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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. KENT 79-104 Assessment Control No. 15-11301-03003V
v.		
AMBER COAL COMPANY, INC.,	RESPONDENT	Mine No. 3

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
John Wilson Kirk, CPA, Williamson, West Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 18, 1980, a hearing in the above-entitled proceeding was held on June 5, 1980, in Pikeville, Kentucky, 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. 50-55):

> This hearing involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-104 on August 13, 1979, by the Secretary of Labor, alleging a violation of 30 C.F.R. 75.200. The issues in a civil penalty case are whether a violation occurred and, if so, what penalty should be assessed based on the six criteria which are set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
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> The alleged violation in this instance was cited in Order No. 74180, dated July 12, 1978. The order was written under section 104(d)(1) of the Act. The inspector described conditions which showed that the order was appropriately issued under the unwarrantable failure provisions of the Act.

The inspector's testimony adequately supported his allegations that several violations of respondent's roof-control plan had occurred. Section 75.200 requires that each operator of a coal company submit a roof-control plan for his mine and follow its provisions. In this instance, the operator had driven entries and crosscuts for a distance of about 600 feet in such a way that approximately 30 percent of the entries were 22 feet to 24 feet wide, whereas the roof-control plan provides for widths to be no more than 20-feet. The roof-control plan provides for the roof bolts to be separated by distances of 4 feet in each direction but the inspector found that the roof bolts were from 4-1/2 feet to 6 feet apart for approximately 50 percent of the time. Additionally, the inspector found that support of an adequate nature had not been installed where hill seams were located. Consequently, there were at least three violations of the roof-control plan. Since I have found that the violations occurred, the Act requires that a civil penalty be assessed. There are six criteria which must be considered in assessing a civil penalty.

First, there must be consideration as to the size of respondent's business. The operator, at the time these violations occurred on July 12, 1978, was producing 600 tons of clean coal per day on two shifts and employed approximately 13 men on both shifts at that time. By June of 1979, respondent was producing approximately 1,000 tons of clean coal on two shifts and employed from 20 to 30 miners. The operation is a conventional one employing the usual cutting machine, loading machine, scoops, and conveyor belt. Based on those facts, I find that the size of the operation is somewhat above a small-sized operation and that any penalties assesed should be in a moderate range of magnitude.

The next question is whether the payment of penalties would require respondent to discontinue in business. The former Board of Mine Operations Appeals has held that if no testimony is given with respect to the operator's financial condition, a judge may find that payment of penalties would not cause respondent to discontinue in business. Respondent's witnesss in this case and representative is a certified public accountant and I presume that if he had intended to put in financial data that he would have done so. Therefore, I find that payment of penalties would not cause respondent to discontinue in business.

The third criterion to be considered is whether respondent showed a good faith effort to comply once the violations were written. Mr. Taylor, in his summation, has argued that he does not think that respondent showed a good faith effort to achieve compliance. He based that argument somewhat on

the fact that the State inspector had already closed this particular mine because of the existence of a roof fall in the mine and apparently respondent was back in operation while the serious conditions continued to exist. I feel that I should base my findings on what the inspector said in this case and what his findings were. The inspector in this instance seemed to think that the operator had gone about the correction of these problems in an adequate manner and the terminatio of the order was 2 days after it was written. It is indicated that the operator had installed timbers, crossbars, and additional roof bolts. Consequently, I find that the operator did show a good faith effort to achieve compliance.

The fourth criterion to be considered is whether there is an adverse or any history of previous violations. Mr. Taylor has stated that this was the first inspection of respondent's mine and that there did not exist any history of previous violations. Therefore, that criterion does not have to be considered.

The fifth criterion is the gravity of the violation. The evidence on gravity is quite extensive and I can make no finding other than that the violations were very serious. As the inspector pointed out, we are still having a large number of fatalities each year as a result of roof falls. Although, as Mr. Kirk has pointed out in this summation, respondent has had no fatalities in its mine, or no serious accidents, apparently, I can only observe or conclude from the inspector's testimony that perhaps the inspector's action in this instance had the effect of preventing anyone from being injured seriously in this mine.

The conditions as described by the inspector were very serious and there is no doubt in my mind that if these conditions had continued, there is every probability that someone would have been killed by a roof fall. The inspector noted that respondent had cleared a way through a roof fall which already existed and which had made a cavity in the roof 8 feet high. Although the operator had cleared a place through the roof fall for vehicles to travel to the loading point, no support had been put in that roof cavity and another fall occurred during the inspector's examination of the mine. So these conditions that existed in the mine had to be very serious.

Now, Mr. Kirk has pointed out that he knows the operators of the mine. He states that he knows these men are reasonable and he does not think that they would go into a coal mine and work in it, as these men do, and expose themselves to known

hazards. I agree with Mr. Kirk that his observation is absolutely logical. Nevertheless, I have sat in these hearings and heard inspectors tell about men who failed to take the proper safety precautions and I'm just astounded that it occurs. And yet, I've had the operators put on witnesses themselves who corroborate inspectors' statements, that the men who are working underneath roofs actually failed to install timbers and roof bolts just because they are somewhat indifferent or they get a feeling of safety and well being and they just fail to do it. I've had cases in which the same men who failed to take the precautions are killed by roof falls. So the fact that these gentlemen appear to be safety-minded on the surface in everything they do, does not mean that they will always take the same kind of safety precautions in the mine that they ought to. Consequently, since I do not have in this record any evidence from the men who were down there saying that any of the statements made by the inspector are incorrect, I have no choice but to find that there were gross violations of the Act and that the procedures that were being followed were extremely grave.

When it comes to the sixth and final criterion of negligence, I think there can be no finding other than that the violations resulted from a very high degree of negligence constituting gross negligence by the operators because they were deliberately allowing the mine to be driven too wide. They were failing to install additional supports even though they had wide places in entries and crosscuts on a consistent basis, and they had failed to take proper precautions where a roof fall existed.

Since all these criteria indicate one of the worst factual situations I have seen with respect to roof control, I have no choice but to assess what I consider to be a major penalty for an operator of this size. If this were a large company such as Consolidation Coal Company, I would assess $10,000.00, but in view of the size of this operation, I think a penalty of $2,000.00, as recommended by Mr. Taylor, is appropriate in these conditions.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $2,000.00 for the violations of section 75.200 alleged in Order No. 74180 dated July 12, 1978.

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