FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

23 JUL 1980

SECRETARY OF LABOR, MINE SAFETY ANDHEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding	
		Docket Nos.	Assessment Control Nos.
v.		WEVA 80-124	46-01407-03042V
		Olga Mine	
OLGA COAL COMPANY,	Respondent	WEVA 80-125	46-02437-03007V
		WEVA 80-126	46-02437-03008
		WEVA 80-127	46-02437-03009V
		Olga Preparation Plant	
		WEVA 80-128	46-05319-03009V
		Road Fork No. 2 Mine	

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
James R. Haggerty, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law-Judge Steffey

Pursuant to a notice of hearing issued March 21, 1980, a hearing in the above-entitled proceeding was held on May 20, 1980, in Bluefield, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 141-154):

> The Petition for Assessment of Civil Penalty in Docket No. WEVA 80-124 was filed on January 25, 1980, and seeks to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.200. In any civil penalty proceeding the issues are whether a violation of a mandatory health or safety standard 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.

The first matter to be considered in this proceeding Insofar as the contested case is concerned, is whether a violation of section 75.200 occurred.

CONTESTED CASE

DOCKET NO. WEVA 80-124

I shall make some findings of fact based on the evidence which I've heard today. Those findings will be set forth under enumerated paragraphs.

1. On May 16, 1979, two coal mine inspectors went to Respondent's Olga Mine. At that time, those two inspectors, namely, James M. Oliver and Melvin L. Sperry, went to the six north section, and specifically to the No. 2 pillar split.

2. After examining the conditions that they saw in the No. 3 pillar split, they jointly wrote Order No. 655146, dated May 16, 1979, alleging that respondent had violated its roof-control plan, and thereby had violated section 75.200, because the continuous-mining-machine had proceeded for a distance of 35 feet so as to bring the controls of the continuouslnining machine beyond roof supports.

3. Exhibit P-2 provides, in Paragraph 6, that "The operator shall not advance the controls of the miner inby the last row of bolts and additional bolting shall be done if necessary to keep the operator in compliance and breaker posts shall be extended to the last row of bolts during mining of wing lifts."

4. The inspectors based the violation on measurements of the intitial cut of coal in the pillar, and of the area off to the right of the bolted portion of the entry, as shown in Exhibits P-3 and P-5. The violation here is not the normal one which is encountered in this-kind of situation, because the area of unsupported roof under which the operator of the continuouslnining machine proceeded was up the right rib of the pillar block. The inspectors based their conclusion that the operator of the continuous-mining machine had cut along the right rib in a straight direction, parallel to the right rib, on the fact that they saw ripper cutting marks, or bit marks, which were parallel to the right rib. They additionally made measurements beyond the last row of roof bolts to show that the last row of roof bolts was 17 feet outby the face of the cut of coal which had been mined.

5. Respondent presented as witnesses, the superintendent of the mine and the operator of the continuous-mining machine on the evening shift, which was the one involved in the violation cited in the inspectors' order. The operator of the continuous-mining machine testified that he did not go out from under supported roof in order to cut the coal, as it is depicted on Exhibit A. The operator of the continous-mining machine stated that he had inadvertently started cutting a wing off the initial split in the pillar, and had cut about one and maybe a little more of another shuttle car of coal when he realized that he had made a mistake. At that point, he backed up the continuous-mining machine and moved it inby that portion he had just cut, so as to begin cutting on the wing at a more inby point in this No. 3 pillar split. The operator stated that he had cut the coal out, as shown in the green area on Exhibit A, by the end of his shift, at which time the roof fall occurred. And he backed the continuous-mining machine out of the No. 3 pillar split, and left the section.

I think that those are the primary findings I need to make. A question of whether a violation of section 75.200 occurred must be based on the painful process of determining which of the various witnesses' testimony is the most credible. There are several considerations that must be made for me to find that a violation of section 75.200 occurred; and I shall explain them at this time.

The operator of the continuous-mining machine was unable to explain satisfactorily why an operator with 4 years of experience would have failed to recognize that he had no need to start taking a wing of coal out of a block, midway in that block, when he was aware of the fact that a previous operator had cut through the left side of the pillar at an opening which should have alerted the operator that the first wing of coal to be cut would be in the same area to which he eventually went, and which is shown on Exhibit A in green.

Another reason that I've elected to accept the inspectors' testimony as more credible than the operator's, is that the operator's Exhibit A does not purport to explain why the initial split had excess width, as compared with the red area, where the operator of the continuous-mining machine said he mistakingly made a cut. I cannot believe that the inspectors could have measured the distance from the rib to the last roof bolt on the left, in the four places shown on Exhibits P-3 and P-5, without having established that the right rib ran in a straight direction.

Additionally, the operator of the continuous-mining machine made no statements concerning whether there were bit marks running parallel to the right rib or running diagonally a6 they should have run, if this red and green area shown on Exhibit A had been mined in a diagonal fashion, as is shown by the location of the continuous-mining machine on Exhibit A.

Also, the inspectors measured the distance from the last roof bolt to the mqst inby area of the pillar split with their measuring tape and I do not believe they could have done that without having been aware of whether there was. a roof fall in the green area or not. As Ms. Kaufmann pointed out in her closing statement, either there was not a roof fall there, or it had been cleaned up before the inspectors arrived on the scene.

There was no testimony by any expert to rebut the inspectors' claim that the cuts of the continuous-mining machine were parallel to the right rib. It is true that one of the inspectors believed that the make of the continuous-mining machine was a Joy machine, when in actuality it was a Lee Norse machine, but I did not hear anyone claim that the Lee Norse machine would fail to make any marks parallel to the rib, if the machine had been trammed while cutting in a straight inby path, from the beginning of the pillar to the last. portion that was cut by the continuous-mining machine.

There has been some discussion by respondent's attorney as to the fact that Inspector Oliver seemed to think that this pillar block was only 35 feet long, whereas it appears to have been about 70 feet long. But I think that that is immaterial when it comes to a question of whether the continuous-mining machine was out from under permanent supports.

In any event, Inspector Sperry was very specific In drawing Exhibit P-5, showing that'he depicted the posts which were in the crosscut outby the No. 3 pillar; and he said he was positive that the drawing he has on Exhibit P-5 shows the outby area of the pillar. The drawing, which he made very carefully on Exhibit 5, does show all of the pillar which is involved in the citation described in Order No. 655146.

For the reasons given above, I find that a violation of section 75.200 occurred when the controls of the continuous-mining machine were advanced beyond permanent supports. Having found that a violation occurred, it is now necessary to consider the six criteria. At least three of the criteria may be given a general consideration, which will be applicable to the settled cases as well as the contested case.

The parties entered Into some stipulations about at least two of the criteria. It was stated that respondent is subject to the jurisdiction of the Act, the Commission, and the judges. It was also stipulated that the violation alleged in Order No. 655146 was abated in a normal good faith effort to achieve compliance.

It was stipulated that as to the size of respondent's business that it produces 530,342 tons of coal per year; and since respondent is an affiliate of Youngstown Sheet & Tube Company, it may be considered to be a large operator. To the extent that the size of the operator is considered in assessing a penalty, I find that the penalty should be in an upper range of magnitude.

The former Board of Mine Operations Appeals has held in several cases that if respondent presents no financial data, it may be concluded that the payment of a penalty would not cause it to discontinue in business. Since no financial data were presented in this case, I find that payment of penalties would not cause respondent to discontinue in business.

As to the criterion of the history of previous violations, counsel for the Secretary of Labor has stated that she will mail to me a computer printout in the near future, and will send a copy of it to counsel for respondent. And If he does not notify me of any errors that he thinks exists in the computer printout, I shall subsequently add to the written decision, which is mailed to the parties, a consideration of the criterion of history of previous violations.

A El-page computer printout listing alleged violations for which respondent has already paid penalties was sent to me on May 24, 1980. That 21-page document is marked for identification as the Secretary of Labor's Exhibit P-6 in this proceeding and is received in evidence. Counsel for respondent has not notified me that he has found any errors in Exhibit P-6. Therefore, it will be used to evaluate the criterion of history of previous violations.

Exhibit P-6 shows that respondent has previously violated section 75.200 on 52 occasions. Sixteen of the violations occurred in 1977, 28 occurred in 1978, and 8 violations had occurred In 1979 by May 9, 1979. Since roof falls still account for a large percentage of the injuries and deaths which occur each year in underground mines, I consider it to be a serious matter when an operator has a long list of violations of section 75.200, especially if the violations have an upward trend, as they do in this case, because there is an increase from 16 violations in 1977 to 28 in 1978. Therefore,

the penalty otherwise assessable under the other five criteria for this violation of section 75.200 will be Increased by $500 under the criterion of history of previous violations.

As to the criterion of gravity, there was considerable testimony by the inspectors to the effect that the roof conditions in the six north section were substandard, in that there was heaving of the bottom, and some cracking in the roof, and that going out from under the roof bolts would be a hazardous act for a person to make. Consequently, I find that the violation was serious.

As to the criterion of negligence, the evidence does not show that the section foreman on the second shift was aware of the fact that the continuous-mining machine had been used in the fashion that it was. There is evidence that this particular split on the No. 3 pillar was something that was written up by the preshift examiner. And there's been some testimony that danger boards had been erected outby the pillar. The inspectors did not see the danger board, but it is alleged that the preshlft examiner had put one up. So, at least an effort had been made to alert people to the possibility that this was a dangerous area. Now, for that reason I find that there was not a large degree of negligence.

Considering that respondent is a large operator, that payment of penalties will not cause respondent to discontinue in business, that there was a normal good faith effort to achieve rapid compliance, that the violation was serious, and that there was a low degree of negligence, a penalty of $1,000 would have been assessed, but as indicated above, the penalty of $1,000 will be increased by $500 to $1,500 because of respondent's adverse history of previous violations of section 75.200.

APPROVAL OF SETTLEMENTS

DOCKET NO. WEVA 80-125

The violation here involved was an alleged violation of 30 C.F.R. § 77.202, which prohibits the existence of coal-dust accumulations in dangerous amounts. Order No. 655348, issued May 30, 1979, cited a violation of section 77.202 because float coal dust was present on all four levels of the crusher building, ranging in depths of up to 18 inches. The motion for approval of settlements states that respondent has agreed to pay the full penalty of $800 proposed by the Assessment Office in this instance, because the facts show that possible ignition sources existed in the area of some of the accumulations. Some mitigating factors were that the accumulations existed on surface facilities where there was little danger that dust would

accumulate in a hazardous amount, and that some steps were being taken to clean up the accumulations at the time the order was written. Therefore, the violation was not as serious as it would have been if it had occurred underground, and respondent was not as negligent as it would have been if no steps to clean up the accumulations had been taken.

I find that the Assessment Office determined an appropriate penalty, and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

DOCKET NO. WEVA 80-126

The single violation of section 103(f) of the Act involved in Docket No. WEVA 80-126 was alleged in Citation No. 654849, which stated that respondent failed to pay a miner who walked around with an inspector. The Assessment Office considered the violation to be nonserious, to be associated with ordinary negligence, and proposed a penalty of $114. Respondent has agreed to pay a reduced penalty of $52.

The motion for approval of settlement states that the reduced penalty is justified because respondent acted in good faith under its interpretation of section 103(f), namely that respondent was obligated to pay only one representative under the walkaround provisions of section 103(f) of the Act.

I find that respondent's agreement to pay a reduced penalty of $52 should be approved, because respondent was not as negligent, in the circumstances, as the Assessment Office believed when it proposed a penalty of $114 based primarily on attributing 10 penalty points under the criterion of negligence pursuant to 30 C.F.R. § 100.3.

DOCKET NO. WEVA 80-127

Three violations of section 77.202 are involved in Docket No. WEVA 80-127. The first violation of section 77.202.was alleged in Citation No. 654835, because the inspector asserted that float coal dust had accumulated on all three levels of the crusher building in depths of up to 3 inches. The motion for approval of settlement says that the Assessment Office's proposed penalty of $500 is excessive, and that respondent's agreement to pay $375 is justified, because respondent has a clean-up plan under which the

crusher building is washed down every three shifts, which had the effect of making the crusher building damp, and reducing the likelihood of fire or explosion. Additionally, the accumulations were less than 3 inches in depth, except in a few locations. It is said that these facts reduced the probability of fire, and also the degree of negligence.

The second violation of section 77.202 was cited in Order No. 654837, which alleged existence of float coal dust up to 6 inches in depth in the skip hoist facility. Respondent has agreed to pay a penalty of $450 instead of the penalty of $600 proposed by the Assessment Office. The motion for approval of settlement states that a reduced penalty is justified because the accumulations were less than 1 inch in all but a few locations, that there were no miners in the area described in the order, and that there were no ignition sources in the area.

The third violation of section 77.202 was cited in Order No. 654847 which alleged that float coal dust up to 1 inch in depth had accumulated at several places In the man hoist facility. The motion for approval of settlement states that a reduced penalty of $600 is warranted instead of the penalty of $800 proposed by the Assessment Office, because further investigation has indicated that the accumulations were less than 1 inch in depth in nearly all instances. The motion avers that that fact warrants a conclusion that respondent was not as negligent, and that the violation was not as serious as it had been considered to be by the Assessment Office.

I have found in prior cases that inspectors do not consider accumulations on the surface as serious as underground accumulations. Therefore, I find that satisfactory reasons have been given for accepting respondent's offer to pay reduced penalties for the three violations of section 77.202 involved in Docket No. WEVA 80-127.

DOCKET NO. WEVA 80-128

Two violations are involved in Docket No. WEVA 80-128. The first violation was of section 75.200, alleged in Citation No. 655224, which stated that respondent had failed to follow the provisions of its roof-control plan, because no temporary supports had been installed in the face area of the Nos. 1 and 2 entries after completion of the mining cycle. The motion for approval of settlement states that the No. 1 entry had been driven 19 feet inby permanent supports, and that the No. 2 entry had been driven 21 feet inby permanent supports, and that there were cracks in the roof. Since the

violation was serious and involved a high degree of negligence, the motion states that respondent has appropriately agreed to pay the full penalty of $1,000 proposed by the Assessment Office.

The second violation in this docket was cited in Order No. 655225 which stated that respondent had violated section 75.326 because belt haulage air was being used to ventilate the active working section. The motion for approval of settlement states that respondent's offer to pay a reduced penalty of $500 instead of the $1,000 penalty proposed by the Assessment Office is justified because, although belt haulage air was used to ventilate the working face, the air had reached the working face because respondent had been forced to remove a permanent stopping in order to bring in supplies needed for installing a new conveyor belt. The belt could not have been installed without removing the stopping.

At the time the order was written, the conveyor belt was not being operated. The 'motion states that the aforementioned facts show that the violation was not as serious and did not involve as much negligence as the Assessment Office believed to exist when it proposed the penalty of $1,000.

I find adequate reasons have been given to approve respondent's agreement to pay $1,000 and $500, respectively, for the violations of sections 75.200 and 75.326 involved in Docket No. WEVA 80-128.

Summary of Assessments

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. WEVA 80-124

Order No. 655146 5/16/79 § 75.200.....(Contested).....$ 1,500.00

Settlement Agreements

Docket No. WEVA 80-125

Order No. 655348 5/30/79 § 77.202.....$ 800.00

Docket No. WEVA 80-126

Citation No. 654849 4/23/79 § 103(f).....$ 52.00

Docket No. WEVA 80-127

Citation No. 654835 4/3/79 § 77.202.....$ 375.00

Order No. 654837 4/4/79 § 77.202 ● ***.***.....$ 450.00
Order No. 654847 4/17/79 § 77.202..... 600.00

Total Penalties in Docket No. WEVA 80-127.....$ 1,425.00

Docket No. WEVA 80-128

Citation No. 655224 6/22/79 § 75.200.....$ 1,000.00
Order No. 655225 6/22/79 § 75.326..... 500.00

Total Penalties in Docket No. WEVA 80-128.....$ 1,500.00

Total Settlement and Contested Penalties in This Proceeding.....$ 5,277.00

WHEREFORE, it is ordered:

(A) The parties' requests for approval of settlement are granted and the settlement agreements submitted in this proceeding in Docket Nos. WEVA 80-125, WEVA 80-126, WEVA 80-127, and WEVA 80-128 are approved.

(B) Pursuant to the parties' settlement agreements and the bench decision rendered in the proceeding in Docket No. WEVA 80-124, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $5,277.00 as set forth in the paragraph under Summary of Assessments above.

Richard C. Steffey

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

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