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PITTSBURG & MIDWAY COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PITTSBURG & MIDWAY COAL MINING CORPORATION, APPLICANT	Application for Review Docket No. WEST 82-131-R Order No: 1016966 2/24/82
v.	Und. Citation No. 1016965 5/23/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, RESPONDENT	Edna Strip Mine
SECRETARY OF LABOR, ET AL, PETITIONER	Civil Penalty Proceeding Docket No: WEST 82-170
v.	A/O No: 05-00303-03015 H
PITTSBURG & MIDWAY COAL MINING CORPORATION, RESPONDENT	Edna Strip Mine

DECISION

Appearance: Phyllis K. Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, 1961 Stout Street, Rm. 1585, Denver, CO 80294, for the Secretary of Labor
John A. Bachman, Esq., The Gulf Companies, 1720 So. Bellaire Street, Denver, CO 80222 for the Operator, Pittsburg and Midway Coal Mining Corpn.

Before: Judge Moore

After inspecting the mine on February 23 and 24, 1982, Inspector Horbatko issued the imminent danger order involved in this review proceeding and civil penalty case. In it he charged a violation of 30 C.F.R. 77.1000 because the operator was not in compliance with its ground control plan. That section of the regulation states:

> "each operator shall establish and follow a ground control plan for the safe control of all high walls, pits and spoil banks to be developed after June 30, 1971 which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure high wall and spoil bank stability."

It should be noted that unlike ventilation plans and roof control plans ground control plans do not require the approval of MSHA. On March 9, 1982 the inspector amended the order to add several charges and change the violation from Section 77.1000 to Section 77.1002. Section 77.1002 provides:

> "when box cuts are made, necessary precautions shall be taken to minimize the possibility of spoil material rolling into the pit."

After the civil penalty suit was filed MSHA filed a motion to plead in the alternative a violation of either section 77.1000 or 77.1002. The operator did not oppose the motion and the issues are therefore, did the operator violate either 30 C.F.R. 77.1000 or 30 C.F.R. 77.1002 and did an imminent danger exist?

I am convinced from MSHA Exhibit 4, the mining dictionary (FOOTNOTE 1) and the testimony at the trial, including that of the inspector, that the area involved in this imminent danger order was not a box cut. Thus, Section 77.1002 has nothing to do to do with the area of the mine involved in this closure order. The box cut is the initial cut involving two high walls, and the spoil has to be dumped on to one of these high walls. This operation did begin with a box cut but that was thirteen pits earlier and long ago. The charge that Section 77.1002 was violated is DISMISSED.

The ground control plan filed by the operator in 1977 requires a fifty foot pit width and states that it proposes a spoil bank angle of 1-1/4 to 1 which is the same as 38. The wording of the plan is peculiar in that fifty feet is a required width but the proposed angle of the spoil bank is merely a goal. There are two seams of coal being mined at the Edna Strip Mine. The top seam is about 75' underground and is 5-1/2 feet thick. Ten feet below that is another 2' seam of coal. The operator first mines the top seam for the entire length of the pit and then goes back and shoots the 10 feet of parting material and removes that to get to the lower 2' coal seam. The order herein is concerned only with the mining of the top seam.

The pit is mined from west to east and there is a station marker every 100 feet. The station numbers get higher as you approach the east end of the pit. The area of the mine closed by the order is "east of survey station 18, off ramp number 5, for approximately 150' to the end of the pit." There was a great deal of testimony concerning the condition of the mine to the left (west) of survey station 18 and a slump that had occurred there three days before the order was issued. As far as this order is concerned, however, the relevant area of the pit is east of station 18. The inspector saw large rocks that had fallen off the high wall east of station 18 and these may have been pulled down by the dragline rather than having fallen out of their own accord.

This is a standard strip mine operation. The dragline rests on the

bench and removes the overburden from the south side of the pit and drops it on to the spoil bank to the north. After the dragline has moved some 200' east of a particular section the drillers come in and drill the coal, then the blasters shoot the coal and the coal is then loaded and hauled out of the pit. By this time the dragline has removed the overburden from another section and the operation repeats itself until the east end of the pit is reached. There was some question as to the exact location of the dragline when the order was issued, but it was somewhere on the edge of the branch at the east end of the pit. At the time the order was issued the dragline was attempting to remove the overburden east of station 18 but the spoil kept falling back into the pit. When the dragline operator tried to remove the tow of the spoil, other spoil would roll into the area, and he was having difficulty in finding a place to drop the spoil. This was caused by the fact that he had dumped high spoil on the right hand side and could not dump over it or reach over it to dump, and a road was hampering his ability to dump even if he swung a 270 arc to his left. He asked the inspector if he had any suggestions. The inspector had none and on measuring the angle of the spoil bank with a level, he found the bank steeper than 40. He could see that the width of the pit was very narrow in the area where the dragline was working. While admitting there was no imminent danger at the time he actually issued the order he thought one would be created in a short time. When questioned about the term "imminent danger" he said it could be a danger that is about to happen or could be "down the road aways." The Solicitor's attorney brought out the definition pronounced by the Interior Department's Board of Mine Operations Appeals to the effect that death or injury might occur before the condition can be abated "if normal mining practices continue."

The operator's witnesses testified that if they had been unable to solve the problem with the dragline they intended to put a bulldozer on top of the spoil bank and shove the spoil down toward the pit to create a more shallow bank. To some extent the spoil bank had been scaled down by the dragline. The next step would have been to try to remove the spoil off of the pit bottom with bulldozers and haul it to the other end of the pit. The inspector thought that would be a very uneconomical way to mine this area. There was, however, about $50,000 worth of coal east of station 18.

The theory advanced by counsel for MSHA in its closing argument, was that the operator wanted that coal so badly that he was going to bring his drills and blasters and trucks and operate on top of the boulders and unconsolidated material that had fallen down from the spoil bank. That makes no more sense to me than it did to the mine operator.

If the operator did try to get its drills and blasters and bulldozers and trucks to operate in the area east of 18 before the area had been properly prepared for such activities an imminent danger would exist. But that is not the normal mining practice and there is no evidence that respondent intended to mine in that manner.

While, as stated earlier, the inspector did admit on cross examination

that there was no imminent danger at the time he issued the order, it was his earlier testimony that both the imminent danger and the violation resulted from the fact that the operator had not complied with its ground control plan. The spoil bank was not at the proper angle east of station 18 and the pit was less than 50' in width. Considering the nature of a dragline operation, when the dragline first gets to the top of the coal seam, the pit is necessarily only the width of the dragline which in this case was 10 or 12 feet. This creates neither an imminent danger nor a violation. The ground control plan must be interpreted to mean that the pit should be 50' wide before the drillers, blasters and loaders enter the area. No one entered the area in this case, and the order was issued while the operator was still trying to clear the pit area east of station 18. If the operator had tried to enter the area east of station 18 to mine, before the pit had become 50' wide, it would have been a violation of its ground control plan. Whether an imminent danger existed would depend on the likelihood of rocks falling off the spoil bank rather than whether or not the ground control plan had been violated. I find there was no imminent danger and there was no violation. It is interesting to note that at the present time the ground control plan under which this pit is operated allows a width of from zero to 150 feet and a spoil bank angle of 45.

The order is vacated and these two cases are DISMISSED.

With respect to Citation No: 1016965, an examination of the "Application for Hearing" reveals that the company did desire to contest both this citation and the previously discussed withdrawal order. If our docket office had been aware of that, it would have assigned two separate docket numbers. It is only in civil penalty cases that multiple citations and orders are assigned the same docket number.

Through accident or oversight Pittsburgh paid the penalty which resulted from this citation and while there was testimony concerning this alleged violation at the trial the government did not try to uphold the citation and I considered such testimony as background information. At page 232 of the transcript the government attorney specifically stated that the citation and standard 77 C.F.R. 1713 was not involved in this case. Certainly the fact that the company had paid the assessment would lead government counsel to believe that the citation was not being contested.

Without deciding whether a mining company has a right to a hearing concerning the validity of a citation even though it has paid the assessment, I will hold that where the assessment is paid through accident or oversight, and where the clear intent to challenge the citation is apparent, that the company did not waive its right to a hearing on the validity of the citation. Nevertheless, the record as it stands is not adequate for me to make a decision, but on the other hand I do not want to hold up the decision as to the order. I will therefore separate the two notices of contest and assign a different docket number to the contest of the citation. It will be WEST 82-131-R-A. If the

company still thinks a hearing or ruling on the citation is necessary, I will receive further

evidence on the matter in the form of affidavits, references to the transcript of the hearing conducted in Glenwood Springs, Colorado, or if the parties desire, I will conduct another hearing.

Pittsburgh and Midway Coal Mining Company is accordingly directed to advise me, within 20 days, whether it wants to pursue this matter. If not, I will dismiss docket No: WEST 82-131-R-A. But if the company indicates that it does want to pursue this matter further, the parties are directed to inform me whether they want the opportunity to present further evidence at a hearing. In this connection, if Denver, Colorado, is a convenient place for a hearing on the citation, I will be attending a conference in Denver on the 13th and 14th of September and could probably hear this matter on Thursday or Friday of that week.

Charles C. Moore, Jr.
Administrative Law Judge

FOOTNOTE START HERE-

1 "A Dictionary of Mining, Minerals and Related Terms."