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SOL (MSHA) V. CLINCHFIELD COAL
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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),		Civil Penalty Proceeding
		Docket Nos. Assessment Control Nos.
	PETITIONER	VA 79-66 44-00281-03017 V
		VA 79-107 44-00281-03021
v.		
		Moss No. 2 Mine
CLINCHFIELD COAL COMPANY,		
	RESPONDENT	

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Gary W. Callahan, Esq. and Donald R. Johnson, Esq., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 29, 1980, a hearing in the above-entitled proceeding was held on May 1 and 2, 1980, in Abingdon, Virginia, 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 decisions which are set forth below:

Docket No. VA 79-66 (Tr. 72-77)

This consolidated proceeding involves two Petitions for Assessment of Civil Penalty filed in Docket Nos. VA 79-66 and VA 79-107 on July 30, 1979, and September 26, 1979, respectively. First I shall deal only with the single violation which was alleged in Docket No. VA 79-66. In that docket, MSHA's Petition alleged a violation of section 75.200 based on Order No. 678352 dated February 12, 1979.

In a civil penalty proceeding, the issues are whether or not a violation occurred and, if so, what penalty should be assessed under the six criteria set forth in section 110(i) of

the Act. As to the question of whether a violation occurred, the inspector's testimony shows that he believed that a violation of section 75.200 had occurred because a permanent stopping had been constructed in a crosscut to the left of the No. 1 entry in the 1 West 025 Section of Clinchfield's Moss No. 2 Mine. The inspector believed that the men who constructed the stopping had gone out from under supported roof to do so. According to the inspector's testimony, there was a cavity in the crosscut approximately 17 feet in length. The inspector said that, insofar as he could tell, there was about a foot between the 17-foot cavity and the stopping. There were three roof bolts between the stopping and the cavity so that a 1-foot protected area existed along the stopping. The inspector believed that the men who constructed the stopping would necessarily have had to have been under the unsupported area to construct the stopping. The inspector did not think that the men could have bent over and picked up cinder blocks and stacked them while remaining within the protected 12-inch area.

The inspector's conclusion that the stopping was constructed by men who worked under unsupported roof is based on his examination of the site without his actually having seen anyone working there and without his actually having gone up close to the stopping. The location of the stopping, its proximity to the cavity, and the spacing of the roof bolts are shown on Exhibits 10 and B. The inspector stated that his measurement of the 17-foot cavity was made by tying a rock to a tape and throwing the tape and rock across the area under the cavity. His estimate as to how far the stopping was from the edge of the cavity was based on a visual examination made by the inspector while he was standing in the No. 1 entry at a point which, according to his testimony, would have been at least 17 feet from the stopping which had been constructed. Therefore, the inspector based everything that was stated in his Order No. 678352 on conjecture and on facts that the company has presented witnesses to rebut.

The company presented two witnesses who were the men who constructed the stopping. Their testimony is almost identical despite the fact, as Mr. Callahan pointed out, that they were sequestered during the testimony of the inspector and of each other. As Mr. Callahan also pointed out, the company has done all it can do to show that it feels that it was improperly cited for this particular violation. The testimony of the two men who constructed the stopping differed primarily in the fact that Mr. Salyer believed that the cavity in the crosscut was smaller than Mr. Fields thought it was. Otherwise, their testimony is identical in that both of them stated that they were told by their foreman to construct the stopping and to do

it safely. They are both members of a self-rescue team and they are both skilled in checking roof conditions.

It was their testimony that the only place that they saw in the crosscut that they considered hazardous was an area of from 3 to 4 feet in diameter or length. It is their testimony that they checked the roof bolt close to the cavity and found that it was 48 inches long and they believed that it was well anchored. They then loaded cinder blocks for constructing the stopping on a scoop which Mr. Salyer estimated to be about 25 feet long. They then drove the scoop completely under the cavity so that the bucket containing the cinder blocks was on the far end or front end of the scoop. The operator of the scoop remained on the rear end of the scoop but he was not under the cavity. According to their testimony, they had a protected area of from 4 to 6 feet within which to build the stopping. The protected area extended from the point where the bucket ended to the line along which the stopping was constructed. They say that they, at no time, were under unsupported roof. They also say that the roof bolts that they visually checked appeared to be sound, except for one bolt inside the cavity area under which they did not travel.

As both Mr. Cohen and Mr. Callahan have indicated, the case goes off on a question of credibility. I do not think credibility is necessarily something which, if decided in favor of Clinchfield's witnesses, means that the inspector was improperly concerned about the conditions which he observed. The inspector was dealing with an area which he believed to be hazardous and under which he did not wish to travel. I can respect his reasons for feeling that it was a hazardous area. Under those conditions, I think that he properly had additional support installed before any other work was done. Nevertheless, when I am confronted with two witnesses who say that they were there in person and who describe almost exactly, without contradiction between them, what was actually done, I think that the preponderance of the evidence shows that the men who constructed the stopping did not go under unsupported roof to construct the stopping.

In his testimony, the inspector alleged that there was a violation of section 75.200. The sentence in section 75.200, to which the inspector referred, states, "[t]he 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." What I am further required to consider is whether the inspector alleged the violation of section 75.200 by what is shown in his Order No. 678352. While the inspector testified here

this morning that the above-quoted portion of section 75.200 was violated, in his order, he stated "that the roof control plan for this mine was not being complied with on the 1 West 025 section in that a permanent stopping had been erected 17 feet inby any supported roof in the 3rd connecting crosscut outby the face of the No. 1 entry."

The ultimate decision as to whether a violation of section 75.200 occurred should be made on the basis of the language used by the inspector in his order. In the order, the inspector simply alleged a violation of the roof-control plan. In support of the violation, the inspector cited a provision in the roof-control plan on page 5, paragraph 3(c), which states that only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed (Exh. 3). Since the witnesses for Clinchfield have stated that they did not go beyond the permanent supports to install the stopping, I do not think there was a violation of paragraph 3(c) of the roof-control plan. I find that the testimony given by the two men who built the stopping preponderates in this instance. Therefore, I find that the violation of section 75.200 alleged in Order No. 678352 did not occur. The order accompanying this decision will dismiss the Petition for Assessment of Civil Penalty in Docket No. VA 79-66.

Docket No. VA 79-107 (Tr. 84-93)

The Petition for Assessment of Civil Penalty in Docket No. VA 79-107 was filed on September 26, 1979, and alleged that two violations had occurred. One of the alleged violations was of 30 C.F.R. 75.1101-15(d). With respect to that particular alleged violation, the parties entered into a settlement agreement which was placed in the record yesterday and about which I shall make some further comments when this decision is issued in final written form.

This bench decision is related to the other violation alleged in Docket No. VA 79-107, which is an alleged violation of section 75.1722(a). I have already stated in the other bench decision above what the issues are in a civil penalty case.

The first consideration is whether any violation has occurred. The inspector's citation here involved is No. 680970 which was issued on May 29, 1979, at 6:00 p.m. The inspector actually alleges three different violations of section 75.1722(a) but the Petition for Assessment of Civil Penalty seeks a penalty for only one alleged violation of section

75.1722(a). Consequently, when I assess the penalty in this instance I shall arrive at a single penalty after considering all three of the alleged violations.

I shall make some findings of fact which will show what conditions existed with respect to each of the alleged violations. My findings of fact will be given below in enumerated paragraphs.

1. The inspector first cited a violation with respect to a drive chain and in that instance he said that a part of the guard was still on the drive chain at the time that he examined it and it was his belief that it would have been possible for someone to have caught his hand in the top of the sprocket as well as at the bottom where the guard had been cut away.

2. The second violation alleged by the inspector was that the sprocket at the rock pick on the feeder had not been guarded. Although the chain which would drive the sprocket wheel here involved was not on the sprocket wheel, there was a cylinder beneath the sprocket which turned when coal passed beneath it. The result was that the turning of the cylinder caused the sprocket wheel to turn.

The inspector believed that it would have been possible for someone to have caught his hand or arm in the sprocket as it was being turned by this moving coal, and he had good reason to think so, because he said that the area around the sprocket wheel was uneven and he himself slipped and fell toward this sprocket. It caused him to realize that it was a dangerous area.

3. The third violation alleged by the inspector was in connection with the tram chain and sprocket wheels which operate only when the feeder is being trammed to a new location. There was no guard at all on this tram chain, but it was not in motion at the time that the inspector examined the feeder.

He could only assume that the machine had been trammed without the guard having been on it. He saw the guard some 300 feet outby the place where the feeder was then situated and he said that the condition of the teeth on the sprocket wheel made him feel that the feeder had been trammed recently and that as far as he was concerned the guard was not on at the time it was moved. That conclusion was, of course, an assumption on his part.

4. Respondent's chief electrician at the present time, and who was assistant chief electrician on May 29, 1979, gave

some testimony with respect to all three of these alleged violations. With respect to the chain drive and guard on the feeder, the chief electrician said that he had examined them on May 29, and while a portion of the guard was not in place, he felt that the remainder served as an adequate guard because he did not think that anyone would have been caught in it. Therefore, he would not have made any effort to change that guard if it had not been cited by the inspector. After it was cited by the inspector, however, they did install a guard completely enclosing the drive chain.

5. As to the rock pick, the chief electrician testified that the guard for that particular item had been bent and that he had instructed his miners to take that guard off and send it to the shop so as to have it either repaired or to have a new one made. Those instructions were being carried out at the very time that the rock-pick sprocket was cited by the inspector. The chief electrician also expressed an opinion that it would not have been likely for anyone to be hurt by this particular sprocket wheel because he said that at least half of it is protected, that is, on the outer side of the sprocket, there is a speed reducer which would tend to keep anyone from getting completely into the teeth of the sprocket wheel.

6. With respect to the guard on the tram chain, the chief electrician said that the mine superintendent had called him on May 29, on the day shift and had told him that there was no guard on that tram chain. The response of the chief electrician to that notification was that the pump should be disconnected which operates the tram so that the tram could not be moved until a guard could be put on it. The superintendent had the pump taken off. Therefore, the chief electrician says that the lack of a guard on the tram chain at the time that it was cited by the inspector could not have been a hazard to anyone.

Additionally, the chief electrician says that the feeder cannot be pulled around by any other vehicle, such as a scoop, because the track on which the feeder sits will not move unless everything is disconnected at the tram chain and that they normally will not try to move the feeder except under its own power.

I think that those are the primary facts that should be considered in connection with each of these alleged violations. I find that the violation alleged by the inspector with respect to the guard on the chain drive occurred because the inspector, I believe, looked at this with great care and the chief electrician agreed that it might be possible for someone to have gotten

hurt if he had fallen completely against this guard where it was not entirely in place. So, while the hazard may not have been as great as it would have been if the guard had been lacking entirely, there was still a violation of section 75.1722(a).

In connection with the rock pick, Mr. Johnson, the attorney for Clinchfield, has argued that no violation occurred at all and he bases that primarily on a contention that the chain on this particular sprocket wheel is removed and does not operate because the company has found it unnecessary to break up the coal coming from a continuous-mining machine.

Since the chain had been disconnected, it is Mr. Johnson's feeling that it is a type of wheel that does not move except when coal moves the drum underneath it. Inasmuch as it is not operated under power, Mr. Johnson believes that it does not need guarding or at least is not hazardous. I find that that particular argument is not well taken because the inspector himself testified that he practically fell into it.

Therefore, I find that the violation of section 75.1722(a) occurred here also. I particularly would like to point out, in this connection, that respondent itself recognized that this guard should be on this piece of equipment and a guard was in the process of being made or repaired when the citation was written. So, I think that respondent achnowledged that the guard does need to be installed on the feeder.

Finally, with respect to the guard for the tramming device on the feeder, obviously that was a violation of section 75.1722(a) because respondent was having it repaired and replaced at the time the citation was written and the superintendent himself had been the one who noticed that it was missing and who recommended or ordered that it be replaced.

Having found a violation of section 75.1722(a), I now have to assess a penalty by considering all of the six criteria. It was stipulated yesterday on the first day of the hearing that respondent is subject to the jurisdiction of the Commission and subject to the Federal Mine Safety and Health Act of 1977.

It was stipulated that respondent is a large operator and a member of the Pittston Coal Group. It was stipulated that Moss No. 2 Mine is fairly large and has 250 employees. It was also stipulated that payment of a reasonable penalty would not affect respondent's ability to continue in business.

That leaves for consideration the gravity and negligence associated with the violations. I find that the violations

were all moderately serious except the one at the rock pick. The one at the chain drive was partially guarded. The lack of a guard at the tram would not have been a hazard to anyone because the feeder could not have been trammed at the time the citation was written.

The violation at the rock pick was serious because the inspector came close to falling against the sprocket. The lack of a guard would not, by itself, have been serious if the conditions near the rock pick had not contributed to producing a possible injury. The foregoing conclusion is based on the existence of several hazardous conditions. There was an incline at the rock pick as well as water and mud in the area. There were enough accumulations along the rib that a person walking by the rock pick was forced toward the unguarded sprocket. Therefore, I find that the lack of a guard at the rock pick should be classified as serious and that the other two guarding deficiencies should be classified as moderately serious. As to the criterion of negligence, the fact that respondent disconnected and made inoperable the tram chain supports a finding of no negligence with respect to that violation because the lack of a guard had been found by the superintendent and the tram chain had been disengaged so that it could not be operated.

In connection with the guard at the drive chain, the chief electrician had examined that one and he reached a conclusion that it was satisfactory and did not need additional work. There was no negligence because there was only a difference of opinion between two people as to what was adequate or not adequate.

As to the rock pick, I think that there was negligence of a fairly high degree because the area was slippery and the guard had been taken off and nothing had been done to keep a person from slipping against the sprocket at the time the citation was written.

As to the criterion of whether there was a good faith effort to achieve rapid compliance, the inspector said that a good faith effort had been made to achieve compliance. The testimony shows that respondent was in the process of repairing two of the guards at the time they were cited and respondent very rapidly fixed the third one and had it installed before the inspector returned to the mine the next day. Therefore, respondent demonstrated an extraordinary effort to achieve rapid compliance in connection with the three guards.

Finally, consideration must be given to the criterion of history of previous violations and that information is

shown in Exhibit No. 1 in this proceeding. I have examined the exhibit and find that respondent had eight violations of section 75.1722 in 1974, one in 1975, one in 1976, 11 in 1977, three in 1978, and one in 1979, by January 9, 1979.

It has been my practice to increase a penalty otherwise assessable under the other five criteria if I find that respondent has violated the same section on a previous occasion even if there is only one previous violation. I always add at least $5 to $15 depending on the size of the company, but I also take into consideration the trend that I see in those violations. If I had seen an increase in the trend from 1977, when there were 11 violations, and that had gone to 12 and 13 for the next 2 years, I would have assessed a large penalty under the criterion of history of previous violations.

The fact that respondent had only three violations in 1978, and one in 1979, before being cited for the instant violation on May 29, shows that respondent is making an effort to maintain adequate guards on its equipment. The fact that the tram guard on the feeder was reported by the superintendent himself is a very good indication to me that respondent is making a sincere effort to avoid this type of violation. Consequently, in this instance, I shall assess $25 under the criterion of history of previous violations.

As indicated above, I am not going to assess a separate penalty for each of the three violations alleged in Citation No. 680970 since the Petition for Assessment of Civil Penalty seeks assessment of a single penalty for a violation of section 75.1722(a). Respondent, therefore, has not received notice that more than one penalty is to be assessed. Of course, inasmuch as all three violations alleged in Citation No. 680970 have been given individual consideration in my decision, there would be no difference in the total penalty even if I were to assess three separate penalties because the total penalty is based on all three violations and their effect on the health and safety of the miners.

In view of respondent's extraordinary effort to achieve rapid compliance, the fact that no negligence was associated with two of the three violations, and the fact that only one of the three violations was serious, an amount of $100 will be assessed for all three violations. The penalty of $100 will be increased by $25 under the criterion of history of previous violations to a total penalty of $125 for the violations of section 75.1722(a) involved in Citation No. 680970 dated May 29, 1979.

SETTLEMENT

Counsel for the parties moved at the hearing that I accept a settlement agreement with respect to the other violation for which a civil penalty is sought in the Petition for Assessment of Civil Penalty filed in Docket No. VA 79-107. Under the settlement agreement, respondent would pay the full penalty of $90 proposed by the Assessment Office for the violation of section 75.1101-15(d) alleged in Citation No. 680971 dated May 30, 1979.

Section 75.1101-15(d) requires that an adequate number of nozzles and reservoirs be supplied to provide maximum fire protection for belt drives and electrical controls along conveyors. The Assessment Office considered the violation to be relatively nonserious, to involve ordinary negligence, to have been associated with a normal effort to achieve compliance, and to warrant a civil penalty of $90. I find that the Assessment Office assigned a reasonable number of penalty points under 30 C.F.R. 100.3 and derived an appropriate penalty. I further 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 the violation of 30 C.F.R. 75.1101-15(d) alleged in Citation No. 680971 in Docket No. VA 79-107 is granted and the settlement agreement is approved.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. VA 79-66 is dismissed because the evidence submitted in this proceeding did not prove that the violation of 30 C.F.R. 75.200 alleged in Citation No. 678352 dated February 12, 1979 occurred.

(C) Respondent, pursuant to the settlement agreement approved in paragraph (A) above, and pursuant to the bench decision above, shall pay civil penalties totaling $215.00 within 30 days from the date of this decision. The penalties are allocated to the respective violations as follows:

Citation No. 680970 5/29/79 75.1722(a)...(Contested)....	$125.00
Citation No. 680971 5/30/79 75.1101-15(d)(Settlement)..	90.00
Total Settlement and Contested Penalties in This Proceeding.....	$215.00

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