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SOL (MSHA) V. PRICE RIVER 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

CIVIL PENALTY PROCEEDING

Docket No. WEST 81-224
A.C. No. 42-00165-03051

v.

Price River No. 3 Mine

PRICE RIVER COAL COMPANY,
FORMERLY BRAZTAH CORPORATION,
RESPONDENT

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor U.S.
Department of Labor, Denver, Colorado, for Petitioner
Stanley V. Litizzette, Esq., Price River Coal Company,
formerly Braztah Corporation, Helper, Utah, for Respondent

Before: Judge Vail

Procedural History

This case is before me upon petition for assessment of a civil penalty by the Secretary of Labor pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). Respondent (formerly the Braztah Corporation, and now the Price River Coal Company) is charged with violation of a mandatory underground coal mine safety standard, for which a citation was issued pursuant to section 104(a) of the Act. In conjunction with the citation, a withdrawal order for failure to properly abate was issued pursuant to section 104(b) of the Act. Respondent duly contested the proposed penalty for the alleged violation of the safety standard. Upon notice to the parties, a hearing on the merits was held in Salt Lake City, Utah. Both parties filed post-hearing briefs.

Issues

The principal issues presented in this proceeding are: (1) whether respondent was properly charged with a mine safety violation, and if so, what civil penalty is appropriate based upon the criteria set forth in section 110(i) of the Act; and (2) whether respondent may now challenge a withdrawal order for respondent's alleged failure to abate the violative condition. Additional issues raised during the proceeding are identified and disposed of where appropriate 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: (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 of the penalty 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.

Stipulations

At the outset of the hearing, the parties stipulated to the jurisdiction of the Mine Safety and Health Review Commission to hear this case, and to several facts relevant to the assessment of penalties. It was agreed that: (1) respondent produces 3,200 tons of coal daily and employs 269 miners at the Price River No. 3 Mine; (2) respondent would stipulate to the admissibility of a computer printout (Exhibit P-7) to show the number of cited violations occurring over a 24 month period ending on February 5, 1981, the day that the citation involved in this proceeding was issued; and (3) respondent's payment of a penalty would not impair its ability to continue in business.

Findings of Fact

1) Respondent owns and operates a coal mine known as the Price River No. 3 Mine near Helper, Utah.

2) On February 2, 1981, Fred Lupo, president of the Local 8303 of the United Mine Workers of America (UMWA) at the Price River No. 3 Mine, attended a safety meeting at the mine, and afterward informed the mine superintendent of his concern with dirty mine belts. Upon being informed by the mine superintendent that when the mine's manpower was "built-up then they could spread out and do more jobs," Lupo advised the superintendent that he believed that the dirty belts had existed for a long period of time and that he intended to notify the Mine Safety and Health Administration (MSHA) and request an inspection (Tr. 75, 76).

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3) On February 2, 1981, Lupo sent a letter on behalf of the UMWA to MSHA complaining of dirty belt lines in the mine, and requesting an inspection pursuant to section 103(g) of the Act. (FOOTNOTE 1) The letter was received by MSHA on February 3, 1981 (Tr. 76, Exhibit P-8).

4) Upon receipt of Lupo's letter, MSHA assigned Jerry Lemon to inspect the mine's belt lines. Lemon commenced his inspection on February 5, 1981 and was accompanied by Lupo and Victor Stuart, the mine's safety inspector.

5) Upon arriving at the No. 1 belt at the mine's Castle Gate portal on February 5, 1981, Lemon observed accumulations of both loose coal and float coal dust in the area of the belt's second set of air-lock doors, about 500 feet inby the mine portal. The coal accumulations extended a distance of 20 feet and were six inches to two feet in depth. Black deposits of float coal dust had accumulated on the floor and ribs of the same area (Tr. 29, 30, Exhibit P-6). Upon proceeding down the No. 1 belt to the area of the belt tailpiece, Lemon observed three belt drive rollers and the idler roller running in loose coal accumulations which measured 13 to 32 inches in depth and extended over a distance of 20 feet. In addition, black float coal dust accumulations were again evident and extended approximately 120 feet from the tail piece in the direction of the portal (Tr. 28, 31, 48, Exhibit P-6).

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6) Lemon issued citation No. 1021163 at 4:40 p.m. on February 5, 1981, charging violation of 30 C.F.R. 75.400. The citation listed the conditions in the area of the No. 1 belt described above in Finding No. 5 (Exhibit P-6).

7) After discussing the amount of time necessary for abatement of the cited conditions with the mine safety inspector, Lemon allowed two hour and 40 minutes for completion of the abatement work (Tr. 35, 80, Exhibit P-6).

8) Upon returning to the site four and a half hours later, Lemon determined that the abatement was incomplete. No rock dusting had been performed, and only 80 percent of the loose coal accumulations had been removed. Lemon then issued withdrawal order No. 1021164 pursuant to section 104(b) of the Act (Tr. 60, 62, Exhibit P-6).(FOOTNOTE 2)

9) Four miners, a mine foreman, and Lupo completed the required abatement work within one hour, whereupon the withdrawal order was terminated at 10:25 p.m. on February 5, 1981 (Tr. 38, Exhibit P-6).

10) On May 26, 1981, the Secretary filed a petition for the assessment of a civil penalty against the respondent predicated upon the issuance of citation No. 1021163 for a violation of 75.400 and proposed a penalty of \$470.00. Respondent filed an answer on June 16, 1981, admitting the above citation was issued on the date indicated but denying that a violation occurred. Respondent had not

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filed a notice of contest to the withdrawal order No. 1021164 issued on the day of the inspection, pursuant to section 105(d) of the Act.(FOOTNOTE 3)

Discussion

Citation No. 1021163 charges respondent with violation of safety standard 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.

Lemon's description (both in the citation and at the hearing) of coal and float coal dust accumulations in the area of the mine's No. 1 belt was corroborated at the hearing by Fred Lupo.

Lemon testified that it was unlikely that the coal accumulations he observed occurred during only one shift, but instead had been there for at least five days. Lemon further stated that where a belt and its rollers run in loose coal, frictional heat can provide an ignition source and result in fire. In turn, the fire may set off an explosion where float coal dust has been allowed to accumulate. Both fire and mine explosions pose the threat of serious or fatal injury to miners (Tr. 32, 34, 35). In light of such alleged safety hazards, petitioner seeks to have citation No. 1021163 affirmed, and a civil penalty imposed.

In contrast, respondent urges that a civil penalty be disallowed. However, while respondent generally denied petitioner's allegation of a safety violation in its "Answer to Petition for

Assessment of Civil Penalty," it failed to make any arguments at the hearing or in its post-hearing brief rebutting the cited conditions of coal and float coal accumulations. Witnesses Stuart and Robert Lindsey (safety inspector and belt foreman respectively at the mine) did testify that the accumulations were damp. However, I find the credibility of such testimony to be weak since Lindsey also testified that he could not directly controvert Lemon's testimony that overall, the areas cited were dry (Tr. 114, 125). In view of such testimony, and upon careful review of the evidence, I find that accumulations of coal and float coal dust existed in respondent's mine and that such accumulations posed a hazard of a fire and explosion occurring. Accordingly, I affirm the issuance of citation No. 1021163.

Respondent further argued both at the hearing and in its post trial brief that the abatement period set by Lemon to correct the cited condition was unreasonable. Respondent therefore reasons that withdrawal order No. 1021164 was wrongfully issued, and that as a consequence the proposed penalty at issue in this case should not be assessed. In making such arguments, respondent confuses the function of this civil penalty proceeding with that involved in a "contest of order" proceeding. Section 105(d) of the Act allows a challenge of withdrawal orders, but only if the contest is filed within 30 days of the receipt of the order. 30 U.S.C. 815(d). See Black Diamond Coal Mining Co, 5 FMSHRC 764 (April 1983)(ALJ) at 766-767. Based on the facts in the present case, the withdrawal order was issued and served on respondent by inspector Lemon on February 5, 1981, and there is no evidence that respondent filed its notice of contest challenging the order within the 30 day period as provided in section 105(d). Respondent's "contest" was initiated when it was served with a copy of MSHA's proposed civil penalty for the violation of standard 75.400 and informed MSHA on April 6, 1981 that it wished to contest citation No. 1021163 and the associated proposed penalty. Accordingly, I will not rule on the validity of the withdrawal order in the instant civil penalty case. Instead, I will decide only the affect of the withdrawal order on considerations of good faith abatement when addressing the issue of assessment of an appropriate penalty for respondent's violation of safety standards 75.400.

Penalty

Mine History, Size, and Financial Status

The evidence in this case shows that respondent had a history of approximately 114 violations at the Price River No. 3 Mine over a two year period ending on February 5, 1981 (Exhibit P-7). Respondent stipulated that the mine employed 269 miners, produced 3,200 tons of coal daily, and that payment would not effect its ability to continue in business (Tr. 5, 6). I find that the mine is of a medium size and that the number of prior violations indicates a moderate history of violations.

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Negligence

I accept Lupo's un rebutted testimony that he informed a mine superintendent on February 2, 1981 of his concern with dirty mine belts. In view of such testimony, I conclude that respondent had notice of a potentially hazardous condition and yet failed to correct it. Furthermore, the evidence shows the respondent had been cited previously for violations of the same regulatory standard and was aware of application of the standard to conditions in its mine (Tr. 41). I therefore find that respondent's failure to maintain clean belt lines and correct hazardous conditions, although provided with notice of their existence, amounts to gross negligence.

Gravity

I find that the action of the respondent in this case constitutes a serious hazard. The accumulations of coal under the No. 1 belt, in combination with significant accumulations of float coal dust, created a serious hazard of fire and explosion and consequently the threat of serious or fatal injury to miners.

Good Faith

In addressing the issue of good faith abatement of a violative condition, petitioner contends that respondent's lack of good faith is demonstrated by the respondent's failure to timely abate the cited safety violations. The evidence of record establishes that upon issuance of citation No. 1021163, Lemon allowed two hours and 40 minutes for abatement of the hazardous conditions (Exhibit P-6). Upon returning to the site four and a half hours later, he discovered that while the coal belt continued in operation, only 80% of the loose coal accumulations had been removed and placed in the travelway adjacent to the belt. In addition, no rock dusting had been performed (Tr. 60). Lemon therefore issued a withdrawal order, and shut down the belt (Exhibit P-6). The abatement work was subsequently completed by four miners and the mine foreman, with the assistance of Lupo, within one hour, whereupon the order was terminated (Tr. 64).

Respondent contends that it used diligence and good faith in an attempt to abate the alleged violation. It rejects petitioner's claim that Lemon established the abatement period following a discussion with Stuart (the mine's safety inspector), during which Stuart allegedly indicated that two hours would be sufficient time to abate the cited conditions (Tr. 35, 80). Respondent denies that such a conversation took place (Tr. 126). It further contends that the abatement period was unreasonable due to Lemon's issuance of further citations for conditions which also required abatement, and the need to allow miners performing the abatement work a lunch break.

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Upon careful review of the evidence, I find that respondent is unconvincing in its attempt to establish that Lemon was unreasonable in issuing the withdrawal order and refusing to extend the abatement period. Respondent offers no evidence that an extension of the abatement period was requested. Nor does the abatement period seem unreasonable in relation to activities required for the abatement of other cited violations. Lemon testified that while he later issued four other citations, the abatement deadline on at least two of them was set for the following day or later (Tr. 142). While Lemon established an abatement period of two hours and 40 minutes, he actually allowed four and a half hours to abate before returning to inspect such activities. At that time, Lemon discovered that necessary abatement work was incomplete although the necessary manpower was apparently available to perform such duties, since upon issuance of the withdrawal order, the abatement work was completed within one hour. Similar facts exist in U. S. Steel Corporation, 2 FMSHRC 832, 844 (April 1980)(ALJ), involving contest of a citation and 104(b) withdrawal order. In that case, Administrative Law Judge Koutras found that mine management was less than diligent in achieving abatement where manpower required for abatement work was available and yet had been assigned to other duties. Again, upon issuance of a withdrawal order, abatement of a safety violation was rapidly achieved. In light of the foregoing, and the credible evidence in this case, I find that respondent failed to make a diligent and good faith effort to achieve abatement.

Conclusions of Law

Based upon the entire record in this case, and consistent with my findings in the narrative portion of this decision, the following conclusions of law are made:

1) Respondent violated 30 C.F.R. 75.400 as alleged by the Secretary of Labor, and accordingly citation No. 1021163 is affirmed.

2) Respondent failed to file a timely challenge to withdrawal order No. 1021164 and therefore is estopped from attacking its validity in this proceeding.

3) Based on a consideration of the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation charged in citation No. 1021163 is \$470.

ORDER

WHEREFORE IT IS ORDERED that citation No. 1021163 is affirmed and respondent shall pay the above assessed penalty of \$470.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 103(g) provides in pertinent part as follows:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

2 Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

3 Section 105(d) of the Act provides in pertinent part as follows:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under

section 104, or other citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.