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SOL (MSHA) V. OLGA COAL
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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.

OLGA COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. WEVA 81-380
A.O. No. 46-01407-03091V

Olga 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

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. 75.400. Respondent filed a timely answer in the proceedings and a hearing 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.

In determining the amount of civil penalty assessments, 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 charged,

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(3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

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.

Discussion

Citation 0655868, 12/29/80, 30 CFR 75.400, states as follows:

3 West 034 Section - Loose dry coal was allowed to accumulate along the active shuttle car haul road beginning at the loading ramp and extending inby for a distance of approximately 200 feet. The coal measured from 4 to 12 inches in depth.

Testimony and Evidence Adduced by the Petitioner

MSHA Inspector Aubrey T. Castanon testified as to his background and confirmed that he conducted an inspection at the mine in question on December 29, 1980, and that he issued Citation 0655868 after finding accumulations of dry loose coal and coal fines in the 3 west section beginning at the ramp loading point and extending inby to the pillar block which was being mined. He measured the accumulations with a standard ryer and they ranged from four to twelve inches in depth (Exhibit P-1, Tr. 6-9). He took notes of the conditions he observed, and stated that during the inspection he discussed the conditions cited with respondent's mine safety inspector Jim Baylor, and his notes reflect that Mr. Baylor could not understand "why the dayshift left the roadway in the shape it is in" (Tr. 11).

Inspector Castanon identified a copy of his inspector's statement which he filled out at the time he issued the citation and he confirmed that the roadway which he cited was an active working area of the mine. He believed that mine management was negligent because the area where the accumulations were found was the only roadway from the ramp to the pillar being mined and that the conditions should have been obvious to the section foreman or pre-shift examiner walking the area (Tr. 12). Mr. Castanon stated further that at the time he observed the conditions the shift had begun and eight men were working in the section. He believed the accumulations of coal presented a possible fire hazard, and energized shuttle car cables would be lying in the roadways where the accumulations were present (Tr. 14-15).

Mr. Castanon stated that clean-up operations began at approximately five p.m. and were completed by 4 a.m., December 30, 1980. Approximately three shuttlecars of coal were loaded just in front of the ramp to abate the citation and the abatement efforts were confirmed by company safety inspector Aaron Charles. Since the abatement took approximately 11 hours, Mr. Castanon believed the coal accumulations were extensive. Mr. Castanon stated that mine management representatives, including the mine superintendent and foreman, discussed the matter with him during the abatement process and that Mr. Baylor advised him that he had been on the section during the previous day shift, had noticed the accumulations and had instructed the evening shift section foreman to back the continuous mine up to the ramp and to clean the roadway but that this had not been done at the time he arrived on the section. He also stated that Mr. Baylor had agreed with his decision to issue the citation and that his notes confirm this fact (Tr. 17-18).

On cross-examination, Inspector Castanon confirmed that the mine in question operated on three shifts; namely, the "hoot-owl" shift from 11:00 p.m. to 7:00 a.m., the day shift from 7 to 3 p.m., and the evening shift from 3 p.m. to 11 p.m. He confirmed that he observed someone around the ramp area when he first arrived on the section the day of his inspection, and that the person was "just sitting" (Tr. 24). He could recall no one shovelling coal or cleaning in the area. He did recall some individuals working around the continuous miner which was facing towards the face, but he could not recall what the individuals were doing (Tr. 26-27). He also observed a shuttle car parked at the ramp area facing south, and a second shuttle car parked at the first check curtain to the east of the ramp area (Tr. 29). He confirmed the fact that he went to the face area to observe the roof conditions, and later came back and issued the coal accumulations citation after looking over the area and making his measurements (Tr. 30). The deepest accumulations consisting of 12 inches were present at the ramp area, and the four inches were measured along the remaining area for approximately 200 feet continuously from the ramp to the split of the two blocks of coal, outby the area where the miner was parked and towards the face (Tr. 32).

Mr. Castanon testified that a citation was issued on the continuous miner, and he vaguely recalled being told that the miner machine was broken down (Tr. 34). However, his notes do not reflect any details concerning the breakdown of the machine. He stated that the usual method of cleaning accumulations in the mine was by means of scoops, but he could not state whether this was the means used in this case since he had not been at the mine for some time (Tr. 35). Had he observed cleaning in process with the use of a continuous mining machine only, he would still have issued a citation because he does not believe that a mining machine can do an adequate clean-up job because of the fact that the machine pan cannot clean up the middle of the roadway. The ramp area must be cleaned by shovel and the continuous miner could not adequately clean the ramp and the accumulations were continually being run over and packed down by the machine (Tr.

35-37).

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Mr. Castanon testified that he recalled one power cable lying on the shuttlecar roadway, but could not recall which one. He also indicated that the ribs were solid and could recall no rib sloughing problems. He stated that the cleanup program required that accumulations be cleaned up as needed and reiterated his belief that the day shift and evening shift foremen should have been aware of the accumulations which he found, and he could not recall being told that the miner was parked by the ramp to facilitate clean-up (Tr. 40).

On redirect, Mr. Castanon testified that he saw no evidence of anyone cleaning up when he arrived on the section, and had he observed clean-up taking place he would not have issued a citation (Tr. 41-42). He also believed that the accumulations had occurred over more than two shifts (Tr. 43).

In response to bench questions, Mr. Castanon conceded that had the continuous mining machine been in the process of cleaning the roadway when they arrived on the scene, he would still have issued the citation because the machine pan could not reach the mine floor and when the respondent attempted to use it for clean up it was riding on the top of the coal and could not reach down far enough to clean up the accumulations lying on the roadway (Tr. 50). He reiterated that he issued the citation because of the presence of coal accumulations and the fact that the respondent allowed them to exist without making any effort to clean them up (Tr. 53).

In response to bench questions, Inspector Castanon stated that he observed no splices in the cables which were present in the area of the accumulations and that while he was present during the abatement three shuttle cars of coal were cleaned up from the roadway but little from the ramp. He also stated that the accumulations were black and he believed they resulted from overloading of the shuttle cars over a period of time (Tr. 54-55).

Respondent's Testimony and Evidence

Harry Litteral testified that he was the 3 West second shift (evening) section shift foreman on December 29, 1980, when the citation was issued by Inspector Castanon. At the beginning of the shift he had a discussion with the previous shift foreman, Arthur Christian, who advised him that coal was beginning to accumulate on the shuttlecar haulway, that the number one pillar needed to be "broken off", and that additional dusting was needed. The mine superintendent instructed him to back the continuous mining machine to the ramp and to begin cleaning the coal accumulations. However, after discovering that the No. 1 pillar "was working", he decided to break it off and to install timbers for roof support to keep the roof from "riding back" to where coal would have to be mined. He then moved the miner out so that the shuttlecar could travel to the ramp to obtain roof support supplies. He then encountered a broken water hose on the miner water sprays and he proceeded to make those repairs near the ramp when Inspector Castanon arrived on the scene (Tr.

56-63).

Mr. Litteral testified that prior to the arrival of the inspector, he had one of his miners assigned to ventilation work, one man cleaning at the ramp, two roof bolters and two timber men timbering the No. 1 pillar block, and two men at the continuous mining machine helping him repair the water hose break. Mr. James Baylor was with the inspector, and Mr. Baylor advised him that the miner was dirty and needed cleaning. Mr. Litteral then assigned a man to clean the machine and advised Inspector Castanon that he had no intention of loading coal until the roadways were cleaned up. While clean up of the roadway was in progress, the inspector advised him that it was not doing the job, and clean up then continued by hand. Mr. Litteral conceded that the miner pan will not clean the entire roadway if it elevated and shovels must be used (Tr. 66-67).

Mr. Litteral stated that coal was loaded out only for clean up during his shift and when he returned the next day the citation was abated. He believed that rib sloughing contributed to the accumulations, and that spillage does occur when the shuttle cars are "too heavy" (Tr. 69). He indicated that the coal was soft that the movement of the shuttle car around the corner by the ramp, and the cable moving about contributed to the dispersment of the coal accumulations on the roadway (Tr. 70). No coal was mined during the shift and he intended to clean up first before beginning to mine coal (Tr. 71). He also stated that he assigned men to clean and rock dust and identified a copy of the mine cleanup program (Exhibit R-3). He stated that numbered paragraph four of the plan was the applicable procedure for cleaning the shuttlecar roadway in question (Tr. 73).

On cross-examination, Mr. Litteral confirmed that the previous shift foreman had informed him that coal was beginning to accumulate on the shuttlecar roadway and that the accumulations extended for the approximate 200 foot distance as stated by Inspector Castanon (Tr. 74). He also conceded that the accumulations could not have occurred between his shift and the previous shift. He also reiterated that rib sloughing was a constant problem and that this would account for coal accumulations in the roadway and the cleanup program requires daily attention to clean up and that "you work on it all the time" (Tr. 76). Road bottom conditions dictate whether the accumulations can effectively be cleaned by use of the miner machine and a scoop might be better since it has a sharper blade (Tr. 77).

James Baylor testified that at the time the citation issued he was employed at the mine as a safety assistant and that he accompanied Inspector Castanon during his inspection. Mr. Baylor stated that while on the section he encountered section foreman Litteral and advised him that he needed to clean up coal accumulations on the continuous miner. Inspector Castanon was in the area inspecting the faces and the roadway. He then decided to issue the citation for coal accumulations and at that point in time Mr. Baylor advised the shift foreman that the citation had issued and he assigned additional men to clean them up (Tr. 89).

When it was determined that clean up could not be effectively accomplished by using the continuous miner, additional shovels were brought to the area and the accumulations were shovelled into shuttle cars (Tr. 90). Mr. Baylor did not see accumulations to the depth of a foot, and he indicated that rib sloughing does cause accumulations at the base of the rib. He observed the accumulations in the roadway and indicated that they were caused by the shuttle cars driving on the roadway and the slack cable that moves about as the shuttle cars travel the roadway. He observed no one pulling down or cleaning up the coal ribs and he explained that this could not be done because it would widen the width of the roadway and cause roof control problems (Tr. 91-93).

On cross-examination, Mr. Baylor confirmed that he told Inspector Castanon that he could not understand why the day shift left the accumulations on the roadway, and he conceded that it was unusual for the shift to be left in such a condition (Tr. 94). He admitted that it "was in bad shape" but denied that there were 12 inches of coal accumulations all along the roadway, but he did not question that 12 inches were present near the anchoring point of the shuttle car trailing cable (Tr. 95). Mr. Baylor took no measurements of the accumulations and he could not recall whether he was present when the inspector made his measurements. Although Mr. Baylor stated that he took notes, he did not have them with him at the hearing (Tr. 96).

Findings and Conclusions

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. Olga Coal Company owns and operates the Olga Mine.
2. Olga Coal Company is involved in the extraction of raw coal from its natural deposits in its operation at the Olga Mine.
3. Inspector Aubrey T. Castanon was at all times relative thereto an authorized representative of the Secretary of Labor.
4. Olga Coal Company and the Olga Mine is subject to the Mine Safety and Health Act of 1977.
5. The Administrative Law Judge has jurisdiction over these proceedings.
6. The subject citation and termination thereof were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Olga Coal Company at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of the statements asserted therein.

7. The assessment of an appropriate civil penalty in this proceeding will not affect Olga Coal Company's ability to remain in business.

8. The appropriateness of the civil penalty, if any, to the coal operator's business should be based on the fact that in 1980 the company had an annual tonnage of eight hundred thousand twenty (800,020) production tons and Olga Mine had an annual tonnage of five hundred ninety-eight thousand seven hundred ten (598,710) production tons.

9. In the twenty-four month period prior to the issuance of the subject citation, the operator had a history of five hundred thirty-six assessed violations.

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."

In its post-hearing brief, petitioner argues that the testimony of the inspector who issued the violation, as well as the testimony of the section foreman and respondent's safety assistant, support the fact that the cited accumulations did in fact exist as detailed by the inspector both in his testimony and the citation which he issued, and relying on the decision by the Commission in the case of Secretary of Labor v. Old Ben Coal Company, 1 MSHC 2241-2243, petitioner asserts that the citation should be affirmed.

In its post-hearing brief, respondent takes the position that a literal application of section 75.400 would in effect prohibit all underground coal mining since spillage and collection of coal left in shuttle cars and mine cars between turns and during work stoppages would all technically be violations of the standard. Respondent maintains that the intent of section 75.400 is to prohibit combustible materials from accumulating in certain areas of the mine shift to shift without any effort being made to clean them up. This being the case, respondent argues further that the active workings are by their very nature clean, being cleaned, or in the process of accumulating combustible materials.

In this case, the respondent's defense is bottomed on an assertion that the inspector could not estimate how long it took to accumulate the amount of materials which he cited, and that the respondent was in the process of taking remedial action to clean up any accumulations that existed in the areas in question. Further, respondent maintains that it was its intention to clean up the haul road and ramp area before mining any coal. Respondent states that its clean-up plan permits the use of

continuous mining machines to clean up active roadways, and that even though a scoop used to clean the roadway in question was not available, the use of the mining machine was proper and the inspector acted prematurely in issuing the citation before giving the respondent time to clean up the areas cited.

In *Old Ben Coal Company*, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), the Commission 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*.

Turning to the evidence and testimony adduced in this case, I conclude and find that the preponderance of the evidence establishes the existence of the accumulations of loose dry coal and coal fines as described by the inspector along the haulage road and ramp area in question. The detailed testimony by the inspector, supported by his notes and the measurements he took to support the citation more than adequately establish the conditions he described both on the face of his citation as well as in his testimony during the hearing. The inspector's testimony that approximately three shuttle cars of coal were loaded out during the abatement process which took approximately 11 hours is indicative of the fact that the accumulations were rather extensive. Further, even though the inspector had no precise idea as to how long the accumulations were there, he believed that they existed for over two shifts and he saw no clean-up taking place at the time of his inspection. As stated during the hearing, the inspector issued the citation after finding accumulations of coal which he believed were permitted to exist without any efforts at cleaning them up (Tr. 53).

In view of the foregoing, I conclude and find that petitioner has established the fact of violation in this case, and I accept its arguments in support of the citation, and reject the arguments advanced by the respondent in its defense. 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 coal production was approximately 598,710 tons, and I consider this to be a medium-to-large size mining operation.

Good Faith Compliance

The record reflects that the inspector fixed the initial abatement time as twelve noon on December 31, 1981, but the termination notice reflects that the conditions were abated and the citation terminated at twelve noon on December 30, 1981. In

addition, the testimony presented

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by all of the witnesses reflects that respondent exhibited rapid compliance in cleaning up the accumulations. Under the circumstances, I find that respondent exhibited rapid abatement in cleaning up the cited accumulations and this is reflected in the penalty assessed by me in this case.

Negligence

The extent of the accumulations which the inspector found in this case suggests more than just a "beginning" of accumulations on the haul road and ramp as argued by the respondent in its brief. In addition, on the facts of this case, I reject respondent's attempt to defend the existence of the accumulations on the basis of the language found in its clean-up program which states that accumulations on each shift need only be cleaned up "if needed". In my view, the "need" for clean-up had long passed by the time the inspector arrived on the scene and issued his citation. I accept the inspector's testimony that the accumulations existed for more than two shifts, and since the roadway in question was one traveled by miners and supervisory personnel I believe that mine management should have known of the accumulations earlier than is suggested by its post-hearing arguments and that its failure to exercise reasonable care to correct the conditions which caused the violation and which respondent knew or should have known amounts to ordinary negligence.

Gravity

Although it is true that coal was not being mined at the time the conditions were observed by the inspector and the one power cable which may have been lying on the accumulations was not energized, the fact is that coal accumulations which are not cleaned up present a serious potential for a mine fire. In this case, while the probability of an ignition was low because mining was not taking place and the continuous miner was down and deenergized due to some repair work, the fact is that men were on the section and the existence of accumulations of combustible coal and coal fines presents a hazard to those miners. Under the circumstances, I conclude that the violation which I have affirmed is serious.

History of Prior Violations

The parties stipulated that in the 24 month period prior to the issuance of the citation in question, respondent had a history of 536 assessed violations. In its post-hearing brief, petitioner alludes to a computer print-out showing a breakdown of assessed violations of section 75.400 by the respondent, and it was submitted on January 26, 1982. The print-out shows 86 paid assessments by the respondent for violations of section 75.400, during the period December 29, 1978 to December 28, 1980.

For a mine of its size, I conclude that respondent's past history of assessed violations is not a particularly good one. Although petitioner has submitted no details concerning the 86

prior citations concerning

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accumulations citations for violations of section 75.400, the repetitive nature of these citations should alert the respondent to the fact that its clean-up program may be in need of further attention. I conclude that respondent's history of prior violations is such as to warrant an increase in the original penalty assessment made in this case and this is reflected in the penalty which I have assessed for the violation in question.

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 \$1200 is reasonable and appropriate for Citation No. 0655868, December 29, 1980, 29 CFR 75.400, and respondent IS ORDERED to pay the penalty within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge