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SOL (MSHA) v. SOLAR FUEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
PETITIONER

v.

SOLAR FUEL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. PENN 79-142
A.C. No. 36-06100-03004

Solar No. 9 Mine

DECISION

Appearances: Susan L. Olinger, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner
Charles E. Sliter, Esq., Hamel, Park, McCabe & Saunders, Washington, D.C., for Respondent

Before: Judge James A. Laurenson

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (hereinafter the Act), to assess a civil penalty against Solar Fuel Company (hereinafter Solar) for two violations of a mandatory safety standard. Pursuant to cross motions filed by the parties, I issued a summary decision on July 3, 1980, in favor of Solar. Thereafter, on June 23, 1981, the Commission reversed my decision and remanded the case to me for disposition consistent with its decision.

On August 3, 1981, a hearing was held in Falls Church, Virginia on the above matter. In light of the Commission decision which held that 30 C.F.R. 75.503 applies to equipment which is intended to be or is habitually taken or used in by the last open crosscut, the parties agreed to my entering summary decision on behalf of MSHA with regard to the fact of violation. On the issue of the amount of civil penalty which should be assessed, Inspector Earl L. Miller testified on behalf of MSHA. Both parties presented arguments and waived the filing of briefs.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. 820(i) provides in pertinent part:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such

penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. 75.503 provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.502 to be permissible which is taken into or used in by the last open crosscut of any such mine."

STIPULATIONS

1. On May 3, 1979 and May 4, 1979, duly authorized representative of the Secretary of Labor, coal mine inspector Earl Miller, performed a regular quarterly inspection at the Solar Fuel Company's Solar No. 9 Mine.
2. During the course of his inspection on May 3, 1979, Inspector Miller observed that a Jeffrey mining machine located in an intake air course outby the last open crosscut, was not in permissible condition (see Citation No. 0617857, received in evidence as Exh. No. G-1). He also observed a roof bolting machine, in non-permissible condition in an intake air course outby the last open crosscut, on May 4, 1979, at the same mine in the same working section. (See Citation No. 0617859, attached hereto as Exh. No. G-2).
3. The section of the mine in question was being prepared for mining operations which were scheduled to begin shortly after the issuance of the subject citations. The operator intended to use both pieces of equipment in by the last open crosscut while performing these mining operations.
4. On May 3, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617857 was issued, produced 105 tons of coal after the citation was issued.
5. On May 4, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617859 was issued, produced 285 tons of coal after the citation was issued.
6. Solar Fuel Company is the owner and operator of the subject mine.
7. Solar Fuel Company and Solar No. 9 Mine are subject to the Federal Mine Safety and Health Act of 1977.
8. The Administrative Law Judge has jurisdiction over the parties in the subject matter of this proceeding.
9. Copies of the citations are authentic and were properly served upon the Respondent.

DISCUSSION

Solar stipulated that it intended to use the equipment, which was not in permissible condition, in by the last open crosscut. The Commission's Decision in this matter, therefore, mandates a finding of a violation of 30 C.F.R. 75.503 in connection with both citations. Solar does not oppose MSHA's motion for partial summary decision.

The remaining issues concern the amount of civil penalties to be assessed for these violations. Citation No. 0617857 alleged that the Jeffrey Miner was not maintained in permissible condition in that the ballast box for the lighting system had an opening in excess of .005 of an inch. Citation No. 0617859 alleged that the roof bolting machine was not in permissible condition because a bolt was broken off the lid of the ballast box for the lighting system. Additionally, two conduits were cut off the packing glands on the roof bolts. MSHA Inspector Earl Miller testified that he did not consider either of these violations to be significant or substantial at the time the citations were written. He did not believe that Solar was aware of either violation. He stated that an accidental occurrence was improbable in each case. The inspector's statements were premised upon the fact that he found no methane reading on his methane detector and that the area was well rock dusted and damp. However, bottle samples of air were later analyzed to show .01 to .02 percent methane. He conceded that this was a very low level of methane and did not present any danger to persons in the area. MSHA initially proposed civil penalties in the amounts of \$38.00 and \$40.00 for these two citations. At the hearing, counsel for MSHA requested "the assessment of a substantial penalty...."

Solar attempted to show that a Draft Electrical Manual prepared by MSHA constituted MSHA's enforcement policy at the time these two citations were issued. Inspector Miller denied this fact and stated that he had not seen the Draft Electrical Manual until shortly before the hearing. Moreover, he testified that, to his knowledge, it had always been MSHA policy to cite permissibility violations found out by the last open crosscut where the equipment was intended to be used in by the last open crosscut. In any event, Solar never asserted or established that it relied on the Draft Electrical Manual at any time prior to the dates of these citations. Of course, any statement in the Draft Electrical Manual is not a rule of law binding upon the Commission. Old Ben Coal Co., 3 FMSHRC 2806, 2809 (1980). I find that this case is distinguishable from King Knob Coal Co., 3 FMSHRC 1417 (1981) where the Commission agreed that the operator was not negligent because the MSHA Manual caused confusion concerning the appropriate standard of care. There is no evidence herein of any confusion attributable to statements in the Draft Electrical Manual. Hence, I find that the statements in the Draft Electrical Manual are irrelevant to the criteria for assessment of a civil penalty pursuant to section 110(i) of the Act.

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, Solar's prior history of 13 violations in the previous 2 years is noted. I also note that

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5 of these 13 violations were for the same section in controversy here: 30 C.F.R. 75.503. On the other hand, Solar received an MSHA safety award at this mine in 1979. In any event, the assessment of civil penalties herein will not affect the operator's ability to continue in business.

Contrary to the statements of the MSHA inspector, I find that Solar knew or should have known of these violations. This is so because a bolt was missing from the cover of a ballast box. This condition should have been apparent to Solar. The other cited violations should have been detected by Solar. I find Solar chargeable with ordinary negligence. The gravity of these conditions is slight. The almost nonexistent level of methane indicates that the possibility of an explosion was extremely remote. Both citations were abated in good faith.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that civil penalties should be imposed for the violations as follows:

Citation No. 0617857	\$ 38.00
Citation No. 0617859	\$ 40.00

It should be noted that Citation No. 0617858 was vacated by MSHA on February 8, 1980, because it was issued in error.

ORDER

WHEREFORE, IT IS ORDERED that Respondent Solar pay civil penalties within 30 days for the violations as follows:

Citation No.	Regulation	Civil Penalty
0617857	30 C.F.R. 75.503	\$38.00
0617859	30 C.F.R. 75.503	40.00

James A. Laurenson Judge