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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. VINC 78-457-P A.O. No. 11-00598-02040V
v.	Eagle No. 2 Mine
PEABODY COAL COMPANY, RESPONDENT	

DECISION

Appearances: Inga Watkins, Attorney, Office of the Solicitor U.S. Department of Labor, Arlington, Virginia, for the Petitioner Thomas Gallagher, Esquire, St. Louis, Missouri, for the Respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner on August 17, 1978, against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two violations of mandatory safety standards, namely, 30 C.F.R. 75.200 and 75.202. The alleged violations were served on the respondent by MSHA coal mine inspector Harold Gulley in two section 104(c)(2) orders issued on August 1 and 29, 1977, pursuant to the 1969 Act. Petitioner seeks an assessment of civil penalties for the alleged violations in the amount of $10,000 for each citation, for a total assessment of $20,000.

Respondent filed a timely notice of contest denying that it has violated the cited mandatory safety standards and requested a hearing. The hearing was initially scheduled for February 13, 1979, but was continued on motion by the respondent and by agreement of the parties because of the unavailability of respondent's sole witness. In addition, the parties engaged in discovery, and petitioner responded to certain interrogatories served on it by the respondent and they are a matter of record. The case was subsequently redocketed for hearing at St. Louis, Missouri, March 25, 1980, and although petitioner's counsel advised me by telephone late Friday, March 21, 1980, that the parties had engaged in settlement negotiations,

the parties were directed to appear at the hearing as scheduled and were informed that they would be given an opportunity to argue any proposals for settlement on the record.

The parties appeared at the hearing on March 25, and at that time informed me that their prior settlement negotiations were finalized and they sought leave to present them on the record for my consideration pursuant to Commission Rule 30, 29 C.F.R. 2700.30. After reminding the parties of the fact that the hearing notice in this matter was issued by me more than sixty (60) days in advance of the scheduled hearing of March 25, 1980, and after advising them that I considered petitioner's notification to me by telephone that the parties were in the midst of settlement negotiations to be untimely, they were permitted to present their proposed settlement and supporting arguments on the record for my consideration.

Discussion

The citations at issue in this proceeding and the conditions and practices cited by MSHA inspector Harold Gulley are as follows:

Citation No. 7-0161, August 1, 1977, citing a violation of 30 C.F.R. 75.200, states:

> The roof control plan was not being followed on section 008, 3 north off 3 mains east in that the entries were to [sic] wide. No. 5 entry 23 feet in width, No. 2 crosscut outby face between No. 4 and 5 entries 24 feet in width, No. 4 entry 60 feet outby face 26 to 30 feet in width, No. 3 entry 27 feet in width. Sketch 1 in roof bolting plan development entries states 20 feet width in entries and crosscuts.

Citation No. 7-0199, August 29, 1977, citing a violation of 30 C.F.R. 75.202, states:

> Overhanging ribs were observed in rooms and crosscuts Nos. 1 thru 6 and first crosscuts outby face (No. 1 room, 52 to 86 inches) (No. 2 room 71 inches) (Crosscuts between No. 1 and 2 room 49 inch) (crosscuts between 2 & 3, 76 inches) (No. 3 room 53 inch and crosscut between 3 & 4 room 65 inch) (No. 4 room 51 to 71 inch undercut and crosscut 4 & 5, 48 inch) No. 5 and 6 room and crosscuts 6 inch to 55 inches undercut.

The parties stipulated to the following (Tr. 5):

1. Respondent is a large coal mine operator and the Eagle No. 2 Mine is a large mining operation.

2. Respondent is subject to the 1969 Federal Coal Mine Health and Safety Act, as well as the 1977 Amendments thereto.

3. MSHA inspector Harold Gulley was, at all times relevant to this proceeding, an authorized representative of the Secretary, the citations were properly served on the respondent, and the conditions and practices described on the face of the citations did not constitute an imminent danger.

4. The proposed civil penalty assessments and settlement amounts will not adversely affect respondent's ability to remain in business.

The parties propose a settlement in the amount of $2,000 for Citation No. 7-0161, issued on August 1, 1977, and $3,500 for Citation No. 7-0199, issued on August 29, 1977. In support of the proposed settlement disposition of the citations, petitioner's counsel indicated that Inspector Gulley was present in the courtroom and concurred in the proposed disposition of the matter. Counsel summarized his testimony if it were necessary for him to testify in the matter, and counsel also introduced for the record Exhibits M-1 through M-12, which are copies of the citations, inspector's statements, notes, the applicable mine roof-control plan, sketches of the entries in question, the termination notices, and a computer printout of the prior history of violations issued at the mine in question.

Respondent introduced copies of its Exhibits, R-1 through R-8 pertaining to one citation, and R-1 through R-4, pertaining to the second citation. These documents consist of notes, sketches, preshift reports, photographs, and the mine ventilation and roof-control plans. In addition, respondent's counsel summarized its position with respect to the merits of the citations, as well as certain factual and legal defenses he would advance in defense of the citations, and he concurred in the proposed settlement disposition of the matter.

In further support of the proposed settlement, petitioner's counsel asserted that the initial proposed civil penalty assessments resulted from an application of a "special assessment" procedure and policy which is no longer being followed by MSHA. The initial assessments of $10,000 for each of the violations in question resulted from a finding that the citations were "unwarrantable failure" citations, and coupled with the fact that respondent is a large operator, the civil penalty would "automatically be in the range of $5,000 to $10,000 unless there were other strong and mitigating factors" (Tr. 6). Counsel stated that this policy is no longer followed by MSHA, and counsel requested that I consider the matter de novo. Further, counsel asserted that MSHA's Office of Assessments is in agreement with the proposed settlement of the two citations in question and that the inspector who issued the citations is also in agreement with MSHA's proposed disposition of the citations (Tr. 26, 29).

In addition to the foregoing, MSHA's counsel presented

arguments with respect to the circumstances surrounding the issuance of the citations in

question, and in particular presented information with respect to the statutory criteria set out in section 110(i) of the Act.

Good Faith Compliance

MSHA asserted that respondent exercised rapid compliance in achieving abatement of the conditions cited (Tr. 8, 11).

Gravity

With regard to Citation No. 7-0161, 30 C.F.R. 75.200, MSHA stated that while the roof areas where the widths of the entries were in fact driven to excessive widths as noted in the citation, the roof areas themselves were not loose (Tr. 7). However, if called to testify, the inspector would state that the hazard created by the condition would pose a risk of a roof fall created by a strain placed on the roof by the excessive widths in the entries in question (Tr. 8).

With regard to Citation No. 7-0199, charging a violation of 30 C.F.R. 75.202, MSHA asserted that while the conditions cited were serious, most of the overhanging ribs were outby the face and were fairly solid (Tr. 10-11). Respondent's arguments regarding this citation reflect that the overhanging ribs would have been taken down during the shift in which the citation was issued, that this procedure was in accord with the approved mining plan, that the ribs in question were "tight," and in fact had to be drilled and shot down (Tr. 12-13).

Negligence

With regard to both citations, MSHA advanced the argument that the conditions cited were visually obvious, that preshift or onshift examinations were required to be conducted, and that the conditions cited existed for at least one shift prior to the time they were cited (Tr. 6-7, 10).

Respondent advanced the argument that corrective action had begun to correct the wide entry violation prior to the issuance of the citation alleging a violation of section 75.200, and that with respect to the alleged violation of section 75.202, its evidence would show that in the course of the normal mining cycle, the overhanging ribs cited would have been taken down during the shift in which the citation issued, and that this procedure was in accord with respondent's approved ribcontrol plan (Tr. 8, 10-13).

History of Prior Violations

Petitioner's evidence reflects that a total of 504 violations were issued at the mine during the 2-year period prior to the issuance of the citations in question, that 24 of these were for violations of section 75.200, and 19 were for violations of section 75.202 (Tr. 14-15). Considering the size and scope of respondent's mining operations at the

mine in question, petitioner argued that while these citations were serious, respondent's overall prior history of violations is not extraordinarily bad (Tr. 16).

Conclusion

Taking into account the fact that the citations in question were issued over 2-1/2 years ago, that the initial assessments were arrived at through the application of a "special assessment" procedure and policy which is no longer in use, and the fact that MSHA's Office of Assessments is in accord with the proposed settlement, I conclude and find that the proposed settlement is reasonable. Further, I am persuaded by the arguments presented by counsel with respect to the factors of negligence, gravity, and good faith compliance, as supported by the documentary evidence presented in support of these statutory criteria, that the agreed-upon payment of $5,500 for the two citations, which have been vigorously contested by the respondent, is in the public interest and will effectuate the deterrent purposes of the Act and the mandatory safety standards in issue in this proceeding.

ORDER

Pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the proposed settlement is APPROVED and respondent is ORDERED to pay civil penalties in the amount of $5,500 in satisfaction of the two citations in issue in this proceeding, payment to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge