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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	Civil Penalty Proceeding Docket No. KENT 81-94 A.O. No. 15-07166-03061 V
v.	
PEABODY COAL COMPANY, RESPONDENT	Sinclair Slope Underground No. 2 Mine

DECISION

Appearances: Thomas A. Grooms, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Thomas A. Gallagher, Esquire, St. Louis, Missouri, 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. 75.1725(a). Respondent filed a timely answer in the proceeding, a hearing was held in Nashville, 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 those have been considered by me in the course of this decision.

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.

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, 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 are identified and disposed of where appropriate 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.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the case, that respondent is a large mine operator whose operations affect interstate commerce, and that any penalty assessments imposed will not adversely affect respondent's ability to continue in business (Tr. 4-5).

Discussion

Section 104(d)(1), Citation No. 1031535, issued on October 30, 1980, by MSHA inspector Lendell Noffsinger, cites a violation of 30 C.F.R. 75.1725(a), and states as follows:

> There are no less than twenty-three (23) damaged and frozen rollers on the 2nd Main East Belt Conveyor starting at No. 60 stopping and extending outby to the belt drive. This condition was recorded in the belt examiner's book on October 28 and 29, 1980 (Freddie Hill Belt Examiner). The belt is approximately 3,070 feet long and running. The damaged rollers only were marked with red tape. Witness: Donnie Higgins. Responsibility of Bill Hampton.

Petitioner's Testimony

MSHA inspector Lendell W. Noffsinger testified that on October 30, 1980, he was the resident inspector at respondent's mine, was there practically every day, and confirmed that he inspected the mine that day and issued the citation in question. Prior to the inspection, he reviewd the belt examiner's book (Exh. G-4) for the October 28th and 29th day shifts. Several entries in the book indicated that the belt needed rock dusting,

that float dust was

present, and belt examiner Freddie Hill had made a notation in the book that damaged and defective or frozen rollers were discovered on the East Main Belt, and the locations were noted by stopping numbers. Mr. Hill told him that he was having some trouble getting the rollers "changed out" on the third shift (Tr. 7-13). Although some of the area had been rock dusted, one area had not, and the inspector issued another citation for that condition (Exh. G-3, Tr. 12).

Inspector Noffsinger confirmed that he issued the citation in question in this case after finding no less than 23 damaged and frozen rollers along the belt line, and he testified that he did so because he considered such conditions to be unsafe and the condition had previously been noted in the belt examiner's book. Under these circumstances, he believed that the respondent should have been aware of the condition of the rollers and changed them out on the shifts prior to his inspection. While he permitted the belt to continue running, he insisted that the area be rock dusted, and that the rollers be changed out on the third shift that same day. He indicated that he did not take the belt immediately out of service because he did not consider the roller conditions to be serous enough to cease production on the three units which were dumping coal on the belt line in question. In addition, by requiring immediate rock dusting, any hazards from the roller conditions would have been minimized. However, if he considers conditions to be "real bad," he will take a belt line out of service, but did not do so in this case as an accommodation to mine management. He maintained that the cited roller conditions were unsafe since a frozen roller could produce heat and it could possibly reach the underside of a bottom roller where the rock dust may have fallen off (Tr. 16-20).

Mr. Noffsinger stated that while no ignition source was present when he observed the rollers, the rollers that were located along the belt areas which had not been rock dusted could have become worse, and since this may have potentially been an ignition source, he insisted that the area be rock dusted (Tr. 28-29). Later in his testimony, he stated that he was concerned that the defective roller condition had been recorded by the belt examiner, but the rollers were not changed out (Tr. 32). He also stated later that he was concerned over the lack of rock dust and the possibility of a fire (Tr. 33).

On cross-examination, Mr. Noffsinger stated that when he reviewed the belt examiner's books, he saw no indication that the roller conditions had been corrected and he identified the rollers which he cited by means of "red flags" apparently placed by the stopping locations by the belt examiner. He made a note of these locations before inspecting the belt in question, and while walking the belt line, he did not observe any hot rollers or rollers turning in coal, and in some places the conditions were wet. He also confirmed that he saw no sources of any potential fire on the belt line, and had this been the case he would have immediately taken the belt out of service. However, he nonetheless considered the cited roller conditions as unsafe (Tr. 20-23, 25). He also indicated that the belt examiner's book

did indicate that rollers on other belts had been changed out, but not the ones which he cited (Tr. 27).

Mr. Noffsinger confirmed that he did not identify which rollers were defective or damaged and which ones were frozen. Since they all had to be changed out, he did not believe it made any difference to identify each roller by any specific defect. However, he did observe all of the rollers (Tr. 51), and his concern was that the rollers were not changed out and he wanted the respondent to insure that they were. He also indicated that the cited standard does not provide for any time limits within which a cited "bad roller" must be changed out (Tr. 30).

Inspector Noffsinger described a "frozen" roller as one that would not turn, and he indicated that this condition may be caused by a stuck roller bearing or the presence of mud (Tr. 30-31). In response to my question as to the meaning of the comment "bad roller" as it appears in the belt examiner's book, Mr. Noffsinger stated that it could indicate a broken roller, one with a missing bearing, or one that needed maintenance. Simply recording the condition as "bad" would not give any specific indication upon visual examination as to the precise problem, but it does indicate to the belt examiner that the roller needs to be replaced (Tr. 46-47).

Inspector Noffsinger reviewed a copy of MSHA's enforcement policy guideline concerning the application of section 75.1725(a) (Exh. R-2), indicated that it was recently brought to his attention, and he conceded that it requires that unsafe equipment be immediately removed from service (Tr. 24).

Motion for Directed Verdict

At the close of the petitioner's case, respondent's counsel moved for a summary decision in its favor on the ground that the inspector's testimony and evidence presented by the petitioner does not support his conclusions that the cited conditions were unsafe. In support of his motion, counsel argued that the inspector's critical concern was the fact that the rollers in question had been previously flagged for change out during a previous maintenance shift and that this had not been done. Counsel asserted that the inspector issued the citation in this case only to insure that the rollers were changed out, and that based on his testimony that the rollers were not hot, were not turning in coal, that the belt was made of fire-retardent material, and that he saw no ignition sources or possible fire hazards present, his conclusion that the conditions cited were "unsafe" are simply not supportable. In addition, counsel points to the fact that section 75.1725(a) requires equipment in unsafe condition to be removed from service immediately, and since the inspector permitted the belt to continue to operate and did not require it to be taken out of service immediately, he can hardly be heard to argue now that the conditions were unsafe. Respondent's counsel argues further that section 75.1725(a) does not provide for "degrees of safeness," and the conditions cited by an inspector must either be safe or unsafe (Tr. 52-55).

Petitioner's counsel argued in opposition to the motion for summary decision and asserted that Inspector Noffsinger

considered the defective roller conditions to be unsafe in the context of, and in conjunction with, the other

conditions which he observed along the belt line, namely, the lack of rock dust in some areas, and the fact that the preshift book had entries written in attesting to inadequate rock dust and the presence of float coal dust in some of the areas where defective rollers were noted and observed by the belt examiner. Counsel asserted that the term "unsafe" need not be applied in the context of an immediate condition noted by the inspector, but may be applied to a situation which could develop into a problem if not corrected. In short, counsel contends that defective rollers which may not pose any immediately dangerous or hazardous situation are nonetheless unsafe since the defect could eventually deteriorate and lead to a dangerous or hazardous situation if allowed to remain uncorrected. Here, counsel states that the inspector exercised his discretion in not shutting down the belt or requiring respondent to shut it down, and the fact that the belt was not shut down does not detract from the unsafe condition of the cited roller (Tr. 53-54).

The motion for summary decision was taken under advisement, and respondent proceeded to call its witnesses and to present evidence and testimony concerning the citation.

Respondent's Testimony and Evidence

Allen R. Gibson, respondent's safety manager, confirmed that he accompanied Inspector Noffsinger during his inspection of October 30, 1980, and by reference to a mine map (Exh. R-4), he indicated where they had walked the belt line and what they observed. He indicated that both he and the inspector touched approximately 10 of the cited belt rollers and none of them were hot. He also confirmed that the belt line from the No. 39 crosscut to the No. 1 stopping was in need of rock dusting, and that in this area there were 10 rollers among those which were cited. The crosscuts are on 60-foot centers, and the entire length of the belt line cited is 4,200 feet. He also confirmed that the rollers cited by the inspector were tagged by the belt walkers for change out because they were "frozen" and not turning, and that the float coal dust condition which existed from the No. 39 crosscut outby the belt header was not a severe condition because the belt was wet at different locations (Tr. 57-64).

Mr. Gibson testified that at the time the inspector issued the roller and float dust citations, the belt was running and he stated that the inspector was disturbed because the rollers which had been identified as being in need of change out had not been changed out. He also indicated that the belt fire-suppression unit and fire hoses were in operational order (Tr. 66).

Albert Knight, general mine foreman, testified that he first became aware of the citation in question when Mr. Gibson telephoned him over the mine phone and advised him that Inspector Noffsinger had issued the citations on the belt line. He confirmed that he had previously left instructions in the mine manager's book for the second shift to change out the rollers which had been noted by the belt examiner and cited by the

inspector. The instructions were written at approximately 1:30 p.m., the day the citation issued, and were intended for the second shift which came on at 4 p.m. (Tr. 70-74).

Mr. Knight testified further that he was not aware of any dangerous or unsafe condition on the belt in question, and that had such a situation existed, the belt examiner would have shut the belt down. He also indicated that belt maintenance is performed on the third shift and that normal maintenance on the belt is done at that time (Tr. 74-76). He confirmed that the belt examiner's books do in fact reflect entries on October 28 and 29 concerning the rollers cited by the inspector on October 30 (Tr. 77-78). Mr. Knight stated that five men are usually assigned for the entire mine to change rollers, and that three men would have been on the section in question to change the rollers (Tr. 80).

With regard to the notations made by the belt examiner on the preshift book for October 29, Mr. Knight stated that they do not indicate an immediate problem or any dangerous or unsafe condition. He also indicated that such notations concerning rollers are not indicative of unsafe conditions and that it is not unusual for 2 or 3 days to go by before such roller conditions are corrected or the rollers changed out (Tr. 82). As for the frozen rollers in question, if six of them were top rollers and were all within a span of some 60 feet, there could be friction on one or two of them, and they could cause some heat (Tr. 84). He also indicated that a roller end bearing could heat up, but that once the roller is frozen, there is no heat generated as such except for some belt friction which is not much (Tr. 85).

Mr. Knight reviewed the language of section 75.1725, and he expressed the view that if an unsafe condition is found, the equipment cited must be taken out of service (Tr. 90). He also identified a statement signed by several miners, including Belt Examiner Hill, who expressed the view that they "did not see any violation of the law on these rollers" (Exh. R-6, Tr. 91). The statement also contains a statement of company policy indicating rollers are normally changed out on the maintenance third shift except that rollers which could cause fires or damage to the belt line are immediately changed out during a production shift.

On cross-examination, Mr. Knight conceded that the belt examiner's preshift books for October 28 and 29 did reflect notations concerning defective rollers and the existence of float coal dust and that the rollers were not changed out during the third shifts on those days. He explained the failure to change them out by stating that company policy dictates that the maintenance shift change as many rollers as they can get to, and that some rollers were changed out for another belt which had been cited, but he conceded that they were changed out only after a citation was issued (Tr. 93). He also conceded that part of the belt line had gone undusted for 2 days after that particular condition was cited and noted (Tr. 94-95, 101).

In clarifying the meaning of a notation in the belt examiner's books which simply states "Bottom rollers on second east, 53, 55, 56 etc", Mr. Knight indicated that the rollers needed to be changed out, but not necessarily right away or on

the third shift (Tr. 109).

Findings and Conclusions

Fact of Violation

In this case, the respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.1725(a), which provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner argues that notwithstanding the fact that the inspector did not take the belt line out of service, he nonetheless considered the roller conditions as an unsafe condition, and he did so because of the presence of float coal dust at several locations along the belt line, and that coupled with the defective and frozen rollers, the conditions were unsafe. Although conceding the fact that there was no immediate ignition source, petitioner maintains that the inspector's concern was with the potential for such an ignition source to develop at any time because of the fact that the defective rollers could become progressively worse. Finally, petitioner argues that the fact that at least 2 days went by before the rollers were changed out, or the area completely rock dusted, supports an inference that mine management is not totally aware of when such conditions will be corrected (Tr. 115-116).

As indicated earlier in the discussion supporting the respondent's motion for summary decision, it is the respondent's position in this case that the petitioner has failed to establish a violation of section 75.1725 because (1) the inspector has not established that the cited belt roller conditions constituted an unsafe condition, and (2) the inspector failed to take the belt line out of service. In support of its case, respondent cites my previous decision of August 3, 1976, in the case of Alabama By-Products Corporation v. MSHA, BARB 76-153 (Tr. 114).

In my previous Alabama By-Products decision cited by the respondent, I vacated a portion of a citation for an alleged violation of section 75.1725(a), and I did so on the ground that MSHA (then MESA) had failed to establish that the cited conditions (13 defective belt rollers along a 3,000-foot belt line) were unsafe. I held that a finding that the equipment is unsafe is a condition precedent to a finding of a violation of this safety standard. However, it should be noted that while I vacated that portion of the citation which alleged a defective and unsafe belt roller condition, I affirmed that portion of the citation which alleged that the cutting of the conveyor belt into numerous bottom belt structures was in fact an unsafe condition constituting a violation of section 75.1725(a). I also concluded that in addition to citing an operator for failing to maintain equipment in safe operating condition, an inspector could also issue a citation if he found that an operator had failed to take such unsafe equipment out of service when the condition was first detected.

My decision in Alabama By-Products vacating that portion of the citation which alleged that 13 rollers were unsafe was made on the basis of the specific facts and evidence of record in that case. I found that the inspector who issued the citation had no rational basis for concluding that the cited roller conditions were in fact unsafe, and that his motivation in issuing the citation was to implement a policy guideline calling for the removal of "faulty" equipment from service. Since I concluded that the inspector obviously believed that "faulty" or "defective" rollers were per se unsafe, without detailing any specifics as to the assertedly dangerous conditions which prevailed in the areas where the rollers were located, I found that he acted arbitrarily.

It should be noted that in the Alabama By-Products case, the mine operator argued that the mere presence of defective rollers does not per se render them unsafe. That is precisely the argument advanced by the respondent in this case. However, I take note of the fact that in the previous case, the operator advanced the argument that an inspector must take into consideration other factors, such as the presence of coal or coal-dust accumulations, or the extent of rock dusting in the affected area, in order to properly evaluate whether the cited roller condition was unsafe. This is the argument advanced by the petitioner in this case.

The question of whether a piece of equipment is in an unsafe condition need not be limited to or determined on the basis of that particular piece of equipment. It seems to me that a piece of equipment which has deteriorated to some degree through normal wear and tear may not necessarily be unsafe simply because it is not new. If it is operating in a totally safe environment, the fact that it is beginning to show signs of wear may not warrant its immediate replacement. On the other hand, if the equipment is operated in a mine area where other real or reasonably potential hazardous conditions exist, then it is not unreasonable for one to conclude that such equipment, continually operated under those circumstances, may be unsafe and in need of attention. In my view, this is precisely what we are faced with in the instant case. Respondent takes the position that even though the cited rollers may have been defective (frozen), they were not unsafe because the overall prevailing belt conditions where the rollers were located were not hazardous. Further, since the inspector did not shut the belt line down, respondent argues that he obviously could not have considered the rollers unsafe since the standard requires him to take the equipment out of service once he determines it is unsafe. In short, respondent seeks to penalize the inspector for an act of charity in not shutting down the belt line and interrupting production. In retrospect, had the inspector ordered the belt line shut down, I venture a guess that the respondent would then argue that he acted arbitrarily.

On the facts of this case, it seems clear to me that the operator's own belt examiner recognized the fact that the cited rollers were in need of attention and had to be changed out since

he specifically noted and flagged them, and made the appropriate entries in the belt examiner's book. Thereafter, the normal procedure calls for corrective action to be taken during

the next available maintenance shift. However, the record in this case reflects that several shifts went by after the initial condition was noted by the belt examiner and the rollers had not been changed out prior to the inspection by Inspector Noffsinger. While it may be true that Mr. Noffsinger saw no ready ignition sources present and was concerned that the rollers were not changed out earlier, his judgment that the rollers were unsafe did take into consideration the presence of float coal dust along several belt line locations as well as his concern that the frozen rollers could have deteriorated further, thereby producing heat in those areas where the rock dust may have fallen off the belt. In these circumstances, I cannot conclude that he acted arbitrarily. In light of all of the prevailing conditions which existed along some of the affected belt line locations where the frozen rollers were found, I conclude that his decision that the rollers were unsafe was correct. As a matter of fact, Mine Foreman Knight conceded that frozen rollers may generate some friction on the belt, and he did not dispute the presence of float coal dust on the belt where rock dusting had not been completed, and that this condition had existed for a day or two prior to the inspection.

In Mid-Continent Coal and Coke Company, DENV 79-29-P, 1 MSHC 2246, October 1, 1979, final order November 9, 1979, the Commission affirmed a decision issued by Judge Broderick affirming a violation of section 75.1725(a). Judge Broderick found that a frayed cable on a hoist assembly used to open an airlock door constituted an unsafe condition. While the record before Judge Broderick did not support a conclusion that the condition of the cable contributed to a fatality which had occurred at the mine, the condition of the cable was such that it possibly could have contributed to serious injuries. Upon subsequent court review, the Tenth Circuit Court of Appeals on September 24, 1981, (No. 2271, unreported), affirmed the decision and noted that "Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing" (case noted in the October 7, 1981, issue of the BNA Mine Safety & Health Reporter, pp. 185-186).

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established a violation of section 75.1725(a), and the citation is AFFIRMED. Respondent's motion for summary judgment is DENIED.

Gravity

While it is true that no ready ignition sources were present in the areas where the frozen rollers were located, the presence of float coal dust and the absence of complete rock dusting along with the possible further deterioration of the roller conditions presented a hazardous situation which I consider serious. The belt was running when the inspector arrived on the scene, and even though he saw no imminent danger present, the fact is that the conditions which prevailed presented a potential danger. Under the circumstances, I find that the violation was serious.

Negligence

The frozen roller conditions were noted by the belt examiner at least a day or two before the inspection in question and the conditions were not

corrected. Although respondent established that corrections were made with regard to similar roller conditions on another belt line and that it had a company policy dealing with such corrections, that policy apparently permits each belt examiner to make his own judgment as to whether a roller condition is such as to start a fire or is simply one that can be taken care of during the next maintenance shift. In this case, the record establishes that the cited roller conditions were not corrected during the next regular maintenance shift after detection by the belt examiner. Under the circumstances, I find that the failure to correct the conditions cited resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this amounts to ordinary negligence. The fact that maintenance was being performed on another belt and that men may not have been available to change out the rollers in question is no excuse. MSHA v. Sewell Coal Company, HOPE 78-744-P, Commission decision of June 11, 1981, 3 FMSHRC 1380.

Good Faith Compliance

I cannot conclude that the respondent is entitled to any additional consideration on the basis of good faith compliance. The fact is that compliance was achieved after the inspector issued his unwarrantable failure citation, and the conditions were subsequently corrected within the approximate time fixed by the inspector. Under these circumstances, I cannot conclude that the respondent acted in bad faith once the citation issued.

History of Prior Violations

The history of prior violations for the Sinclair Slope Underground No. 2 Mine reflects that the respondent paid civil penalty assessments for 452 citations issued at that mine during the period October 30, 1978, through October 29, 1980 (Exh. G-1). Five of the citations were for violations of section 75.1725(a). While the overall number of citations is not particularly good, I cannot conclude that the mine has had problems with compliance with the cited mandatory safety standard, nor can I conclude that the record in this case warrants any additional increase in the civil penalty otherwise assessed by me because of respondent's history of prior citations.

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

The parties stipulated that the respondent is a large mine operator and that any penalty assessed in this case will not adversey affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

Penalty Assessment and Order

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a penalty assessment in the amount of $750 is reasonable and appropriate for the citation which I

have affirmed, and the respondent IS ORDERED to

pay the assessed penalty within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge