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Federal Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

CANNELTON INDUSTRIES, INC.,
RESPONDENT

Civil Penalty Proceed
Docket No. WEVA 81-22
A/O No. 46-02061-03040V
Peytona No. 4 Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, PA for Petitioner,
MSHA;
William C. Miller II, Esq., Cannelton Industries, Inc.,
Charleston, WV for Respondent, Cannelton Industries, Inc.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the government against Cannelton Industries, Inc. A hearing was held on April 7, 1981.

Order of Withdrawal 668147

At the hearing, the Solicitor moved the approval of a settlement for this violation in the amount of \$500. The original assessment for this violation was \$750. This order was issued for a failure to comply with the approved ventilation plan which requires that line curtain be maintained to within 10 feet of the face and that 3,000 cubic feet of air per minute be maintained at the face. In support of the reduction, the Solicitor advised that negligence was less than originally assessed since the continuous miner had just finished mining in this section and had knocked down the curtain as it was backing out. In addition, gravity was less because no power had been turned on in the section, no other work was in progress there and there was no methane detected in the area. Further, the condition was abated immediately by the rehanging of the curtain and the size of both the mine and the company is medium. I accepted the Solicitor's representations. Noting that the recommended amount was a substantial amount, I approved the proposed settlement.

Order of Withdrawal 665636

At the hearing, the parties agreed to the following stipulations (Tr. 4):

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- (1) The operator is the owner and operator of the subject mine.
- (2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
- (3) I have jurisdiction of this case.
- (4) The inspector who issued the subject order was a duly authorized representative of the Secretary.
- (5) A true and correct copy of the subject order was properly served upon the operator.
- (6) Imposition of a penalty will not affect the operator's ability to continue in business.
- (7) The alleged violation was abated in good faith.
- (8) The operator had 182 assessed violations in the 24 months preceding the alleged violation, which is an average history.
- (9) The operator is a medium size company and the mine in question is medium in size.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-138). At the conclusion of the taking of evidence, the parties waived the filing of written briefs and agreed to make oral argument and have a decision rendered from the bench (Tr. 138). A decision was rendered from the bench setting forth findings, conclusions and determinations with respect to the alleged violation (Tr. 142-144).

BENCH DECISION

This case is a petition for the assessment of a civil penalty based upon an alleged violation of 30 C.F.R. 75.200. The alleged violation is of the operator's roof control plan. It is now well established that the roof control plan has the effect of law and of a mandatory standard.

The pertinent section of the operator's roof control plan is Paragraph 11(a), which provides as follows: "Sidecuts shall be started only in areas that are supported with permanent roof supports. During development, except where old workings are involved, working places shall not be holed through into accessible areas that are not supported on 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face."

The basic conflict here is one of credibility. There is no dispute that there was a punch-through or a hole-through in the

last open crosscut from the No. 2 crosscut into the No. 1 Room. There is, however, a conflict between the two inspectors and the operator's two witnesses with respect to whether the area in the No. 1 Room punched through from the No. 2 crosscut was supported. The inspectors testified that they saw no such supports. The operator's safety inspector and the operator's supervisor of health and safety testified that there were such supports and in particular, two temporary supports right in the punch-through and four to six temporary supports in the No. 1 Room, which was reached by the punch-through.

After consideration of the demeanor and the statements of all the witnesses, I accept the operator's testimony in evidence on this point and most particularly the testimony of the operator's supervisor of health and safety. I accept the operator's evidence given at the hearing with respect to the temporary supports marked on the documentary exhibits, and I further accept the testimony with respect to a photograph taken of these temporary supports.

I further believe that the Government's case is weakened by the fact that there was so much confusion and inconsistency regarding the map of the area in question. No such confusion and inconsistencies were present in the operator's case.

I also accept the operator's evidence regarding temporary supports in the subject area because it was undisputed that the operator was very careful when it set supports and dangled off the No. 1 Room. It simply makes no sense for the operator to have been so careful in the No. 1 Room and then immediately thereafter undertake such dangerous activities in punching through from the No. 2 crosscut.

Moreover, I accept the testimony of the operator's supervisor of health and safety that the only reason for the temporary supports being set in the affected area was because it was going to be a punch-through from the No. 2 crosscut.

It does appear to me that there was some confusion, as testified to by the operator's witness, with respect to the basis on which the order was issued, and this evidence as well supports the operator's version of the case.

Based upon the foregoing, I find that there was no violation and, therefore, no civil penalty will be assessed.

ORDER

The foregoing decisions issued from the bench are hereby

AFFIRMED.

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The operator is ORDERED to pay \$500 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge