

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUN 25 1981

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 80-166
Petitioner	:	Assessment Control
	:	No. 44-03761-3019 V
v.	:	
	:	No. 2 Mine
ELKINS ENERGY CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Robert T. Copeland, Esq., Copeland & Thurston, Abingdon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 3, 1981, a hearing in the above-entitled proceeding was held on April 21, 1981, in Wise, Virginia, 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. 107-118):

This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. VA 80-166 on October 24, 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 Elkins Energy Corporation.

I shall make some findings of fact on which my decision will be based.

1. Inspector Charles Reece went to Elkins Energy Corporation's No. 2 Mine on June 4, 1980, to make some respirable dust investigations. He traveled to the face area about 8:00 a.m. While he was in the face area, he observed that the No. 3 entry had been cut to a depth which appeared to be more than the 20 feet permitted under the roof-control plan. He talked to the roof-bolting machine's operator who advised the inspector that he had made a test hole that morning, and also that he had just finished completing the installation of a row of bolts 4 feet outby the row of bolts on which he was working at that time. The inspector made a measurement from the row of bolts which had last been installed up to the face area after the place had been completely bolted, and determined that the distance was 28 feet.

2. The inspector's measurement of 28 feet was based upon a statement made by a witness who was **not available** to testify in the proceeding today. The inspector, however, drew a diagram, which is Exhibit 4 in this proceeding, and that diagram shows that the inspector's own observation would permit him to testify, which he did that the distance from the roof bolts which were being installed at the time the inspector was on the section was a distance of 24 feet. The evidence shows in this case that a 14 Joy continuous-mining machine was being used to produce coal; and that the distance from the forwardmost bit on the Joy continuous-mining machine to the controls is a distance of **21-1/2** feet. If the measurement of 24 feet is used as the distance which the machine was trammed beyond the last permanent roof support, the controls of the machine would have been out from under the supported roof a distance of only **2-1/2** feet. **One** of the company's witnesses testified that under that situation the hand of the operator would have been under unsupported roof but not his body.

3. The continuous-mining machine here involved was equipped with a canopy so that the controls of the miner are under the canopy, and the result is that, even if the operator's hands and arms were beyond the last permanent roof support, the operator and his hands and arms would have been under the canopy. Additionally, if the continuous-mining machine had been advanced a distance of 8 feet beyond the last row of permanent supports, the canopy would have protected the operator from a possible roof fall.

4. The roof-control plan is Exhibit 2 in this proceeding. That plan provides on page 4 that the maximum depth the continuous-mining machine may be advanced beyond the last row of permanent supports is 20 feet. Page 11 of Exhibit 2 provides in paragraph 3 that the operator of the continuous-mining machine shall not advance the controls of such equipment **inby** the last row of roof bolts.

5. The inspector's citation, which is Exhibit 1 in this proceeding; states that several mountain breaks existed in the face area. He testified, however, that he observed no mountain **breaks** in the No. 3 entry where the mining machine advanced beyond the last row of permanent supports.. One of the operator's witnesses testified that he observed mountain breaks in the entry adjacent to the No. 3 entry, but that he saw none in the No. **3 entry**. The main roof and immediate roof in this mine are comprised of sandstone. The inspector testified that, while he didn't think any roof was completely safe, of the various types of immediate roof that he encounters, that he considered sandstone to be the least subject to falling particles and hazardous conditions. The inspector was not aware of **any roof** falls which had occurred in this mine at the time he made his inspection. One of the operator's witnesses testified that no roof falls had occurred. The inspector testified that the roof-bolting machine operator and his helper had installed the proper number of safety supports prior to commencing bolting in the No. 3 entry.

6. The chief financial officer of the **Elkins Energy Corporation** testified in this proceeding. His name is **W. Jack Davis**. Mr. Davis testified that **Elkins Energy** has been showing a net loss for a considerable period of time. In 1977 the company had a net loss of \$306,847 (Exh. D). In 1978, it showed a net loss of **\$2,274,925** (Exh. C). In 1979 the company went through some formal bankruptcy proceedings. At that time another company by the name of **Sylvia Ann Coal Company** acquired the stock of **Elkins Energy** and began making a joint return with **Elkins Energy**, and in that 1979 return, **Elkins Energy** itself showed a loss of \$36,000 and the joint return showed a loss of \$86,313 (Exh. B). Under the bankruptcy provisions, the secured creditors started receiving payments in September 1979, and those payments vary over different periods, depending upon the decisions made in the bankruptcy proceeding. The unsecured creditors, however, are to be paid off on a quarterly basis over a **4-1/2-year** period. In 1980 **Elkins Energy** showed a net income of **\$200,752.24** (Exh. A). Some of that net income has been used to make payments to unsecured creditors beginning on March 13, 1980, and some more will be used to make a payment as of June 13, 1981. The company's liabilities are **\$4,130,140.91** in excess of its assets (Exh. E).

7. Under the bankruptcy provisions, there are four operating officers and an additional management person, namely, Mr. Davis, who received from \$25,000 to \$30,000 a year in salary, but the bankruptcy provisions control payments of funds out of the company's cash flow. The company has a certain amount of flexibility so that it might be able to pay a penalty of up to \$500 without having to discharge payment of the penalty under the provisions of **payments** to unsecured creditors. Any amount over \$500, and this is purely an estimate by Mr. Davis, would have to be done on a quarterly basis over a period of **4-1/2** years. Therefore, any large penalty that I might assess in this proceeding would have to be paid in the same manner, that is, on a quarterly basis.

8. **Elkins Energy Corporation**, at the present time, is not producing any coal because of the strike. If it were producing coal, **and** assuming the strike ends and production resumes, the company operates three different mines, the No. 6A Mine, the No. 10 Mine, and the No. 12 Mine. The average production from all three mines totals 35,000 tons per month, and the total employment, including managerial personnel, is 125 employees. All of the company's coal is sold under a contract with either **Clinchfield Coal Company** or **Flat Gap Mining Company**. The No. 6A Mine has an estimated life of 5 to 7 years. The No. 10 Mine has an estimated life of 6 months, and the No. 12 Mine has an estimated remaining life of from 10 to 15 years.

I believe that those are the primary findings of fact which I have gleaned from the testimony given here today. I believe that the testimony supports a finding that a violation of section 75.200 occurred because, even if we restrict the testimony to the personal observations

of the inspector, there is no doubt but that the evidence supports the fact that the continuous-mining machine controls were advanced beyond the last row of permanent supports, which would be a violation of the provisions in the roof-control plan which I mentioned in my findings above.

Having found that a violation occurred, it is necessary that I assess a penalty. The Act does not permit a judge to find that a violation occurred and waive the assessment of a penalty. The size of the company's business has been discussed in the findings of fact, and they indicate that the company is a relatively small operator. I did not include anything as to the criterion of history of previous violations in my findings above because those previous violations are set forth in Exhibit 3 in this proceeding and Exhibit 3 indicates that the company has a history of only four previous violations for the last 24 months preceding the occurrence of the violation cited in, this case.

One of those was a violation of section 75.200 which was cited in February of 1980. It has been my practice over the years to increase the penalty otherwise assessable under the other five criteria if I find that an operator has violated on a prior occasion the same section of the Act or regulations which is before me in any given proceeding. Since there has been a previous violation of section 75.200, I find that whatever penalty is otherwise assessable should be increased by **\$25** under the criterion of history of previous violations.

I made no reference in the eight-findings of fact set forth above to the criterion of whether the operator demonstrated a good-faith effort to achieve rapid compliance. The entries on Citation No. 687711 shows that it was issued at **9:45** a.m. by the inspector, and that the violation was abated by **3:15** p.m. the same day. The evidence in this case shows that the inspector waited until the No. 3 entry had been completely bolted before he measured the distance from the last row of permanent supports to the face, and he testified that he didn't even write the citation until the area had been completely bolted. Consequently, at the time the inspector wrote the citation, the roof bolting that needed to be done in this entry had already been completed.

The inspector said that roof bolting was only a portion of the abatement that he required, the other portion being that when a violation of the roof-control plan occurs, the operator is required to explain the roof-control plan to the crew so that they will know that a violation occurred and will avoid similar oversights in the future.

The company's safety director, Mr. Donnie Short, explained the roof-control plan about 3 o'clock to both the day shift, which was leaving the mine, and to the oncoming shift, which was due to begin working at 3:00 p.m. Consequently, the total abatement of the violation is based on the explanation of the roof-control plan by the operator's safety director at approximately 3:00 p.m.

It was speculated in this proceeding that the tramming of the controls of the continuous-mining machine beyond the last row of permanent supports was an act which was done by the second shift which came to work at 3:00 p.m. Consequently, the inspector appropriately waited until both shifts had had the plan explained to them before he abated the citation. I believe that those facts support a finding that the operator demonstrated a good-faith effort **to** achieve rapid compliance, and that the penalty should neither be increased nor decreased under the criterion of good-faith effort to achieve rapid compliance.

The last findings of fact set forth above, that is, Nos. 7 and 8 show that the operator is currently carrying on its business under provisions of the Bankruptcy Act and, consequently, can only pay penalties based on the provisions of the court's **disposition** of that filing in bankruptcy. Since respondent has an outstanding obligation to pay off both secured and unsecured creditors in a considerable amount, I think it would be appropriate to find that large penalties would have an adverse effect on the company's ability to continue paying off its creditors and, therefore, any penalty assessed in this proceeding should take that criterion into consideration.

The remaining two criteria are negligence and gravity. Insofar as negligence is concerned, the evidence supports a finding that there was at least ordinary negligence because the continuous-mining machine's controls were advanced farther than they should have been. Although the roof-control plan, which is Exhibit No. 2 **in** this proceeding, became effective only a few days before the citation was written, Mr. **McGinn** stated in his closing remarks that the old roof-control plan, which has a date of March 2, 1979, contained the same provisions that I used in finding that a violation of the roof-control plan occurred. Consequently, the operator was aware of the provisions of his roof-control plan, and we cannot say that the section foreman was unaware of the fact that the controls of the continuous-mining machine should not have been advanced beyond the last permanent roof supports.

As to the criterion of gravity, the evidence and the findings of fact that I have already made show that the immediate roof was sandstone which is less hazardous than some shales and other types of immediate roofs. Also, fortunately, the continuous-mining machine was equipped with a canopy which did have a safety factor built in to it, if a person does go beyond permanent roof support.

Additionally, there is no evidence in the case to show that anyone other than the operator of the continuous-mining machine went beyond permanent roof support, and the operator of the roof-bolting machine had installed the proper temporary supports before he began to install the permanent supports. Consequently, we do not have any evidence that a large number of people went beyond permanent **support** in this instance. Consequently, the gravity of the situation is not as great as it might have been. Of course, as the inspector pointed **out**, **roof-control** violations are the most serious ones in the coal mines because

roof falls still are a primary contributor to death and serious accidents in the mines. Therefore, none of them are to be taken lightly.

By way of summary, since we have a situation in which the company is already in bankruptcy, and one which involves a small operator, and a situation where there was ordinary negligence, and not a great degree of gravity, I believe that a penalty of \$200 should be assessed, to which \$25 should be added for the history of previous violations, so that a penalty of \$225 will be assessed in this proceeding.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of \$225.00 for the violation of 30 C.F.R. § 75.200 alleged in Citation No. 687711 dated June 4, 1980.

Richard C. Steffey

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

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