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SOL (MSHA) V. YOUNGTOWN MINES
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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.

YOUNGSTOWN MINES CORP.,
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 81-379
A.O. No. 46-01397-03098V

DeHue Mine

DECISION

Appearances:

David Bush, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner; Roger S. Matthews, Esquire, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Case

The 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 CFR 75.400. Respondent filed a timely answer in the proceedings and a hearing regarding the petitions was held on November 17, 1981, in Charleston, West Virginia, and the parties appeared and participated therein.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing 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:

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(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 1077 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. Respondent Youngstown Mines Corporation owns and operates the mine in question.
2. Respondent is engaged in the business of extracting coal.
3. The inspector who issued the citation in this case is a duly authorized representative of the Secretary of Labor.
4. The DeHue Mine is subject to the provisions of the 1977 Federal Mine Safety and Health Act.
5. The presiding administrative law judge has jurisdiction to hear and decide this case.
6. The citation at issue in this case was duly served on a representative of the respondent and it may be admitted in evidence.
7. An appropriate civil penalty in this case will not adversely affect respondent's ability to remain in business.
8. Respondent's 1980 annual coal production was 259,001 tons.
9. Respondent's history of prior assessed violations for the 13 month period preceding the issuance of the citation in issue in this case consists of 501 citations.

Discussion

Citation 912344, 8/26/80, 30 CFR 75.400, states as follows:

Combustible materials coal, coal dust, float dust, oil and grease were allowed to accumulate on the 11 CM continuous miner and the frames and electric apparatus 0" inches 4" inches in the 1 north west main section.

Petitioner's Testimony and Evidence

MSHA Inspector Ernest Mooney, confirmed that he inspected the mine in question on August 26, 1980, and issued the citation charging the respondent with a violation of mandatory safety standard 75.400. He identified copies of the citation, the abatement, and his inspector's "narrative statement" which he filled out (Exhibit P-1). He testified that the area where the citation issued was an active working section and confirmed that he measured the coal accumulations inside the continuous miner motor compartment with a standard ruler and that the accumulations were "real black". He determined that the miner machine was "hot" after opening the compartment and detecting heat coming out of it, but he did not touch the hot machine. Section Foreman Cook was with him at the time of the inspection, and someone told him that the machine had been operated during the immediate previous shift, but he could not recall who told him and he took no notes other than to write up the citation.

Inspector Mooney testified that he believed the coal accumulations which he cited had accumulated on the machine during previous shifts and did not believe that they had "just occurred" shortly before his arrival on the scene. The applicable accumulations clean-up plan required clean-up "when needed", and he believed that mine management should have been aware of the accumulations because each working shift in the mine has a shift supervisor present. Although Mr. Mooney stated that the section foreman may have informed him that the machine in question may have "been down", since he took no notes he could not confirm this fact. The citation was abated on August 27, 1980 by another inspector.

On cross-examination, Inspector Mooney stated that he left the mine surface on August 26 at approximately 7:00 a.m., but was underground when he issued the citation. The miner machine was backed away from the working face and appeared to be located just outby the last open crosscut. The face in question was the only working face on the section, and while he observed the machine operator at the miner he could not recall what he was doing. Although the machine was not energized, power was on the trailing cable and the lights were on, but the motor was not running. He indicated that the machine has protective shields over the motor and cables, and he inspected both sides of the machine and detected that the shield on the operator's side of the machine was missing. The shields are usually installed on hinges so that they can be readily raised to facilitate cleaning and inspection of the motor and cables, but he did not know how many shields are required to be on the machine.

Inspector Mooney testified that he found accumulations of coal and coal dust on both sides of the machine, and that on the side opposite the operator he found that the coal accumulations were mixed in with oil and grease in the motor compartment near the pump motor. He could not recall whether anyone said anything to him about any mechanical problems with the machine and he made no inquiries as to why the machine had been backed away from the fact. The machine was removed from service, and he remained on the section.

Inspector Mooney confirmed that at the time he observed the machine coal was not being mined. He indicated that the mine operated on three daily 8-hour shifts and that issued the citation on the second shift which was from 4 p.m. to 12 midnight. At the time that he issued the citation he believed that the miner had been used to mine coal at the face during the preceding shift, and he stated that had the operator been in the process of cleaning the machine at the time he observed it he would not have issued the citation. It was his belief that the machine needed cleaning, and that he issued the citation because of the presence of the accumulations which he found and the fact that cleaning had not been done. (Tr. 15-60).

Respondent's Testimony and Evidence

Paul Cook, presently employed by the respondent as an assistant mine foreman, testified that at the time the citation was issued by Inspector Mooney he was employed as the section foreman. His previous experience with the respondent includes service as a UMWA miner, member of the safety department, and section boss. Mr. Cook stated that on the day the citation issued he arrived on the section at approximately 4:30 p.m., and that the previous shift foreman advised him that the continuous miner which was cited by Mr. Mooney had a leaky hydraulic hose on the "off-side". The machine was located just outby the last open break, and after checking the faces Mr. Cook turned the machine power on to see what the problem was. The motor ran for approximately 5 to 10 seconds when he detected hydraulic oil spurting out of a two-inch return line which had burst. Since the miner could not be operated without any hydraulic oil, he assigned the miner operator and his helper to the job of cleaning up the miner and he observed one shield missing from the motor panel at the location where the hose had burst. Mr. Cook stated that the miner and his helper were cleaning the oil accumulations around the motor area so that an electrician could have access to the area to change out the hose which had broken.

Mr. Cook testified that after directing that the machine be cleaned up he telephoned for a replacement hose for the machine and as he left the area he encountered Inspector Mooney. He informed Mr. Mooney that the machine "was down" and Mr. Mooney placed a red closure tag on it. Mr. Cook then called outside and ordered that a cleaning machine be brought in so that the machine could be cleaned up. He also indicated that the machine uses a fire-resistant white emulsion oil which contains

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approximately 40% water and that it is MSHA-approved. Although the machine has no fire suppression devices, he stated that none are required as long as the fire-resistant oil is used.

Mr. Cook identified a copy of the section foreman's report (Exhibit R-1) which indicates that no coal was being loaded during the shift. He also indicated that the mine operates two production shifts and that the third shift is a maintenance shift. He confirmed that the miner was shut down at 6 p.m., and he indicated that he was aware of the fact that Inspector Mooney had issued other citations during his inspection of August 26, and that they were all signed as being issued at 7:30 p.m.

On cross-examination, Mr. Cook identified the previous shift foreman as Arlie Bush and he stated that the miner machine in question had not operated at the face as of 3:30 p.m. on August 26. Mr. Cook did not believe that the machine could have remained "hot" from that time until 7:30 p.m. when the citation was issued by Mr. Mooney. Mr. Cook conceded that the shift report (Exhibit R-1) was filled out after the issuance of the citation in question (Tr. 60-95).

Petitioner recalled Inspector Mooney in rebuttal, and he testified that he is familiar with emulsion oil, but saw none sprayed all over the miner on the day in question. In response to my questions, he stated that he did not know whether the miner machine had a broken hose, and at the time he looked into the motor compartment the engine was not running. He also indicated that due to the packing of the accumulations at a depth of some four inches inside the motor compartment, there is no way that a broken miner hose used for one shift could have caused those accumulations over that one shift. He also did not believe that all of the accumulations inside the machine could have occurred from the immediate previous shift. When he first looked into the machine and observed the accumulations, the miner operator was present, and after he (Mooney) "tagged" the machine, he then encountered Mr. Cook (Tr. 95-100).

On cross-examination, Mr. Mooney stated that the packed accumulations led him to believe that the coal was mixed with oil and that it packed in over a period of time. He conceded that he did not use the term "packed" or "compacted" in the citation or his inspector's statement. He also stated that had he observed only loose coal on the outside of the machine which had just been idled he would not issue a citation, but if he finds it inside the machine and there is an indication that it has accumulated, he would (Tr. 101-102). He explained that the machine in question had not accumulated coal over the one shift but that it had been left from one shift to another without being cleaned. Under the clean-up plan, the machine should be cleaned "as needed" and that judgment is made by the section supervisor. In response to bench questions, Mr. Mooney summed up the crux of the citation he issued as follows (Tr. 103-104):

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JUDGE KOUTRAS: Mr. Mooney, I got the distinct impression what your concern was is that you saw evidence that this four inches of accumulation that had built up inside on the motor of the continuous miner had been a condition that existed for God knows how many previous shifts and nobody ever paid any attention to it, because it was accumulations of four inches.

I got the distinct impression from your testimony that it had been something that had been built up and built up and built up and caked on there combined with oil and what have you that made it adhere together and it was caked on there four inches. And when Mr. Cook discovered the broken hydraulic hose, he had to have his people go in and clean all that stuff off there before they could make repairs.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Is that what it is?

THE WITNESS: Yes.

JUDGE KOUTRAS: Now, the story I'm getting from Mr. Cook is no, that's not the case. The accumulations the inspector was talking about are something that just happened from the natural cutting action of the machine. "It happens all the time, Judge." Sure, he measured four inches. We have six inches, we have twelve inches while we're operating.

THE WITNESS: He had to remove the coal. What he was saying, I think, he had to remove the coal before he could repair the machine, and the coal dust out of the compartment.

JUDGE KOUTRAS: How about this grease and oil, did you attribute that to something other than the oil leak when you looked at it?

THE WITNESS: No, sir, I thought that was over a period of time; really, I did.

JUDGE KOUTRAS: So, the grease and oil you're talking about in your citation is not the same hydraulic oil

Mr. Cook is talking about?

THE WITNESS: No. You know, I didn't know about the busted hose, the burst hose.

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of the provisions of 30 C.F.R. 75.400, which provides as follows: "Coal dust,

including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

With respect to the question as to whether the evidence adduced in this proceeding supports a finding that the respondent violated the provision of 30 C.F.R. 75.400, as charged by the inspector, I take note of the fact that the Commission, in *Old Ben Coal Company*, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist," 1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also, *MSHA v. C.C.C.-Pompey Coal Company, Inc.*, Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanding the case to the judge to apply its holding in *Old Ben*.

In its post-hearing brief, petitioner argues that the testimony by the inspector, as well as the testimony of respondent's section foreman Cook supports the inspector's findings that accumulations of coal, coal dust, and grease and oil in the inner workings of the continuous miner in question did in fact exist at the time the inspector issued his citation. In addition, petitioner relies on the Commission's decision in *Secretary of Labor v. Old Ben Coal Company*, 2 MSHC 1017 (1979), and *Secretary of Labor v. C.C.C.-Pompey Coal Company*, Docket No. PIKE 79-125-P, decided by the Commission on June 12, 1980, remanded to Judge Steffey for application of the principles set forth in *Old Ben*.

Petitioner asserts that the fact that the continuous miner may have been out of service makes no difference since the standard simply prohibits accumulations on electrical equipment and there is no requirement that such electrical equipment be in service or even energized. Even so, on the facts in this case, petitioner asserts that the continuous miner trailing cable had power and that the lights were on. In addition, petitioner points to the fact that even accepting the testimony of foreman Cook that the machine had a broken hose, Inspector Mooney tagged it out and took it out of service when he looked inside the machine and found the accumulations which he cited, and that the inspector took it out of service because in his judgment it needed to be cleaned.

In its post-hearing brief, respondent cites the cases of *Ziegler Coal Company*, 3 IBMA 366 (1974), and *Plateau Mining Company*, 2 IBMA 303 (1973), in support of its argument that citations should be issued for accumulations of oil and grease on a piece of equipment which had been taken out of service and was being cleaned at the time the violation is cited. Even though the continuous mining machine in the instant case may have been defective because of the presence of accumulations of grease and coal, respondent maintains that it has demonstrated by a preponderance of the evidence that the miner was under repair (being cleaned), and in support of this conclusion respondent relies on the testimony of Mr. Cook as well as his shift report

(Exhibit R-1).

Respondent also argues that coal accumulations on mining machines used at the face during mining are unavoidable and are inherent in the nature of the coal mining business. While conceding that the intent of section 75.400 is to prevent coal accumulations which are left from shift to shift without being cleaned up, respondent nonetheless maintains that in this case the miner was down and being cleaned at the time the inspector observed it. Citing the testimony of section foreman Cook, respondent maintains that he had a clearer recollection of the events in question than did Inspector Mooney.

Respondent's reliance on the Ziegler and Plateau decisions by the former Board of Mine Operations Appeals as a defense to the citation issued in this case is rejected. Those cases dealt with withdrawal orders issued by mine inspectors for defective equipment. In the instant case, the respondent is charged with a violation of section 75.400, which deals with accumulations of combustible materials and not with a citation for any defects in the machine. I conclude and find that the Commission's decisions in Old Ben and C.C.C.-Pompey Coal Company are controlling and applicable to the facts presented in this case. In Old Ben, while the Commission accepted the fact some spillage of combustible materials may be inevitable in mining operations, it also found that an accumulation of such materials were in fact present and did exist in that case and that the mine operator did not dispute those facts.

I accept the testimony of Inspector Mooney that he tagged the machine out after finding the accumulations of coal, coal dust, grease and oil caked around the engine compartment, and I conclude and find that Inspector Mooney took that course of action because of the accumulations and not because of any broken hose. Although a broken hose may have contributed to the caking of the accumulations, the amounts measured by Mr. Mooney reasonably support an inference that the accumulated combustible materials had been permitted to exist for at least several working shifts prior to his inspection. In this case, while the record reflects that the shift foreman prior to Mr. Cook's shift purportedly told Mr. Cook about a defective hydraulic hose on the "off-side" of the machine, and the machine operator was at or near the machine when the inspector looked into the motor compartment, neither of these individuals were produced by the respondent at the hearing to testify. Although Mr. Cook's "foreman's report", exhibit R-1, reflects that the miner machine was down at the start of his shift from 4:30 to 6:00 p.m. because of a "broken suction hose", it also reflects that it was "still down" from 6:00 to 11:15 p.m., because the inspector believed it needed cleaning. As correctly pointed out by petitioner in its brief, Mr. Cook's report was filled in after the fact, and the previous shift foreman was not called to substantiate any claims by the respondent that the miner had been idled during the day shift because of any broken hose.

After careful review and consideration of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has the better part of the argument and that

it has proved a violation of section 75.400 by a preponderance of the evidence and the citation is AFFIRMED.

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

The parties stipulated that the assessment of an appropriate civil penalty in this case will not adversely affect the respondent's ability to remain in business, and I adopt this as my finding in this case. With regard to the respondent's size of business, the parties stipulated that respondent's annual 1980 coal production was approximately 259,001 tons, and I consider this to be a medium size mining operation.

In its post-hearing brief, petitioner's counsel argues that I should consider the annual production tonnage of 3,258,781 for the Youngstown Mine Corporation, the parent company, in any determination of the size of the respondent. This argument is rejected. Petitioner stipulated to respondent's annual production during the relevant time period and counsel specifically stated at the hearing that he was in agreement that an annual production of 259,000 would place the mine in the small or medium range (Tr. 7).

Good Faith Compliance

The record reflects that respondent took immediate steps to abate the citation and to assign men to clean the accumulations from inside the miner in question. This is indicative of rapid good faith compliance on respondent's part and that fact is reflected in the civil penalty which I have assessed for the citation in question.

Gravity

Although I consider accumulations of combustible materials on electrical machines or components to be serious matters, on the facts presented in this case the gravity of the conditions cited is tempered somewhat by the fact that the miner machine was not in operation and that coal was not being mined. In addition, petitioner has not rebutted the testimony by the respondent that the fire resistant emulsion oil used in the miner does afford some protection against any possible fire. Under the circumstances I conclude that the gravity connected with this citation was low.

Negligence

Since I have concluded that the accumulations cited by the inspector were permitted to exist over a period of time, I must also conclude that the respondent was negligent for failure to exercise reasonable care to correct the condition resulting in the violation. Accordingly, I find that the violation resulted from respondent's ordinary negligence.

History of Prior Violations

The parties stipulated that for the 13-month period prior to the issuance of the citation in question respondent had a history

of

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501 assessed violations. Although petitioner presented no details or arguments concerning this history, for a mine of its size, 501 violations over a span of 13 months is not a good compliance record. Accordingly, this reflected in the penalty assessment made by me in this case.

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 assessment in the amount of \$1,000 is reasonable and appropriate for the citation which I have affirmed, and respondent IS ORDERED to pay the assessed penalty within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this case is DISMISSED.

George A. Koutras
Administrative Law Judge