

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 26 1981

LESLIE COAL MINING COMPANY, Contestant	:	Contests of Citations
v.	:	Docket No. KENT 79-375-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 713366; 8/31/79
	:	"
	:	Docket No. KENT 79-376-R
	:	Citation No. 715998; 9/5/79
	:	"
	:	Docket No. KENT 80-217-R
	:	Citation No. 729889; 3/18/80
	:	"
	:	Leslie Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
v.	:	"
LESLIE COAL MINING COMPANY, Respondent	:	Docket No. KENT 80-259
	:	A/O No. 15-07082-020288
	:	"
	:	Docket No. KENT 80-314
	:	A/O No. 15-07082-03035
	:	"
	:	Leslie Mine

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page,
Pikeville, Kentucky, for Contestant-Respondent;
Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, for Respondent-Petitioner.

Before: Judge Charles C. Moore, Jr.

These combined civil penalty and review proceedings were heard February 24, 1981, in Prestonsburg, Kentucky. Two citations and a withdrawal order alleging violations of 30 C.F.R. §75.200 are at issue. ^{1/} Per stipulations introduced at the hearing, Leslie Mine is medium-sized, producing 177,818 tons of coal annually, has a moderate prior history consisting of 235 violations during two and one-half years, and imposition of the maximum civil penalty will not adversely affect Contestant-Respondent's ["Contestant's"] ability to remain in business.

^{1/} 30 C.F.R. 175.200 prescribes, in part, "[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."

The first citation became the basis of a withdrawal order five days later. A second citation alleging a violation of **§75.200** in a different section of the mine was issued by Inspector Oney, who had **issued the** withdrawal order.

Inspector Smith issued citation 713366 on August 31, 1979, during an investigation of a non-fatal roof fall in the 009 working section of the Leslie Mine. The roof fall, not at issue here, had occurred in the third entry between Spads 971 and 999 (see Contestant's Exhibit ["Ex."] C-2). The fall encompassed most of the entry between the crosscuts (Tr. 43-46). The remaining portion of the entry had been timbered to 'prevent the fall from spreading to a power center **inby** Spad 999 in the third entry.-_2/ A power cable had been routed around the fall into the second entry **and** back to the power center.

The inspector observed large cracks and cutters in the roof around the fall (Tr. 11). 3/ Water was dripping and flowing from the roof in large quantities, "**like** a faucet" (Tr. 14-15). This roof is composed of laminated or layered shale with additional parts of sandstone and fossilized material (Tr. 15). As such, it is structurally weak and the presence of dripping and flowing water increases the likelihood of roof falls (Tr. 16). Ten roof falls had occurred in the Leslie Mine during the five months before this citation was issued (Tr. 27, 152). Metal straps and four, five and six foot resin roof bolts supported the roof and metal plates were also put up in some areas (Tr. 16, 17, 40, 173 and Ex. C-6). It was stipulated that Contestant was following an approved roof control plan when both citations and the order were issued and that a violation of the plan is not alleged. Section 75.200 may be violated, however, if roof **is** inadequately' **supported regardless** of whether a plan is being followed.

After observing these conditions, Inspector Smith issued a citation **pertaining to** three areas near the fall. 4/ The citation was to have been abated five days later. Inspector Oney entered the area September 5, 1979, while conducting a regular inspection and observed cracks in the roof and dripping water (Tr. 51). He saw no evidence of additional roof support and issued withdrawal order 715998 intending to cover the same area as the citation. The order differed from the citation, however, in that it failed to include an area around Spad 999 that was included in the citation, and was unclear with respect to the measurements of the

2/ "**Inby**" is a term of direction meaning toward the working face, and "**outby**" refers to the direction away from a working face. a dictionary of mining, mineral and related terms, Bureau of Mines, U.S. Department of the Interior, 1968.

3/ The inspector defined a "cutter" as a crack occurring where the roof meets the ribs, indicating stress (Tr. 13).

4/ The first area was the crosscut between Spad 971 and 997; the second was a section of roof in the second entry beginning 60 feet **inby** Spad 997 and extending 100 feet into the intersection; the third was a section of roof beginning at Spad 999 and extending **outby** 40 feet.

area cited around Spad 997. An additional ambiguity in the citation's language, carried over into the order, was not discovered **until** the hearing. The first inspector had intended to cite the crosscut between the second and third entries (between 997 and 971) but the citation read, "80 feet to the left of Spad 997," which could have been interpreted to mean that part of the crosscut between the first and second entries. This caused some confusion for Contestant as to the proper placement of cribs and timbers to abate the citation. A witness for Contestant testified that he first realized that some of the timbers and cribs had been misplaced while accompanying the inspector who issued the order. He requested that **the compliance** date be extended in order to remedy the error but the inspector refused (Tr. 181). On redirect examination, the inspector stated that he did not recall the witness making such a **request** (Tr. 185). The order was abated three months later after cribs and timbers had been installed to the satisfaction of the inspector.

The inspector gave several reasons for his opinion that the roof was not adequately supported. As a roof control specialist, these were the worst conditions he had ever seen (Tr. 14-15). A fall had recently **occurred in** the area of the citation as had ten roof falls at this mine in the five months preceding issuance of the citation. Water flowing from the roof posed a threat of electrical shock should a piece of wet roof fall on the high voltage cable (Tr. 25). Although he admitted it was possible to have sound roof despite the presence of large quantities of water, the inspector felt that such was not the case here (Tr. 38-39).

Three witnesses for Contestant testified that the roof was adequately supported before the citation was issued, and that the **timbers** and cribs installed to abate the order had not taken weight since their installation (Tr. 124-125, 142, 158-159, 166, 173-174). Two of those witnesses had recently visited the area; the third had only spoken to miners who regularly worked there (Tr. 124-125). Mr. **Wooten**, who was Contestant's safety director when the citation was issued (Tr. 165), testified that a crack was discovered up in the roof when test holes were drilled in the area in preparation for mining (Tr. 166). Contestant then began using five and six foot bolts instead of four foot bolts, as required by the roof control plan (Tr. 166).

In view of the fact that this was admittedly bad roof, that a roof fall had just occurred and that Contestant did not prove to my satisfaction that greater roof support was used in the cited area than had been used in the fall area, I think the inspector was justified in issuing the citation. It follows that since no action was taken to abate the citation by September 5, 1979, the withdrawal order was also proper. Both the citation and the order are affirmed.

While I disagree with Contestant's evaluation of its roof condition, I find that Contestant knew of the conditions and did not consider the area dangerous. Its degree of negligence was therefore small. As to gravity it must be remembered that the inspector did not issue an imminent danger order. A penalty of \$300 will be assessed.

Citation 799889 was issued when Inspector Oney was conducting a regular safety and health inspection in the 010 working section of the Leslie Mine and observed a vertical crack, one-half inch wide and 24 feet long, extending the length of the intersection between the entry and the crosscut at Spad 1608 (Ex. C-3, Tr. 69). After speaking to the roof bolting machine operator and using the "sound and vibration" method, he also found a horizontal crack 48 inches up the roof (Tr. 75-77). 5/ 6/ He saw that the cribs and timbers immediately **outby** the intersection had taken weight (Tr. 69), so much so in fact that the wedges installed between the timbers and the roof to insure a tight fit were "mashed almost flat," (Tr. 77). Eight foot roof bolts were being installed (Tr. 90). Four, five, six and eight foot roof bolts and metal straps supported the area (Tr. 117). Timbers and cribs had been installed in the second entry **outby** Spad 1608 before the citation was issued. The entry was an active coal haulage road when the citation was issued but is no longer actively used (Tr. 102, Ex. C-3).

A witness for Contestant, Mr. Vaughan, testified that he visited the area after the citation was issued and found only one crib had taken weight (Tr. 127). **Two** timbers **were so** loose that he was able to knock them out with a small mason **hammer** (Tr. 116).

The inspector and one witness for Contestant testified that cribs and timbers in the area have taken weight since the citation was abated (Tr. 97, 159-160). Upon returning to the area after the citation was abated, the inspector observed that more timbers had been added and that others had broken so that it was difficult to tell which timbers had been installed to **abate** the citation, and whether they had taken weight, in order to determine whether or not the additional support mandated in the citation was needed (Tr. 97). One witness for Contestant testified, however, that the area was timbered off pursuant to a company policy requiring escapeways to be timbered regardless of roof conditions in order to prevent falls (Tr. 127). This testimony was refuted by another witness for Contestant who testified that the cited area was not an escapeway; that the witness was "off one overcast" (Tr. 162). 7/

Although the existence of the vertical crack was well established at the hearing there was some question as to whether MSHA proved the existence of the horizontal crack. All of the Contestant's witnesses,

5/ "Sound and vibration" testing is an accepted method for detecting horizontal cracks. It consists of placing one hand on the roof then tapping the roof with a hammer. In this case the inspector found that the roof "sounded heavy" indicating weight on the roof bolts, supporting his conclusion that a horizontal crack existed (Tr. 77). Peabody Coal Company, 2 FMSHRC 987 -(April 1980) and Itmann Coal Company, 1 FMSHRC 1591 (October 1979).

6/ A vertical crack is a crack in the roof visible to the naked eye. A horizontal crack is a separation of strata up in the roof not visible to the naked eye. Its existence is established by using the sound and vibration method, above, or by drilling test holes.

7/ An "overcast" is "[a]n enclosed airway to permit one air current to pass over another one without interruption." a dictionary of mining mineral and related terms, supra.

however, acknowledged that detection of a horizontal crack was the reason **longer** bolts were installed (Tr. 121, 122, 134, 159, 173-174). The real dispute was whether the roof was adequately supported when the citation was issued.

The inspector felt more support was needed and that the intersection would have fallen had not additional support been installed (Tr. 81). Contestant, on the other hand, was of the opinion that the area was adequately supported when the citation was issued (**Tr.** 159-160).

When experts disagree as to **the safety** of a particular situation it presents a difficult question.' The Government has the burden of proof, but I believe a close question should be decided in favor of safety. I hold that on balance, the Secretary has shown that the intersection needed more roof support. I accordingly affirm the citation.

As to the penalty, I find a low degree of negligence. As to gravity, I take into consideration the fact that no imminent danger order was issued. A penalty of \$100 will be assessed.

ORDER

Contestant is ordered to **pay** to MSHA, within 30 days, a penalty of \$400.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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