inches. The legs of the V-shaped ridge were about 10 or 12 inches apart at the roof, or point of origin (Tr. 20-24; 56; 93). The inspector considered water dripping from the roof at the site of the cracked roof to be a further sign of a weakened roof because water displaces material comprising roof strata and creates voids in the roof (Tr. 39).

2. The inspector believed that the V-shaped broken place in the roof of the crosscut constituted an imminent danger which he defined as a condition which might cause injury or death before it could be corrected (Tr. 31; 57; 107). The inspector thereafter orally issued an imminent-danger order under section 107(a) of the Federal Mine Safety and Health Act of 1977 and advised Mr. Brock, the unit foreman, that he would determine the extent of the area covered by his order as soon as he could complete his examination of the unit (Tr. 23-24; 108).

3. The inspector then found another V-shaped crack in the roof of the second crosscut from the face between the Nos. 5 and 6 entries and still other cracks in the same crosscut between the Nos. 6 and 7 entries (Tr. 31; Exh. 2). The inspector could not divorce the cracks in the roof from the separations he had heard described by the miners before he began his underground examination (Tr. 32). Mr. Brock granted the inspector's request that the operator of the roof-bolting machine be permitted to drill test holes to determine whether separations still existed in the roof strata of the No. 1 Unit (Tr. 24-25). The inspector had the operator of the roof-bolting machine to drill about 35 test holes. The inspector concluded that actual separations in the roof strata existed because, when the test holes were made, the drill on the roof-bolting machine would suddenly jump about 2 inches after the drill had penetrated the roof for a distance of from 36 to 38 inches (Tr. 25-26; 74; 90-91). Resin-grouted roof bolts were being used and the inspector believed that the roof bolts were pushing the resin into the separations which existed near the ends of the bolts. The passage of the resin into the separations was seriously eroding the effectiveness of the resin bolts by preventing the resin from hardening along the full

length of the bolts so as to pin the roof strata together and provide a secure beam (Tr. 73; 76; 85-86; 98; 105).

4. The inspector ultimately determined that the left side of the No. 1 Unit was the place where the roof was unsafe and Order No. 795972 delineated the territory covered, namely, an area extending 175 feet outby the face in No. 7 entry, an area extending 130 feet outby the face in the No. 6 entry, an area extending 110 feet outby the face in the No. 5 entry, an area extending 80 feet outby the face in the No. 4 entry, and an area in the No. 3 entry at the second open crosscut (Tr. 141-142; Exh. 1).

5. The inspector stated that Mr. Shemwell, the roof bolter who drilled the test holes, drilled the holes while exerting a steady pressure on the upthrust lever and the inspector said that he would have detected it if Mr. Shemwell had tried to manipulate the lever so as to fabricate the appearance of jumping. The inspector firmly believed that authentic jumping was occurring and that the jumping was caused by actual separations in the roof strata (Tr. 61-64). The inspector also stated that hitting extremely hard rocks with the drill stem would have slowed the drill stem and that the speed of the drill would have been restored to normal after the drill had passed through such rocks, but the inspector said that operators of roof-bolting machines are familiar with variations in types of roof strata and would not interpret reactions of the machine when rocks are encountered to be separations in roof strata (Tr. 62-64; 68-69; 81).

Negligence Associated with Violation

A determination as to whether respondent was negligent in violating section 75.200 involves consideration of several findings which are set forth below:

1. About a week before imminent-danger Order No. 795972 was issued, Mr. Inman, a roof bolter, told Mr. Brock, the unit foreman, about the jumping of the drill on the roof-bolting machine (Tr. 357), but Mr. Brock did not think the roof was bad enough to need extra support--that is, support in addition to the 42-inch resin bolts which were being installed at the time the order was issued (Tr. 34; 149-150). Mr. Brock took his hammer and pulled down some pieces of shale and decided that he would take no further precautions until such time as the roof appeared to become more adverse than it was when Mr. Inman warned him about it (Tr. 162).

2. Mr. Charles Ford, the unit foreman in the No. 1 Unit on the day shift, stated that he had worked the day shift immediately preceding the issuance of the imminent-danger order (Tr. 167). Mr. Ford had also known about the jumps of 1 to 2 inches in the drill for about a week before the imminent-danger order was issued, but he had concluded that the drill was hitting soft places in the roof strata because the jumps occurred to within 10 inches of the working face and he felt that there would have had to have been a visible break in the roof in order for separations to have occurred that close to the face (Tr. 168).

3. Order No. 795972 was orally issued at about 3:30 p.m.,

on the evening shift of May 21, 1979 (Tr. 59-60). Toward the end of Mr. Ford's day

shift of May 21, 1979, an operator of a roof-bolting machine, Mr. Charles Howard, called Mr. Ford's attention to some bad roof at a breakthrough near the face of the No. 5 entry. Mr. Ford thought that the roof was too hazardous for bolts to be installed until such time as crossbars could first be erected. Since it was then close to the end of Mr. Ford's day shift, Mr. Ford told Mr. Howard that he would report the bad top to the mine manager. Mr. Ford also made an entry in the preshift book stating "All left side of unit--bad top and water" (Tr. 164; 175). When Mr. Ford reported to work on the following day, May 22, 1979, he was surprised to hear that the imminent-danger order had been issued on the evening shift because the mine superintendent, Mr. Clyde Miller, had given instructions for the men to withdraw from the No. 1 Unit and work in some rooms to the left of the No. 1 Unit. Mr. Ford said that he had expected to move back into the No. 1 Unit after the miners had "* * * made it safe to go back in there" (Tr. 171). Mr. Miller's decision to withdraw from the No. 1 Unit had been made after Mr. Ford had reported the jumping of the roof-bolting machine and the existence of bad top in the No. 5 entry. Mr. Ford expected to go back into the No. 1 Unit after about three shifts because Mr. Ford estimated that two shifts could be required to move a pump into the No. 1 Unit and that one shift would be required to install supporting timbers. Mr. Ford would not have objected to reentering the No. 1 Unit to work after the dangerous places had been timbered properly (Tr. 177).

4. Mr. Alton Fulton, the mine manager, worked the day shift on May 21, 1979, and he received the aforementioned call from Mr. Ford about 2:15 p.m. The call had been made by Mr. Ford to advise Mr. Fulton that crossbars were needed at two crosscuts. Mr. Fulton advised Mr. Ford that he would check into the matter and discuss the problem with Mr. Brock, the unit foreman on the evening shift, before Mr. Brock began working on his shift. Mr. Fulton made an inspection of the No. 1 Unit. He did not see any cracks and Mr. Fulton did not see any roof-bolting machines in operation although he had been told that jumps were occurring (Tr. 190-191).

5. Mr. Fulton had gone home on May 21, 1979, before it was reported to him by telephone that the imminent-danger order had been issued. Mr. Fulton called Mr. Conrad Bowen, the assistant mine superintendent, and Mr. Ford and Mr. Bowen went to the mine and tried to convince the inspector, without making any examination of the conditions then existing in the No. 1 Unit, that the roof in the No. 1 Unit was not bad enough to warrant the issuance of an imminent-danger order, but the inspector adhered to his original position that the top constituted an imminent danger (Tr. 193-194). On May 22, 1979, Mr. Fulton, Mr. Bowen, Mr. Miller, and Mr. French, the mine safety director, went into the No. 1 Unit and made an inspection (Tr. 195). All of them concluded that the roof was safe. Mr. Fulton said he would work under the roof if he were a union employee (Tr. 202). Mr. Miller said he would spend his vacation under the roof (Tr. 247).

6. Mr. Miller tried to get the supervisor of the inspector who wrote the imminent-danger order to make a personal

examination of the roof in the No. 1 Unit, but the supervisor declined to do so, explaining that he did not

want to become involved in the controversy (Tr. 252). Mr. Miller said that MSHA could force them to do almost anything, but in this instance he was in a position to make a test of MSHA's actions. Therefore, he decided that he would not take any steps to abate the order because he believed that any work he might do to abate the conditions alleged in the inspector's order would be interpreted as a concession by respondent that an imminent-danger actually existed (Tr. 222; 255).

7. Mr. Guy McDowell, respondent's roof-control specialist, presented testimony and several exhibits which show that he has considerable expertise in designing resin-anchoring systems for both roof bolts and trusses (Tr. 271-283). After the imminent-danger order had been issued, management requested Mr. McDowell to examine the roof in the No. 1 Unit. Mr. McDowell saw no signs of roof failure during his examination which was made by testing the roof with the sound and vibration method and by observation (Tr. 284-285). Mr. McDowell also checked 100 of the 2,800 roof bolts in the area covered by the order and found that 50 bolts had resin on them at the bottom plate. Mr. McDowell concluded that the resin roof bolts were anchoring satisfactorily (Tr. 300-302).

8. Mr. McDowell made no checks of the roof in the No. 1 Unit by any method which was not also used by the operators of the roof-bolting machines and by the inspector, that is, he checked the roof by the sound and vibration method and by observation just as the inspector and operators of the roof-bolting machines did. Mr. McDowell stated that if there really were separations in the roof at or near the extreme end of the 42-inch bolts, the resin would go into the separations and not produce a proper bond for supporting the roof. He also said that one of the signs of roof failure would be cracks in the roof. Moreover, he agreed that if the V-shaped cracks described by the inspector really existed, such cracks would be a preliminary sign of roof failure even when resin bolts are used (Tr. 321; 324).

9. Mr. Inman, the roof bolter who accompanied the inspector on May 21, 1979, was afraid to work under the roof in the No. 1 Unit as it existed just prior to issuance of the imminent-danger order (Tr. 358). Mr. Inman said that resin will exude at the bottom or heads of resin bolts when no jumps or separations occur near the tops of the bolt holes, but the last night that Mr. Inman bolted before the imminent-danger order was issued, the drill stem was jumping in seven out of eight holes drilled and resin was coming out at the bottom of only one or two bolts out of eight (Tr. 376-378). Mr. Inman did not cause the jumps by deliberately manipulating the roof-bolting machine to produce that sort of manifestation and Mr. Inman did not believe that it would be possible for anyone to operate a roof-bolting machine so as to create an artificial appearance of jumping (Tr. 366-367). Mr. Inman did not think the jumps could have been caused by the drill stem's encountering alternate soft and hard places in the roof strata (Tr. 379-380).

10. Mr. Shemwell, who operated the roof-bolting machine for drilling test holes for the inspector, agreed with Mr. Inman's and the inspector's description of the jumps occurring when holes were drilled. Mr. Shemwell

was still at the dinner hole on May 21, 1979, when he heard someone say that one of the working places had been designated as an imminent danger by the inspector (Tr. 388-389). Mr. Shemwell believed that the roof in the No. 1 Unit was definitely bad and he would have been afraid to have continued working in the unit without installation of support in addition to the resin bolts they were installing at the time the imminent-danger order was issued (Tr. 390). Mr. Shemwell said that every operator of a roof-bolting machine has experienced hitting hard rocks and soft places in the roof strata and knows the difference between the slowing down of the drill and the speeding up of the drill at such times, as compared with the jumps which occur when the drill hits separations between the strata as was occurring in the No. 1 Unit prior to the issuance of the imminent-danger order (Tr. 394-395). Mr. Shemwell agreed with Mr. Inman that it was very dangerous to work in the No. 1 Unit and he said he would have joined with any other miners who might have been willing to decline to work under the roof (Tr. 396).

11. Management had used conventional bolts in the No. 1 Unit up to May 15, 1979, but management had changed to use of resin bolts because water had been encountered and tests showed that torque was being lost on the bolts after they had been installed (Tr. 266). Mr. Shemwell did not think the resin bolts were performing their intended function with respect to water leaking through the roof because he could install resin bolts and thereafter find water dripping off the bottom of them when he came by the same bolts again during the next mining cycle. In Mr. Shemwell's opinion, if the resin bolts had been anchoring as was intended, water would not have been running off the bolt heads (Tr. 401).

12. Mr. Charles W. Howard, among other things, operated the roof-bolting machine and he had shortly before the imminent-danger order was issued declined to install resin bolts in the No. 5 entry because he considered the roof unsafe. He reported the unsafe roof to Mr. Ford, the unit foreman, and Mr. Ford reported the hazardous condition to the mine manager (Tr. 407). Mr. Howard agreed with the other operators of roof-bolting machines that the drills cannot be made to jump by manipulating the upthrust lever to create such an impression (Tr. 418).

13. Mr. Jerry D. Fulton has been a coal miner for about 11 years and has been an operator of a roof-bolting machine for approximately 10 years (Tr. 424). He agreed with the other operators of roof-bolting machines that the roof was in fair to good condition in the Nos. 1, 2, and 3 entries, but he believed that the roof in the Nos. 4, 5, 6, and 7 entries was in poor condition, as cited in the inspector's order, because the drilling stem would jump in those entries. He had previously had to back up his roof-bolting machine in the No. 7 entry and install longer roof bolts when the conventional bolts then being used lost their torque (Tr. 425). Thereafter, management converted to using resin bolts (Tr. 426). Mr. Fulton tested the roof by using sound and vibration and observation and the roof appeared to be fair in the Nos. 1, 2, and 3 entries and

substandard in the Nos. 4, 5, 6, and 7 entries. Mr. Fulton said that on previous occasions when the operators of the roof-bolting machines believed that they had encountered adverse

conditions which warranted use of roof support in addition to roof bolts, management had provided the extra support, but for some reason, when the roof bolters encountered the jumps and the miners observed cracks in the roof in the No. 1 Unit shortly before the imminent-danger order was issued, management refused to provide the extra support the miners thought was needed (Tr. 428-429).

The findings above support a conclusion that a high degree of negligence was associated with the violation of section 75.200 cited in Order No. 795972. If respondent's management had been given no preliminary reports concerning hazardous roof conditions in the No. 1 Unit prior to the writing of the imminent-danger order, I would have concluded that little, if any, negligence was associated with the violation because the facts show that respondent was using a 42-inch resin bolt which is superior to conventional bolts. Respondent had adopted the use of the 42-inch resin bolt for the purpose of overcoming problems associated with separations in the roof and with water coming through the roof.

As the above findings show, however, respondent's management had made a superficial response to complaints from the roof bolters about the jumping of the drill stem and the miners' concern about separations in the roof strata. Mr. Jerry Ford, for example, testified that when separations had previously occurred, management had been responsive and had provided supplemental support in addition to roof bolts, but when the roof bolters reported the separations prior to issuance of the imminent-danger order, management declined to provide extra support.

The inspector was put on the defensive at the hearing by respondent's counsel who wanted to know why the inspector did not use a borescope to enable him to determine for certain whether separations in the roof actually existed (Tr. 51-53). Respondent's management had available among its employees an expert in designing and experimenting with resin bolts and trusses. Respondent's management could have asked its roof-control expert to check the roof with a borescope when the roof bolters complained about the separations. If the jumps in the drill stems of the roof-bolting machines had been proven by the borescope to be mere soft strata in the roof, the miners would have been reassured and management would have had a basis for its belief that no separations in the roof strata were actually occurring as claimed by the miners.

Management's inspection of the roof before and the day after issuance of the imminet-danger order consisted of nothing more than personal observations of the roof. Top management did not even watch the roof bolters install roof bolts. Their conclusions, therefore, that no separations existed were not based on a thorough investigation of the dangerous conditions about which their miners and some unit foremen were complaining. Management's efforts to convince the inspector that no imminent danger existed were first made without engaging in any kind of preliminary examination of the conditions which actually existed

at the time the inspector's order was written. The inspector was able to justify the issuance of his

order on the basis of information gained by observing the drilling of 35 test holes. Those holes were accompanied by jumps in the drill stem and by no resin appearing around the bolt heads to provide evidence that the resin was hardening along the full length of the bolts rather than being lost into the cavities formed by the separated strata. Management's decision to contest the order was made without ever watching any roof-bolting machines in operation and without ever using the borescope which they apparently believed would have removed all doubt about whether the roof strata had actually separated.

Management's failure to determine for certain whether separations were occurring left management with no solid reason for declining to have supplemental supports installed when the hazardous roof conditions were reported. Since management did not make an updated personal inspection of the conditions which existed at the time the imminent-danger order was issued, management had no basis for trying to persuade the inspector to retract his imminent-danger order. If the inspector had been less suspectible to pressure from mine officials, he might have been persuaded to vacate the order and the miners might have been killed when they continued to produce coal without having the protection which would have been provided by the erection of the crossbars which the inspector and the miners believed were needed in the absence of any concrete proof that the roof bolters were mistaken about the separations which they believed existed in the roof strata.

Assessment of Penalty

In view of the fact that the violation was very serious, that a large operator is involved, and that there was a high degree of negligence, a penalty of $8,000 would have been assessed. As indicated above, however, the penalty will be increased by $150 to $8,150 under the criterion of respondent's history of previous violations.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $8,150.00 for the violation of section 75.200 cited in Order No. 795972 dated May 21, 1979.

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

~FOOTNOTE 1

The names of counsel listed above were those who represented the parties at the hearing held with respect to the application for review which had been filed in Docket No. KENT 79-107-R.

~FOOTNOTE 2

All references in this decision to transcript pages and exhibit Nos. are to the record in Docket No. KENT 79-107-R. It was stipulated at the hearing that respondent is subject to the Federal Mine Safety and Health Act of 1977 (TR. 6-7).