CCASE:
SOL (MSHA) V. PYRO 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. KENT 83-137 A.C. No. 15-11408-03510
v.	Pride Mine
PYRO MINING COMPANY, RESPONDENT	

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner
William M. Craft, Assistant Director of Safety, Pyro Mining Company, Sturgis, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary charges the Pyro Mining Company (Pyro) with three violations of mandatory regulations. The general issues before me are whether Pyro has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violations.

CITATION NO. 2074459 At hearing, the Secretary moved to amend its petition by seeking to withdraw this citation for lack of evidence. The Secretary now concedes that the cited explosives in fact had not been stored in the working place as alleged. Under the circumstances there appears to have been no violation of the cited standard and the motion for amendment and withdrawal is granted. Commission Rule 11, 29 C.F.R. 2700.11.

CITATION NO. 2074458 This citation, issued by MSHA Inspector Ronald Oglesby pursuant to section 104(a) of the Act, initially alleged a violation of the standard at 30 C.F.R. 75.523. The standard which tracks the enabling language at 30 U.S.C. 865(r), provides that "[a]n authorized

representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency." The citation alleges as follows: "A violation was observed on No. 1 unit, section ID003 in that the FMC roof bolter (left side of section) would not deenergize when actuating lever was pushed. The lever was damaged to the extent, part of lever bar was broken off."

The citation clearly does not charge a violation of the cited regulation and, indeed, it is difficult to conceive of any factual circumstance that would constitute a violation of the regulation. As explained by Inspector Oglesby at hearing, the reference in the citation to the standard at 30 C.F.R. 523 was erroneous and he meant to charge a violation under the standard at 30 C.F.R. 75.523-2(b). The Secretary declined, however, to amend the citation to comport with this intent. The undersigned therefore issued on July 29, 1983, a notice of intent to modify the citation pursuant to section 105(d) of the Act to charge that the standard violated was 30 C.F.R 75.523-2(b) and not 30 C.F.R. 75.523. See also Rule 15(b) Federal Rules of Civil Procedure and United States v. Stephen Brothers Line, 384 F.2d 118, 124 (5th cir. 1967). In accordance with the notification to the parties of this intended action, the parties were given additional opportunity for hearing and/or to present additional evidence. International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977).

The operator did in fact submit additional evidence and argument by letter dated August 1, 1983. The Secretary declined to submit any additional evidence and indicated that he had no objection to either the proffered evidence or to the action contemplated by the undersigned judge. Accordingly, at this time Citation No. 2074458 is modified to reflect that it charges a violation of the standard at 30 C.F.R. 75.523-2(b). Secretary v. Consolidation Coal Company, 4 FMSHRC 1791 (1982).

The standard at 30 C.F.R. 75.523-2(b) provides that "[t]he existing emergency stop switch or additional switch assembly shall be actuated by a bar or lever which shall extend a sufficient distance in each direction to permit quick deenerization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated."

The facts relating to this citation are not in dispute. It is only the interpretation to be placed upon those facts that is at issue. During the course of an inspection of the Pride Mine on October 27, 1982, MSHA Inspector Ronald Oglesby observed the "FMC" roof bolter operating in the No. 1 unit, section ID003 with a broken panic bar. Although the roof bolter was not then operating inby the last open crosscut, it is not disputed that it could have been so operated.

Pyro does not disagree that the panic bar on the roof bolter was broken as alleged but argues that the cited roof bolter was not "electric face equipment" within the meaning of the MSHA Electrical Manual. The manual defines "electric face equipment" as electrical equipment that is "installed, taken into, or used in or inby the last open crosscut." The definitions found in the MSHA manuals are not officially promulgated, however, and are not binding upon the Commission or its judges, Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981), Old Ben Coal Company, 2 FMSHRC 2806 (1980). In any event even under the definition of "electric face equipment" found in the cited MSHA Manual there would nevertheless have been a violation of the cited standard in this case. The uncontradicted testimony of Inspector Oglesby was that, when cited, the roof bolter was located in the last open crosscut.

I also note that in the case of Secretary v. Solar Fuel Company, 3 FMSHRC 1384 (1981), the Commission held that "equipment which is taken or used inby the last open crosscut" means equipment habitually used or intended for use inby regardless of whether it is located inby or outby when inspected. The Commission emphasized in Solar Fuel that it is not where the equipment is located at the time of inspection that is important, but whether it is equipment which can be taken or used "inby." Accordingly, since the roof bolter here cited is without question equipment that can be taken or used inby the last open crosscut it is clear that the violation is proven as charged in the amended citation.1 Whether that violation was "significant and substantial," however, depends on whether, based on the

particulars surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. I accept the undisputed testimony of Inspector Oglesby concerning this issue. In particular, he testified that in the absence of a functioning "panic bar" a machine operator or other person could be pushed and pinned against the coal ribs and, if unable to actuate the panic bar, could easily be crushed. Oglesby testified about past incidents of crushed legs and fatalities resulting from such a defect. Indeed there had been four accidents since 1978 at the Pyro Mines alone involving equipment pushing miners into the ribs, resulting in crushed lower extremeties, broken bones and, in one case, permanent disability. The violation was accordingly "significant and substantial." For the same reasons the violation was one of high gravity.

Donald Lamb, an official of Pyro admittedly knew that operative panic bars were required on his roof bolters and acknowledged that the operator had been cited previously for similar problems with the panic bars. The operator accordingly should have been on particular notice of this recurring problem and may be charged under the circumstances with negligence in failing to discover the broken panic bar.

CITATION NO. 2075863 This citation alleges a violation of the operator's roof control plan under the standard at 30 C.F.R. 75.200 and reads as follows

> The roof control plan dated 8/10/82 was not being followed on No. 3 unit (ID004) in that a three way place was observed. The first cut had been taken out of right and left crosscuts and face also had been cut and loaded. Cuts 1 and 2 were extracted and roof had not been supported before the face was extracted. Plan states (page 16) that 1 and 2 are to be bolted before the face areas cut and loaded. Roof bolter was in area at time of inspection pinning No. 2 crosscut.

The cited portion of the roof control plan consists of a diagram (attached hereto as Appendix A) with an explanation reading as follows: "Cuts No. 1 and No. 2 will be extracted and the roof supported, then on the next

mining cycle, cuts No. 3, 4 and 5 will be taken in a normal manner, etc. The face will be driven no more than 30 feet from the inby rib of crosscut until crosscut is holed through and ventilation is established."

The citation was issued on December 14, 1982, by MSHA Inspector Jerrold Pyles. During the course of his inspection on that date, Pyles observed that three cuts had been taken on the No. 3 unit. The right and left crosscuts and the face had all been cut to a depth of 9 feet and loaded out. The cuts had not yet been bolted although a roof bolter was beginning to bolt the No. 2 crosscut. Since this evidence is not disputed it is apparent that the roof control plan has been violated as alleged. The operator nevertheless argues that a violation of the roof control plan would exist only if miners are actually working inby unsupported roof. I find nothing in the plan to support the defense and accordingly reject it.

I further find that the violation was "significant and substantial". National Gypsum, supra. According to the uncontradicted testimony of Inspector Pyles, there had been a history of roof falls at the Pride No. 6 Mine and that the stability of the cited unsupported roof was "unpredictable." Moreover, there had previously been six roof falls in the same general area of the mine. Two miners were working on the roof bolter in the vicinity of the unsupported roof at the time the condition was discovered and would have been the most likely victims of any roof fall. Serious and fatal injuries would be likely if the roof did in fact fall. The violation was accordingly "significant and substantial" and of a high level of gravity.

According to the undisputed testimony of Inspector Pyles, it is the industry practice for the section foreman to run the sites for center lines and to mark the width of places to be cut before the cut is actually made. The cutting machine operator indeed would not have the authority to proceed with his work until such directions were given by the section foreman. It may therefore reasonably be inferred that an agent of the operator, the section foreman, knowingly directed the commission of the violation.

In determining the appropriate civil penalty for the violations within the framework of section 110(i) of the Act, I am also considering that the operator is medium to small in size and that it has a fairly substantial history of violations including previous violations of the standards cited herein.

ORDER

Citation No. 2074459 is vacated. Citation No. 2074458 is affirmed and a penalty of $300 is assessed. Citation No. 2075863 is affirmed and a penalty of $500 is assessed. The penalties herein shall be paid within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

FOOTNOTE START HERE-

1 The operator also contends in a letter dated August 1, 1983, that the Secretary failed to prove the degree of pressure applied to the cited panic bar and the distance the bar was moved in accordance with 30 C.F.R. 75.523-2(c). The alleged deficiency is irrelevant, however, inasmuch as no violation of 30 C.F.R. 75.523-2(c) has been alleged.

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APPENDIX A

Cut Pattern For
Conventional Sections

TABLE