

CCASE:
SOL (MSHA) v. G & M COAL
DDATE:
19810407
TTEXT:

Federal Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER
v.

G & M COAL COMPANY,
RESPONDENT

Civil Penalty Proceedings

Docket No. SE 81-12
A.O. No. 40-02419-03011

Docket No. SE 80-140
A.O. No. 40-02419-03008

Docket No. SE 81-7
A.O. No. 40-02419-03010

No. 1 Mine

DECISIONS

Appearances: George Drumming, Jr., Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
the petitioner;
Bill Marshall, pro se, Kingston, Tennessee, for the
respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with a total of 13 alleged violations found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and notices of contest requesting a hearing, and a hearing was convened in Knoxville, Tennessee, on March 12, 1981, and the parties waived the filing of posthearing proposed findings and conclusions.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be

~890

assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties agreed to the following:

1. Respondent is subject to the jurisdiction of the Act, and I have jurisdiction to hear and decide these cases.
2. At the time the citations were issued, the respondent operated the No. 1 Mine, and the mining operation was small in size.
3. The inspectors who issued the citations were duly authorized MSHA mine inspectors, and the citations were duly served on the respondent.
4. Respondent's history of prior violations is reflected in Exhibit P-1, a computer printout listing all citations issued to the respondent for the period June 9, 1978, through August 5, 1980. The printout reflects five prior citations concerning mandatory safety standard 30 C.F.R. 75.200, one prior citation concerning section 75.1100-2(a)(2), and one citation for a violation of section 70.507.
5. Respondent exhibited normal good faith compliance with respect to all of the citations issued in these proceedings, except for Citation Nos. 985402 and 985403 (Docket No. SE 80-140), which the respondent abated rapidly.
6. Respondent does not contest the fact of violation with respect to all of the citations except Citation No. 984540 (Docket No. SE 80-140).

7. Respondent is no longer in the mining business and has abandoned the mine in question. He is, however, engaged in reclamation work at the site in

~891

order to reclaim the land so as to meet the requirements imposed on him by Federal and State surface mining and reclamation agencies.

8. Since the respondent is no longer in business and has abandoned the mine, the issue concerning the effect of any civil penalties imposed for the citations in question is moot.

Procedural Matter

Petitioner's motion to amend Citation No. 984540 to add subsection paragraph (d) to the cited standard section 75.1720 was granted.

Findings and Conclusions

Docket No. SE 80-140

Fact of Violations

MSHA inspector Arthur C. Grant confirmed that he issued Citation Nos. 984540, 985402, and 985403 on June 6 and 9, 1980, during mine inspections which he conducted. The first citation was issued after he observed mine operator Bill Marshall exiting the mine at the portal without wearing a hardhat. Mr. Marshall was not carrying one at the time, but went to his truck where the hat was located and then put it on.

Respondent's defense to this citation is based on Mr. Marshall's belief that the hardhat requirement of section 75.1720(d) only applied to mine employees, and since he was the mine owner rather than an employee, and since he is not recognized as an "employee" for other purposes, he did not believe the cited standard was violated.

Section 75.1720(d) requires that each miner regularly employed in the active workings of an underground coal mine wear a suitable hardhat or hard cap. Mr. Marshall does not dispute the fact that he did not have such a hat on when the inspector observed him. He also conceded that he works in the mine and had been underground when the inspector observed him coming out of the mine. His interpretation of the requirements for wearing a hardhat is erroneous and it is rejected. The citation is AFFIRMED.

Mr. Grant testified that he issued the remaining citations after finding that short-circuit protection was not provided for the roof-bolting machine and cutting-machine trailing cables operating in the section. Section 75.601 requires that trailing cables be provided with automatic circuit breakers or other no less effective MSHA-approved devices. Respondent does not dispute the fact that the cited trailing cables lacked the required short-circuit devices. Accordingly, the citations are AFFIRMED.

Negligence

I conclude and find that the respondent should have been aware of the requirements of all the cited safety standards, that the violations resulted

~892

from respondent's failure to exercise reasonable care to prevent the conditions cited, and that this constitutes ordinary negligence as to all of the aforementioned citations which have been affirmed.

Gravity

With respect to the hardhat citation, the facts reflect that Mr. Marshall was exiting the mine when he was observed, and at that point in time there is no evidence that he was exposed to any hazard. However, Mr. Marshall did not deny that he had been underground in the mine without his hat, and in these circumstances, I conclude that the violation is serious.

With regard to the two trailing cable citations, Mr. Marshall testified that the main power source junction box supplying power to the cables was equipped with a magnetic-type short-circuit protective device which provides for an instantaneous power disconnect in the event of problems with the cables. However, there is no evidence that this provided a fail-safe protection and respondent conceded that the cables were not equipped with the required short-circuit protective devices. Accordingly, I find that these citations were serious in that the lack of cable short-circuit protection posed a potential electrical hazard to the equipment operators.

Docket No. SE 81-12

Fact of Violation

MSHA inspector Jerry F. McDaniel confirmed that he issued Citation Nos. 984814, 984815, 984816, 984818, and 984822 during mine inspections he conducted on August 6 and 7, 1980 (Exhs. P-2 through P-6). The first two were issued because of violations of the respondent's approved roof-control plan (Exh. P-7). Page 4 of the plan requires the use of crossbars or steel strips as additional roof support in areas where overhead hill seams or horsebacks are encountered. In addition, the transmittal letter which accompanied the plan also required the respondent to use a combination of posts and roof bolts so as to provide full overhead support in all roof spans during the initial development of the mine. Since the respondent was not in full compliance with the plan, Mr. McDaniel issued the citations. I find that the petitioner has established the violations, and Citation Nos. 984814 and 984815 are AFFIRMED.

Citation No. 984816 concerns the lack of an automatic audible backup alarm of an end loader used on the surface to load coal into trucks. Respondent conceded that the loader was not equipped with the required alarm and the citation is AFFIRMED.

Citation No. 984822 concerns the failure by the respondent to provide at least 500 gallons of water and at least three pails of 10-quart capacity for the mine section as required by section 75.1100-2(a)(2), as part of the mine's firefighting equipment. Respondent conceded that the water and pails were not provided

and the citation is AFFIRMED.

~893

Citation No. 984818 concerns an alleged violation of section 70.507 because of an asserted failure by the respondent to conduct a noise survey. The citation was vacated from the bench after I concluded that the petitioner could not establish by any credible evidence that a violation occurred. Petitioner interposed no objection to my ruling and in fact concurred that it could not prove a violation.

Negligence

I conclude and find that each of the citations which have been affirmed resulted from respondent's failure to exercise reasonable care to prevent the cited conditions, and that this constitutes ordinary negligence as to each of the citations in question.

Gravity

Citation Nos. 984814 and 984815

Inspector McDaniel testified that the mine roof was well supported and fully roof bolted according to the plan. Some straps were used, but his inspection did not detect any loose, cracked, or faulty roof. In addition, Mr. McDaniel agreed with Mr. Marshall's testimony that by driving the entry less than the 20-foot wide distance permitted by the plan, additional support was provided to the roof. Although the inspector stated that he observed some horsebacks and hill seams, he also indicated that the horseback condition is a roof condition where rock flares out of the coal seam, but that he observed none in the immediate area where men may have been working and he observed no hazardous roof conditions. Under the circumstances, I cannot conclude that the conditions cited were serious, and I find that they were not.

The inspector considered Citation No. 984816, concerning the lack of an alarm on the end loader, to be of "minimum" gravity because of the fact that it was a tractor-type loader, with good visibility to the rear, and he observed no one in back of it or exposed to any real hazard. I find that this citation was nonserious.

With regard to Citation No. 984822, concerning the lack of water on the section, the inspector believed that the gravity was "minimum." He testified that fire extinguishers were provided on the mobile equipment which was operating in the section, and there is no evidence that the other fire equipment required by the cited standard was not provided. Further, the inspector stated that since the entry had not been driven more than 100 feet or so, the men could readily escape the mine in the event of a fire quicker than it would take to fight any fire with water and pails. He also indicated that the use of water is not effective in the event of an electrical equipment fire. Under the circumstances, I conclude that the conditions cited were nonserious.

Fact of Violation

Inspector McDaniel confirmed that he issued Citation Nos. 984813, 984817, 984819, 984820, and 984821. Respondent conceded that the conditions cited by the inspector constituted violations of the cited standard. I find that the petitioner has established the violations and the citations are AFFIRMED.

Gravity

Citation No. 984813 concerns the failure by the respondent to install a main mine fan after driving approximately 100 feet into the mine for approximately two crosscuts. The inspector considered this violation to be serious because the respondent had already mined into an area of the old mine workings and could have mined into another similar area. In the event methane were found, the lack of a fan would result in a methane buildup, and coupled with the fact that coal dust was present, the lack of a fan prevented the removal of dust and possible methane from the mine. I conclude that this citation was serious.

Citation No. 984817 concerns the failure by the respondent to weigh the self-rescuing devices worn by the miners underground during the required 90-day interval. Weighing is necessary to determine whether the chemical agent inside the device was leaking or contaminated. The inspector believed the citation was of "minimum" gravity because the men could readily escape from the mine without the need to use the devices, and once the rescuers were weighed, they were found to be in proper working order and in compliance. Under the circumstances, I find that the violation is nonserious.

Citation Nos. 984819 and 984820 concern failure by the respondent to record the results of certain mine examinations required to be made under several mandatory safety standards. The inspector testified that the examinations had been made but respondent simply neglected to record them in the mine books. He considered the two citations to be "record keeping" violations and believed they were of "minimum gravity." I conclude that the citations were nonserious.

Citation No. 984821 concerns the failure by the respondent to store several detonators in a magazine as required by section 77.1301-(a). The inspector found the detonators in a large cardboard box on the wooden floor of a metal-covered storage building which also contained some mine record books and which may have been used as an office. The inspector believed the gravity to be "probable" and indicated that it was possible that lightning could strike the building or someone could have taken the detonators since they were in plain view and unsecured. Under the circumstances, I find that the violation was serious.

Negligence

I conclude and find that each of the aforementioned citations which have been affirmed resulted from respondent's failure to exercise reasonable care to prevent the cited conditions, and that this constitutes ordinary negligence as to each of the citations.

With respect to the detonator citation, Mr. Marshall stated that he had no idea who placed the detonators in the storage shed and indicated that they were of a different brand from those which he normally used. However, the fact is that the inspector found no storage magazine on the mine property and the detonators were subsequently removed from the property. In these circumstances, I conclude that the respondent was negligent in not discovering the detonators which were in plain view of the inspector.

Good Faith Compliance

The parties stipulated as to respondent's good faith compliance in all of these cases, and I adopt these stipulations as my findings on this issue. I have also considered respondent's compliance in this regard in assessing the civil penalties for the citations which have been affirmed, and find that he is a responsible operator who made an effort to comply with the law.

History of Prior Violations

Respondent's history of prior violations as reflected in Exhibit P-1 shows that respondent paid civil penalty assessments for 31 citations during a 2-year period. Although there are several repeat violations, I cannot conclude that respondent's history of prior violations is such as to warrant any substantial increases in the penalties assessed in these cases.

Size of Business and Effect of Assessed Penalties on Respondent's Ability to Continue in Business

Petitioner does not dispute the fact that the respondent is no longer in the mining business and has abandoned the mine. Further, petitioner does not dispute the mine operator's assertion that he is financially unable to pay civil penalties in the amounts initially assessed for the citations in question, nor does it dispute the fact that the respondent has been forced to liquidate some of his property to pay debts that he has incurred as a result of his small and somewhat marginal mining operation.

The record establishes that at the time the citations were issued respondent had recently developed and activated the 002 section, that coal production was minimal, and that the entry had been driven for a distance of approximately 100 to 120 feet.

Penalty Assessments

In a previous decision concerning these very same parties, I took into consideration the fact that the respondent's financial situation was such as

~896

to preclude payment of substantial civil penalties for two violations which had been established by the petitioner. MSHA v. G & M Coal Company, Docket No. SE 79-128 (November 19, 1980). Nothing has changed since that decision, and it seems clear to me that respondent has abandoned the mine and is no longer in the mining business. In these circumstances, and considering the fact that I consider the respondent to be a responsible party who has made a good faith effort to comply with the law and to meet his obligations, I conclude that the following civil penalty assessments are reasonable considering the particular circumstances of these cases:

Docket No. SE 80-140

Citation No.	Date	30 C.F.R.Section	Assessment
984540	6/6/80	75.1720(d)	\$ 5
985402	6/9/80	75.601	10
985403	6/9/80	75.601	10

Docket No. SE 81-12

Citation No.	Date	30 C.F.R.Section	Assessment
984814	8/6/80	75.200	\$10
984815	8/6/80	75.200	10
984816	8/6/80	77.410	5
985822	8/7/80	77.1100-2(a)(2)	5

Docket No. SE 81-7

Citation No.	Date	30 C.F.R.Section	Assessment
984813	8/6/80	75.300	\$20
984817	8/6/80	75.1714-3(c)	5
984819	8/7/80	75.1803	5
984820	8/7/80	75.1801	5
984821	8/7/80	77.1301(a)	10

ORDER

Respondent IS ORDERED to pay civil penalties totaling \$100 within thirty (30) days of the date of these decisions for the citations in question, and upon receipt of payment by MSHA, these matters are DISMISSED.

George A. Koutras
Administrative Law Judge