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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

v.

D. C. COAL COMPANY, INC.,
RESPONDENT

Civil Penalty Proceeding

Docket No. SE 80-106
A.O. No. 40-02287-03014 V

No. 1 Mine

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor,
Nashville, Tennessee, for the petitioner;
Rudolph L. Ennis, Esquire, Knoxville, Tennessee, for the
respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. 75.201. Respondent filed a timely answer in the proceeding and a hearing regarding the proposal was held on August 27, 1981, in Oak Ridge, Tennessee, and the parties appeared and participated therein. The parties waived the filing of posthearing arguments, but were afforded the opportunity to make arguments on the record and they have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing safety regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. Respondent is subject to the provisions of the Act, and is a small coal mine operator producing approximately 25,000 tons of coal annually. At the time of the inspection in question, respondent was engaged in "retreat mining," and was producing coal on only one section.

2. On December 5, 1979, MSHA inspector Donn W. Lorenz conducted an inspection of the mine and issued Citation No. 999971, citing the respondent with a violation of mandatory safety standard 30 C.F.R. 75.201. Respondent was given an opportunity to accompany the inspector during the inspection.

3. Inspector Lorenz fixed the abatement time as 11:30 a.m., December 5, 1979, and the conditions cited were abated at 11:15 a.m., that same day.

Discussion

Citation No. 999971, December 5, 1979, cites a violation of 30 C.F.R. 75.201, and states as follows:

The two rows of breaker posts that have been installed in the No. 1 entry on the 003 working section where pillar recovery is being done have been removed, and gob rock and mud have been pushed in by the breaker line. The posts were then re-installed. Four cuts of coal have been taken from this pillar before the breaker posts were removed.

The abatement of the conditions cited reflects that "a safety meeting was held and all persons were warned against this act."

Petitioner's Testimony

Inspector Donn W. Lorenz confirmed that he issued Citation No. 999971 on December 5, 1979, because breaker posts had been removed in order to push gob, rock, and mud inby the breaker line where cuts of coal had already been taken from the pillar. The inspector explained that he had previously issued a citation on November 30, 1979, to respondent for failure to install breaker posts in the No. 1 entry and that these were the same posts which he determined had been removed to push mud behind them. When he returned on December 5, he knew he was in the same areas as on November 30, because he saw the pillar with the cut off one corner. This pillar, which had been under unsupported roof, was the reason he had issued a citation on November 30. On December 5, he saw mud and gob behind the posts which had not been there on November 30. The foreman, Troy Jackson, had told him that they had pushed the mud through the timbers.

Mr. Lorenz testified further that he did not believe the foreman's account of how the mud got pushed to the other side of the breaker posts. The inspector had noticed that the breaker posts were covered with mud from top to bottom and were not sturdy and were not caked with mud on November 30. He assumed that they had been removed and laid to the side while the area was filled. The inspector testified that the posts could not have stood the pressure of having mud pushed through them and would have been knocked out. He also concluded that the mud could not have been pushed through the No. 2 entry because this area had already been robbed and it would have been a violation to do so. He could tell by the angle of the mud that it had not been brought in through this entry. The inspector stated that the mud was angled toward the pillar demonstrating that it had been pushed up by a scoop bucket and then tapered outby the No. 1 entry. He knew that they had not brought the mud in from the left side of the No. 1 entry because it was also full of gob and mud. The inspector, in explaining the violation, stated that by removing the timbers and going inby the breaker line, the miners would be exposed to unsupported roof, since one pillar had been removed and another cut off. Since the area was not bolted, the danger of a potential roof fall was increased (Tr. 9-26, 45-47).

On cross-examination, Mr. Lorenz admitted that he had relied only on his visual observations to determine his location on December 5. He stated that the corner of the pillar which had been cut off was the only one like it in the area, and that there were no other pillars further back that were scarred or marked in a similar fashion. The inspector testified that the mine was muddy and had water in it, and that the mud was anywhere from 4 to 6 inches deep. The timbers were stacked in the mine with two or three laying alongside one another, and he did not know whether there was gob material behind the pillar labeled "D" on Government Exhibit 2 (G-2), which was the one with the cut taken out of it. He restated his belief that the mud could not have been brought through the left of the No. 1 entry because it was full of mud and gob and had been that way on November 30. He stated that there was no evidence of the mud having been moved

since that time. The inspector testified that he stood at the line of the breaker posts to make his observations, and

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that the slab taken off pillar "D" was not bolted, but he did not get close enough to that pillar to determine whether the area around it had been bolted (Tr. 27-44).

In response to bench questioning, Mr. Lorenz admitted that he did not personally observe the violation but assumed that the posts had been taken down and that miners had worked under unsupported roof. His assumption was based on the fact that there was only a 4-foot spacing between the posts and if machinery had pushed mud through that area, the posts would have fallen. He reiterated his belief that the posts had been taken down in order to push gob into the area behind the breaker line. He stated that he did not take notes at the time of the inspections and could not say how much pillar recovery had been completed (Tr. 50-57).

Testimony and Evidence Adduced by the Respondent

Don D. Collins, owner and operator of D. C. Coal Company, Inc., testified that the particular mine where the violation in question occurred is now closed and was in operation for 14 years, but that his present operation is located about a mile from the old facility. Mr. Collins stated that he employs 6-7 men at most, and that two of them would be involved in pillar extraction. He indicated that he has a cutting machine, a bolting machine, and two battery-powered scoops, and that since they are 26 inches tall and about 30-35 feet long, they often run into columns or knock off corners of pillars as the machines go around them. He also stated that every pillar which is close to the machines is scarred, and that the pillars change shape from square to hexagon or round.

Mr. Collins testified that he spoke with his men about the violation on November 30 because he did not want the violation to reoccur. He stated that once posts are installed, they are never removed and all his men had been instructed in that respect. He did not remember Foreman Jackson telling him that the mud had been pushed through the posts, and he accounted for the presence of mud behind the breaker posts by describing the procedure which was regularly used at their mine. He explained that prior to setting the posts and robbing the pillars, the area around the pillars are cleaned. This involved pushing 2 to 9 inches of mud, dry rock, and loose coal as far as possible toward the last row of breaker posts. This method saved the trouble of making a number of trips outside with the mud while still providing a clean area to set the posts in and to work in.

Mr. Collins testified that once the posts are installed, the pillars are extracted, and they repeat the process of moving the coal, mud, and gob to the next row of pillars. He stated that the pillars are rarely recovered completely, that usually seven or eight cuts are made, leaving one or two of the corner stumps before moving on. The extraction of coal creates more debris in the area which is cleaned up with the rest of the gob and mud in retreating to the next row of pillars. Mr. Collins indicated that it was pillar No. 5942 on Exhibit R-2 which the inspector

noticed on November 30, although he could not recall whether it had a corner cut off of it. He

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pointed to the pillar No. 5941 as being the one in question on December 5, and asserted that the breaker posts in that area had been installed and not moved prior to cutting into that pillar (Tr. 64-88, 101-102).

On cross-examination, Mr. Collins could not remember whether he accompanied the inspector underground on November 30, although the posts that needed to be installed were pointed out to him. He did remember speaking with the inspector underground on December 5, but contended that on December 5, Mr. Lorenz was in the same entry but near a different row of pillars than on November 30. In further explaining the procedure for moving mud, he stated that a miner would not be exposed to unsupported roof while pushing the mud back because the pillars would not have been robbed (Tr. 88-99).

Troy Jackson testified that he was acting in his capacity as section foreman on both November 30 and December 5. He stated that on November 30, four cuts had been taken from the pillar which needed about seven to eight cuts to be pulled all the way through. He claimed that there was mud, gob, and debris behind the posts on November 30, and that this was the result of having gathered all the muck and rock from the previous stump and putting it in the back to clear an area for the next row of breaker posts. Once the posts were in place, there would be no debris in the mine entrance side of the pillars. He denied that they had taken the posts down to push mud behind them. He stated that if his men had done this, he would have known about it. None of the workers had ever been instructed to engage in this practice of removing the posts. When the inspector issued the citation, he did not explain to him their procedure of pushing away the mud and debris before installing the posts because the inspector was at the mine every week and he assumed he knew the procedure followed. He denied having told the inspector that gob was pushed between the posts. He indicated that stump No. 5942 was the pillar being worked on November 30, but that on December 5, they were working on pillar No. 5941, and had taken out about half of that pillar by making four cuts on it (Tr. 109-123).

On cross-examination, Mr. Jackson confirmed that he accompanied the inspector on November 30, 1979, to the No. 1 entry where the inspector instructed that breaker posts be installed, and conceded the citation was issued because gob was being stored in an unsupported area where cuts had been taken from a pillar. Although asserting that the inspector had been disoriented as to his location in the mine on previous occasions, he stated that he did not try to explain the presence of gob on December 5, and asserted that he did not recall telling Mr. Lorenz that the gob had been pushed through the posts (Tr. 124-130).

On redirect examination, Mr. Jackson stated that it was not their practice to put debris on the retreat side once cuts were made in the pillar. After they were ordered to put posts up on November 30, no gob was put behind them. He asserted that roadway timbers can be knocked down by equipment after they are

installed, and he believed that the inspector should have known that the mud had been pushed up prior to installing breaker posts because the inspector had seen them do so on other occasions (Tr. 135-139).

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.201, which provides as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

It seems clear from the record in this case that the storage of gob and mud behind breaker posts in the mine is not per se a violation of any safety standard. However, once the breaker posts are installed, they are not to be removed if men and equipment are still in the area and working under that unsupported roof. In this case, the critical question is whether or not the breaker posts had been removed to facilitate the pushing of the gob and mud behind them, and then reinstalled. If the posts were removed, and then reinstalled after the gob and mud was pushed into the area, a violation of the cited section would have occurred because men would be working under the unsupported roof area, and would therefore be exposed to roof falls from faulty pillar recovery methods.

The inspector's testimony is that when he inspected the area on November 30, he observed no breaker posts installed and no gob or mud stored in the area. Once the breaker posts were installed to abate the citation which he issued on November 30, there was no gob or mud behind the posts. However, when he returned to the same area during his December 5 inspection, he testified that he observed mud and gob behind the same breaker posts, and assumed that someone had taken the eight posts down in order to push the gob and mud behind them (Tr. 141).

Inspector Lorenz testified that on November 30, 1979, there was one active section being mined, and while he served the first citation on Mr. Collins, Mr. Collins was not underground with him. However, he indicated that Section Foreman Jackson was with him underground at that time, and that two rows of breaker posts were installed to abate the citation. When he returned to the section 5 days later on December 5, 1979, he observed mud and gob behind the same breaker posts, and since there was no mud or gob in that area on November 30, he surmised that the posts had been removed to facilitate the pushing of mud and gob behind them, and that once this was done, the posts were reinstalled. Mr. Collins was not with him underground on December 5, but Mr. Jackson was (Tr. 41). When he questioned Mr. Jackson about this, Mr. Jackson purportedly told him that the posts were not removed but that mud and gob was pushed between the posts. At that time, Mr. Lorenz observed that the posts were muddy from top to bottom, and since he believed the posts would have been pushed out of place and broken by the pressure of all of the gob and mud which was behind them, he did not accept Mr. Jackson's explanation and issued the unwarrantable failure notice.

Inspector Lorenz indicated that during the intervening period from November 30 to December 5, four cuts of coal were taken from the pillar in question (Tr. 62). He specifically recalled that he was at the same location on November 30 and December 5 because the pillar being mined was one and the same, the breaker post location was at a corner which had been "slabbed off" or cut away, and it was the only corner cut in that fashion on both days (Tr. 29). Although Mr. Lorenz stated that he normally does not make notes or sketches at the time he issues a citation but simply relies on the conditions described on the face of the citation, in this case he made a sketch of the scene shortly before the August 27, 1981, hearing, and to the best of his recollection,, the sketch is accurate (Exh. G-2; Tr. 57). More significantly, Mr. Lorenz testified that when he discussed the matter with Foreman Jackson on December 5, Mr. Jackson said nothing to him about being in the wrong location, and Mr. Jackson made no protest that the posts in question were not the same as the previous posts cited on November 30 (Tr. 11-14).

Mine Operator Collins was not sure whether he was with the inspector underground during both of the inspections in question, and I accept the inspector's testimony that he was not. Mr. Collins apparently went underground with the inspector only on December 5 after the citation was served on him. Further, Mr. Collins conceded that he did not recall too much about the row of pillars cited by Inspector Lorenz on November 30 (Tr. 81), and he testified that the basis for his belief that Mr. Lorenz was not in the same location on December 5 is the fact that the mining cycle advances from week-to-week, from pillar row to pillar row, and that it generally takes 3 or 4 days to mine a row of pillars (Tr. 78-79). In this connection, I take judicial notice of the fact that November 30, 1979, was a Friday, and that December 5, 1979, was a Wednesday. Absent any indication that the mine was operated over the intervening weekend, this time span would not have permitted the complete mining out of the pillar rows in question, particularly under the wet and muddy conditions which apparently prevailed in the section at the times in question. Mr. Collins testified that he had no idea how many days coal was mined in 1979, and that "most of the time" coal was mined 6 days a week (Tr. 90). He also testified "possibly three of four shifts" worked during the period November 30 to December 5, but that all three pillars in question could not have been completely mined either on November 30 or December 5 (Tr. 100).

Mr. Collins conceded that Inspector Lorenz was in the right entry on both November 30 and December 5, and while he believed that on December 5 he was in a row of pillars closer to the mine portal, Mr. Collins did not recall too much detail about the three pillars (A, C, D) being mined (Tr. 92). Mr. Collins also conceded that he did not protest the citation of November 30, and does not dispute the fact that the breaker posts were not installed as required. Further, I take note of the fact that after Mr. Lorenz issued his unwarrantable failure notice of December 5, Mr. Collins filed no contest and sought no independent review of that citation. It seems to me that if he was so sure that the citation was erroneously issued, the natural

thing would have been to contest it at that time rather than to wait for the civil penalty case to be

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filed. Further, even though the record suggests that the three miners working at the scene had no present recollection of the circumstances surrounding a citation which occurred close to 2 years ago, it seems to me that since a safety meeting was called to discuss this matter, and since the inspector accepted this meeting as part of the abatement, someone from mine management would have protested if they believed the inspector was wrong.

Mr. Collins did not personally observe any gob or mud being pushed into the area behind the breaker posts in question, and his belief that the material was pushed there before the posts were installed is based on the fact that this was the usual and routine mining practice (Tr. 102). Mr. Collins could not recall Inspector Lorenz telling him that Mine Foreman Jackson stated to him that the gob and mud were pushed between the breaker posts (Tr. 99), nor could he recall Mr. Jackson ever telling him that the gob and mud was pushed between the posts (Tr. 101). On the day of the December 5 inspection, three men were working on the section where the violation assertedly occurred, but Mr. Collins stated that he spoke with the men recently and none of them could recall the events which transpired nearly 2 years ago (Tr. 88). Petitioner's counsel confirmed that this was the case (Tr. 96), and none of these men were called to testify.

Section Foreman Jackson testified that the citation that Mr. Lorenz issued on November 30 resulted from the fact that gob and mud were being stored in the area without breaker posts being installed to support the roof (Tr. 127). When asked to explain why he offered no explanation to Mr. Lorenz on December 5, Mr. Jackson stated "They usually write us up once or twice a week anyway" (Tr. 130). Although Mr. Jackson denied telling the inspector that the gob and mud were pushed between posts, he candidly admitted that he did not discuss this procedure with the inspector at the time the citation was issued. His explanation for not discussing it was his belief that the inspector knew the procedure they were following. However, it seems to me that once the citation issued, a section foreman would certainly discuss such a situation with an inspector, particularly if he believes that a citation was being issued for a procedure which he believed had the inspector's approval.

The difficulty presented in this case is that the crucial question of violation turns on the credibility of the witnesses and their perceptions as to the events which transpired some 2 years ago. After viewing the witnesses on the stand during the course of the hearing in this case, they all impressed me as being candid and honest in their testimony. However, based on my evaluation of the entire record in this case, I conclude and find that the inspector's account of what transpired is totally credible and that based on the foregoing analysis and evaluation of the testimony and evidence, his inference that the breaker posts were removed to facilitate the pushing of gob and mud behind the posts is supported by a preponderance of the evidence and testimony adduced in this case. Further, I conclude and find that the breaker posts cited by the inspector on November 30 were in fact the same posts, and at the same location, as those cited

on December 5. In these circumstances, removal of the posts constituted a violation of the cited mandatory safety standard, and the citation is AFFIRMED.

History of Prior Violations

The parties stipulated that for the 24-month period prior to December 5, 1979, the respondent at its No. 1 Mine had paid and been cited for 53 violations of the Act's mandatory health and safety standards. In addition, petitioner's counsel conceded that except for the citation issued in this case, the respondent had no previous violations issued pursuant to section 75.201 (Tr. 151). Under the circumstances, I cannot conclude that respondent's prior history is such as to warrant any additional increases in the penalty assessment made in this case.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business

Mine operator Don D. Collins testified that the No. 1 Mine is now closed, that he only has small blocks of coal to mine, and that he is presently mining at a location approximately a mile or so from the No. 1 Mine (Tr. 66). The parties agreed that the respondent is a small mine operator (Tr. 151), and I accept this as my finding. Further, I conclude that the civil penalty assessed by me in this case will not adversely affect respondent's ability to continue in business.

Gravity

While it is true that the area of unsupported roof may have exposed two men to a hazard had the roof fallen, the fact is that the roof was otherwise bolted to some extent, and petitioner's counsel conceded that the scoop operator would not have been under unsupported roof because any areas not bolted would have been next to the pillar or rib that had been cut. Further, respondent's witness indicated that the roof areas around the roadways and pillars in the surrounding area were supported by roof bolts and petitioner does not deny this fact. Even so, while the area was apparently adequately roof bolted, the fact is that in the immediate roof area behind the breaker posts, which I have found had been removed, was not supported by the posts, thereby possibly exposing the scoop operator to a hazard. Respondent's counsel conceded that at least two men would have been exposed to a hazard in these circumstances (Tr. 150-151). Under the circumstances, I conclude that the violation was serious.

Negligence

I conclude and find that the violation resulted from the failure by the respondent to exercise reasonable care to prevent the conditions cited, and that this failure by the respondent amounts to ordinary negligence. Although the fact is that the inspector cited an unwarrantable failure to comply, I cannot conclude that the record evidence supports a finding of gross negligence and the petitioner has advanced no such argument.

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Good Faith Compliance

Abatement in this case was achieved by calling a safety meeting to explain the provisions of the roof-control plan and to impress on the work force the fact that once installed, breaker posts should not be removed. In the circumstances, I conclude that the citation was abated in good faith and petitioner has established nothing to the contrary.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, particularly the fact that the respondent is a small operator, has ceased mining in the particular mine which was cited, the gravity of the conditions cited, and the fact that the respondent had not been previously cited for an identical violation, I conclude and find that a civil penalty assessment of \$500 is appropriate.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$500 within thirty (30) days of the date of this decision and order, and upon receipt of same by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge