CCASE:
SOL (MSHA) V. THE HOKE COMPANY
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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 Nos. Assessment Control Nos.
	BARB 79-327-P 15-09969-03002 Processing Division
v.	
	PIKE 79-113-P 15-05447-03004
THE HOKE COMPANY, INC., RESPONDENT	Murray Strip Mine

DECISION

Appearances: Darryl A. Stewart, Esq., and George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Byron W. Terry, Safety Director, Owensboro, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 22, 1980, a hearing in the above-entitled proceeding was held on April 3, 1980, in Evansville, Indiana, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves two Petitions for Assessment of Civil Penalty filed by the Mine Safety and Health Administration. The Petition in Docket No. BARB 79-327-P filed March 26, 1979, seeks to have civil penalties assessed for five alleged violations of the mandatory health and safety standards by The Hoke Company. The second Petition was filed on May 17, 1979, in Docket No. PIKE 79-113-P by MSHA and seeks assessment of a civil penalty for an alleged violation of 30 CFR 71.107 by The Hoke Company.

On March 20, 1979, counsel for MSHA filed a Motion for Approval of Settlement reached by the parties with respect to Docket No. PIKE 79-113-P. The motion states that respondent has agreed to pay the full amount of a $34.00 penalty proposed by the Assessment Office for the single violation of section 71.107 involved in Docket No. PIKE 79-113-P.

The Settled Case

Docket No. PIKE 79-113-P

The Assessment Order in the official file indicates that the respondent produced 384,560 tons of coal on an annual basis and that 190,935 tons annually are produced at the Murray Strip Mine which is involved in

Docket No. PIKE 79-113-P. On the basis of those production figures, I find that respondent operates a medium-sized business and that any penalties which might be assessed should be in a moderate range of magnitude.

There is no evidence in the file or in the Motion for Approval of Settlement pertaining to respondent's financial condition. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

Respondent does not have a large number of previous violations and that factor should be considered as a mitigating circumstance when determining penalties.

The specific violation of section 71.107 involved in this settled case was alleged in Citation No. 9948403 which stated that respondent had failed to submit a respirable dust sample or a reason for not sampling one employee within the time period for submitting the required sample. Respondent abated the violation very quickly by submitting a Miner's Status Change Notice card showing that the sample had not been submitted for the miner concerned because he no longer worked for respondent.

In such cirumstances, the violation was nonserious, but the violation was a result of a rather high degree of negligence. Respondent abated the violation within a much shorter time than was allowed for abatement in the citation. Considering the conscientuous effort made by the respondent in achieving rapid compliance, I find that the Assessment Office proposed a reasonable penalty of $34.00 for the alleged violation of section 71.107 and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

The Contested Case

Docket No. BARB 79-327-P

Citation No. 400126 9/19/78 77.400

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 38-41):

> The contested part of this proceeding, as I previously indicated applies only to the Petition for Assessment of Civil Penalty filed in Docket No. BARB 79-327-P. The issues in any civil penalty case are whether there were any violations of the mandatory health and safety standards, and, if so, what penalties should be assessed based on consideration of the six criteria set forth in section 110(i) of the Act. Three of those criteria can be given a general evaluation in most cases. As I indicated in my opening remarks in this case, the company has not at this point, and I take it, will not present any financial information and in the

absence of such information, I find that the payment of penalties will not cause the company to discontinue in business.

It has been stipulated that the company is subject to the Act and to the regulations promulgated under it. It has also been stipulated that the size of the preparation plant is such that it processes approximately 125,000 tons annually and that the controlling company produces about 384,000 tons on an annual basis. Those findings support a finding fact that the company is moderate in size and that any penalties to be assessed should likewise be in a moderate range of magnitude.

Exhibit 17 in this proceeding is a listing of violations for which penalties have been paid by the company. According to that exhibit, the company has not previously violated any of the mandatory health and safety standards alleged in this proceeding. It has been my practice to increase the penalty somewhat when there is evidence before me showing that respondent has previously violated the same section of the regulations which is alleged by MSHA in the case currently being considered. Since respondent has not previously violated the sections being considered in this proceeding, the criterion of history of previous violations will not be used to increase or decrease any penalty which may be assessed under the other criteria (Tr. 56).

Turning now to the criteria of negligence and gravity and good faith effort to achieve rapid compliance, I find that the first citation before us in this proceeding, No. 400126 dated September 19, 1978, and alleging a violation of section 77.400(c), I find in connection with that particular citation that there was a violation of section 77.400(c) because that section does refer to the fact that the guard should extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught in the belt and pulley.

Considering the criterion of negligence, there has been testimony that the company was aware of the provision I've just referred to and that it considered the guard that was on the pulley extended far enough to the rear of the pulley to keep a person from falling into it. It is also indicated by the record that other inspections had been made and apparently the guard that was on the pulley was considered to be adequate by inspectors other then the one who wrote this citation now before us. In view of that fact, I find that there was a very low degree of negligence in the occurrence of the violation.

From the standpoint of gravity, I think that the violation was only moderately serious because it is a fact that the evidence shows, particularly Exhibits A and A1 through A4, that there was a facility around the tail pulley which would keep a person from just walking

into it upright and the only way that a person would be near this particular pulley would be for him to stoop under this construction that surrounded the tail pulley and then he would probably be on the alert just because of his going into an area like that.

> But the fact remains that it would be possible for someone to have his clothes caught in this place and he could be injured in this pulley from the rear. So, based on the fact that there was moderate seriousness and a low degree of negligence, I find that a penalty of $15.00 should be assessed for this violation of section 77.400(c).

Citation No. 400127 9/19/78 77.206(a)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision Tr. 55-56):

> With respect to the alleged violation in Citation No. 400127, I find that a violation occurred because the operator's witness and the inspector both agree that three rungs in the ladder were broken. The inspector does not contest the fact that the operator was not using the portion of the facility that is here involved at the time the citation was written and consequently it was not being inspected at that time. So, there is not as great a degree of negligence in that area as there would have been if this were a place where the people were frequently traveling up and down this ladder. Additionally, the operator's testimony shows that there was a ladder and Exhibit B2 shows that there was a ladder on the opposite side of this particular area cited by the inspector and it is alleged that the other ladder was being used instead of the one that was cited by the inspector. Additionally, the ladder has only four rungs and is approximately 5 feet high; therefore, the likelihood of serious injury as a result of any of the rungs breaking if someone had used the ladder is less likely than it would be if a great height were involved. Consequently, I find that there was moderate seriousness in connection with the violation. I think that extenuating circumstances in this instance also justify finding that a penalty of $15.00 is adequate.

Citation No. 400128 9/19/78 77.205(e)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 75-76):

> My decision with respect to Citation No. 400128 is that, as all testimony indicated there was a violation of section 77.205(e). The company, I think, was a little more negligent in this instance than it was in the previous violations, because, even though there was not normally any use of this particular elevated walkway, there having been only three uses of it between the time this violation was written in September of 1978 and the present time, it was known to the company that there had been an open section left

where another walkway might have been tied into this walkway at a future date. And, it was known that there was a gap of three feet

in the handrails. So, I think that since the facility was constructed with this gap in it that the company should have put in a more stable handrailing than a rope, assuming that the rope was there at the time the citation was written. Additionally, there should have been an enclosed handrailing at the end where the storage silo existed.

As for the gravity of the violation, there is agreement of both the company's witness and the inspector that if a person were to fall from this area, it could be a fatal accident. Therefore, I find that the violation was serious, and, in view of this large degree of negligence in this instance, I find that a penalty of $150.00 is appropriate.

Citation No. 400129 9/19/78 77.206(a)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 94-95):

I have taken additional testimony from Mr. Terry to be sure that I didn't improperly assess too much in connection with the alleged violation of section 77.205(e), and after further consideration, I find that there was at least a period of time when the company was using the walkway and I still adhere to the ruling that I made previously in the amount of penalty that I previously assessed.

Turning to the one as to which we just had testimony, which is Citation No. 400129 alleging a violation of section 77.206(a), that section provides that ladders shall be of substantial construction and maintained in good condition. I find that a violation of section 77.206 occurred because the ladder was rusted, was made of light materials, and did have an extensive area at the top which made it difficult and dangerous to use. There is evidence from the operator's witness which showed that at the time the citation was written the silo was not being used because the company did not have orders that required the screening operation that was involved in that portion of the facility for which the citation was written. But the company's witness had indicated that the facility was used at some point in time and, therefore, I feel that the ladder should have been inspected and it should have been put in a proper and safe condition at the original time the facility was used. I find that there was a rather high degree of negligence in their failure to do so at that time. It would have been difficult to negotiate this ladder. Of course, as the company's witness has indicated, the likelihood of someone going on up the ladder was somewhat remote but it would have been possible for someone to need to do some maintenance work and it would have been possible for someone to have tried to

negotiate the ladder. He could have fallen because of the inadequate construction. Therefore, I find that the violation was serious and since it was a serious violation with a high degree of negligence, I think a penalty of $150.00 is appropriate for this violation.

Citation No. 400130 9/19/78   77.1707(b)

Upon completion of introduction of evidence by the parties with respect to the above citation, I rendered the following bench decision (Tr. 106-107):

> The final alleged violation in this case was contained in Citation No. 400130 alleging a violation of section 77.1707(b). I find that a violation of that section did occur. The provision that was violated lists twelve items which are supposed to be included in first-aid equipment at a prepartion plant and at mines. The paragraph that caused Mr. Terry and his company to have less than the full amount of equipment provided for in paragraph (b) was the section which contains somewhat ambiguous phraseology which is subject to an interpretation that a company would not have to have a full complement of first-aid equipment unless there were ten or more employees at the preparation plant. I can see easily why a company might arrive at that conclusion and, consequently, I find that there was a low degree of negligence in their failure to have the equipment at this particular preparation plant.
>
> Insofar as gravity is concerned, as the inspector has pointed out, the violation could be associated with considerable gravity if someone were to be seriously injured and not have the appropriate first-aid equipment immediately available, but in view of the company's good faith in trying to comply with the regulation, I find that there were extenuating circumstances in this instance and that a penalty of $20.00 is appropriate for this violation of section 77.1707(b).

Summary of Assessment and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreement, the following civil penalties should be assessed:

Docket No. BARB 79-327-P

Citation	Date	Section	Penalty
Citation No. 400126	9/19/78	77.400(c)	$ 15.00
Citation No. 400127	9/19/78	77.206(a)	15.00
Citation No. 400128	9/19/78	77.205(e)	150.00
Citation No. 400129	9/19/78	77.206(a)	150.00
Citation No. 400130	9/19/78	77.1707(b)	20.00
Total Penalties in Docket No. BARB 79-327-P			$350.00

Docket No. PIKE 79-113-P

Citation	Date	Section	Penalty
Citation No. 9948403	1/5/79	71.107 (Settled)	$ 34.00

Total Settlement and Contested Penalties in This Proceeding....................................$384.00

(2) Respondent, as the operator of the Murray Strip Mine and Processing Division, is subject to the Act and to the mandatorysafety and health standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The parties' request for approval of settlement is granted and the settlement agreement submitted in this proceeding in Docket No. PIKE 79-113-P is approved.

(B) Pursuant to the parties' settlement agreement and the bench decision rendered in the proceeding in Docket No. BARB 79-327-P, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $384.00 as set forth in paragraph (1) above.

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