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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. KENT 80-304 Assessment Control No. 15-11581-03007 F
v.	
TRIWAY MINING COMPANY, RESPONDENT	Triway No. 1 Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Charles J. Baird, Esq., Baird & Baird, P.S.C., Pikeville, Kentucky, for Respondent

Before: Administrative Law Judge

Pursuant to a notice of hearing dated November 17, 1980, as amended on January 13, 1981, a hearing in the above-entitled proceeding was held on March 4, 1981, 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. 273-284):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-304, on August 25, 1980, by the Secretary of Labor seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. 75.200, by Triway Mining Company. I shall make some findings of fact on which my decision will be based:
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> 1. The Triway Mining Company produces approximately 5,800 tons of coal per month and employs about 14 miners, including a co-owner who does work underground on occasion, but who mostly works on the surface dealing with managerial problems and financial matters. The testimony by the co-owner in this case shows that the company has not been very profitable. Exhibit A, for example, shows that the company had a net income of $15,904.95 as of December 31, 1979. The operator was unable at the hearing to give his exact income or loss for the year 1980, but he did

testify at some length concerning his financial situation and he has shown in Exhibit B, page 2, that he has outstanding obligations totaling $182,644.92. During his testimony we took the prices that he receives for coal on a tonnage basis and multiplied them by the number of tons that he sells each month and found that that amounted to approximately $88,000.00. Then when we had subtracted from that sum the amount that he had to pay for trucking the coal and for his payroll, including his salary and that of the other co-owner, for roof -bolting cost, for electricity, for maintenance of electric motors, for tires for the equipment, and other expenses we found that he doesn't seem to have enough gross income to meet all of his obligations. The operator indicated that ever since he began operating the No. 1 Mine in 1978, he has been able to survive financially only by asking his coal purchaser to advance him money each month above and beyond that which he would be entitled to receive as of the 10th of the following month. Based on the testimony summarized above, I find that, as to the statutory criterion of whether the payment of penalties would cause the operator to discontinue in business, that payment of penalties would have a very adverse effect on his ability to continue in business.

2. The violation which was alleged in this case resulted from a fatal accident which occurred at Triway Mining Company's No. 1 Mine on September 28, 1979. On that day, the operator of the roof-bolting machine was observed by his assistant going beyond permanent support for the purpose of prying down some loose roof. In the process of doing the prying, a portion of the roof fell upon the operator of the roof-bolting machine and he was crushed by a section of the falling roof.

3. On October 2, 1979, a group of MSHA inspectors made an investigation at the mine and interviewed a number of people who worked at the mine on September 28, 1979, when the accident occurred. The transcript from that investigation was admitted into evidence as Exhibit 6, and on the basis of the testimony of the various people at the mine, a roof-control specialist wrote an order of withdrawal under section 107(a) and section 104(a) of the Act citing a violation of section 75.200. The primary violation alleged in that order and citation is a violation of respondent's roof-control plan, a copy of which is Exhibit 4 in this proceeding. The plan provides on page 12, in safety precaution No. 9, that where loose material is being taken down a minimum of two temporary supports on not more than 5-foot centers shall be installed between the workmen and the material being taken down unless such work can be done from an area supported by permanent roof supports installed in sound roof.

4. The roof bolter's helper on September 28, 1979, stated unequivocally at the hearing and during the interview by the inspectors on October 2, 1979, that the deceased person had proceeded beyond the permanent

supports and had pried down some loose roof without setting the temporary supports. Consequently,

there is no doubt that a violation of section 75.200 occurred in that the roof-bolter operator did go beyond permanent supports without installing the necessary and required temporary supports.

5. Order of Withdrawal No. 708133 also alleged two other violations of the roof-control plan. It was alleged that there had not been torque testing of the roof bolts and it was also alleged that test holes and had not been drilled as required by the roof-control plan. At the hearing, the section foreman testified that he had observed some test holes being drilled on September 28, the day of the accident, and the helper for the roof bolter testified that torques had been tested on September 28, 1979. While it is true that some of the transcript of the interview conducted by the inspectors on October 2, 1979, appears to show that the helper for the roof-bolting operator didn't always drill the test holes and that there might have been some failure to do some testing of the torque, I think the preponderance of the evidence here today supports my finding that those two portions of the roof-control plan were not violated on September 28, 1979.

6. One of the witnesses who testified at the hearing today was a person who conducts training for the miners in the No. 1 Mine and he testified that both the person who was killed in the accident and the two miners who normally helped him in his roof-bolting installation attended a class that he conducted during which they were instructed in proper roof-bolting procedures. His testimony and that of the operator give indication that the operator of the mine here involved was a safety-minded person who took safety as a serious matter and who had made every effort to have his miners do their work in a safe manner.

I believe that those findings are sufficient for the purposes of this case. Since I have already found that a violation occurred, it is now necessary to consider the six assessment criteria set forth in section 110(i) of the Act because those criteria have to be evaluated when a penalty is assessed. I have already indicated in Finding No. 1 above that the operator is in a marginal financial condition at best and that payment of penalties would have an adverse effect on his ability to continue in business.

Insofar as the criterion of history of previous violations is concerned, Exhibit 5 in this proceeding shows that there have been no previous violations of section 75.200 by the operator. The exhibit shows some other citations of section 75.200 by another inspector on October 2, 1979, but they would not be prior to the violation here alleged. Therefore Exhibit 5, does not show any prior violations of section 75.200. It has

been my practice over the years that I have been hearing cases under the 1969 Act and the 1977 Act to increase a penalty if I find occurrence of previous violations of the same section of the regulations which is before me in a given hearing. Since the record does not show any previous violations of section 75.200, it is unnecessary under that criterion either to increase or decrease the penalty otherwise assessable under the other five criteria.

As to the criterion of whether the operator showed a good faith effort to achieve rapid compliance, there is some lack of proof one way or the other on that criterion because a different inspector from the one who wrote the order and citation here involved wrote the termination of the order and it appears that he lost the actual termination order. Consequently, the inspector who testified today and who wrote the original order, was unable to say exactly when the order was terminated. We normally find a good faith effort to achieve rapid compliance when abatement is accomplished within the amount of time given by an inspector in a citation. But where a withdrawal order is involved, a time is not given within which to comply, and the result is that we normally have some difficulty in a case involving a withdrawal order in determining whether the criterion of good faith compliance is applicable at all.

In this instance, I believe that the testimony we have heard today would merit a finding that the operator did demonstrate a good faith effort to achieve rapid compliance because, as I have indicated in Finding No. 6 above, the men who were acquainted with this violation were trained in proper roof-bolting techniques. There has been testimony by several witnesses to the effect that the operator constantly told the men not to go out from under permanent support for any purpose and the men who testified here today all explained that it was not their practice to go out from under permanent roof control for prying down roof or installing roof bolts. Consequently, I think the testimony supports my finding that there was a good faith effort to achieve rapid compliance of the section of the roof-control plan which was violated in this instance.

In finding No. 1, I have already discussed the fact that this mine produced 5,800 tons of coal per month and only employed 14 people. Those figures support a finding that a small operator is involved.

Next we come to the criterion of negligence. As to that criterion, I think that the testimony would support a finding that the operator was not personally negligent. The same factors which I used in making a finding as to good faith effort to achieve rapid compliance would also apply to the criterion of negligence in that the operator had seen that the men were instructed in the proper procedures and all of them who testified here today indicated that they had been instructed in those procedures and had been constantly reminded of safe operating procedures and the operator had supplies of roof bolts and timbers on hand in the mine at the time this violation occurred.

Mr. Baird in his closing argument made a good point in stressing that the quitting time at this mine was 2:00 p.m. and that this accident occurred around 1:30 p.m.

He suggested that perhaps the deceased miner, in his haste to finish up bolting in the No. 4 heading, might have gotten careless at this particular time and just didn't take the precautions that he would ordinarily observe,

and that he had simply failed to put in the temporary supports. He failed to do it at a time when the mine roof happened to be very fragile and gave way.

Mr. Baird has asked me to find that the order was improperly written if I should find that the operator was not negligent. The Commission held in Secretary of Labor v. Ace Drilling, Inc., 2 FMSHRC 790 (1980), that liability for the occurrence of violations in coal mines is not conditioned upon fault. The Commission also held to the same effect in U.S. Steel Corporation, 1 FMSHRC 1306 (1979), and in Peabody Coal Company 1 FMSHRC 1494 (1979). Consequently, even though an operator may not be negligent in the occurrence of a given violation, that does not excuse him of the absolute liability to account for or be responsible for violations which occur in his mine.

We now come to the final criterion which is the question of gravity. The unfortunate aspect of a violation of the roof-control plan is that any violation of the roof-control plan at any time may result in a person's death. I have always considered violations of the roof-control plan generally to be the most serious of all violations. I think that the evidence in this case supports such a finding because, here, even assuming that the deceased had never before gone out from under supported roof either to install roof bolts or to pry down loose material, it just takes one time to fail to comply with the roof-control plan or any safety aspect of the roof-control system, for that oversight to result in a fatality. Therefore, it was without any doubt a very grave violation in this instance because the failure to install the temporary supports prevented the deceased from being able to get back to a safe place when the roof gave way.

The Commission held in Secretary of Labor v. Co-Op Mining Company 2 FMSHRC 3475 (1980), that judges are not bound by assessments recommended by the Assessment Office and Mr. Stewart for the Secretary has indicated in his closing argument that he did not think that the one recommended in this case by the Assessment Office was appropriate in light of the evidence that we have received here today. The Assessment Office, of course, when it recommended the penalty that was proposed originally in this case, did not have before it the evidence that we have heard here today. Consequently, there was reason for the Assessment Office to have suggested a very large penalty originally, and there are reasons for Mr. Stewart to believe, after hearing the testimony in this proceeding, that a mistake may have been made in proposing a large amount. Because of the extenuating circumstances that I have outlined above and the fact that the operator is in a very difficult financial position I am going to assess a

much smaller penalty than I would otherwise.

Nevertheless, there were certain things that could have been done by management on September 28 that were not done. For example, it is a fact that the section foreman was operating the scoop, and in doing so, he was the primary person who was keeping production going at the mine. He conceded that he had not made his methane checks every 20 minutes as he was required to do, and he conceded that he was obligated to do more things than he could comfortably and efficiently perform on September 28, 1979. Also the operator was personally running the cutting machine and working underground because the cutting-machine operator had quit with only the previous day's advance notice and another person had had to go home because of illness. Those circumstances made it necessary for the section foreman to do work which kept him from doing his supervisory function as efficiently as he might otherwise have performed his supervisory responsibilities.

In view of the above-described aspects of management and the fact that there might have been some things done here that were not done, I believe that a penalty should be assessed which may be a hardship for the operator, but which I think is the very minimum that should be assessed in the circumstances. Therefore, a penalty of $500.00 will be assessed for this violation of section 75.200.

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

Respondent, within 30 days after the date of this decision, shall pay a civil penalty of $500.00 for the violation of section 75.200 alleged in Order No. 708133 dated October 2, 1979.

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