FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE. SUITE 400
DENVER. COLORADO 60.204

AUG 24 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-239
v.	MSHA CASE NO. 05-02820-03011 V
C F & I STEEL CORPORATION, Respondent.	MINE: Maxwell

DECISION AND ORDER

Appearances:

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For the Petitioner

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Denver, Colorado 80290
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The Secretary of Labor, Mine Safety and Health Administration [hereinafter "the Secretary"], brought this action against C F & I Steel Corporation [hereinafter "C F & I"] alleging one violation of the Act. The Secretary seeks an order assessing a civil monetary penalty against C F & I for its alleged violation of the Act.

FINDINGS OF FACT

1. C F & I is the operator of an underground coal mine located near Weston, Colorado, known as the Maxwell Mine.

2. Products of the Maxwell Mine enter or affect interstate commerce.

3. On March 29, 1979, a duly authorized representative of the Secretary conducted an inspection of development Unit No. 2 of the Maxwell Mine pursuant to section 103(g) of the Act.

4. In the last crosscut of that unit, the MSHA inspector observed a complete cycle of roof bolting utilizing resin grouted roof bolts. The inspector observed that the roof bolter never attempted to wait a minimum of ten minutes before torque-testing the installed rod as required by the mine's roof control plan. 1/ Subsequent investigation revealed that the roof bolting crew was not provided with a torque wrench and that the roof bolting machine had a broken set of pressure gagues on its right side.

5. Order of Withdrawal No. 387995 2/ was issued to C F & I by the MSHA inspector for its alleged violation of 30 C.F.R. § 75.203. 3/ Additionally, the order contained findings by the inspector pursuant to section 104(d)(1) of the Act that the violation was caused by an unwarrantable failure of the operator to comply with a mandatory safety standard.

1/ Paragraph 9 of the roof control plan then in effect at the Maxwell Mine reads:

"For test purposes, the first resin grouted rod installed in each cycle in each working place, after a minimum curing time of 10 minutes, shall be checked with a torque wrench or the bolter after installing the first line of permanent support and prior to removing any temporary supports. The torque applied should be 150 foot-pounds. Should the rod turn in the hole, a second rod shall be tested in the same manner. If this rod also turns, resin installation shall be discontinued until reasons for failure of the resin is determined."

2/ The condition or practice cited alleges:

"A torque wrench socket was not provided for the torque wrench for testing the installed resin grouted rods. The gauges for the torque value on the Long Airdox Roof Bolter Serial No. 52-1086 were also broken. So means was not available for testing installed bolts in Unit No. 2."

3/ Roof bolt tests. [STATUTORY PROVISIONS] When installation of roof bolts is permitted, such roof bolts shall be tested in accordance with the approved roof control plan.

6. At the time of this inspect ion, C F & I was relying upon prior statements made by an MSHA representative specializing. in roof control that resin grouted roof bolts should not even be torqued because torquing the bolt increases the possibility that the bond between the roof bolt and the consolidated epoxy resin may be broken.

7. The requirement regarding the torque-testing of resin grouted roof bolts was subsequently deleted from the mine's roof control plan.

8. Payment of the proposed penalty will not impair the ability of C F & I to continue in business.

ISSUES

1. Did Respondent fail to test the, roof bolts in Unit No. 2 in accordance with the mine's approved roof control plan?

2. If so, was the violation caused by an unwarrantable failure of the Respondent to comply with the mandatory safety standard?

DISCUSSION

The condition or practice cited was in fact a technical violation of the mandatory safety standard contained in 30 C.F.R. § 75.203. The Maxwell Mine roof control plan does permit the installation of roof bolts, and as such, they were to be tested in accordance with the approved plan. That plan called for test torquing with a torque wrench or roof bolter "after a minimum curing time of 10 minutes." The facts as found indicate this was not done.

'C F & I raises the defense that they were excused from the plan's torquing requirements by their justifiable reliance on the representations of MSHA officials that torquing resin grouted roof bolts was counterproductive and, indeed, dangerous. From a technical standpoint, this may be true. However, as a matter of law, the requirements of the standard are enforceable. In Secretary of Labor, Mine Safety and Health Administration (MSHA), v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), the Review Commission held that a safety standard controls over an interpretation of that standard set forth in MSHA's interim inspector's manual. I find the situation presented here is analogous to! the cited case in that the inspector's representations were merely informal and non-binding. Relying on the Commission's reasoning, I find that the requirements of the standard are binding and reject the defense.

C F & I raises an additional defense that they were excused from the plan's torquing requirements because compliance with the mandates of the standard posed a "greater hazard" to the miners than did noncompliance. As authority, C F & I cites Olga Coal Company, v. Secretary of Labor, Mine Safety and Health Administration (MSHA), and United Mine Workers of America, 1 FMSHRC 1580 (1979), and a line of cases interpreting the narrow "greater hazard" defense recognized under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. However, under this Act, the appropriate channel to follow to avoid such a conflict would have been to petition the Secretary for a modification of application of the standard pursuant to section 101(c), 30 U.S.C. §811(c). In Secretary of Labor, Mine Safety and Health Administration (MSHA), v. Penn Allegh Coal Company, Inc., 3 FMSHRC 1392 (1981), the Review Commission held that the defense of diminuation of safety is improperly raised in an enforcement proceeding and should properly be pursued in the context of the special standard modification procedures provided for in the Act. C F & I did not avail itself of that avenue of potential relief and to consider the defense in this forum would be inappropriate. Consequently, the defense is rejected and a violation of the Act is found to have occurred.

On the issue of whether the violation was caused by an unwarrantable failure on the part of C F &I to comply with the mandatory safety standard, I find for the Respondent. The evidence establishes that a significant degree of confusion ensued from the statements of the MSHA inspector regarding the effects of torquing resin grouted roof bolts once they had set. I conclude that it was not unreasonable for C F & I to be somewhat confused by these representations. On this basis, the finding of unwarrantable failure to comply should be vacated.

In determining an appropriate civil penalty for the violation, I take note of the fact that C F & I's roof bolters did utilize certain procedures in setting the roof bolts which allowed them to determine the integrity of the epoxy resin during the bolting cycle. By gauging the resistance of the bolt in relation to the constant force exerted by the drill, the installer was able to determine whether the resin had set. This procedure provided essentially equivalent protection to that insured by the plan. The fact that the torquing requirement was eventually dropped from the Maxwell Mine's roof control plan indicates the reduced degree of negligence and gravity associated with the violation.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Petitioner proved that Respondent violated the Act as alleged in Order of Withdrawal No. 387995, hut failed to meet the burden of proof that the violation of the Act was occasioned by an unwarranted failure of the Respondent to comply with its provisions.

3. Order of Withdrawal No. 387995 should therefore be affirmed and the finding of unwarrantable failure vacated.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Order of Withdrawal No. 387995 is AFFLRMED and that the finding of unwarrantable failure is VACATED. It is FURTHER ORDERED that Respondent shall pay a civil penalty in the amount of $100.00 for its violation of the Act within 30 days of the date of this Decision.

Jon D. Boltz
Administrat ive Law Judge

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