FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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11 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 79-105
	:	A/O No. 36-00807-03023
v.	:	
	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Introduction

The above-captioned proceeding is'a petition for the assessment of civil penalties filed by the Mine Safety and Health Administration (MSHA) against Consolidation Coal Company. Pursuant to a prehearing order issued December 27, 1979, the parties discussed the 12 alleged violations contained in the petition and reached a settlement as to 10 of the 12 violations. The terms of this settlement were submitted in a Motion for Decision and Order Approving Settlement filed by the Secretary on February 4, 1980. With respect to the two remaining citations, the parties advised they would submit stipulations for the material facts involved and requested permission to file motions for summary judgment and supporting briefs concerning these two citations. In an order issued March 14, 1980 this request was granted, and the parties subsequently filed the above-mentioned stipulations, motions and briefs.

Citation Nos. 618573, 618578, 618579, 618643, 618645, 618646, 618648, 618649, 618650, 618651.

The Solicitor has filed a motion to approve settlements for these 10 citations.

In her motion, the Solicitor advises the following:

1. The attorney for the Secretary and the respondent's attorney have discussed the alleged violations and the six statutory criteria stated in section 110 of the Federal Mine Safety and Health Act of 1977.

2. Pursuant to those discussions, an agreed settlement has been reached between the parties in the amount of $1,635. The original assessment for the alleged violations was $2,300.

3. A reduction from the original assessment is warranted for the following violations.

Citation No. 618573 was issued for a violation of 30 CFR 75.703. The $195 penalty assessed for this violation should be reduced to $100. The citation states that the energized bonder being used at the bottom landing was not provided with a grounding wire. However, further investigation has disclosed that the bonder was equipped with a grounder which was inadvertently torn off. This could not have been known to the operator. Therefore negligence is less than originally assessed. Also, it must be noted that the track itself gives grounding and that the ground power conductor was proper. Therefore, the probability of occurrence is minimal. It is also relevant that this is direct current and not alternating current. The probability of occurrence with a direct current is far lower than with an alternating current. Therefore, $100 is an appropriate assessment.

Citation No. 618578 was issued for a violation of 30 CFR 75.200. The citation states that the approved roof control plan was not being complied with in the designated and return escapeways for a total distance of 2,000 feet. Further investigation has disclosed that at least half of this area was not required to be center posted as stated in the citation. It was not required to be center posted because it was driven in 1973, well before the roof control plan requiring center posting was instituted. Therefore, the operator's negligence is less than originally stated and a reduction from $295 to $145 is appropriate.

Citation No. 618579 was issued for a violation of 30 CFR 75.200 and appropriately assessed a penalty of $255. The approved roof control plan was not being complied with where partial pillaring was taking place. A cut of coal approximatly 20 feet long and 11 feet wide was exposed and not roof bolted or barricaded as required. As stated in the inspector's statement, the condition should have been detected during a pre-shift examination. However, it is not likely that a person would be harmed by this failure to comply with the roof control plan as there was no means of access to the area which was blocked by the continuous miner. Therefore, the penalty as proposed is appropriate.

Citation No. 618643 was issued for a violation of 30 CFR 75.200 and appropriately assessed a penalty. of $305. The approved roof control plan was not being followed as bolts are required to be placed on 4 foot centers. In this case the distance between bolts ranged from 52 inches to 60 inches. Further investigation has disclosed that only three rows of the bolts were out of pattern and that the area has a good solid top. Therefore, the likelihood of an injury occurring is low. However, as the operator is obligated to comply with its roof control plan, a penalty of $305 is appropriate.

Citation No. 618645 was issued for a violation of 30 CFR 75.523-2. The $170 assessment for this violation should be reduced to $120. The deenergizing device on the shuttle car was inoperative.

However, it was not within the operator's control to know of this violation. Someone had tampered with the adjustments on the equipment and the equipment operator did not inform the operator. Also, although more pressure needed to be exerted than allowable, it was possible to deenergize the equipment in its condition at the time this citation was issued. Also, the probability of occurrence is lowered as the shuttle car was protected by a canopy. For these reasons, the penalty reduction is appropriate.

Citation No. 618646 was issued for a violation of 30 CFR 75.400. The $225 assessment for this violation should be reduced to $140. An accumulation of combustible material was found around the bottom landing of the Renton shaft for approximately 700 feet. This operator maintains a weekly clean-up program and a garbage can is provided by the operator. However, this accumulation existed at the lunch place. The operator has instructed the men to use the garbage can and to clean-up after themselves. This violation is not within the operator's exclusive control. It is confirmed that the operator maintains a clean-up plan at this area. For these reasons, the operator's negligence is very low and a $140 assessment is appropriate.

Citation No. 618648 was issued for a violation of 30 CFR 75.200. In the intake escapeway the operator failed to post 100 feet according to the roof control plan. The operator did know of this violation. However, according to the roof control plan posts are supplementary support to be used only after bolts are installed. This area was bolted according to the plan. Also, the roof in this area was strong and there was no indication that there was weight on the cribs. Moreover, the entry was posted. [In a telephone conversation on June 26, 1980 the operator informed my law clerk that the ninth word in the second sentence in this paragraph should be "post" and not "bolt." The operator further agreed to pay the full assessment of $255 for this violation rather than the reduced amount the parties had agreed upon.]

Citation No. 618649 was issued to the operator for a violation of 30 CFR 75.807. The $150 assessment for this violation should be reduced to $100. In this case, a bare energized trolley wire was coming in contact with the high voltage cable on the main track haulage. However, the cable itself was wrapped and insulated. It was not within the operator's control that this condition occurred. One of the brackets holding up the cable broke causing the cable itself to slip and sag near the trolley wire. As the operator was not negligent and as the cable itself was wrapped, this penalty should be reduced to $100. This reflects accurately the lack of operator negligence as well as the low probability of occurrence.

Citation No. 618650 was issued for a violation of 30 CFR 75.200. The approved roof control plan was not being complied with

as the pillar line was not fenced off or posted. The $240 assessment for this violation should be reduced to $160. Further investigation has disclosed that the posts had been set as required by the roof control plan. However, an unintentional roof fall knocked out the breaker posts. As the operator initially did comply with the roof control plan and had not yet reinspected this area, the penalty reduction appropriately reflects the operator's degree of negligence. Also, this occurred in a gob area where it was unlikely that men would be travelling.

Citation No. 618651 was issued for a violation of 30 CFR 75.400. The $210 assessment for this violation should be reduced to $110. An accumulation of fine dry coal, loose coal and float coal dust was present in the pillar section. The-operator maintains a continuous clean-up plan. However, this violation occurred in an area where the ribs were frequently sloughing and it was very difficult for the operator to control the violation. Thus, the operator's negligence was very slight. It is documented that the operator cleans this area at approximately dinner time and at the end of the shift. This citation was issued at 11:15, just slightly before the dinner hour. For these reasons, the penalty reduction as proposed is appropriate.

Each of the above penalty proposals takes into account all relevant statutory criteria.

I accept the Solicitor's representations. Accordingly, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved.

Citation Nos. 618574 and 618644.

In accordance with Commission Rule 64, 29 C.F.R. § 2700.64, each party has moved for summary decision with respect to Citation Nos. 618574 and 618644. 1/

A. Citation 618574

This citation alleges a violation of 30 C.F.R. § 75.1704 for the following condition:

1/ 29 C.F.R. § 2700.64 provides in part:

"(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render smmary decision disposing of all or part of the proceeding.

"(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."

The designated return escapeway in the 15 North Section ID #015 had two roof falls which were not maintained to insure passage at all times of any person including disabled persons. Both falls were inby #4617. Both falls did not provide the required width of six feet and both needed posts.

30 C.F.R. 75.1704 provides as follows:

> Except as provided in § § 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently-tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

No factual dispute exists. The parties have submitted signed stipulations as to all material facts. These stipulations set forth that:

1. In the designated return escapeway in the 15 Section I.D. No. 015, two roof falls had occurred.

2. Five posts were dislodged.

3. The falls did not allow the required six feet of clearance.

4. The roof in the return escapeway is solid sandrock and generally *strong.*

5. The return escapeway was examined in compliance with 30 C.F.R. 75.1704-2(c)(1) on April 17, 1979, and the condition described in the subject citation did not exist at that time.

6. On April 20, 1979, an authorized representative observed the two roof falls in the designated escapeway and issued the subject citation.

7. The roof falls occurred between the time of the last regular weekly escapeway inspection, i.e., April 17, 1979, and the date of the issuance of the citation; that is April 20, 1979.

8. The escapeway was not used between April 17, 1979, and April 20, 1979.

9. The negligence of the operator is low, as the operator did comply with the weekly examination requirement of 30 C.F.R. 75.1704-2(c)(1).

10. Were the escapeway to be needed in the event of an emergency, the roof falls could have made passage extremely difficult. Due to the obstruction created by the roof falls, an existing injury could have been aggravated, causing a possible fatality. However, the operator did have its one other designated escapeway maintained in passable and good condition. Also, other entries, though not designated escapeways, were in passable condition. Therefore, it is improbable that such an incident would have occurred.

The issue presented is whether there is a violation of 30 C.F.R. § 75.1704 when the cited condition occurs between the time of the escapeway inspection conducted pursuant to 30 C.F.R. § 75.1704-2(c)(1) and the MSHA inspection.

The mandatory standard is clear in requiring that at least two passageways maintained to insure passage at all times of any person be provided and maintained in a safe condition. "Maintain" is defined, inter alia, as "to keep in a certain condition or position, especially of efficiency, good repair, etc." Webster's New World Dictionary (1972 edition). The regulation does not distinguish between conditions which occur due to unpredictable circumstances and those which are caused by the operator's lack of due diligence. Nor does the standard contain any reference to time. Accordingly, I conclude that the standard imposes an absolute duty upon the operator with respect to the condition of the passageways. Since passage admittedly was extremely difficult, a travelable passageway did not exist and the operator failed to meet the obligation imposed upon it.

I am bound by the clear language of the regulation. The circumstances under which the failure to maintain the requisite passageways occurred, such as the recent roof falls, may be taken into account in determining the degree of negligence. The fact that the operator complied with the weekly examination requirement in 30 C.F.R. § 75.1704-2(c)(1) does not affect the issue of whether there is a violation of 75.1704.

In light of the foregoing, I conclude that a violation of 30 C.F.R. § 75.1704 occurred for which a civil penalty must be assessed. Pursuant to the stipulations set forth herein, I find negligence was low. I also take note of representations that the violation was abated in good faith, the operator is large in size, has a history of previous violations, and that the imposition of a penalty will not affect the operator's ability to continue in business.

A penalty of $180 is assessed.

Citation No. 618644

This citation alleges a violation of 30 C.F.R. § 75.303, for the following condition:

> At three high cavities along the Conveyor Belt in the 16 South Section ID #019 there was no evidence or indication that a pre-shift examination was made prior to men entering the 16 South Section for work. There was no date, time or anybody's initials for the above date. This is a statutory provision that a pre-shift examination and also evidence of said examination shall be made 3 hours preceeding the beginning of the shift. [Modified on May 3, 1979 to read: At three high cavities along the conveyor belt in the 16 South Section ID No. 019 there was no evidence to indicate that an examination was made for 5/1/79 or 5/2/79 after the coal producing shift had begun. The evidence required is the date, time and initials of the person making the examination at all locations he examines. An examination on these cavities was made by the safety director on 5/2/79 after it was pointed out to him by me that no dates were there for 5/1/79. This section produced coal on 5/1/79.]

30 C.F.R. 75.303 provides in relevant part as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his

initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.

* * *

The parties have submitted stipulations with respect to the facts involved. These stipulations set forth that:

1. On May 1, 1979, the Renton Mine was idle, therefore, no coal was produced.

2. 30 C.F.R. § 75.303 provides: "belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines."

3. As the mine was idle on May 1, 1979, it was not necessary for the operator to examine the belt on that day.

4. On May 2, 1979, the operator was engaging in producing coal on the 8:00 a.m. shift and the conveyor belt in the 16 South Section, I.D. No. 019, was energized at the time of the inspection.

5. The authorized representative issued the subject citation at 11:30 a.m.

6. At the time the inspector issued the citation there was no evidence to indicate that an examination was made for May 2, 1979, after the coal-producing shift had begun.

7. The operator did intend to make a belt examination on May 2, 1979, sometime during the shift in which the citation was issued.

8. At the time the citation was issued, the belt was in good condition and no hazards existed.

9. The probability of occurrence is low, as the belt was in good condition.

10. The operator exercised normal good faith in abating this condition within the time set for abatement or a reasonable time thereafter.

The issue presented for resolution in this matter is whether 30 C.F.R. § 75.303 requires an examination of belt conveyors which carry coal to be conducted immediately after each coal-producing shift has begun or at any time during such coal-producing shift.

I conclude that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. There is no requirement of immediate examination of belt conveyors after the start of a production shift. Indeed, there is no time requirement at all except that the examination occur during the shift. If the Secretary wished to require an immediate inspection of such conveyors or an inspection within a specified time after the start of the shift, the regulation could have so provided. As I have stated before, I have neither the authority nor.the inclination to substitute myself for the formal rulemaking procedures set forth in the Act. See, e.g., Riverside Cement Company, WEST 79-94-M et al, (December 18, 1979).

The Solicitor cites the inspector's manual which provides that these examinations shall be started without delay. I do not know what "without delay" means. The operator cites an earlier memorandum issued by a Subdistrict Manager which states that the examination can be done at any time during the shift. I am not bound by either interpretation, which are not official regulations but I do note that the former Board of Mine Operations Appeals held that the operator cannot properly be held to comply with guidelines or amplifications of the Act not properly promulgated as regulations issued pursuant thereto. Kaiser Steel Corporation, 3 IBMA 489 (1974). Here the language of the mandatory standard is clear. If the Secretary wants to require something more or something different, he must amend the regulations in the proper manner.

For these reasons, I find no violation existed and the citation must be vacated.

ORDER

The operator is ORDERED to pay $1,870 within 30 days from the date of this decision.

Citation No. 618644 is hereby VACATED.

Paul Merlin
Assistant Chief Administrative Law Judge

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