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SOL (MSHA) V. LITTLE EGYPT 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), PETITIONER	Civil Penalty Proceeding Docket No. VA 80-85 A.C. No. 44-04048-03014V
v.	
LITTLE EGYPT COAL COMPANY, RESPONDENT	No. 1 Mine

Appearances: Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Harold Jackson, Little Egypt Coal Company, Grundy, Virginia, for Respondent

DECISION

Before: Judge Melick

Hearings were conducted in this case in Abingdon, Virginia, on November 5, 1980, following which I rendered a bench decision.

That decision, which I affirm at this time, is set forth below with only nonsubstantive corrections.

This proceeding is, of course, before me under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815, the "Act." The general issues are whether the Little Egypt Coal Company (Little Egypt) has violated the regulatory standards cited in the petition filed by the Department of Labor, Mine Safety and Health Administration (MSHA) in this case, and, if so, what is the appropriate penalty to be paid by Little Egypt.

Section 110(i) of the Act sets forth the criteria that I should consider in arriving at an appropriate penalty for violations under the Act, namely: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Now, I observe that the one citation before me is a section 104(d)(1) citation and the two orders before me are orders of withdrawal under section 104(d)(1). These ordinarily require for their validity certain specific findings regarding "unwarrantable failure" and "significant and substantial." Since this is a civil penalty proceeding, however, only the fact of the violation and the relevant criteria under section 110(i) of the Act will be considered.

Now, going to the one citation before me, Citation No. 696006, I find that the violation did occur as charged. The citation charges that dry, loose coal was permitted to accumulate approximately 35 feet outby Survey Station No. 2506, located in the No. 4 entry intake airway, adjacent to the belt entry. The "accumulation" was approximately 4 feet high, 20 feet wide, and 60 feet long.

The cited standard (that is, 30 C.F.R. 75.400) reads as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate in the active workings or on electrical equipment therein." MSHA inspector Harold Burnett testified here today--and I find his testimony to be completely credible and on essential points uncontradicted--that on July 31, 1979, in the course of a regular inspection with Mr. Ball, another MSHA inspector, that he did in fact observe in the No. 4 intake entry the described stockpile of coal.

He measured that pile of coal using a 50-foot rule and found the size as reported in the citation. His testimony is undisputed, so I find that the size of the material to be as it was cited. Now, with respect to the combustibility of this material, I have some problems with Mr. Burnett's testimony because at one point he says, "My visual observations were not sufficient to determine the combustibility," and at another point he testified that in essence those observations were sufficient from which he could conclude that the material was combustible. Burnett did testify, however, that the material which looked like coal was indeed black, was in fact dry, and was in fact not intermixed with observable noncombustibles such as rock dust or pieces of cement block or sundry other noncombustible materials.

The equivocal testimony is, in any event, obviated by the laboratory tests on the samples taken by Mr. Burnett. The samples, taken at each end of this pile and one in the middle,

showed only 30, 27, and 23 percent incombustible material, respectively. These tests therefore demonstrate the presence of a rather high percentage of combustible material.

Now, even if you do not accept Burnett's testimony regarding the combustibility of this material, Mr. Jackson himself (the owner of Little Egypt) testified that this stockpile was treated the same as any other coal that is shipped out of his mine, that is, it was sold as part of its mine product. Clearly, if this "accumulation" did not consist of combustible materials to a significant degree, it could not have been so disposed.

Now, from the vast size of the stockpile alone, which was 4 feet high, 20 feet wide and 60 feet long, I conclude also that it was indeed an "accumulation" within the ambit of recent decisions by the Mine Safety and Health Review Commission. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (December 1979); Secretary v. Old Ben Coal Company, 2 FMSHRC 2806 (October 1980). Now, indeed, even though the Commission has indicated that it is not necessary in proving a violation of this standard that some time have had elapsed while that "accumulation" remains, it is apparent from Jackson's own testimony that the "accumulation" had in fact existed since the previous day.

Now, I also find that Little Egypt was grossly negligent in allowing this coal to accumulate as it did. Jackson admitted that beginning in the middle of July 1979, because his union employees were supposed to be working only parttime on alternate days, he could not ship his coal out of the mine every day of the week as he desired. As a result, he found it economically necessary to stockpile the coal inside the mine for short periods of time. It was therefore a company policy to keep coal accumulated at least for that 1-day period or until such time as the coal could be shipped out. So I find that clearly the operator not only knew that this accumulation was present but in fact actively condoned maintaining such accumulations. As further evidence of the operator's negligence in this case, I note that Jackson admittedly had two "accumulations" in the mine and that although he had two scoops available, he used only one for cleanup while he continued to use the other for production.

Now, the condition did present a hazard and this testimony, again, is essentially uncontradicted that combustible materials such as this could be ignited and could cause fire or an explosion not only in the immediate section but the entire mine and there were potential, if not then existing,

sources of ignition not far away. Burnett testified that there were electrical cables in an adjacent entry some 60 to 70 feet away, that there was a battery-operated scoop operating as close as 20 feet to the accumulation, and that there was a supply station some 40 or 50 feet from the accumulation in which timber, oil, and other combustible materials were stored. Explosives were also stored in the mine. Of course, the seven or eight men who were working in the mine at that time could be killed by any resulting explosion or fire. The degree of hazard is somewhat reduced by the fact that no defects were found in the cables and no permissibility violations were found on the equipment. Moreover, this mine has no history of methane problems and on the date of the inspection no methane was detected. I have taken these factors into consideration.

Now, with respect to the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation, the testimony is that indeed the condition which was cited at 10:15 a.m. was abated by 9 o'clock the next day. The foreman stopped all production in the mine and had two scoops immediately clean up the accumulation. However, as Inspector Burnett points out the operator really had no choice but to clean up the condition because he would not otherwise have been permitted to continue mining. Order No. 696007 charges that roof-bolt test holes had not been drilled at 15-foot intervals, beginning approximately 80 feet inby Survey Station No. 2506 located in the No. 4 entry on the 001 section, and extending inby to the working faces of the Nos. 4 through 1 entries and connecting crosscuts for a distance of approximately 300 feet.

The cited standard, 30 C.F.R. 75.200, deals essentially with the requirements for filing and having an approved roof-control plan in effect. However, that standard has been interpreted by the former Interior Board of Mine Operations Appeals and various administrative law judges in the Mine Safety and Health Review Commission, including myself, to require also that the operator comply with his roof-control plan. That is the interpretation I shall follow here. Now, that part of the roof-control plan cited here appears on Page 7, Item 9 of Exhibit D, and states as follows:

In each active working place where roof bolts are installed during a production shift at least

one roof bolt hole shall be drilled to the depth of at least twelve inches above the anchorage horizon of the bolts being used to determine the nature of the strata. Such test holes shall be drilled at intervals not to exceed fifteen feet, and the test holes shall either be left open for examination or a bolt length equal to or greater than the required test hole depth may be installed and tightened.

Inspector Burnett, again without contradiction, testified that indeed the condition that was cited did in fact exist. The violation is therefore proven. Burnett conservatively estimated that even assuming the best of mining conditions it would take approximately 4 or 5 days with one shift operating to progress 300 feet in a mine such as the Little Egypt Mine. Since the test holes had not been driven over that distance it is apparent that the cited condition had existed for at least 4 or 5 days. The fact that the condition existed for such a long period of time indicates that the operator was also negligent. This violation should have been detected in the course of the preshift and onshift examinations over this 4- or 5-day period. I also consider in terms of negligence the fact that this mine had indeed been cited before (and this is conceded by Mr. Jackson here today) for violations of the same nature.

Now, I can sympathize to some extent with the operator's problem. I take into consideration that his roof-bolting machine operator was negligent in failing to perform a duty that he had been instructed to perform and in fact had been previously reprimanded for failing to perform in the past. However, that does not exonerate the foreman and the mine operator from liability for this type of violation. Indeed, if this same violation had occurred in the past, the operator had perhaps an increased duty to see that the same violation did not occur again.

The hazard in this situation was serious because the test holes are used to evaluate roof conditions and if indeed the roof-bolting machine operator is not performing these tests, the roof bolts that he is implanting could be of no use at all because defects may very well exist in the strata just beyond the reach of his bolts. Of course, the danger present here is from roof falls causing death or serious injuries to anyone working on that section.

I note that this condition was abated within the time allotted but, again, I observe the operator really had no choice if he wanted to continue mining.

I find also that the violation in Order No. 696003 has been proven as charged. The order states as follows: "The No. 4 entry has been driven from twenty-four to twenty-eight feet wide, beginning ninety feet in-by Survey Station No. 3506, located in the No. 4 entry and extending inby for a distance of approximately thirty-three feet on the 001 section." The inspector commented that this had become a common practice at this mine and indicated that the approved roof-control plan permits a maximum width of 20 feet.

Now, again, the standard cited here is 30 C.F.R. 75.200 which is the standard relating to the requirement for the filing of and approval of a roof-control plan. The roof-control plan in effect here required, in relevant part, on Page 4 that the entry width and the crosscut width shall be 20 feet.

The testimony is undisputed that the widths in the No. 4 entry were precisely as charged, that is, from 24 to 28 feet. The measurements were precisely made, again, with a 50-foot tape with the assistance of Inspector Ball. The hazard from this overwide entry is, of course, from a weakened roof resulting in possibly fatal roof falls. The condition was abated within the time specified for abatement by adding timbers to bring the width to within the 20 feet specified in the roof-control plan.

Now, certain criteria under section 110(i) are appropriate to consider across the board, and are common to all of the orders and the citation at issue. One of those criteria is the size of the operator. The operator here is small having only 10,704 production tons per year. With respect to a history of previous violations, the printout admitted as Government Exhibit F does not provide sufficient detail for me to really determine the specific nature of the previous violations. I am, of course, considering only those violations in which a penalty has actually been paid since those are the only ones that have become final as of this date. It appears, however, that the operator does not have a significant history of violations.

Now, considering what effect penalties might have on the operator's ability to continue in business, I note that Mr. Jackson has testified that even the penalties proposed by the Department of Labor would have such an effect. However, Mr. Jackson has been given the opportunity to obtain and to present documentary evidence to support his testimony here but has chosen not to. Apparently, that evidence is not in a form in which it could be readily presented to the court, but since nothing has been presented, I cannot give great weight to the unsupported testimony. If, indeed Jackson could reach

the conclusions he reached here today, it must have been based upon some records.

All right, considering all of these factors, I feel that the following penalties are appropriate for the violations that I have found:

With respect to Citation No. 696006, a penalty of $400.

With respect to Order No. 696007, a penalty of $250.

And with respect to Order No. 696008, a penalty of $300.

ORDER

The Little Egypt Coal Company is ORDERED to pay a penalty of $950 within 30 days of this order.

Gary Melick
Administrative Law Judge