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SOL (MSHA) V. GLEN IRVAN
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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 PROCEEDINGS Docket No. PENN 83-25 A.C. No. 36-03137-03502
v.	Docket No. PENN 83-146 A.C. No. 36-03137-03508
GLEN IRVAN CORPORATION, RESPONDENT	Bark Camp No. 2

DECISIONS

Appearances: David Bush, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner
Robert M. Hanak, Esq., Reynoldsville, Pennsylvania, for Respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with 11 alleged violations of certain mandatory safety standards found in Parts 75, and 77, Title 30, Code of Federal Regulations. Respondent filed timely answers and the cases were heard in Pittsburgh, Pennsylvania on July 27, 1983, along with two other cases involving these same parties.

Issues

The principal issue presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised 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 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.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is subject to the Act, that I have jurisdiction to hear and decide the cases, that the respondent has a good history of prior citations, and that it is a small operator (Tr. 5; 134-137).

Discussion

During a colloquy on the record with counsel for the parties in these proceedings, it was made clear to counsel that the Secretary's Part 100 Civil Penalty Assessment regulations are not binding on the Commission or its Judges. It is also clear to me that under the Act all civil penalty proceedings docketed with the Commission and its Judges are de novo and that any penalty assessment to be levied by the Judge is a de novo determination based upon the six statutory criteria found in section 110(i) of the Act, and the evidence and information placed before him during the adjudication of the case. Sellersburg Stone Company, 5 FMSHRC 287, March 1983.

The fact that the petitioner may have determined that some of the violations in issue in these proceedings are not "significant and substantial", and therefore qualify for the so-called "single penalty" assessment of $20 pursuant to section 100.4, and are not to be considered by the petitioner as part of the respondent's history of prior violations pursuant to section 100.3(c), is not controlling or even relevant in these proceedings. Regardless of the Secretary's regulations, once Commission jurisdiction attaches, I am bound to follow

and apply the clear mandate of section 110(i) in determining the civil penalty to be assessed for a proven violation after due consideration of all of the criteria enumerated therein. The fact that Congress chose to include language in section 110(i) which arguably authorizes the Secretary not to make findings on the penalty criteria clearly is inapplicable to the Commission.

Section 110(i) of the Act requires Commission consideration of all six penalty criteria, and the fact that the Secretary chooses to ignore $20 citations as part of a mine operator's compliance record is not controlling when the case is before a Commission Judge. Accordingly, for civil penalty assessment purposes, I will take into consideration all previously paid citations by the respondent, including any "single penalty" $20 citations which have been paid.

Findings and Conclusions

Docket No. PENN 83-146

The parties proposed a settlement for all of the citations in this case. The proposal called for the respondent to make full payment for all of the proposed assessments with the exceptions of Citation Nos. 2112921 and 2112924. The parties proposed a reduction in the penalty assessments for these citations (Tr. 108-109). Although the inspector who issued the citations was not present (he was on vacation), the parties furnished relevant and material information in support of their proposed settlement disposition for the citations, including the facts and circumstances surrounding each of the cited conditions (Tr. 118-133). After consideration of the arguments in support of the proposed settlements, I approved the following dispositions for nine of the citations:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2112828	2/24/83	77.400(a)	$ 20	$ 20
2112829	2/24/83	75.403	20	20
2112836	3/22/83	75.303(a)	58	58
2112838	3/23/83	75.512	20	20
2112839	3/23/83	75.601	20	20
2112840	3/23/83	75.516-2(a)	20	20
2112921	3/23/83	75.1722(a)	54	40
2112923	3/24/83	75.503	20	20
2112924	3/24/83	75.1704	106	66
			$ 338	$ 284

With regard to Citation No. 2112837, March 22, 1983, citing an alleged violation of section 75.202, I rejected the proposed settlement requiring the respondent to pay the full penalty of $20 for this "non-S&S" citation (Tr. 117, 133-134). I did so because the conditions or practices as stated by the inspector on the face of the citation indicated to me that miners were exposed to certain hazardous roof conditions while performing certain work at the face. By agreement of the parties, the petitioner's counsel was directed to contact the inspector to ascertain all of the prevailing circumstances surrounding this citation, including some explanation as to why he believed the conditions cited did not present a "significant and substantial" violation, and to file a further statement with me posthearing. Counsel was also directed to file a copy of the respondent's history of prior citations.

By letters filed September 16 and October 7, 1983, petitioner's counsel submitted a computer print-out of respondent's prior history of violations and a full and complete explanation of the circumstances surrounding the issuance of Citation No. 2112837. Included in this explanation is an assertion by the inspector that his finding that the violation was not significant and substantial was based on the fact that no miners were exposed to any hazard, and the inspector's supervisor fully concurred in his evaluation of the violation and the potential hazard. After careful consideration of this information, I conclude that the proposed settlement disposition for this citation is reasonable, and it is approved as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
2112837	3/22/83	75.202	$20	$20

Docket No. PENN 83-25

This case involves a section 104(a) citation issued by Inspector Walter E. Kowaleski on August 19, 1982, charging the respondent with a violation of section 75.200. Citation No. 2000842 is "non-S&S", and the conditions or practices cited by the inspector are as follows:

> The roof control plan was not fully complied with in that the posts installed along the low belt were spaced from 4 1/2 feet to 7 feet at several locations. The approved roof control plan specifies that posts will be set at 4 foot spacings.
>
> These violations will not be terminated until such time as a responsible official explains

> to all crew members on all shifts the part of the roof control [sic] pertaining to the allowable spacing of post.

Inspector Kowaleski confirmed that he issued the citation in question, and he testified that on the day in question he rode into the working section with the mine superintendent. After alighting from the mantrip approximately 150 feet from the working face, he and the superintendent proceeded to crawl through the low coal to the face. As they were proceeding to the face he observed that the posts used to support the roof were wide, and after taking measurements he determined that they were spaced on centers ranging from 4 1/2 to seven feet. Since the roof control plan required that they be spaced on four-foot centers, he decided to issued a citation and advised the superintendent accordingly (Tr. 14-18).

Mr. Kowaleski confirmed that at the time he observed the wide spacing the crew had advanced beyond that point, and after the superintendent conceded that the spacing was wide and led him to believe that it was due to oversights by the working crew, he (Kowaleski), advised the superintendent that "I'll not make it S&S" (Tr. 19).

Mr. Kowaleski testified that based on his observations of the conditions which he cited he did not believe that those conditions presented a reasonable likelihood of an injury (Tr. 19). He explained further that after pointing out the wide spacing to superintendent James Bailor, face mining ceased and Mr. Bailor called in a crew to install the roof supports on four foot centers (Tr. 20).

In response to further question, Mr. Kowaleski confirmed that the roof conditions where mining was taking place consisted of "pretty good roof" (Tr. 23). He also confirmed that abatement was achieved immediately by the next crew installing the roof supports to the required interval (Tr. 25).

In response to certain bench questions, Mr. Kowaleski conceded that the approved roof control plan was binding on the respondent, and that the plan required that the roof support posts in question be installed on four-foot centers (Tr. 26). He confirmed that the reason he concluded that the violation was "non-S&S" was the fact that men would not be working in the area "and no one will go there in the next five years" (Tr. 27).

Mr. Kowaleski confirmed that approximately 11 posts were installed wider than the specifications called for by the roof

control plan (Tr. 29). He also confirmed that aside from the wide spacing of the posts, the roof was in good condition, it was solid and otherwise supported, and the crew was not in the area on a regular basis. Given these circumstances, and the fact that the conditions were not present at the working face, he concluded that the violation was not "significant and substantial" (Tr. 30).

In response to a question as to why he did not make a negligence finding in this case at the time he issued the citation Mr. Kowaleski stated that based on instructions from his subdistrict office, once he found that the violation was not "S&S", he was not to make any gravity findings (Tr. 31). He conceded that the mine area which he cited was an area which was required to be preshifted, and respondent's counsel conceded that there is negligence in this case (Tr. 32). Mr. Kowaleski conceded that the respondent has a good compliance record and that it has a basic safe roof control plan which it has always adhered to (Tr. 33).

At the hearing I observed that the petitioner has established the fact of violation. I also observed that the testimony by the inspector in support of the citation supported a finding of negligence and the respondent conceded this point (Tr. 37-38). With regard to the question of gravity, I made a finding that while the roof was otherwise supported and sound, the roof support spacings at the area observed by the inspector were wider than allowed by the roof control plan. Since the inspector and the superintendent were in the area, I can only conclude that they were exposed to a possible hazard from a roof fall due to the wide roof support spacing (Tr. 38-39).

Respondent declined to call any witnesses in support of its case. Under the circumstances, and based on the inspector's testimony there is no doubt as to the fact of violation. Accordingly, I find that the conditions cited constitute a violation of the cited mandatory standard and the fact of violation IS AFFIRMED.

With regard to the inspector's "non-S&S" finding, as far as I am concerned this presents a question of gravity. Based on the inspector's testimony that he and the mine superintendent had to crawl through an area which contained inadequate roof support spacings which did not comply with the approved roof control plan, I can only conclude that the violation was serious. With regard to negligence, the respondent has conceded that the conditions should have been observed by the preshift examiner, and that mine management's failure to detect and correct the cited conditions before the inspector arrived on the scene constituted negligence on its part (Tr. 40).

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Petitioner's proposed civil penalty of $20 IS REJECTED. Based on my gravity and negligence findings, as well as the prior history of six violations of the roof control standards found in section 75.200, I simply cannot conclude that a $20 civil penalty is reasonable. Based on my independent de novo consideration of this violation, including the six statutory criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment of $150 is appropriate and reasonable for the citation in question.

ORDER

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the civil penalty assessments which have been agreed upon by settlement, as well as those imposed by me on the basis of the preponderance of the evidence adduced in these proceedings are appropriate and reasonable for the citations which have been affirmed. Accordingly, the respondent IS ORDERED to pay the civil penalties approved by settlement or otherwise imposed by me within thirty (30) days of these decisions and order, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge