FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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24 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. WEVA 79-222 A/O No. 46-01367-03024 V
v.		
AMHERST COAL COMPANY,	Respondent	Paragon Mine Docket No. WEVA 79-223 A/O No. 46-03773-03012 V MacGregor No. 8 Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, Region III, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Edward I. Eiland, Esq., Logan, West Virginia, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). The hearing in these matters was held in Charleston, West Virginia, on January 16, 1980. At the conclusion of the hearing, the parties waived their right to file posthearing briefs.

1/ Section 110(a) of the Act reads as follows:
"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

On December 7, 1978, inspector Henry J. Keith issued Order No. 23000 pursuant to section 104(d)(1) 2/ of the Act. He cited 30 C.F.R. § 75.1307 3/ and described the relevant condition or practice as follows:

> Explosives were not properly stored in the 10 road 008 section in that about 24 sticks of powder were lying on the floor of the No. 2 entry near a battery charger that was energized. Said explosive was not kept in a container constructed for this purpose. The container the explosives were in also was not closed. This was located in the above area.

The inspector found that the operator demonstrated an unwarrantable failure to comply with the mandatory standard. He noted that the operator had a responsibility to conduct an onshift examination in the section. He based his finding of unwarrantable failure on his belief that the condition was obvious and would have been observed in the course of such inspection.

2/ Section 104(d)(1) of the Act reads as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

"If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

3/ 30 C.F.R. § 75.1307 reads as follows:

"Explosives and detonators stored in the working places shall be kept in separate closed containers which shall be located out of the line of blast and not less than 50 feet from the working face and 15 feet from any pipeline, powerline, rail, or conveyor, except that, if kept in niches in the rib, the distance from any pipeline, powerline, rail, or conveyor shall be at least 5 feet. Such explosives and detonators, when stored, shall be separated by a distance of at least 5 feet."

The operator abated the condition by removing the explosives to the mouth of the section. In the opinion of the inspector, a normal degree of good faith was shown by the operator in abatement.

The parties were in agreement with respect to all statutory criteria to be considered in determining the amount of civil penalty to be assessed except for the issue of negligence. At the conclusion of Petitioner's presentation of evidence, the Administrative Law Judge made a finding from the bench with respect to the negligence of the operator in permitting the existence of the condition. This ruling was as follows:

> Let the record show that there have been discussions between counsel and the Judge and, in response to the question as to whether or not there was negligence, I find that the record at this point, as adduced by evidence of the Government, has failed to show the length of time that the explosives were in the area in which they were sighted by the inspector and it has not been shown that anyone connected with management was either in that area or should have been in that area at the time when the explosives were there. Therefore, it has not been shown that the company knew or should have known of the existence of the explosives where they were found by the inspector. Therefore, I find that there was no negligence by the operator.

As a result of this finding regarding negligence, and additional discussions between counsel, the parties agreed that the penalty in this case should be reduced to $200. A penalty of $1,500 had been proposed by MSHA's Office of Assessments. In support of the settlement agreement, counsel for Petitioner asserted the following:

> The parties have agreed that, although there was no negligence involved, this was a moderately serious situation warranting more than a merely nominal penalty. The parties feel that a penalty of $200 adequately reflects the absence of negligence and the seriousness of the violation. The operator's past history in regard to these types of violations is insubstantial. * * * The parties have reached a stipulation as to the size of the operator and it is agreed that the 1978 production figure of 1,377,448 tons is representative of the operator's average annual tonnage and that places this operator in the size of a medium sized operator. In light of these criteria the parties move that the proposed settlement of $200 for this violation be approved.

The settlement proposed by the parties was approved by the Administrative Law Judge on the record. This approval is hereby AFFIRMED.

On December 14, 1978, MSHA nspector Keith issued Order of Withdrawal No. 23035 pursuant to section 104(d)(2) 4/ of the Act, citing a violation of 30 C.F.R. § 75.200 5/ for failure to comply with the miner's roof-control plan.

The order of withdrawal noted that the area affected by this order was the No. 5 entry on the No. 4 unit, 027 section. The order, which was issued at 8:30 p.m., was terminated at 10 p.m., when "the entire area was temporarily supported and roof bolts were installed."

The operator mined the No. 4 unit, 027 section, on a five-entry system. The method used to mine was such that coal was simultaneously cut, mined, and loaded. A bridge-haulage mechanism, consisting of three connected segments, was attached to a continuous miner. The bridging linked the miner directly to the belt line which was located in the No. 3 entry.

The operator encountered adverse roof conditions in the No. 5 entry on December 5, 1978. The conditions began along the right rib of the entry and

4/ Section 104(d)(2) of the Act reads as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violation, the provisions of paragraph (1) shall again be applicable to that mine."

5/ 30 C.F.R. § 75.200 reads as follows:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives."

extended across the face areas. As the continuous miner was removed from the face area, a portion of the top fell. In so doing, it knocked out timbers and pulled out roof bolts. Tests performed on the roof indicated that the roof's condition continued to deteriorate. Because of this, the roof-bolting crew was removed and three or more cribs were placed in the center of the entry. The most inby crib was 8 feet from the face. The area left without roof support extended approximately 8 feet from this crib and more than 20 feet from rib to rib. A danger board was placed on the most outby crib and no one was permitted in the area. The operator did not permit entry of either machinery or employees into the area until after Order No. 23035 was issued.

The No. 5 entry had already been driven the length of the pillar. The operator decided, therefore, to approach the area from the crosscut rather than subject its employees to the hazard presented by the adverse conditions in the No. 5 entry. The operator proceeded cautiously to mine the last open crosscut between entries No. 4 and No. 5 (hereinafter, the 4 right crosscut). Cuts were made to depths of 10 feet rather than to the usual 20-foot depth. Roof bolts of 8 to 9 feet in length with plates measuring 6 inches x 16 inches were used, rather than the usual 3- or 4-foot bolts and 6 inch- x 6-inch plates. In addition, the roof-bolting cycle was changed so as to afford the operator of the continuous miner greater protection.

The operator holed through from the crosscut into the No. 5 entry during the day shift on December 14, 1978. The dimensions of this hole were 2 feet x 3 feet. By the end of the day shift, the roof in the 4 right crosscut had been bolted up to the face. No unusual roof problems had been encountered in the 4 right crosscut.

James Cole, the section foreman in charge of the section during the second shift on December 14, 1978, was on the No. 4 unit at the time the inspector issued Order No. 23035. The 9- to 10-foot cut which completed the breakthrough into the No. 5 entry had been made at approximately 6:30 p.m. The roof bolter was in the process of bolting this newly cut area when the inspector arrived. One row of bolts and four temporary posts had been installed. No miner or equipment had ventured under the unsupported or bad roof in the No. 5 entry.

In the order of withdrawal, the inspector described the pertinent condition or practice as follows:

> The roof control plan was not being complied with in the No. 5 entry in that a side cut was made where a crosscut from No. 4 entry entered into the right rib of the No. 5 entry. An area 20 feet wide and eight feet in length approaching an installed crib was not temporarily or permanently supported and evidence indicates that machinery was permitted to work inby. See page 8, paragraph 11, (a) and (b) of the roof control plan.

Although the inspector wrote on the order under "action to terminate" that mine management abated the condition by supporting the entire area with roof bolts, Mr. Cole testified that the inspector allowed work to continue after two safety jacks were set in the No. 5 entry, inby the right side of the 4 right crosscut.

Paragraph 11 of the roof-control plan provides as follows:

> (a) Sidecuts shall be started only in areas that are supported with permanent roof supports. During development, except where old workings are involved, working places shall not be holed through into accessible areas that are not supported on 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face.
>
> (b) When new openings are created and/or sidecuts are made, the newly exposed area shall be supported with temporary or permanent supports in accordance with the development plan, or a row of posts on 4-foot maximum spacing installed across the mouth of the opening before any machinery is permitted to work inby.

The record establishes that the mining procedure utilized by the operator to cope with the roof problems in the No. 5 entry placed it in violation of paragraph 11, sections (a) and (b), of its roof-control plan. Although a sidecut was not started from the area in the No. 5 entry that was not supported with permanent roof supports, the operator holed through from the 4 right crosscut into the No. 5 entry despite the absence of support in the No. 5 entry. That is, a working place was holed through into an accessible area that was not supported on a 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face, thereby violating paragraph 11, section (a). In completing the breakthrough from the 4 right crosscut, the operator violated paragraph 11, section (b), in that machinery was permitted to work inby roof which had not been supported with temporary or permanent supports in accordance with the development plan and no row of posts been placed across the mouth of the opening into the No. 5 entry.

At the hearing, the tenor of Inspector Keith's account of the alleged violation conformed with that of Respondent's witnesses, but it diverged significantly in matters of detail. Respondent called four witnesses to testify in its behalf at the hearing. Three of these four witnesses--Willard Bourne, James Cole, and Clarence Preston--were section foremen at the Paragon Mine during the time period material herein. The fourth, Ernest Marcum, was Respondent's safety inspector. These witnesses who directly participated in the mining process provided an accurate account of the events and conditions existing prior to the issuance of Order No. 23035. The inspector, whose recollection was faulty as to some details, had no direct knowledge of the sequence of events which led to the conditions but drew his conclusions regarding this sequence from observations of conditions which prevailed at the time he issued the order. Nevertheless, the inspector observed conditions

which were in violation of the roof control plan and, even with the testimony of Respondent's witnesses which is accepted as being accurate in detail, the record clearly establishes the existence of the violation.

The negligence of the operator in allowing the occurrence of this violation was slight. Although temporary support should have been provided in the unsupported area of the No. 5 entry before permanent support was placed in the area of the last cut, proper mining procedure had been otherwise followed by the operator. After being confronted with working top in the No. 5 entry on December 5, 1978, the operator proceeded with caution to make the best of the situation.

Although the negligence of the operation was not of the degree asserted by Petitioner based on the observations of the inspector, the gravity of the violation was substantial. The roof-bolting crew was at work adjacent to the area of unsupported and bad roof in the No. 5 entry. If the roof had started falling, the fall could have continued into the area in which the bolting crew was working. The type of injury to be expected in the event such an accident occurred would be a fatality or serious injury.

The operator demonstrated a normal degree of good faith in the abatement of this condition.

The operator's history of prior paid violations from December 15, 1976, through December 14, 1978, at the Paragon Mine is as follows: Respondent's history of violations reflects a total of 153 prior paid violations in 1977 and 212 prior paid violations in 1978. The number of prior paid violations of 30 C.F.R. § 75.200 amounted to 4 in 1977 and 25 in 1978.

The parties stipulated that penalties assessed herein will not adversely affect the operator's ability to continue in business. The parties also agreed that the 1978 production figure of 1,377,448 tons is representative of the operator's average annual tonnage and that the size of Respondent is that of a medium operator.

Assessments

In consideration of the findings of fact and conclusions of law contained in this decision, the following assessments are appropriate under the criteria of section 110 of the Act.

Order No.	Penalty
23000	$200
23035	$200

ORDER

It is hereby ORDERED that Respondent pay the sum of $400 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Issued:

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