FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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1 4 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. KENT 79-50 : Assessment Control No. 15-07476-03005
v.		
ISLAND CREEK COAL COMPANY,	Respondent	: Big Creek No. 2 Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
George S. Brooks II, Esq., Lexington, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 21, 1980, as amended, June 2, 1980, a hearing in the above-entitled proceeding was convened on June 12, 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. 105-112):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-50 on August 21, 1979, alleging eight violations of the mandatory health and safety standards by Island Creek Coal Company. A settlement was reached with respect to five of the alleged violations and a motion to dismiss was made in connection with two of the alleged violations. Those matters will be discussed in this decision under the heading of settled issues.
>
> The bench decision that I am rendering at this time is related only to the contested alleged violation of 30 C.F.R. § 75.1100-2(e).

CONTESTED ISSUES

Citation No. 71781, 9-27-78, Section 75.1100-2(e).

Findings. Section 75.1100-2(e) provides that at each permanent electrical installation there should be two portable fire extinguishers of 5-pound capacity or one lo-pound fire extinguisher. Respondent violated section 75.1100-2(e) because at the power center for the belt drive, only one 5-pound fire extinguisher had been provided. The violation was serious because it was in an area where coal float dust may accumulate and where a spark from an electrical wire may occur and cause a fire or explosion. Additionally, the water had been cut off from the section and no rock dust had been stored at the site of the power center. Respondent was negligent in failing to provide a proper fire extinguisher. A good faith effort to achieve rapid compliance was made.

Conclusions. The foregoing findings of fact are based on credibility determinations because the operator's witnesses testified that the fire extinguisher which the inspector had noted in his citation was actually a 9.5-pound fire extinguisher which MSHA accepts as being within the requirement that a lo-pound fire extinguisher be provided. The operator's witness also stated that he advised the inspector that the capacity of the fire extinguisher was a 9.5-pound fire extinguisher but the inspector replied that it was still not a lo-pound fire extinguisher and, therefore, he would write a violation for the operator's failure to have a lO-pound fire extinguisher.

The operator's'witnesses also indicated that it was not the practice of the Purchasing Department to order anything other than lo-pound fire extinguishers for the Big Creek No. 2 Mine.

Other witnesses of the operator have indicated that only 9.5-pound fire extinguishers are used in the Big Creek No. 2 Mine. The inspector, in his rebuttal testimony, stated that he had made notes while in the mine that the fire extinguisher he had observed, and which was the subject of Citation No. 71781, was definitely a 5-pound fire extinguisher. He denied that anyone had pointed out to him that a 9.5-pound fire extinguisher was involved. Additionally, the inspector's testimony was supported by a witness who was a safety committeeman at the time the inspection was made and who accompanied the inspector during his examination on the day the citation was written. The safety committeeman testified

that there had been no discussion of a 9.5-pound fire extinguisher by anyone, that he personally examined the fire extinguisher, and that he is certain that it was a 5-pound fire extinguisher.

I find that the inspector's and the safety committeeman's testimony is more credible than that of the operator in this instance. I base that on the fact that the inspector did make notes at the time he was underground and that there would be no reason for him to fabricate an opinion that the 5-pound fire extinguisher existed, if he had not seen one. Moreover, I can see no reason for the safety committeeman to corroborate the inspector's testimony, if he had not also seen a 5-pound fire extinguisher.

The safety committeeman also stated that the Big Creek No. 2 Mine had originally been supplied with 5-pound fire extinguishers from respondent's Gund Mine and that some of the 5-pound fire extinguishers had been replaced after UMWA personnel had pointed out to respondent that the 5-pound fire extinguishers should be replaced by lo-pound fire extinguishers. I think that the safety committeeman's testimony shows that the Purchasing Department's policy of purchasing only lo-pound fire extinguishers for the No. 2 Mine would not have prevented the transfer of some 5-pound fire extinguishers from the Gund Mine or some other mine to the No. 2 Mine. Five-pound fire extinguishers could, therefore, have existed in the No. 2 Mine despite the fact that the Purchasing Department had ordered only lo-pound fire extinguishers for the Mo. 2 Mine.

One of respondent's witnesses testified that a 9.5-pound fire extinguisher was taken to the Pikeville MSHA Office where the District Manager agreed that, if a 9.5-pound fire extinguisher had, in fact, been posted at the power center, such fire extinguisher would have been within compliance of the regulation requiring lo-pound fire extinguishers. The witness who obtained that fire extinguisher obtained it on the day after the citation was written and it is easily possible that some confusion could have resulted in his taking a different fire extinguisher from the one that existed at the time the citation was written.

One of the issues in the case in addition to the credibility of witnesses is the question of how close a fire extinguisher must be to an electrical installation in order for the location of the fire extinguisher to be "at" a permanent electrical installation within the meaning of section 75.1100-2(e). Mr. Kramer has cited a decision by Judge Cook in a Rushton Mining Company case in which Judge Cook

apparently found that a fire extinguisher located 60 feet from an electrical installation would not be in compliance with the requirement that the fire extinguisher be "at" a given location. I have no reason to disagree with Judge Cook's determination but I do not rest my decision in this case on being required to follow his decision.

Instead, I was impressed with the testimony of one of respondent's witnesses who stated that in order for a fire extinguisher to be effective in extinguishing any fire that might start, the fire extinguisher would have to be used within the first few seconds of the initiation of the fire. All of the fire extinguishers other than the S-pound one cited in the inspector's citation were anywhere from a minimum of 80 feet to over 200 feet from the electrical installation here involved. It appears to me that inasmuch as the fire extinguisher is needed in a matter of seconds in order to be effective, that the safety committeeman's opinion that the fire extinguisher should be within 10 or 15 feet of the electrical installation would be a logical and reasonable distance for the fire extinguisher to be located. Therefore, I find that fire extinguishers 80 feet or more from an electrical installation are excessively distant from the installation and would not qualify as being fire extinguishers "at" a permanent electrical installation within the meaning of the language used in section 75.1100-2(e).

My findings above have considered the criteria of good faith, negligence, and gravity. Mr. Kramer pointed out to me that Government Exhibit No. 4 shows other violations of section 75.1100 but his reference to that exhibit was made primarily to buttress his argument that respondent should have noted the lack of a fire extinguisher in this instance and that respondent had been negligent in failing to do so in other instances because several other violations of section 75.1100 are shown in Exhibit 4. Since there was no real testimony about the other violations, I do not choose to put any great weight on them in making rulings about respondent's' negligence.

The primary reference that I am using with respect to Exhibit 4 is to consider the criterion of history of previous violations in that context. Exhibit 4 shows only one prior violation of section 75.1100-2. It has been my practice to increase a penalty by an appropriate amount when I find in the case before rue that a respondent has violated on prior occasions the same section of the regulations that I am ruling upon. Although several other violations of sections 75.1100 and 75.1101 are shown in Exhibit 4, those violations are either alleged on the same day as the instant violation,

or on the next day after, or 2 days after, the instant citation was written. Therefore, I shall consider only one violation as constituting a history of previous violations. Whatever penalty is assessed in this case should be increased by $25.00 under the criterion of history of previous violations.

The parties have stipulated as to two other criteria. They have stipulated that respondent is a large operator and that the payment of penalties would not affect the ability of Island Creek to continue in business. Inasmuch as a large operator is involved and in view of the fact that the violation was serious and that there was a considerable amount of negligence, I find that a penalty of $450.00 is appropriate and that penalty should be increased by $25.00 to $475.00 under the criterion of history of previous violations.

One point that should have been mentioned in connection with the assessment of the penalty is the fact that one of the operator's witnesses did point out that there was an attendant in this area and I am using that as a mitigating factor in declining to assess the penalty that the government's counsel has recommended.

SETTLED ISSUES

Counsel for the Secretary of Labor moved at the hearing that I approve a settlement agreement reached by the parties with respect to the remaining seven violations alleged in the Secretary's Proposal for Assessment of Civil Penalty. As to five of those seven alleged violations, respondent has agreed to pay the full amount proposed by the Assessment Office and MSHA has decided to vacate the citations alleging the remaining two violations. Citation No. 71791 alleged that respondent had violated section 75.200 by failing to install additional roof support where the roof had become loose around previously installed roof bolts. The Assessment Office considered that violation to be serious, to involve a low degree of negligence, and to warrant a penalty of $66 which respondent has agreed to pay in full.

Citation No. 71792 alleged another violation of section 75.200 because respondent had failed to install additional roof support where the roof had become somewhat hazardous around previously installed roof bolts. The Assessment Office considered that violation to be more serious and to involve more negligence than the violation of section 75.200 alleged in Citation No. 71791 discussed above, and proposed a penalty of $98 which respondent has agreed to pay.

Citation No. 71793 alleged a violation of section 75.202 because the operator had failed to take down or support some ribs which had become loose along the No. 2 conveyor belt. The Assessment Office considered that alleged violation to be serious, to involve a moderate degree of ordinary negligence, and proposed a penalty of $98 which respondent has agreed to pay.

Citation No. 71796 alleged a violation of section 75.801 because the operator had failed to use a conduit to insulate a high-voltage transmission line in two locations. The Assessment Office considered that alleged violation to be serious, to involve ordinary negligence, and to warrant a penalty of $84 which respondent has agreed to pay.

Citation No. 71058 alleged a violation of section 75.200 because additional roof support had not been installed at a place where the roof was sloughing in two places where miners were required to travel. The Assessment Office considered that alleged violation to be serious, to involve ordinary negligence, to indicate lack of a good faith effort to achieve rapid compliance, and to warrant a penalty of $240 which respondent has agreed to pay in full. The finding of a lack-of-good-faith abatement is based on the fact that the inspector issued a withdrawal order under section 104(b) of the Act before the alleged violation was abated to his satisfaction.

There are no data available to me to show that the civil penalties proposed by the Assessment Office with respect to the five violations discussed above were incorrectly determined under the six criteria. Therefore, I find that respondent's agreement to pay the full amounts proposed by the Assessment Office should be approved.

The Secretary's counsel stated that MSHA had agreed to vacate two of the citations alleging violations. The first one to be vacated is Citation No. 71795 which alleged a violation of section 75.1722 because a guard was not provided on the ripper head that would protect persons from accidental contact when the machine was trammed from place to place in the mine in the event the ripper head should become energized. Respondent contests the fact that the ripper head could, in fact, be contacted by a person while the machine was being trammed. The inspector who wrote Citation No. 71795 was involved in a serious auto accident and was unable to testify in support of Citation No. 71795. In such circumstances, the Secretary's counsel stated that he would accept respondent's version of the facts arid that the citation would be vacated rather than have the case continued until such time as the inspector might be able to testify (Tr. 4).

The second citation to be vacated is No. 71766 which alleged a violation of section 75.605 because a restraining clamp was not provided on the trailing cable supplying power to the continuous-mining machine in that the circuit breaker plug clamp was loose and was not provided with a conduit at the power distribution center. The Secretary's counsel stated that his review of section 75.605 had caused him to conclude that the language of the citation did not properly show a violation of section 75.605 and that the citation is being vacated (Tr. 5). I find that adequate reasons have been given for the decisions to vacate two of the citations alleging violations of sections 75.1722 and 75.605. The order accompanying this decision will dismiss the Secretary's Proposal for Assessment of Civil Penalty to the extent that penalties are‘sought for those two alleged violations.

Summary of Assessments and Conclusions

(1) Based on the findings of fact hereinbefore given and all the evidence of record, respondent should be required to pay civil penalties as to the single contested violation and should pay penalties pursuant to the settlement agreement as set forth in the tabulation below:

Citation No. 71781	9/27/78	§ 75.1100-2(e) ...	(Contested) ...	$ 475.00
Citation No. 71791	9/28/78	§ 75.200	(Settled)	66.00
Citation No. 71792	10/2/78	§ 75.200	(Settled)	98.00
Citation No. 71793	10/2/78	§ 75.202	(Settled)	98.00
Citation No. 71796	10/3/78	§ 75.801	(Settled)	84.00
Citation No. 71058	10/6/78	§ 75.200	(Settled)	240.00

Total Contested and Settled Penalties in This Proceeding . . $1,061.00

(2) The Proposal for Assessment of Civil Penalty should be dismissed to the extent that it alleged violations of sections 75.1722 and 75.605 in Citation Nos. 71795 and 71766, respectively, 'because HSHA has vacated those two citations.

(3) Respondent, as the operator of the Big Creek No. 2 Mine, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement and the decision on the contested issues, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $1,061.00 which are allocated to the respective violations as set forth in paragraph (1) above.

(C) The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 79-50 is dismissed to the extent described in paragraph (2) above.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-622s)

Distribution:

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