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

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | PETITIONER | Civil Penalty Proceeding<br>Docket No. KENT 80-297<br>Assessment Control No. 15-09973-03007 |
| v. | | |
| WRIGHT COAL COMPANY, INC., | RESPONDENT | No. 3 Mine |

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
David Wright, Dorton, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 26, 1980, a hearing in the above-entitled proceeding was held on December 10, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 81-93):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-297 on August 25, 1980, by the Secretary of Labor, seeking to have civil penalties assessed for four different alleged violations of the same mandatory health and safety standard, that is, 30 C.F.R. 75.1710, by Wright Coal Company, Inc.
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> The issues in a civil penalty case are whether violations of a mandatory safety standard occurred and, if so, what civil penalties should be assessed based on the six criteria set forth in section 110(i) of the Federal Coal Mine Health and Safety Act of 1977.
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> I shall make some findings of fact on which my decision will be based, and those facts will be set forth in enumerated paragraphs.

1. The parties have stipulated that Wright Coal Company, Inc., is subject to the Federal Mine Safety and Health Act of 1977 and that I have jurisdiction to hear and decide this case. The Wright Coal Company operated, at the time the notices of violation were written in this case, a No. 3 Mine. The company is a small operator which produces approximately 30,000 tons of coal on an annual basis and employs 12 persons. The No. 3 Mine involved in this case is no longer in operation, having been closed in January of 1980, after all the coal reserves had been exhausted.

2. On October 6, 1977, inspector William E. L. Canada went to the No. 3 Mine and observed that none of the face equipment had installed on it a cab or a canopy, as required by section 75.1710. Therefore, he issued four notices of violation covering each piece of equipment which did not have a canopy.

His Notice No. 1 WELC pertained to an S and S battery-powered scoop and his Notice No. 2 WELC pertained to another S and S battery-powered scoop of the same design. His Notice No. 3 WELC pertained to an Acme roof-bolting machine. His Notice No. 4 WELC related to a similar piece of equipment, that is, an Acme roof drill, but that piece of equipment had been converted by the operator so as to provide only for the drilling of coal at the face for the purpose of installing explosives for loosening the coal for production purposes.

All of the four notices were written on the same day. All of them were extended at various times, up until the time that the No. 3 Mine was abandoned by the operator, and the notices were all terminated on March 10, 1980, as shown in the subsequent action sheets which constitute page 7 of Exhibits 1, 2, 3, and 4 in this proceeding.

3. The notices were extended at various times, mostly on the basis of a letter which the operator had written in which he had described how he was planning to install canopies on the pieces of equipment. The extensions were not all granted by the same inspector who wrote the initial notices of violation because the first inspector was assigned other mines in the period between issuance of the initial notices and the time that they were finally terminated.

4. Since there were various inspectors involved from the time that the original notices were issued and the time that they were terminated, no inspector, particularly the one who issued the original notices, had any detailed knowledge of what actually happened at the No. 3 Mine.

5. The operator was represented in this proceeding by Mr. David Wright, who is vice president of Wright Coal Company, Inc. He had knowledge of what had been done in an effort for his company to comply with section 75.1710. That section provides in pertinent part that all self-propelled electric face equipment employed in active workings of each underground coal mine on and after January 1, 1973, will be equipped with substantially constructed canopies or cabs located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face or rib, or from rib and face rolls. That section also provided that the canopies should be installed depending upon the height of the coal seam in which the various mines happened to be operating at a given period of time.

On July 7, 1977, there was published in the Federal Register, 42 FR 34876, a notice indicating that the Secretary of the Interior, who was then responsible for promulgating regulations under the Federal Coal Mine Health and Safety Act of 1969, had suspended the requirements as to installation of canopies for coal mines in which the actual height from the bottom to the top was less than 42 inches. Therefore, at the time the notices of violation involved in this proceeding were written, canopies were not required if the coal height was less than 42 inches.

6. Inspector Canada, at the time he wrote the four notices of violation involved in this proceeding, made measurements in the face area and he stated that the lowest measurement he made was 43 inches and the highest measurement was more than 50 inches, and that the average height in the area, as he calculated it, was 48 inches. The operator's witness in this proceeding, Mr. David Wright, stated that he agreed that the measurements made by Inspector Canada existed on October 6, 1977, but he said that the coal height was frequently 39 inches and that he encountered low coal on a very erratic basis.

7. Mr. David Wright gave testimony concerning the conditions that existed with respect to each of the pieces of equipment which were cited in the notices written by Inspector Canada. The circumstances with respect to the S and S scoops, cited in both Notice Nos. 1 and 2, were identical, because both S and S scoops have the same basic design and the ability of their being adapted for the use of canopies and low coal is identical for each piece of equipment.

Mr. Wright stated that he already had in his possession canopies for the S and S scoops at the time the notices of

violation were written. He had been unable to use those canopies, but in an effort to comply with the standard cited in the notices, he had the canopies reinstalled and had present at the time that the scoops were taken into the mine a Federal inspector, a State inspector and a UMWA representative.

When the scoops reached a point in his mine where a crossbar measuring 3 inches thick, 8 inches wide, and 16 feet long was encountered, the State inspector indicated that the canopy would not clear that crossbar and consequently the State inspector ordered Mr. Wright to have the canopy removed from the S and S scoops which were taken outside the mine for that purpose.

Mr. Wright says that the Federal inspector, who was a supervisory inspector named Smith, whose first name is not known, did not object to removal of the canopies. The Union representative suggested that the canopies be modified. Mr. Wright had 8 inches cut from the legs of a canopy and had it reinstalled. At that time, the operator of the scoop stated that he would not operate it with the canopy on it because of the discomfort and difficulty of trying to operate the scoop while under the low canopy. Therefore, the canopies were removed from the S and S scoops and they were continued to be used in the coal mine from 1977 until 1980 when the mine was closed.

8. The Acme roof-bolting machine cited in Notice No. 3 WELC, or Exhibit 3 in this proceeding, was of a design for which the Acme Company had no canopy or cab. Mr. Wright, in an effort to obtain a canopy for the Acme roof-bolting machine, contacted a firm or person named Reo Johns of Wheelwright, Kentucky, who stated that he could make a satisfactory canopy for the Acme roof-bolting machine. Such a canopy was made and was brought to the mine and installed, but Mr. Wright was unable to get the Acme roof-bolting machine into the mine with that canopy on it. Therefore, that roof-bolting machine was continued to be operated until 1980 without any canopy on it.

9. The conditions with respect to the piece of equipment cited in Notice No. 4 WELC, which is Exhibit 4 in this proceeding, are similar to the conditions with respect to the Acme roof-bolting machine. The difference between the two pieces of equipment is that the Acme coal drill was adapted from an Acme roof drill, and the adaptation involved the installation of some hydraulic hoses 25 feet long, so that the hydraulic system on the roof-bolting machine could be used for the purpose of operating a hand-held drill in the face area.

The person who operated the drill was, of course, a considerable distance from the piece of equipment on which a canopy would exist. Mr. Wright explained that it would be impossible for the person who was drilling coal at the face to be under a canopy installed on the roof drill or piece of equipment providing the hydraulic power, even if the canopy did exist. Despite the fact that the canopy would have no practical use underground, Mr. Wright did purchase from Reo Johns a similar canopy, which he would have used if he could have gotten it underground.

I believe that those facts cover the essential points in this proceeding.

The former Board of Mine Operations Appeals held in Buffalo Mining Company, 2 IBMA 226, 259 (1973), Associated Drilling, Inc., 3 IBMA 164, 173 (1974), and in Itmann Coal Company, 4 IBMA 61 (1975), that if materials needed for abatement of a given violation were unavailable, no notice of violation should be written. I believe that the findings of fact that I have given in this proceeding show that the materials needed to comply with section 75.1710 were unavailable in 1977 when the notices of violation were written.

I believe that the testimony of Mr. Wright, which is uncontroverted, supports a finding that he had already obtained canopies for the S and S scoops before the notices were written and that he made every effort to use the canopies after the notices were written, but it was impossible for him to do so. Therefore, I find that the notices of violation should not have been written in this case because the required equipment was impossible for Mr. Wright to obtain at that time.

Mr. Drumming, for the Secretary of Labor, has made a very pertinent observation in that he indicated that Mr. Wright would apparently continue to operate in the same way that he did from 1977 to 1980 without canopies in a given mine if the coal height should happen to be the same as those encountered in the No. 3 Mine. I believe that the answer to that objection is that if equipment continues to be unavailable for the low coal in which Mr. Wright was operating, then I would assume that Mr. Wright would have to continue to operate without canopies.

We should bear in mind the fact that Mr. Wright explained that the canopies have to be raised about 2 feet above the height of the equipment in order to install them. Consequently, if a person is operating in low coal running from below 42 inches to slightly above 42 inches, there

> would be times when a measurement taken in the working face would indicate that canopies should be installed because the actual height would be greater than 42 inches.
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> But the canopies cannot be put on in coal which is only slightly above 42 inches because the height of the mine does not permit it. In this instance, Mr. Wright has shown, and his testimony supports the fact that if he goes outside with the piece of equipment and installs the canopy, then in his particular mine, he could not get back in with the canopy installed because he would encounter areas below the height of the canopy as installed on the given piece of equipment.
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> In such mines, I would assume that when the Secretary suspended the requirement of canopies in coal under 42 inches, that he took into consideration that the technology did not exist at that time, and probably does not exist at this time, to have canopies on every piece of equipment all the time.
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> So while I agree with Mr. Drumming that the possibility of noncompliance is unfortunate, I think that those periods of noncompliance will simply have to take into consideration the technology that exists at a given period in time.
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> For example, there undoubtedly are mines operating right now in coal heights well below 42 inches in which no canopies are required because the Secretary has suspended canopies for those low coal heights. Yet, the miners who operate equipment in those low coal mines are exposed to the same kind of possible roof falls and injuries that would otherwise exist in the higher coal mines where canopies can be used to offset the danger of possible roof falls. So what we have here is simply a matter of technology, and the fact that it may well be possible that by the time the manufacturers have experimented over the next few years, that they will be able to construct equipment which can operate with canopies in heights lower than 42 inches without difficulty.
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> But the point of my decision in this case is that these notices of violation were written in October of 1977, and at that time Mr. Wright did not have access to manufacturers who could provide the kind of equipment that was needed to operate in the coal heights that he experienced.

If, at any time between October 6, 1977, when the notices were written, and March 10, 1980, when they were terminated, MSHA had determined that the technology existed for construction and installation of canopies adaptable to the equipment in respondent's mine, MSHA could have issued withdrawal orders compelling respondent to use canopies. The fact that extensions for

compliance were repeatedly issued for a period of over 2 years shows that MSHA recognized the nonexistence of the technology required for installation of canopies on the S and S scoops and Acme roof-bolting machines here involved.

WHEREFORE, for the reasons given above, it is ordered:

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-297 on August 25, 1980, is dismissed.

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