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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. WEVA 81-368
A.O. No. 46-01968-03077

v.

Blacksville No. 2 Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Covette Rooney, Attorney, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the petitioner
Jerry E. Palmer, Esquire, Pittsburgh, Pennsylvania, for the
respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition 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 three alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing regarding the petitions was held on July 29, 1981, before Judge John F. Cook, in Oakland, Maryland and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, but were afforded the opportunity to make arguments on the record. Subsequent to the conclusion of the hearing, the case was reassigned from Judge Cook to me for completion. Accordingly, I have decided this case on the basis of the record made before Judge Cook, including full consideration of all of the evidence of record and the arguments made by the parties at the hearing.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties

filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations 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, P.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 CFR 2700.1 et seq.

Discussion

Citation No. 852152, issued on January 5, 1981, and alleges a violation of 30 CFR 75.601. Judge Cook approved a settlement payment in the amount of \$195, which is for the full amount of the original assessment (Tr. 11).

Citation No. 852149, issued on January 5, 1981, and alleges a violation of 30 CFR 75.400. Petitioner's counsel proposed a settlement for the full amount of \$275 which was assessed for this violation, and in support of the proposed settlement presented arguments concerning the six statutory criteria found in section 110(i) of the Act on the record (Tr. 11-13). Judge Cook rejected the proposed settlement (Tr. 14, 20). The parties then re-submitted the proposed settlement on the record by means of an amendment to reflect an agreed upon settlement payment of \$400 for this citation, and Judge Cook advised the parties to file a motion with him (Tr. 24). Subsequently, by motion filed with Judge Cook on August 13, 1981, the parties seek an approval of the proposed settlement in the amount of \$400.

With regard to Citation No. 852151, which was issued on January 5, 1981, for an alleged violation of 30 CFR 75.200, Judge Cook rejected the proposed settlement and directed the parties to proceed with the hearing on this citation and testimony and evidence was presented in this regard (Tr. 27-53). The parties waived the filing of written post-hearing proposed findings and conclusions, but were permitted to make oral arguments in support of their respective positions on the record. They also stipulated as to certain matters on the record, and presented evidence concerning the six statutory criteria found in section

110(i) of the Act (Tr. 24-27). These stipulations are as follows:

1. The Blacksville No. 2 Mine is owned and operated by the respondent and it is subject to the provisions of the Act.

2. The presiding Judge has jurisdiction in this matter and the subject citation was properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statement asserted therein.

3. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

4. The appropriateness of the penalty, if any, and the size of the coal operator's business should be based on the fact that the size of the company is 42,357,271 production tons, and the size of the mine is 2,264,105 production tons annually.

With regard to the history of Respondent, with respect to Citation 852151, there were 586 prior violations during the 24 month period preceding the issuance of the citation. There were 719 inspection days. During the same period there were 23 violations of 30 CFR 75.200.

5. The parties further stipulate the authenticity of their exhibits but not the truth of the matters asserted therein.

Findings and Conclusions

Citation No. 852152, January 5, 1981, 30 CFR 75.601

I adopt Judge Cook's previous approval of the settlement proposed by the parties for the full amount of \$195 initially assessed for this citation.

Citation No. 852149, January 5, 1981, 30 CFR 75.400

I have fully considered the motion and supporting arguments filed by the parties on August 13, 1981, seeking approval of a proposed settlement in the amount of \$400, for this citation and it is APPROVED.

Citation No. 852151, January 5, 1981, 30 CFR 75.200

Fact of Violation

Respondent is charged with a violation of the roof control requirements of mandatory safety standard section 75.200, in that the inspector observed some roof conditions which required additional roof support in a cross-cut in the 5 South section.

Inspector Fred Rundle testified as to the conditions which he found and confirmed that he issued the citation after inspection of the areas described in the citation which he issued on January 5, 1981. He stated that he tested the roof,

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found it to be "drummy", and instructed the section foreman to danger the area off until additional support could be installed (Tr. 28-29). He also confirmed that he measured the distances referred to in the citation, and testified that the area in question was a travelway used by miners for work and travel (Tr. 30). In his view, the conditions which he observed failed to provide adequate roof protection, but that once the conditions were corrected they did. He also stated that at the time he observed the roof it was "working", that is, some of the roof strata had broken loose and was dripping. If the roof posts had not been installed, he believed the roof would have fallen in and caused serious injuries. He gave the respondent an hour to abate and eight posts were installed to support the roof. He also believed that the conditions should have been detected during the preshift or onshift inspections (Tr. 31-32).

On cross-examination, Mr. Rundle testified that the roof control plan was not being complied with, that he saw two men traveling in the unsupported roof area. He also indicated that no mining was taking place, that abatement was achieved rapidly, and that four men out of the seven man crew were used to abate the citation. He also confirmed that the section had been idle for five days prior to the time of his inspection, and that while adverse roof conditions can occur at any time, he believed the roof conditions in question were present at least three days or possibly shorter (Tr. 32-35).

Respondent offered no rebuttal testimony or evidence with regard to the citation, and upon careful review and consideration of the testimony and evidence adduced by the petitioner in support of its case I conclude and find that petitioner has established a violation of section 75.200, and the citation is AFFIRMED.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Continue in Business.

I find that the respondent is a large mine operator and I adopt the stipulation by the parties that the penalty assessed in this case will not adversely affect respondent's ability to remain in business.

Good Faith Compliance

The record supports a finding that respondent achieved rapid compliance in correcting the adverse roof conditions once they were brought to its attention and this is reflected in the penalty assessed by me in this case.

Gravity

I find that the adverse roof conditions described by the inspector in this case presented a hazard of a possible roof fall and endangered at least two or more miners who would have been in danger had the roof area cited in this case fallen before the inspector acted and dangered it off. Accordingly, I conclude

that the violation was very serious and this is reflected in the penalty assessed by me in this case.

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Negligence

I conclude that the record supports a finding that the respondent failed to exercise reasonable care to prevent the conditions cited by the inspector and that its failure in this regard constitutes ordinary negligence. While it is true that the section may have been idle, as soon as the shift in question began working again any preshift or onshift inspection should have detected the adverse roof conditions cited by the inspector.

History of Prior Violations

The parties have stipulated to the respondent's history of prior violations during the preceding 24-month period prior to the issuance of the citation in question. The record reflects 23 citations of the roof control requirements of section 75.200 during 719 inspection days, and a total of 486 prior violations during this same time period. I am not persuaded that this history entitles respondent to any special consideration in the penalty assessed for this violation, and absent any analysis as to the circumstances surrounding the 23 prior roof fall citations, I have no basis for drastically increasing the initial assessment of \$295 levied by MSHA's assessment office for this violation simply because there were 23 prior citations for violations of this section. However, I have considered the history of violations stipulated to by the parties in this case and this is reflected in the penalty assessed by me for the violation.

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 civil penalty in the amount of \$475 is reasonable and appropriate for Citation No. 852151, January 5, 1981, 30 CFR 75.200, and respondent IS ORDERED to pay the penalty assessed within thirty (30) days of the date of this decision.

With regard to Citation No. 852152, respondent IS ORDERED to pay the agreed upon settlement amount of \$195 within the same thirty day period noted above.

With regard to Citation No. 852149, respondent IS ORDERED to pay a civil penalty in the amount of \$400, within the same thirty day period noted above.

George A. Koutras
Administrative Law Judge