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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 Docket No: WEST 81-268 A/O No: 42-00081-03027 V
v.	Co-op Mine
CO-OP MINING COMPANY, RESPONDENT	

DECISION

Appearance: Phyllis Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 F.O.B., 1961 Stout Street, Denver, CO for Petitioner Carl E. Kingston, Esq., 53 West Angelo, Salt Lake City, UT 84115 for Respondent

Before: Judge Moore

At the outset of the trial it was stipulated that respondent's annual production was approximately 141,233 tons and that it employed approximately 25 miners. As to the history of prior violations there was some question about the printout because it covered more than a 2-year period. While MSHA, in its assessment formula, only considers violations within 2 years of the one being assessed, such limitation does not bind this Commission or its administrative law judges. The computer printout was received in evidence as Exhibit P-1.

The printout has many flaws, however, and is not self-explanatory. For example it includes assessed violations which have not been paid and there is no indication whether they have been contested or vacated or whether respondent has simply refused to pay. Such alleged violations are clearly not a part of the history of prior violations. A substantial number of the alleged violations listed on the computer printout occurred between January 6, 1979 and January 26, 1981. Specific dates of the alleged violations are not listed. The earliest order issued in the instant case was issued on January 6, 1981. While it is unlikely that all of the listed violations were issued between January 6 and January 26 of 1981 I can not make the assumption that they were not so issued, and even if I did I would have no way of knowing how many occurred prior to January 6 of 1981. The entire right half of Exhibit P-1 is stricken from the record. As to the left hand column it does show that some time prior to January 6, 1979 respondent had paid $12,578 in civil penalties.

Government Exhibit P-3 is a mine map with numerous markings thereon. There are five different colors used on the map. The testimony transcribed at pages 12 through 17 purports to describe what these various colors represent. I find that the description is inadequate and that the mine map is of very little value in resolving the issues in this case. The mine map attached to the government's brief is very good, however.

While it was not mentioned in the briefs, respondent brought out in the course of the examination of the inspector, that at the time the citations involved in this case were issued, the United Mine Workers of America was on strike, and while Co-op's mine was a union mine it was not organized by the United Mine Workers and was not on strike. The inspector's brother "was president of the union." (Tr. 87). I presume the witness meant the local United Mine Workers chapter. The Co-op mine was organized by the International Association of United Workers Union. (Tr. 150).(FOOTNOTE 1) I find that bias on the part of the inspector was not established.

Withdrawal Order No: 1022260 alleges a violation of 30 C.F.R. 75.1704 in that two separate and distinct travelable passageways for use as escapeways were not being maintained. The reason that they were not being properly maintained was that a roof fall had occurred in the intake air escapeway and the debris was in a pile that was about eight feet long and four to five feet high. The inspector considered that as blocking the passage which was one of the two escapeways. The other escapeway (return air) will be considered later.

Mr. Bill Stoddard described the areas as follows--"this area was a problem area. We had two parallel faults about 50 feet apart, and the roof had dropped down about four feet, the roof of the mine dropped down about four feet for 50 feet, then back up. So it was a problem area." (Tr. 61). After discussing the roof bolts and wire mesh that were holding up the roof he said the cave-in material was about two feet high and four feet across, that there was no loose roof and he could see that the section foreman had driven his tractor over the two feet of mud and gone on to work. "So it wasn't blocked off and I went in and talked to Kevin at that time about it."

Mr. Nathan Attwood, a mine foreman, was not in the mine at the actual time of the inspection but was there on the same day, January 6. He stated that both escapeways were travelable in a safe manner. (Tr. 137).

Mr. Kevin Peterson another mine foreman said in the area where the June 6 order was issued, he had conducted a pre-shift examination, barred down some material with other material previously barred down, created a two foot high mound and driven his tractor over the mound and on into the face area. He was with the inspector during the inspection and the tracks where he had driven the tractor over the pile earlier in the day were visible.

After considering the testimony discussed above, I find that there was no roof fall in the area as stated by the inspector, but a pile of debris that had been barred down from the roof. I further find that the tractor had been driven over the pile of debris and that the escapeway on intake air was not blocked by the pile of debris. Referring to this area the citation says "a roof fall and bad top is present between the number 13 and 14 crosscut in the intake air entry..." Everyone who testified concerning this area admitted it was a problem area with "bad top" but that does not mean that the "bad top" was not properly supported. It is significant to me that the inspector did not, on January 6, 1981, issue any roof control citations. I therefore find the intake escapeway was not blocked by either debris or dangerous roof conditions.

The other escapeway is partially in return air and partially along a belt entry. The inspector said the roof was supported by cribs and cross bars and that they had "tremendous weight on them." (Tr. 21). He stated "when he started around that crib and to get down into that hole, the amount of pressure that was on those cribs and on those crossbars, there wasn't no way that I was going to go through it." (Tr. 22). Concerning the same area and the secondary escapeway Mr. Peterson said:

> "and we got right here to these cribs and Mr. Jones said that he didn't want to go any further and that he couldn't get through there. And we had been going through there and the belt man had been going through there and we continued to go through there setting timbers and cribs and carrying timbers and cribs in there, because we realized that was a problem area and we were supporting it." (Tr. 126).

When asked if there was anything in either the primary or secondary escapeway that would prevent safe passage on January 6, he answered no.

In balancing the testimony of the various witnesses I find that the government has not sustained its burden of proof with respect to this withdrawal order.

Although it was not mentioned at the trial or in the briefs, the inspector in this case failed to check the block which would make this a citation. He checked only "order of withdrawal" block. In Kontiki Coal Corporation vs. Secretary of Labor 1 FMSHRC 1476 (October 25, 1979), and in Secretary of Labor vs. Wolf Creek Collieries Company which is reported in the first unpaginated volume of FMSHRC decisions dated March 1979, the judges had found violations and assessed penalties, but had vacated withdrawal orders because of the failure of the Secretary to establish the underlying citations. In reversing the judges, the Commission stated that it was improper to vacate a withdrawal order in a penalty proceeding. Both of those Commission decisions involved the 1969 Coal Act and in each, the alleged violation was established. In my opinion that is an entirely different situation than the instant situation where I have found

that no

violation existed. It would make no sense to leave a non-imminent danger order, that was issued solely because of an alleged violation of a safety standard, undisturbed in the face of a finding that no violation occurred. I therefore vacate the withdrawal order.

Withdrawal Order No: 1022262 charges that the operator failed to follow its roof control plan and adequately support the roof of the return air entry. The part of the return air entry involved herein was not designated as an auxiliary or secondary escapeway. Concerning this return entry, the inspector stated:

> "When we got in here a-ways we encountered some bad top... I think we was in about 600 feet. And then he wanted to take me through a door out into the belt entry and I told him no I wanted to stay in the return entry because.....
>
> JUDGE MOORE: You say bad top. Bad enough so you wouldn't walk under it?
>
> WITNESS: It was getting bad--it was getting bad; it was so high in there that it was hard to sound it with your thumping stick, so really I was getting a doubt in my mind as to how much further I wanted to go.
>
> But anyway, he told me we couldn't go on through the return entry, that there were some large caves in that area. And I said, "well, how have they been making their examinations?' He said, "well, we've been making it up to this point and then going into the belt entry and up around"'. [Tr. 36-37].

He then ran into what he called "big caves" where the material from the roof filled the entire entry, he could possibly crawl over the pile of coal but he would have to go up above the roof line to do so. He referred to the caved-in material as coal, but he did not issue any citations for coal accumulations. It was later explained that plenty of air could go over the top of the mound and that the inspections were made by going as far as the caved-in material on one side and then going back out into a belt entry, walking past the cave area, and then back into the return air area and then to proceed in the opposite direction to inspect the entry as far as that end of the cave area was concerned. This had been approved by MSHA for a long time (Tr. 75). A few days before inspector Jones arrived at the mine the operators were advised that because of an explosion in an eastern mine, MSHA had changed its position and would henceforth insist that a return airway be maintained so that all of it could be walked through. The statement on page 7 of the government's main brief "allowing large roof falls to remain in the return air entry is clearly a violation of the operator's roof control plan" may be true. I have not seen the plan or been informed of what it requires, but such plans are usually concerned with supporting a

roof rather than cleaning up after a roof fall. The last paragraph beginning on page 7 of the government's main brief states:

> Mr. Stoddard, the mine manager, said that he thought that allowing this condition to exist was okay because an MSHA supervisor or "some inspector" was "aware" of or had seen it, or "some" circular said it was okay. Yet Mr. Stoddard had never applied for a variance and had never gotten one. (Tr. 108-109). He did not have a copy of any circular nor assumption that some "variance" he thought he had was "changed." Respondent clearly knew he would be using this defense at trial and could have supported this hearsay testimony with the "documents" referred to or with the MSHA supervisor's testimony, if such evidence did exist. Respondent never attempted to obtain the presence of Mr. Matekovic (the supervisor referred to) at the trial, either by subpoena or through this counsel's cooperation. As a mine operator, Mr. Stoddard is charged with the knowledge that any variance must be in writing. For obvious reasons he chose to assume that he had authority to leave the deteriorated conditions in this entry. It would have taken a great deal of his miners' time and labor to rehabilitate this entry. When this order was issued the operator knew he had to completely abandon that entry. It was easier to establish a return air entry somewhere else because "we couldn't rehabilitate that cave" (Tr. 77).

The language quoted above implies that the circular that Mr. Stoddard testified about either does not exist or that the government does not know whether it exists or not. If the government can prove that the circular referred to does not exist, it should consider prosecuting Mr. Stoddard for perjury. If the circular does exist, and the Solicitor's office is aware that it exists, then it should question the properiety of including the above statement in its brief.

Nevin Mattingly is an electrician and vice president of the local International Association of United Workers Union. As such he is concerned with the safety of the miners. He accompanied Mr. Jones on January 8 and did not see any dangerous roof and stated that every time he had gone through the area it "looked sufficient."

In its reply brief the government challenges the credibility of Mr. Mattingly. On page 4 the following appears:

> Mr. Stoddard, an owner and the mine manager clearly stated that "we're non-union. (Tr. 87)". Yet the operator attempted to present Mr. Mattingly as a union representative in an effort to establish him as a credible and objective, even adversary voice.

On Page 87 of the transcript it is explained that the U.M.W. was striking and that the inspector's brother was an officer of the local UMW. The following ensued:

JUDGE MOORE: And you're a non-union mine?

WITNESS: We're non-union. We're not a UMW mine.

I was the one that asked the question and as I understood the answer the second sentence was a correction of the first. It is certainly not enough to challenge the credibility of Mr. Mattingly. Whatever else the government may have established about the conditions at the mine it did not establish a roof control violation and that is what the order charges. I find a violation has not been proved and I vacate the order.

Citation No: 1023061 alleges a violation of 30 C.F.R. 77.202 for accumulations of float coal dust and coal fines in various areas of the tipple. The dust standard for surface areas provides:

> "coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts."

The accumulations described by the inspector were certainly extensive enough to be considered "dangerous amounts". The accumulations consisted of float coal dust and coal fines. The inspector described coal fines as "ground-up coal dust that is too heavy to float on the air. (Tr. 51). While I can not accept the inspector's opinion that this mixture of unsuspended coal fines and float coal dust could be ignited with a match and could burn as rapidly as gunpowder (black powder) it was nevertheless combustible, and a source of ignition in the form of a fire in a bucket was in the area. I find that there was a violation and that respondent was negligent. The hazard involved was serious but respondent exhibited good faith abatement. I agree with the recommendations contained in the "Narrative Findings for a Special Assessment" (Exhibit P-2) and assess a penalty of $800.

It is therefore ORDERED that respondent pay to MSHA, within 30 days, a civil penalty of $800.

Charles C. Moore, Jr.,
Administrative Law Judge

FOOTNOTE START HERE-

1 For some reason witnesses Attwood and Mattingley were left out of the index to the transcript.