

CCASE:
SOL (MSHA) V. PYRO MINING
DDATE:
19801017
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding	
	PETITIONER	Docket Nos.	Assessment Control Nos.
		KENT 80-39	15-10815-03020
		KENT 80-85	15-10815-03023
v.		KENT 80-128	15-10815-03024
		KENT 80-143	15-10815-03025
PYRO MINING COMPANY,	RESPONDENT	Wheatcroft Mine	
		KENT 80-86	15-11408-03020
		KENT 80-129	15-11408-03021
		KENT 80-144	15-11408-03022
		KENT 80-163	15-11408-03023
		KENT 80-164	15-11408-03024 V
		KENT 80-165	15-11408-03025

Pride Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
H. Michael McDowell, Safety Director for Pyro Mining
Company, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a written notice of hearing dated July 28, 1980,
a hearing was held in the above-entitled proceeding on September
17, 1980, in Evansville, Indiana, under section 105(d) of the
Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of
evidence with respect to the contested issues, I rendered the
bench decision which is set forth below (Tr. 89-95):

As was indicated at the beginning of this hearing, only one alleged violation has been contested and that is related to the Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-164.

The issues raised in each civil penalty case are whether a violation occurred and, if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Act. The first question that has to be answered is whether a violation occurred. I shall make some findings of fact on which my decision will be based. Those findings are set forth in the following numbered paragraphs.

Findings of Fact

1. An inspector on September 17, 1979, went into the Pride Mine of Pyro Mining Company for the purpose of making a regular inspection. On his way into the mine, he was accompanied by the safety director for the Pride Mine. During the trip into the mine, the inspector traveled down the supply road. At that time, he noticed that a number of posts, which should normally have been installed under crossbars along the supply road, had been knocked down. He determined that a sufficient number had been knocked down to require the citing of a violation of a mandatory safety standard.

2. The inspector issued Order No. 798942 dated September 17, 1979, citing a violation of 30 C.F.R. 75.202. The order alleged that 17 supports had been knocked out from under crossbars and that the knocked-down supports extended for 15 crosscuts along a total distance of 2,100 feet. Later it was indicated that the probable distance was 900 feet because there were 15 crosscuts and each crosscut was 60 feet in length.

3. The inspector's order was terminated within a short period of time, the order having been issued at 8:30 a.m. and the termination having been issued at 10:20 a.m. The timbers had been left lying in the supply road and all that was required for abatement was that they be reset. Eight miners were used for the purpose of resetting the timbers.

4. Section 75.202 provides in pertinent part, "[e]xcept in the case of recovery work, supports knocked out shall be replaced promptly."

5. Respondent's roof-control plan provides in Safety Precaution No. 31 that "[c]rossbars and railbars shall be

~3008

supported by posts; however, if conditions permit, crossbars or railbars installed inby the dumping point shall be bolted or strapped to the roof and legs will be placed under the bolted bars when the dumping point is moved inby the bolted bars." The testimony of both the inspector and the safety director indicates that the company does not have to install the crossbars except when the company feels that the conditions require the installation of crossbars. Both the company's representative and the Secretary's attorney agree that once the crossbars are installed, if posts are knocked down, they should be replaced.

I believe that those paragraphs constitute the primary facts to be considered in this case. I think that the facts support without any doubt that there was a violation of section 75.202 because supports had been knocked down and they had not been promptly replaced. Having found that a violation occurred, it is necessary now to consider the six criteria. There were stipulations by the parties with respect to some of the criteria.

First of all, it was stipulated that respondent is subject to the provisions of the 1977 Act and that I have jurisdiction to hear the case. It was stipulated that respondent operates the Pride Mine and that the inspector was a duly authorized representative of the Secretary of Labor when he issued the order here involved. It was stipulated that the order was issued under section 104(d)(2) of the Act.

The first criterion is the size of the operator; and it was stipulated that respondent is a large operator. One of the criteria is whether the payment of penalties would cause respondent to discontinue in business. It was stipulated that a penalty assessed in this case would not adversely affect respondent's ability to continue in business. It was also stipulated that the company demonstrated a normal good faith effort to achieve rapid compliance after the violation was cited.

As to the criterion of history of previous violations, there was introduced as Exhibit 1, a computer printout showing that in all of respondent's mines, there have been 22 previous violations of section 75.202. For the Pride Mine, which is the one here involved, there have been three previous violations in the 24-month preceding the violation here involved. As the Secretary's counsel noted, however, all three of those occurred between March 1979 and September 11, 1979. Those violations establish an unfavorable trend in violations of section 75.202; therefore, any penalty assessed in this case should be increased by \$150.00 because of the adverse history of previous violations.

The remaining criteria of gravity and negligence are the ones that generally determine whether a penalty should be large or in a low range of magnitude. Of course, anytime that a large operator is involved, the penalty should be larger than if only a very small company is involved. The gravity of the violation in this instance was only moderate because there were a number of extenuating circumstances. For example, respondent's safety director testified that respondent had made a number of safety installations in the supply road to increase its security because it was anticipated that the road would be used for a considerable period of time and the company wanted it to be as safe as it could be made. Consequently, not only had some conventional roof bolts been installed in the travelway on a 5-foot spacing plan, but some resin roof bolts had also been placed in the haulageway. In addition, some 7-foot conventional bolts had been placed at strategic points, such as intersections, for improving the stability of the roof.

Finally, the company had installed crossbars on not more than 4-foot centers through the entire 900-foot area here involved. When it is considered that out of the total of 450 posts that would have been situated in this 900-foot area, only 17 were missing, and that there were a large number of roof bolts in addition, there was not a great likelihood that a roof fall would have occurred solely because of 17 posts having been knocked out.

As to the criterion of negligence, I think that ordinary negligence was involved because, so far as respondent's safety director was able to determine, the supports had been knocked out on the first shift of the week which began at midnight on Sunday. At that time, the equipment necessary to operate an entire section had been moved down the supply road which was only 14 to 16 feet wide. There was close tolerance of equipment being moved through the haulageway and some likelihood of hitting timbers was prevalent. Additionally, a continuous-mining machine had been used in the supply road to increase the height by taking out some of the bottom or floor and all of these activities had occurred only a short time prior to the inspection of September 17.

Nevertheless, regardless of the length of time between the knocking out of the timbers and their discovery by the inspector, a supervisor would have been in charge of the movement of the equipment or any work that took place because this was the primary way to get in and out of the mine. Consequently, some supervisory person was present and should have seen the timbers when they were knocked down. Safety Precaution No. 31 requires that timbers be replaced promptly,

~3010

which means as soon as they are knocked down they are supposed to be replaced. Consequently, there was at least ordinary negligence in respondent's failure to replace the posts. Although the seriousness of the violation was not great, I must take into consideration the fact that several of these posts, as many as four or five, were in some places consecutively knocked down which had the effect of possibly weakening the roof in a given area. Four or five posts knocked down in a single area should have been more noticeable than a single post or posts knocked down out of sequence.

By way of summary, respondent is a large operator and there are previous violations of this same section. There was a moderate degree of seriousness, but the violation involves a roof-control problem which is very important in ensuring safety to the miners. The circumstances show that the supervisor in charge had ignored the fact that these posts had been knocked down and had not been replaced. Considering all of these factors and mitigating circumstances, I find that a penalty of \$500.00 is warranted, to which \$150.00 should be added under the criterion of history of previous violations, making a total penalty of \$650.00 for this violation of section 75.202.

Settlement

This consolidated proceeding involves a total of 57 alleged violations of the mandatory health and safety standards for which civil penalties are sought in 10 Proposals for Assessment of Civil Penalty. A settlement agreements was entered into by the parties with respect to all of the Proposals except for the Proposal filed in Docket No. KENT 80-164 which is the subject of the bench decision set forth above. Under the settlement agreement, respondent has agreed to pay the full amount proposed by the Assessment Office with respect to the remaining 56 alleged violations.

When a respondent agrees to pay the full amounts proposed by the Assessment Office, it becomes necessary to consider whether the Assessment Office reasonably evaluated all of the six criteria set forth in section 110(i) of the Act when it arrived at the penalties proposed for each of the violations involved in the settlement agreement. As I have already indicated in my bench decision, the parties' stipulations cover some of the criteria. The Assessment Office correctly considered respondent to be a large operator and the Assessment Office appropriately gave respondent credit for having shown a normal, or better than normal, good faith effort to achieve rapid compliance. It has also been stipulated that payment of penalties would not cause respondent to discontinue in business.

The Assessment Office, pursuant to 30 C.F.R. 100.3, assigned from four to 10 penalty points under the criterion of history of previous violations. A computer printout was introduced in the record as Exhibit 1. That

~3011

exhibit lists respondent's previous violations for which penalties have been paid. While Exhibit 1 shows in a few instances that the Assessment Office should have assigned more penalty points than it did for some alleged violations, Exhibit 1 also shows that the Assessment Office assigned, in some instances, more penalty points than are supported by the data in Exhibit 1. A balancing of the overages and underages in the Assessment Office's assignment of penalty points under the criterion of history of previous violations, when compared with the data in Exhibit 1, gives a result which enables me to find that the Assessment Office reasonably evaluated respondent's history of previous violations with respect to the alleged violations involved in the settlement agreement.

I have examined the Assessment Office's assignment of penalty points under the criteria of negligence and gravity and I find that they are also reasonable and should be accepted for purposes of the settlement agreement.

It should be noted that the Assessment Office considered that it had made an error in listing one of the alleged violations in Docket No. KENT 80-86 with respect to Citation No. 800321 dated October 2, 1979, which shows a violation of section 75.523. As to that particular alleged violation, the Proposed Assessment in Docket No. KENT 80-86 indicates that the Assessment Office proposed a zero penalty. Therefore, in the listing of the amounts to be paid under the settlement agreement in paragraph (B) of the order accompanying this decision, the alleged violation of section 75.523 in Docket No. KENT 80-86 is shown to have a zero penalty because the Assessment Office believes that no violation of section 75.523 occurred. It is necessary that I show that particular violation in my list of settlement penalties so that it will not appear that I have made an error in considering all of the violations alleged by the Proposals for Assessment of Civil Penalty in this proceeding.

Since two of respondent's safety directors were present at the hearing, I discussed with them some matters which needed clarification or emphasis. For example, although the inspector refers to the fact that roof bolts should be no more than 2-1/2 feet from the ribs in Citation No. 798220 in Docket No. KENT 80-129, in Docket No. KENT 80-163, there are references in Citation Nos. 799818 and 800865 to the fact that roof bolts should be no more than 3 feet from the ribs. It was agreed at the hearing that the roof-control plan requires bolts to be no more than 3 feet from the ribs. The reference to 2-1/2 feet was not in accordance with respondent's roof-control plan because the plan has not been amended at any time to change the distance from 3 to 2-1/2 feet (Tr. 5).

One aspect of the settlement which gives me some concern is that there are nine alleged violations of section 75.200 among the 56 violations involved in the settled cases. The Assessment Office assigned some rather low penalties for the violations of section 75.200. The only reason that I have agreed to approve a settlement involving nine roof-control violations for which the

Assessment Office has proposed low penalties is that all of the violations are relatively nonserious because most of them involve a failure

~3012

to have proper spacing for just four or five roof bolts. Inasmuch as a small area was involved in the alleged violations, it does not appear that the failure to comply with the roof-control plan would have exposed the miners to any serious hazard. Nevertheless, I emphasized at the hearing that I was disturbed by the fact that nine violations of the roof-control plan were involved in this proceeding (Tr. 6).

I also pointed out to respondent's safety directors that I felt five different violations with respect to the cutting machine indicated that the miners had not been as careful as they should have been in operating the cutting machine and in performing work on it (Tr. 7). I also expressed concern at the hearing about the fact that the settlement cases involved repetitious violations of section 75.316 for respondent's failure to ensure that permanent stoppings were promptly constructed within three crosscuts of the working face. Respondent's safety directors indicated that they would increase their efforts to avoid the repetitious violations which were pointed out to them at the hearing.

Aside from the matters discussed above, I have found no reasons to disagree with the assessments proposed by the Assessment Office for the 56 violations which were the subject of the settlement agreements. Therefore, I find that the motion for approval of settlement should be granted and that the settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement with respect to nine of the 10 Proposals for Assessment of Civil Penalty is granted and the settlement agreement is approved.

(B) Pursuant to the settlement agreement and in accordance with my bench decision in the contested case in Docket No. KENT 80-164, supra, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling \$5,942 which are allocated to the respective dockets and violations as follows:

Contested Case

Docket No. KENT 80-164

Order No. 798942	9/17/79	75.202.....	\$	650.00
------------------	---------	-------------	----	--------

Settlement Cases

Docket No. KENT 80-39

Citation No. 798764	7/23/79	75.316.....	\$	150.00
Citation No. 797210	7/30/79	75.313-1.....		195.00
Citation No. 798928	8/27/79	75.200.....		170.00
Citation No. 798929	8/27/79	75.503.....		72.00

~3013

Citation No. 797219	8/30/79	75.1107-16(b).....	106.00
Citation No. 798600	9/6/79	77.400(c).....	180.00

Total Settlement Penalties in Docket No. KENT 80-39. \$ 873.00

Docket No. KENT 80-85

Citation No. 798247	9/10/79	75.523.....	\$ 150.00
Citation No. 798249	9/11/79	75.503.....	78.00
Citation No. 798250	9/11/79	75.1107-16.....	130.00
Citation No. 798255	9/17/79	75.503.....	90.00
Citation No. 799789	9/25/79	75.1722(b).....	170.00
Citation No. 799790	9/25/79	75.1722(a).....	140.00
Citation No. 799792	9/25/79	75.1103-8(b).....	72.00
Citation No. 799798	9/29/79	75.401.....	122.00

Total Settlement Penalties in Docket No. KENT 80-85. \$ 952.00

Docket No. KENT 80-86

Citation No. 798217	9/11/79	75.1401-1.....	\$ 160.00
Citation No. 799151	9/12/79	75.302-1.....	98.00
Citation No. 799149	9/13/79	75.503.....	40.00
Citation No. 799154	9/14/79	75.503.....	48.00
Citation No. 799156	9/14/79	75.503.....	48.00
Citation No. 798943	9/17/79	75.1722.....	106.00
Citation No. 800138	10/2/79	75.503.....	44.00
Citation No. 800139	10/2/79	75.503.....	44.00
Citation No. 800140	10/2/79	75.1107-16(b).....	48.00
Citation No. 800321	10/2/79	75.523.....	0.00(FOOTNOTE 1)
Citation No. 800323	10/5/79	75.200.....	90.00
Citation No. 800324	10/5/79	75.604(b).....	84.00
Citation No. 800326	10/5/79	75.1105.....	84.00
Citation No. 800343	10/12/79	75.1101-1.....	48.00

Total Settlement Penalties in Docket No. KENT 80-86. \$ 942.00

Docket No. KENT 80-128

Citation No. 800307	10/10/79	75.1722(b).....	\$ 140.00
---------------------	----------	-----------------	-----------

Docket No. KENT 80-129

Citation No. 9948661	8/30/79	70.250.....	\$ 36.00
Citation No. 798220	9/11/79	75.200.....	98.00
Citation No. 798961	9/11/79	75.200.....	98.00

~3014

Citation No. 799150	9/12/79	75.200.....	56.00
Citation No. 800345	10/15/79	75.316.....	72.00
Citation No. 800346	10/15/79	75.316.....	84.00
Citation No. 799809	10/18/79	75.1722(a).....	106.00
Citation No. 800352	10/25/79	75.1400-2.....	38.00

Total Settlement Penalties in Docket No. KENT 80-129 \$ 588.00

Docket No. KENT 80-143

Citation No. 798336	7/19/79	75.503.....	\$ 48.00
Citation No. 799125	8/14/79	75.403.....	60.00
Citation No. 799921	11/15/79	75.313-1.....	150.00

Total Settlement Penalties in Docket No. KENT 80-143 \$ 258.00

Docket No. KENT 80-144

Citation No. 9948716	10/4/79	70.250.....	\$ 160.00
Citation No. 801121	11/5/79	75.316.....	195.00

Total Settlement Penalties in Docket No. KENT 80-144 \$ 355.00

Docket No. KENT 80-163

Citation No. 800342	10/12/79	75.1100-2(b).....	\$ 52.00
Citation No. 800353	10/25/79	77.400.....	84.00
Citation No. 799818	11/2/79	75.200.....	106.00
Citation No. 800865	11/9/79	75.200.....	122.00
Citation No. 800866	11/9/79	75.1308.....	60.00
Citation No. 800874	11/19/79	75.200.....	114.00
Citation No. 800875	11/19/79	75.1722(a).....	66.00
Citation No. 800877	11/19/79	75.1722(b).....	106.00

Total Settlement Penalties in Docket No. KENT 80-163 \$ 710.00

Docket No. KENT 80-165

Citation No. 800344	10/15/79	75.200.....	\$ 90.00
Citation No. 799808	10/18/79	75.200.....	90.00
Citation No. 800872	11/19/79	75.400.....	60.00
Citation No. 800873	11/19/79	75.316.....	48.00
Citation No. 800855	11/30/79	75.1306.....	72.00
Citation No. 799492	12/4/79	75.313-1.....	114.00

Total Settlement Penalties in Docket No. KENT 80-165 \$ 474.00

~3015

Total Settlement Penalties in This Proceeding.....	\$5,292.00
Total Contested and Settlement Penalties in	
This Proceeding.....	\$5,942.00

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

~FOOTNOTE_ONE

1 This alleged violation was included in Docket No. KENT 80-86 by the Assessment Office in error and no penalty was proposed for the violation (Tr. 12).