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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 83-101 A.C. No. 15-11408-03508
v.	
PYRO MINING COMPANY, RESPONDENT	Pride Mine

DECISION

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

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalty 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), seeking a civil penalty for one alleged violation of mandatory safety standard 30 CFR 75.400. The violation was cited in a Section 107(a) "imminent danger" order issued by MSHA Inspector David Furgerson on May 12, 1982. The Citation No. 1133821, states the following condition or practice:

> Float coal dust was permitted to accumulate on the floor of the slope belt entry and adjacent crosscuts for a distance of approximately 600 feet from bottom of slope and inby. Bottom rollers were running in float coal dust at several locations and were causing rollers to heat due to friction.

The respondent filed a timely answer to the civil penalty proposal, and a hearing was conducted in Evansville, Indiana, on November 2, 1983. The parties waived the filing of post-hearing written arguments and made them orally on the record during the course of the hearing.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing mandatory standard as alleged in the proposal for assessment of civil penalty filed in the proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties at the hearing are discussed and disposed of in the course of my 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 Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

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

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

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Petitioner's testimony and evidence

Larry Cunningham, MSHA District 10 Mine Inspector, testified as to his background and experience, and he confirmed that he is familiar with the Pride Mine and has conducted regular and spot inspections at the facility. He also confirmed that he was at the mine on or about May 12, 1982, with fellow inspector David Ferguson for a regular inspection, and that Mr. Ferguson is no longer employed by MSHA (Tr. 8-12). Mr. Cunningham testified that on the day of the inspection he was with mine representative David Sutton in one area of the section, while Mr. Ferguson was in another. At some point during the inspection about 15 minutes later, Mr. Ferguson came to the belt haulage entry and told Mr. Sutton that he had issued an order on the belt conveyor and that the belt would have to be cleaned and rock dusted. Mr. Cunningham identified exhibit P-1 as the Section 107 "imminent danger" order issued by Mr. Ferguson, No. 1133821, and testified as to its contents (Tr. 15).

Mr. Cunningham testified that after the order was issued, he walked the cited belt entry for a distance of some 600 feet while Mr. Sutton began taking steps to correct the conditions. He explained what he observed, and indicated that "the coal dust was definitely there," and that there "was no doubt in my mind that there was a situation established" (Tr. 18). He described the area which he traveled as looking black in appearance, and while some locations were worse than others, all of the cited locations definitely had accumulations of float coal dust. He described the entry as being 18 to 20 feet wide, and confirmed that he measured the float coal accumulations with a ruler, and found that they ranged from one inch to 12 inches. He also stated that he counted eight bottom belt conveyor rollers which were in loose coal, coal dust, and float coal dust. The belt was not running, but if it were, the rollers would have been turning in float coal dust (Tr. 20).

Mr. Cunningham stated that when he first entered the section and was separated from Mr. Ferguson, the cited belt in question was running, but 20 minutes later when he walked it it was not (Tr. 20). Based on his experience, he did not believe that the cited accumulations resulted from the prior shift, and due to the extent of the accumulations, he believed they had existed for "possibly" 16 to 24 hours or longer. He was present when the conditions were corrected, and he counted 30 people in the area when clean up and abatement took place. The clean up took two hours and 45 minutes (Tr. 21).

On cross-examination Inspector Cunningham stated that he was in the mine on May 11, 1982, the day before the order issued and that he was in part of the area cited by Mr. Ferguson. However, he observed no conditions which would have prompted him to issue a citation for coal accumulations. On that day he observed two miners "correcting the situation as it occurred." He also confirmed that he was in the mine for a total of 9 or 10 working shifts during the period from April 1, 1982 to May 12, 1982 and issued no coal accumulations citations (Tr. 24).

Mr. Cunningham stated that the mine is entered by means of a slope car hoist which travels down to the belt in question and that the belt can be visually observed from the slope car. He confirmed that he did not know how many miners were in the mine on May 12, 1982, and that no one was actually physically removed from the mine as a result of the issuance of the order.

Mr. Cunningham was of the opinion that the cited coal accumulations presented a possibility of a mine fire and he described the area cited as dry. He confirmed that the belt line was moved up somewhat after the order was issued in order to facilitate the clean up, and that clean up was achieved by shovelling the accumulations onto the belt so that they could be removed from the mine (Tr. 27-28).

Mr. Cunningham confirmed that belt conveyors which are not used to transport personnel may be examined at any time during the shift, and need not be examined either before the shift or "immediately" after the shift is started (Tr. 36-38). He stated that he checked the preshift examination books for the belt conveyor in question, and found no record that it had ever been examined. As a result of this, he issued a citation for a violation of section 75.303, for failure to examine the belt, or failure to produce evidence that the belt had been examined (Tr. 43).

When asked whether he would issue an imminent danger order based on what he observed after Mr. Ferguson's order issued, Mr. Cunningham stated that he could not answer that question because at the time he observed the conditions the belt was not running and that "I never saw nothing that would promote a mine fire or explosion at that time" (Tr. 45).

Mr. Cunningham stated that the accumulations in question were in an "air lock" where the conditions would facilitate a build up of coal, and he conceded that such accumulations resulted from the mining of coal and that constant clean up is required to control the accumulations. He confirmed that no samples of the accumulations were taken, and they were not tested. He also conceded that he and Mr. Ferguson made no examinations of the power cables, cable insulation, or power boxes to determine whether or not they were in good condition or not (Tr. 50-53).

At the conclusion of the testimony by Mr. Cunningham in this case, respondent's representative suggested that MSHA had not presented any direct evidence as to the actual existence of the cited conditions as observed by Inspector Ferguson at the time he issued his citation (Tr. 54). During a discussion on the record, I advised the respondent's counsel that while it was true that Mr. Ferguson was no longer employed by MSHA and did not testify, Mr. Cunningham's first hand observations of the cited conditions after the withdrawal order was issued established a prima facie case as to the existence of the cited accumulations described by Mr. Ferguson on the face of his citation (Tr. 55-56). When asked whether he had any reason to dispute Mr. Cunningham's testimony in this case, respondent's representative replied that Mr. Cunningham "was probably one of the more reliable people employed by MSHA" (Tr. 56).

Respondent's representative suggested on the record that Mr. Ferguson's departure from his employment with MSHA was somehow connected with his relationship with the respondent, and the representative stated that Mr. Ferguson "was bitter at the Company on different matters," and suggested that there was an "ulterior motive" behind the issuance of the order in question (Tr. 58). When asked why the respondent did not contest the issuance of the order within the required statutory time period, the representative replied "I didn't have anything to do with it then" (Tr. 59). The matter was then dropped, and respondent's representative proceeded to put on a defense.

Respondent's testimony and evidence

James E. Wilson, respondent's mine foreman, testified that he has 35 years of mining experience and that he was aware of the order issued by Inspector Ferguson on May 12, 1982. He stated that according to policy the belt line is shut down every morning at 6:30 a.m. for servicing, cleaning, or the changing of rollers. He described the 600 feet of belt line cited by the inspector as an "airlock," and indicated that problems occur with float dust in that area. He described the ambient temperature of the mine as 62 degrees, and stated that the air velocity in the area was 40,000 cubic feet (Tr. 61). Mr. Wilson indicated that he found no hot rollers when he went to the area and that the belt line may be examined at any time during the shift. He also indicated that Inspector Cunningham had been in the area the night before the order was issued and that he issued no citations or orders (Tr. 62).

On cross-examination, Mr. Wilson stated that he believed the belt was shut down because the mine was operating on 10-hour shifts, and that it is down for four hours from the time the previous shift ended. After maintenance, the belt would start up again at approximately 7:30 a.m. (Tr. 65). He confirmed that on the day the order issued, he went underground at 9:00 a.m., but that between the time of his arrival at the mine that day and the time he went underground he personally did not know whether the belt was running or not (Tr. 67).

In response to further questions, Mr. Wilson confirmed that after the order was issued he observed the conditions at the cited area, and while he saw some float coal dust at least an inch deep where men were shovelling, he did not see any loose coal. He then stated that he walked the entire cited belt area where he did observe coal accumulations, but did not see "a dangerous amount of accumulations" (Tr. 68).

He stated that to the best of his recollection the belt began running at 10:00 a.m. and that no coal was loading from the beginning of that shift until 10:00 a.m. (Tr. 71).

Gregory R. Farrell, testified that on May 12, 1982, he was the third shift mine foreman, and that the belt was not running because some rollers had to be "cut out from under a bridge" (Tr. 72). The belt is normally running, but on that day it was not. He confirmed that he was in the middle of the 600 foot area cited by Mr. Ferguson when he was there, and that the belt was not running. Mr. Farrell also stated that he recalled 15 people working in the area to abate the cited conditions (Tr. 74).

On cross-examination, Mr. Farrell stated the cited belt was down from 6:30 a.m. to 11:00 a.m., because Mr. Ferguson's order was issued at 9:00 a.m., and the belt never started up (Tr. 76). He reiterated that the belt was down from 6:30 a.m. until the cited conditions were abated at approximately 11:45 a.m. (Tr. 76). He stated that maintenance work on the belt began at 6:30 a.m., and that the work consisted of changing rollers. The work was not completed at the time the order issued (Tr. 79).

In response to further questions, Mr. Farrell stated that the reason it took so long to clean up is that Mr. Ferguson wanted materials such as wooden timbers, metal rollers, and "anything lying around" cleaned up and taken out of the area (Tr. 85). Mr. Farrell conceded that there were accumulations of coal present, but he disputed the depths noted by the inspector, and he described them as "normal" for the mine area in question (Tr. 84). Mr. Farrell confirmed that he made no measurements of the accumulations (Tr. 85).

Randy Byrum testified that on May 12, 1982, he was employed at the mine as a belt mechanic. He began work at 8:00 a.m. that day and at that time the belt in question was not running. He performed maintenance on the belt, and that work included the "cutting out" of a belt roller at a conveyor "bridge" area by means of a torch, and at this time the belt power was disconnected by an outside mechanic to insure that his work could be done in a safe manner. He stated that it took him approximately 45 minutes to an hour to complete his work and that two other mechanics were also performing some maintenance on the belt. He was sure that the belt was not running at 9:00 a.m. that day (Tr. 87-89).

On cross-examination, Mr. Byrum stated that he was sure that his belt maintenance work was completed by 9:30 a.m., and he indicated that he did not see Inspector Ferguson that day because Mr. Ferguson would have traveled the belt through another route (Tr. 89-91).

Lillian J. McNary testified that on May 12, 1982, she was working in the cited conveyor belt area shovelling and rock dusting the belt header. She began work at 7:00 a.m. that morning. She checked the belt header area and the air lock and she used a water hose located at the belt to wet the belt line area down. She was present when Inspector Ferguson was there and had started watering the area down while he was there (Tr. 95-97).

On cross-examination, Ms. McNary confirmed that her usual duties are to clean the cited belt, as well as another belt and that she starts at the air lock location. She stated that she had been cleaning the cited belt area for approximately two hours before Inspector Ferguson arrived at the scene. She confirmed that the float coal dust cited by Mr. Ferguson was present, and she described the belt as "dirty" (Tr. 97-100).

David Sutton, testified that he is the mine safety director and that on May 12, 1982 he started work at 6:00 a.m. He rode into the mine with Inspectors Ferguson and Cunningham sometime between 8:30 and 9:00 a.m. He was with Mr. Cunningham while he was conducting his inspection, and was informed by Mr. Ferguson that he had issued a closure order on the belt. Mr. Sutton confirmed that approximately 15 or 20 minutes after he was told that a closure order had been issued he went to the area and personally observed the float coal dust. He stated that the belt was not running, and that he heard several miners asking why the belt was down (Tr. 101-104).

Findings and Conclusions

Fact of Violation

Respondent here is charged with a violation of mandatory safety standard section 30 CFR 75.400, which states 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.

Although the inspector who issued the citation in question was no longer employed by MSHA at the time of the hearing and did not testify, Inspector Cunningham, who was present and viewed the cited conditions shortly after the violation was

issued, did testify as to what he observed. In addition, respondent's mine foreman, shift foreman, and clean-up person all confirmed the presence of loose coal and float coal dust in the cited area. Although one witness may have taken issue with whether or not the accumulations were "dangerous," the fact is that the respondent has not rebutted the fact that the cited conditions did in fact exist as stated in the citation. The detailed testimony provided by Inspector Cunningham, including his measurements and observations, are unrebutted and amply support the violation.

I conclude and find that the petitioner has established the fact of violation by a preponderance of the credible evidence adduced in this case. I also find and conclude that the extent of the accumulations supports a finding that the cited coal accumulations in question were not the result of any "instantaneous spillage," nor can I conclude that the respondent has established that it was in the process of correcting the conditions when the inspector arrived on the scene. To the contrary, I conclude and find that the extensive nature of the cited conditions supports a conclusion that they were permitted to accumulate, and existed at least one prior shift. Accordingly, the violation IS AFFIRMED.

Gravity

Although it is clear to me that the question as to whether or not the cited accumulations constituted an "imminent danger" is not an issue in this civil penalty case, and that the validity of the Section 107(a) Order is not per se an issue, petitioner's counsel candidly conceded during oral argument that it was altogether possible that Inspector Ferguson issued the order to insure that the condition which he observed were attended to promptly, and that he acted to insure that the cited belt conveyor in question would not be placed into operation until such time as the cited coal accumulations were cleaned up and removed from the mine (Tr. 92-93).

In view of the fact that Inspector Ferguson did not testify in this case, petitioner's counsel further candidly conceded that the question as to whether or not the conveyor belt in question was running or not running at the time the order was issued is only critical insofar as the degree of gravity is concerned (Tr. 93). In this regard, counsel conceded that Inspector Cunningham did not observe the belt running at the time the violation was issued, and he stated that "at no time through testimony did we assert that the belt was running" (Tr. 94). He also conceded that any suggestion that the belt in question was in fact "running in float coal dust" has not been established as a fact through any credible testimony (Tr. 94).

On the basis of all of the credible evidence and testimony adduced in this case, I conclude that the petitioner has not established as a matter of fact that the conveyor belt in question was running in float coal dust at the precise time the inspector viewed the conditions. However, given the extensive accumulations of coal dust and float coal dust which was present in the cited areas, I conclude and find that the violation was serious.

With regard to the inspector's finding that the cited violation was "significant and substantial," I take note of the following interpretation placed on that term by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), aff'd in Secretary of Labor v. Consolidation Coal Company, decided January 13, 1984, WEVA 80-116-R, etc., affirming a prior holding by a Commission Judge, 4 FMSHRC 747, April 1982:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In its most recent holding in Consolidation Coal Company, WEVA 80-116-R, etc., January 13, 1984, the Commission stated as follows at pg. 4, slip opinion:

> As we stated recently, in order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Mathies Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6, 1984).

On the facts of the case at hand, it seems clear to me that the respondent has not rebutted the fact that the accumulations of coal and coal dust, including float coal dust, were present

in the areas cited by the inspector. The respondent's defense focused on the assertion that the belt was not running, and a rather feeble attempt to establish that clean-up procedures were being followed at the time of the inspection. In addition, at least one or more of respondent's witnesses were of the opinion that the accumulations found by the inspector were "not dangerous." These defenses are rejected.

It seems clear to me that the cited accumulations were present, and that the areas cited were not adequately rock-dusted. Due to the extensive nature of the accululations, both as to quantity, as well as the rather extensive 600-foot areas where they were present, I conclude and find that they did in fact present a reasonable likelihood that had production continued, the belt would have started up, and an ignition could have occurred from the belt rollers which obviously would have been turning in the accumulations. I believe it was reasonable that a fire or ignition would have resulted. Consequently, I find that the cited coal accumulations presented a real hazard which would have significantly contribute to a major cause of danger and hazard to the miners working on the section. Accordingly, the inspector's finding of a significant and substantial violation IS AFFIRMED, and respondent's arguments to the contrary ARE REJECTED.

Negligence

In this case, while there is testimony from the clean-up person McNary that she was in the process of watering down some of the area cited by Inspector Ferguson when he first arrived on the section, and that she had cleaned up some of the accumulations before he arrived, Inspector Cunningham testified that he examined the preshift examination books and found no entries or evidence that the cited area had been examined as required by section 75.303. Taking into account the extensive accumulations which were cited, I believe it is reasonable to conclude that had closer attention been given to promptly clean up the accumulations, the violation would not have occurred. While it may be true that the belt in question may have been down for some maintenance at the start of the shift, I still believe that respondent failed to take reasonable care to insure that all of the accumulations found by the inspector were cleaned up and the area rock-dusted. Under the circumstances, I find that the violation resulted from ordinary negligence on the part of the respondent.

History of Prior Violations

The record here shows that for the period June 22, 1981 to May 11, 1982, respondent had eight prior citations for violations of section 75.400. Petitioner's counsel agreed that given the fact that there is a no evidence as to the specific circumstances connected with these prior citations, respondent's history of prior violations for purposes of any civil penalty assessment does not appear to be "particularly bad" (Tr. 116). Accordingly, for an operation of its size, I cannot conclude that any civil penalty assessed by me in this case should be increased because of respondent's history of noncompliance.

Size of Business and Effect of Civil Penalty of the Respondent's Ability to Remain in Business.

The record in this case establishes that at the time the citation issued, the annual coal production at the mine in question was approximately 400,000 tons (Tr. 116). While it may be argued that Pyro Mining Company is a large mine operator, the Pride Mine was a relatively small or medium-sized mining operation. In any event, I cannot conclude that a reasonable civil penalty assessment in this case will adversely affect the respondent's ability to continue in business. Further, in assessing a civil penalty in this case, I have considered the respondent's history of prior violations as well as the size of its mining operations.

Good Faith Compliance

The respondent promptly cleaned up and removed the cited accumulations from the mine after the order issued. Accordingly, I find that abatement was achieved by respondent's ordinary good faith compliance efforts.

Penalty Assessment

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 following civil penalty assessment is appropriate for the citation which has been affirmed:

Citation No.	Date	30 CFR Section	Assessment
1133821	5/21/82	75.400	$975

ORDER

Respondent IS ORDERED to pay the civil penalty assessed by me in this case within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge