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SOL (MSHA) V. COOK MINING
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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.	Assessment Control No.
v.	WEVA 81-201	46-05712-03016 V
	WEVA 81-348	46-05712-03002 V
COOK & WORKMAN MINING CO., INC., RESPONDENT	WEVA 81-349	46-05712-03023
	No. 1 Mine	

DECISION

Appearances: James P. Kilcoyne, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
D. Grove Moler, Esq., Mullens, West Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 10, 1981, a hearing in the above-entitled proceeding was held on September 22, 1981, in Madison, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

After the parties had completed their presentations of evidence with respect to the only contested issue in the proceeding, I rendered the bench decision which is reproduced below (Tr. 98-104):

> This proceeding involves three Petitions for Assessment of Civil Penalty filed by the Secretary of Labor in Docket Nos. WEVA 81-201, WEVA 81-348, and WEVA 81-349 seeking assessment of civil penalties for a total of five alleged violations of the mandatory health and safety standards by Cook and Workman Mining Company, Inc. The petition in Docket No. WEVA 81-201 was filed on January 21, 1981, and the petitions in Docket Nos. WEVA 81-348 and WEVA 81-349 were both filed on May 12, 1981. The petition in Docket No. WEVA 81-348 involves three alleged violations and each of the petitions in the remaining two dockets alleges one violation.
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> When the proceeding was convened on September 22, 1981, counsel for respondent indicated that he had a factual issue that he wanted to be considered in this proceeding, and that factual issue pertains to Citation No. 668163, which has been introduced as Exhibit 1 in this proceeding. The only violation, as I have indicated above, which is at issue in Docket No. WEVA 81-201 is the allegation in Citation No. 668163 to the effect that a violation of section 75.1103-4(3) had occurred. I shall make some findings of fact on which my decision will be based, and they will be set forth

in enumerated paragraphs.

1. Inspector Harold Baisden made an examination of respondent's No. 1 Mine on May 5, 1980. He observed that the automatic fire sensor for the No. 1 belt conveyor terminated 500 feet outby the tailpiece. He thereafter issued Citation No. 668163 dated May 5, 1980, at 8:15 a.m., alleging a violation of section 75.1103-4(3) which provides in pertinent part, "When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached."

2. The inspector decided that the violation should be cited as an unwarrantable failure violation because the mine foreman, Edward Robertson, had told the inspector that one of respondent's owners had ordered Robertson to run coal without installing the belt sensor, and Robertson stated that they had been working four shifts without having installed the sensor. Also, the inspector checked the belt examiner's book and saw an entry made for the date of April 30, 1980, to the effect that the belt sensor had not been installed. Entry about the failure to install the sensor had been countersigned by Robertson.

3. Herbert Cook, respondent's President, testified that the No. 1 belt conveyor had been advanced through some old workings of Island Creek Coal Company directly to the working face (Exh. C). In order to advance directly to the working face, about 20 stoppings had to be erected, additional roof bolts had to be installed, and rock falls had to be cleaned up. Cook testified that the No. 1 belt had been advanced about 800 feet and that three other belt flights known as Nos. 2, 3 and 4 had to be removed and reinstalled for the purpose of extending the No. 1 belt conveyor. Cook testified that the extension of the belt had not been completed until Friday, May 2, 1980, and that coal was run only on the evening shift -- that is, 3 to 11 p.m. -- on May 2, 1980.

4. Johnny Maynard, an employee of respondent who ran the coal drill, stated that the extension of the No. 1 belt was completed on May 2, 1980, about 1 p.m. and that the belt was started and coal was run for about 1-3/4 hours on the day shift and a full 8-hour shift on the evening shift on Friday, May 2, 1980.

5. Lonnie McKinney, a section mechanic employed by respondent, testified that he had participated in the work of taking out the Nos. 2, 3 and 4 belts and reinstalling them through old workings, that the work had taken an entire week to complete, that the belt had been extended by Friday, May 2, 1980, and that production on Friday had taken place. But he stated that no production had occurred when he worked on Saturday and that when he came back to work on Monday, May 5, so little production had been done between his working on equipment on Saturday and Monday, when he came back to work, that he could say that no production had been done on Sunday.

I think those findings of fact are sufficient for

considering the arguments made in this proceeding. Counsel for the Secretary, Mr. Kilcoyne, has stressed in his argument that the belt examiner's books which are Exhibits A and B in this proceeding, contain rather

convincing evidence to the effect that production had taken place for at least 24 hours before the inspector wrote his citation. Mr. Kilcoyne points out, based on Exhibit A, that the entries for April 30, 1980, indicate that work was still being done on removal of the other belts and also, for that same day, there is an entry that the fire sensor line needs to be installed; and he goes on to point out that the entries for May 1 show that the fire sensor line needs to be installed and the entry for May 2 repeats that notation and the entry for May 5, of course, shows that the sensor had been installed, because by that time the inspector had written his citation and had terminated it after the sensor had been installed.

The entries in this belt examiner's book, or Exhibit A, are rather convincing to me in that they show that the sensor needed to be installed and they keep saying that from April 30, 1980, through May 2, 1980; and it's true that that period of time would be more than 24 hours and would be sufficient for 24 production hours to have taken place.

The difficulty with jumping from the fact that those entries were made in the book and finding that a violation of section 75.1103-4(3) occurred, is that there is no proof in this belt examiner's book that production occurred at any time on any of those days; and of course, the section of the regulations that is involved, as to which the inspector had the burden of proving a violation, requires that the sensor be extended and put in operation within a period of 24 production shift hours.

We have testimony from three witnesses who were there and whose demeanor impressed me as people who could be considered as telling the truth. Each of them testified that production occurred only on one shift with the exception of Johnny Maynard, who said production occurred on the day shift on Friday from about 1 p.m. to 2:45 p.m. when they stopped working. So, if we were to add up the production that actually occurred, based on the preponderance of the evidence in this proceeding, we would have use of the belt line for 1-3/4 hours on Friday, May 2nd, on the day shift, and for 8 hours on the second shift on Friday, May 2nd. That would be total production for 9-3/4 hours. Then, assuming the mine operated for 1/2 hour or an hour on May 5th before the inspector cited the violation, a total of perhaps 10 or 10-1/2 hours of production occurred before the citation was written.

I don't think that I can make a finding based on the belt examiner's book and the statements made by Robertson to the inspector as being more convincing and more credible than the testimony of three witnesses, all of whom were working in the mine on April 30, 1980, to the time the citation was written on May 5, 1980; and since their testimony has a greater amount of weight -- or I think should be given a greater amount of weight than the entries in the examiner's book and the uncorroborated statements of Robertson, I think the preponderance of the evidence shows that a violation of section 75.1103-4(3) has not been proven.

Settlement Agreements

After I had rendered the bench decision set forth above, the parties entered into a settlement conference. The Assessment Office had proposed a relatively small penalty of $160 for the violation alleged in the Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-349, but the Assessment Office had proposed penalties totaling $2,500 for the three violations alleged by the Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-348. As a result of the settlement conference, respondent agreed to pay the full penalty of $160 proposed by the Assessment Office for the single violation alleged in Docket No. WEVA 81-349 and to pay reduced penalties totaling $700 for the three violations alleged in Docket No. WEVA 81-348.

Section 110(i) of the Act requires that six criteria be considered in determining civil penalties. As to the criterion of the size of respondent's business, the testimony shows that respondent's mine produces about 16,000 tons of raw coal on a monthly basis, but Island Creek Coal Company's preparation plant rejects 60 percent of the coal as waste, so that respondent gets paid by Island Creek for only 6,400 tons of clean coal per month (Tr. 118-119). Respondent employs 22 persons on two production shifts per day (Tr. 106). Those figures support a finding that respondent operates a small coal business and that penalties should be in a low range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

Respondent presented a considerable amount of evidence with respect to the criterion of whether the payment of penalties would cause respondent to discontinue in business. Respondent is a corporation owned by four individuals. Two of the individuals own an interest of 30 percent each and the other two each own a 20-percent interest in the corporation. One of the individuals who owned a 30-percent interest acted as superintendent when the company first began to produce coal. He was discharged on April 1, 1980, by the other three owners of the corporation (Tr. 108; 120). He has brought an action in the Circuit Court in Wyoming County, West Virginia, for dissolution of the corporation and for payment of wages from the date of his discharge. That lawsuit has not even reached the pretrial stage and is a cloud hanging over the corporation's present owners and operations. The company has had to retain an attorney to represent it in the dissolution case and the company has expenses in connection with that legal proceeding (Tr. 109; 115).

Respondent leases the coal reserves it is mining from Island Creek and sells its coal to Island Creek for $21.50 per ton of clean coal. Respondent has to pay Island Creek 65 cents per ton for equipment rental, 40 cents per ton for electricity, 15 cents per ton for road maintenance, and an unstated amount for providing the courses for training and retraining of miners. Respondent has to pay 85 cents per ton, plus the cost of fuel, to have its coal transported from the mine to Island Creek's

preparation plant (Tr. 119).

According to a financial statement prepared by a certified public accountant, respondent's net loss for the 10-month period ending December 31, 1980, was $145,348 and for the year ending February 28, 1981, was $166,091 (Exhibits D and E). Even if one deducts an amount for depreciation of $36,145, which does not represent an actual cash loss, respondent suffered a cash loss of

$109,203 (Tr. 107). Respondent's evidence shows that it also owes the Federal Government $14,000 in back taxes which it is trying to pay at a rate of $2,000 per month (Tr. 111). Respondent also owes $90,000 in workmen's compensation payments and it is trying to work out a plan for installment payments on that obligation (Tr. 110). Respondent's largest supplier of mine supplies is the Central Supply Company which respondent owes $14,000. Respondent is trying to pay off that debt at the rate of $2,000 per month. Until respondent discharges that debt, it is having to pay cash for all mines supplies which it currently buys (Tr. 113-114). Respondent owes about $42,000 on a long-term note for money borrowed to purchase three pieces of mining equipment, namely, an S & S scoop, an S & S feeder, and a Ford end-loader. Payments on those three pieces of equipment amount to approximately $5,250 per month (Tr. 111; 122).

Respondent has no profits at the end of the month after it has paid all expenses for operating the mine and making the payments discussed above. One of the owners manages the business affairs of the company and acts as superintendent of the mine. He gets paid a salary for his managerial functions. Another of respondent's owners operates the scoop in the production of coal and gets paid union wages for performing that work. The third owner does not work in the mine and receives no dividends for his interest in the mine, nor do the other two owners get anything in return for their ownership other than their salary or wages for work actually done (Tr. 122-123).

Respondent is just now beginning to achieve a moderate amount of financial stability. Respondent places much of the blame for its dire financial condition on the fact that its contract with Island Creek required it to produce coal in its mine in an area where sandstone rolls severely impaired its ability to find and produce coal. It was not until it had mined eight breaks on 80-foot centers without passing beyond the sandstone rolls, that Island Creek permitted it to develop coal reserves in an area which permits it to produce enough coal to see signs of being able to meet its financial obligations (Tr. 107; 112).

The evidence of record summarized above shows that respondent's obligations are greater than the revenues it has been receiving from the sale of its coal. The evidence, therefore, supports a finding that payment of penalties will have an adverse effect on respondent's ability to continue in business.

The Secretary's counsel introduced as Exhibit 14 a computer printout listing all of the alleged violations at respondent's mine for which penalties have been paid for the 24-month period preceding the occurrence of the violations alleged in this proceeding. That exhibit shows that one prior violation of each of the five violations cited in this proceeding has occurred with exception of the violations of section 75.514 alleged in Order Nos. 669923 and 669925. Neither the official file nor any of the exhibits submitted by the Secretary's counsel contain a

calculation of penalty points under the formula set forth in 30 C.F.R. 100.3 On the basis of Exhibit 14, I find that respondent's history of previous violations is not excessive and that the settlement penalties hereinafter agreed upon are high enough to provide for the assessment of a small amount under the criterion of history of previous violations. The settlement penalties have, of course, been reduced to give a maximum amount of weight to the criterion that payment of penalties would have an adverse effect on respondent's ability to continue in business.

It is somewhat difficult in this proceeding to make a judgment as to the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance because that criterion normally involves a consideration of whether respondent abated the violation within the time period provided for in the inspector's citation. In this proceeding, all of the violations which were the subject of the settlement conference were orders of withdrawal which, of course, do not contain a time fixed by the inspector for abatement. The inspector's terminations of the orders show, however, that all of the violations were abated within a very short period of time on the same day the orders were written, with the exception of Order No. 668331 which was written on a Friday and abated on the following Monday. Abatement of Order No. 668331 required some roof bolting to be done at a location a considerable distance from the working face and therefore was not easily achieved. Consequently, the evidence supports a finding that respondent demonstrated a rapid good faith effort to achieve compliance and that mitigating factor has been taken into consideration in arriving at the settlement penalties agreed upon by the parties.

The foregoing discussions of four of the six criteria apply equally to all of the settlement penalties agreed upon by the parties. The remaining two criteria of negligence and gravity will be specifically considered in discussing the specific violations which were alleged in each docket.

Docket No. WEVA 81-348

Order No. 669675 alleges a violation of 30 C.F.R. 75.200 because respondent had violated Safety Precaution No. 12(d) of its roof-control plan by hanging the trailing cables to the shuttle cars on roof bolts which had been installed as an integral part of respondent's roof-control plan, whereas the safety precaution requires that a special roof bolt be installed for the purpose of suspending trailing cables to prevent them from being run over by mining equipment. Since the violation was cited in an order issued under section 104(d) of the Act, or the unwarrantable failure portion of the Act, the Assessment Office waived the formula in 30 C.F.R. 100.3 normally used for assessing proposed penalties and proposed a penalty of $750 based on special narrative findings of fact.

There is no evidence in the record to show that the torque of any roof bolts had actually been reduced by the hanging of trailing cables on them, so there is no way to determine whether the roof was made hazardous because of the practice of hanging trailing cables on the roof bolts. Nevertheless, respondent is required to know and follow the provisions of its roof-control plan. Therefore, the violation was the result of a high degree of negligence and the practice of hanging trailing cables on roof bolts had a potential for adversely affecting the torques of the roof bolts. Therefore, the Assessment Office may have proposed a reasonable penalty of $750 for a small mine, but the parties agreed to reduce the penalty to $200 in light of respondent's evidence showing that payment of large penalties will have an

adverse effect on its ability to continue in business.

Order No. 669923 was also issued under the unwarrantable failure provisions of the Act and alleges a violation of section 75.514 because no electrical connectors were used in the making of a temporary splice in the trailing cable for the roof-bolting machine. A 4-inch piece of stranded wire had been

twisted into the splice instead of the strong connector which is required to be used. Failure to make the splice correctly resulted in a weak splice which might have caused a spark or short with a resultant electrical shock or fire. The Assessment Office made special narrative findings as to this alleged violation and proposed a penalty of $750. Here again, the Assessment Office may have proposed a reasonable penalty if the record did not contain evidence showing that payment of penalties will have an adverse effect on respondent's ability to continue in business. The parties gave considerable weight to respondent's financial condition and agreed to reduce the penalty to $200.

Order No. 668331 was also issued under the unwarrantable failure provisions of the Act and alleges a violation of section 75.200 because the roof had not been supported in a 15-foot area at a place where the mantrip traveled each day in taking miners in and out of the mine. The violation was obviously serious and the violation was accompanied by a high degree of negligence. The Assessment Office made narrative findings of fact and proposed a penalty of $1,000. Respondent agreed that its personnel should have observed the lack of roof support and should have installed additional roof bolts, but respondent's witness explained that the unsupported roof appeared in a curve where they had gone into old workings for the purpose of reducing the overall length of the belt conveyor and he said that the unsupported roof was on one side of the entry in a place where the lack of roof bolts was not easily discernible (Tr. 132-134). Since roof falls are still the primary cause of serious accidents in underground coal mines, the Assessment Office may have proposed a reasonable penalty of $1,000, but the parties agreed to reduce the penalty to $300 in view of the fact that respondent's evidence showed it to be in serious financial condition.

Docket No. WEVA 81-349

The Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-349 seeks assessment of a civil penalty for a single violation, namely, a violation of section 75.514 alleged in Order No. 669925 which states that respondent had twisted conductors together in making a splice instead of using proper electrical connectors. The only difference between the instant alleged violation of section 75.514 and the violation of section 75.514 alleged in Docket No. WEVA 81-348, supra, is that the improperly made splice was found in the trailing cable to a shuttle car instead of in the trailing cable to a roof-bolting machine. Despite the fact that both alleged violations were cited in orders issued the same day under the unwarrantable failure provisions of the Act, the Assessment Office proposed a penalty of $750 for the violation of section 75.514 alleged in Docket No. WEVA 81-348 and $160 for the violation of section 75.514 alleged in Docket No. WEVA 81-349. There is not in the official file, nor was there introduced at the hearing any exhibits which show how the Assessment Office arrived at a proposed penalty of $160 for the violation involved in Docket No. WEVA 81-349 as compared with

the proposed penalty of $750 for the identical violation involved in Docket No. WEVA 81-348, supra.

In considering the previous violation, the parties agreed to a settlement penalty of $200, instead of the penalty of $750 proposed by the Assessment Office. In the instant case, respondent agreed to pay the full penalty of $160 proposed by the Assessment Office. The settlement penalty of $200 for the violation of section 75.514 alleged in Docket No. WEVA 81-348 was agreed upon

by the parties primarily because of respondent's showing that it is in dire financial condition. If I had been determining a settlement penalty for the violation of section 75.514 on the basis of evidence in the record, I would probably have assessed a penalty of $200 for each of the violations of section 75.514 in order to be consistent with the facts alleged in each order which show that each violation involved an equal degree of negligence and was equally serious. Inasmuch as all violations alleged in both Docket Nos. WEVA 81-348 and WEVA 81-349 were disposed of in settlement agreements, it is permissible to approve a different penalty for two similar violations because respondents in settlement proceedings rarely agree to pay penalties larger than those proposed by the Assessment Office. Inasmuch as no testimony was introduced by either party with respect to the violations of section 75.514 alleged in Docket Nos. WEVA 81-348 and WEVA 81-349, there is no evidence in the record which would support findings by me that respondent should be required to pay a larger penalty than the one proposed by the Assessment Office.

There is, of course, a great deal of evidence in this proceeding showing that respondent has demonstrated that payment of large penalties would have a very adverse effect on respondent's ability to continue in business. Consideration of that evidence supports a finding that the parties' settlement agreement in Docket No. WEVA 81-349, under which respondent would pay the full penalty of $160 proposed by the Assessment Office, should be approved.

WHEREFORE, it is ordered:

(A) Pursuant to the parties' settlement agreements, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $860.00 which are allocated to the respective alleged violations as follows:

Docket No. WEVA 81-348

Order No. 669675	8/19/80	75.200	$ 200.00
Order No. 669923	8/19/80	75.514	200.00
Order No. 668331	8/22/80	75.200	300.00
Total Settlement Penalties in Docket No. WEVA 81-348 ..			$ 700.00

Docket No. WEVA 81-349

Order No. 669925	8/19/80	75.514	$ 160.00
Total Settlement Penalties in Docket No. WEVA 81-349 ...			$ 160.00
Total Settlement Penalties in This Proceeding			$ 860.00

(B) The Petition for Assessment of Civil Penalty filed in Docket No. WEVA 81-201 is dismissed for failure to prove that the violation of 30 C.F.R. 75.1103-4(3) alleged in Citation No. 668163 dated May 5, 1980, occurred.

Richard C. Steffey

Administrative Law Judge
(Phone: 703-756-6225)