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SOL (MSHA) V. CO-OP 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
v.	Docket No. WEST 82-68 A.C. No. 42-00081-03032 V
CO-OP MINING COMPANY, RESPONDENT	Docket No. WEST 82-69 A.C. No. 42-00081-03033 V
	Docket No. WEST 82-101 A.C. No. 42-00081-03034
	Co-op Mine

DECISION

Appearances: Katherine Vigil, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
Carl E. Kingston, Esq., Salt Lake City, Utah, for Respondent

Before: Judge Melick

These consolidated cases are before me upon petitions for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary has proposed penalties against the Co-op Mining Company (Co-op) of $1,094 for three violations of mandatory standards. The general issues are whether the Co-op Mining Company (Co-op) has violated the regulations as alleged in the petitions and, if so, whether the violations were "significant and substantial." Appropriate civil penalties must also be assessed for any violations found. Hearings in these cases were held on May 13, 1982.

Docket No. WEST 82-68 - Order No. 1023129

The validity of Order No. 1023129, issued under section 104(d)(1) of the Act is not in itself at issue in this civil penalty proceeding, but only the violation charged therein. Secretary v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979); Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (October 1979).

The order alleges a violation of the mandatory standard at 30 CFR section 75.305. That standard provides in relevant part as follows:

> "In addition to the preshift and daily examinations required by this subpart D, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar falls, at seals, in the main return, at least one entry of each intake and return aircourse in its entirety, idle workings, and, insofar as safety considerations permit, abandoned areas. * * * A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons."

The Order reads as follows:

> There was no evidence of the weekly examinations of the return aircourse or intake and the book provided on the surface for this purpose was not filled out for the week of 8/18/81 and 8/26/81 and 9/2/81. Thus, the last examination of intake and return in its entirety was preformed [sic] on 8/12/81.

The order appears to charge two separate violations of the cited standard, i.e. (1) a failure to perform the weekly examinations and (2) a failure to record such examinations. The operator conceded at hearing that the entries required by the cited standard had not been made in the examination books. The violation of that part of the standard is therefore proven as charged. Whether I find that the required inspections had nevertheless been made depends on my determination of the credibility of the witnesses. MSHA coal mine inspector John Turner testified at hearing that the examination book indeed did not have entries corresponding to weekly examinations required for the three week period August 15, 1981, through September 2, 1981. When Turner had shown the examination book to section foreman Kevin Peterson, Peterson acknowledged that the entries had not been made. Peterson, in fact, never claimed that the inspections had been made.

Mine Superintendent Bill Stoddard testified that shortly before the MSHA inspection here at issue, he had assigned maintenance foreman Clyde White to perform the required weekly inspections. White reportedly told Stoddard that he had performed all of the required inspections, but merely failed to enter them into the designated book and failed to place his initials in the return aircourse as required by the cited standard. According to Stoddard, White also said that he had reported the results of his inspections to another foreman, Ken Defa, and that he assumed Defa was making the necessary book entries and was placing his (Defa's) initials in the return aircourse even though Defa had not performed the inspections.

Neither White nor Defa appeared at hearing to testify concerning these matters and no reason was given for their non-appearance. The statements attributed to them were, therefore, not given under oath nor subjected to the scrutiny of cross examination. Under all the circumstances, I can accord but little weight to this self-serving hearsay. On the other hand, it may reasonably be inferred from the absence of the required entries in the examination book and from the absence of an inspector's initials in the return aircourse that the required inspections had never been made. The violations have accordingly been proven as charged.

Whether these violations were "significant and substantial", however, depends upon whether they could be a major cause of a danger to safety or health and whether there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). The test essentially involves two considerations: (1) the probability of resulting injury, and (2) the seriousness of the resulting injury.

If the weekly examinations had actually been performed here and the only violation was the failure to record those examinations, then that violation would undoubtedly not have been "significant and substantial". That, however, is not the case. According to Inspector Turner, other required inspections made at the Co-op Mine on a daily basis would cover all areas but the return entries. Only the weekly exam required by the cited standard provides for inspection of the return entry. Moreover, there is no dispute that the weekly examination of the return entry could lead to discovery of roof falls that might hinder ventilation of the working areas of the mine, defective air stoppings, and coal

dust and methane. Although methane has never been detected at the cited mine and inadequate ventilation through the return entry can be detected by other inspections and tests such as inspection of the exhaust fan chart, and the ventilation and methane tests made during pre-shift examinations and every 20 minutes during production, these factors do not in my opinion detract from the significance of the weekly inspection. Clearly, if these other inspections were handled in as negligent a manner as the weekly inspections, there is a good chance that the extremely hazardous conditions described by the inspector could escape undetected. If accumulations of float coal dust remain undetected, there is no disagreement that the risk of an explosion and resultant serious injury or death to the eight miners ordinarily working underground is greatly increased. Accordingly, I find that the violation was "significant and substantial" and constituted a serious hazard.

I find also that the operator was negligent in failing over a rather long period of time to see that the inspections required by the cited standard were being performed. In determining the amount of penalty herein, I have also taken into consideration that the operator had an annual production of 141,000 tons of coal and had 20 employees. It also had a history of 104 violations over a recent 2-year period. Under the circumstances, I find that a penalty of $500 is appropriate.

Docket No. WEST 82-69

At hearing, the parties moved for approval of a settlement agreement requesting a reduction in proposed penalties from $300 to $150. The parties provided sufficient information at hearing from which I determined that the proposed settlement was appropriate under the criteria set forth in section 110(i) of the Act. The motion for approval of settlement was accordingly granted.

Docket No. WEST 82-101

At hearing, Co-op requested to withdraw its Answer and agreed to pay the proposed penalty of $44. Under the circumstances, permission to withdraw was granted and a default decision entered.

Order

The Co-op Mining Company is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

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Docket No. WEST 82-68 - $500
Docket No. WEST 82-69 - $150
Docket No. WEST 82-101 - $ 44

Gary Melick
Assistant Chief Administrative Law Judge