CCASE:
SOL (MSHA) V. PYRO MINING
DDATE:
19840517
TTEXT:

~1351

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 83-248 A.C. No. 15-13881-03504
v.	
PYRO MINING COMPANY, RESPONDENT	Docket No. KENT 84-72 A.C. No. 15-13881-03514 Pyro No. 9 Slope William Station
	Docket No. KENT 84-71 A.C. No. 15-11408-03518 Pride Mine

DECISION

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

Before: Judge Steffey

A hearing was convened in the above-entitled proceeding on February 28, 1984, in Evansville, Indiana, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

The parties were given an opportunity to discuss settlement prior to the convening of the hearing. As a result of their discussion, a settlement of all issues was achieved. Under the parties' settlement agreement, respondent will pay reduced penalties totaling $734 instead of the penalties totaling $1,684 proposed by the Mine Safety and Health Administration. Some aspects of the parties' settlement agreement are unique in that the parties asked me to modify a citation issued under section 104(d)(1) to a citation issued under section 104(a), as hereinafter fully explained.

Section 110(i) of the Act lists six criteria which are required to be considered in determining civil penalties. The proposed assessment sheets in the official files show that

respondent produces approximately 2,813,000 tons of coal annually. That production figure supports a finding that respondent operates a relatively large coal business and that penalties should be in an upper range of magnitude insofar as they are determined under the criterion of the size of the operator's business.

Respondent did not present any evidence at the hearing pertaining to its financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), that if an operator fails to introduce any data pertaining to its financial condition, a judge may presume that the operator is able to pay penalties. In the absence of any information in the record to support a contrary conclusion, I find that payment of penalties will not cause respondent to discontinue in business and that it is unnecessary to reduce any penalties because of the operator's financial condition.

All of the proposed assessment sheets indicate that, during the 24 months preceding the citing of the violations alleged in this consolidated proceeding, respondent was cited for such a few violations of the mandatory health and safety standards, that MSHA assigned zero penalty points under the penalty assessment formula described in 30 C.F.R. 100.3(c). Therefore, no penalty assessed in this proceeding needs to be increased under the criterion of respondent's history of previous violations.

Each of the proposed assessment sheets shows, with one exception, that all assessments proposed by MSHA have been reduced by 30 percent pursuant to section 100.3(f) because respondent demonstrated a good-faith effort to achieve compliance within the time for abatement given by the inspectors in their citations. The one exception occurred with respect to Citation No. 2337388 and special circumstances pertain to that citation as hereinafter explained.

The above discussion of four of the six criteria is applicable to all penalties proposed by MSHA in this proceeding. The remaining two criteria of negligence and gravity are hereinafter considered in an evaluation of each violation alleged in each docket number.

Docket No. KENT 83-248

The proposal for assessment of civil penalty in Docket No. KENT 83-248 seeks to have penalties assessed for three alleged violations. Citation No. 2217774 alleged a violation of section 75.202 because the roof in the vicinity of the air shaft had been resupported after the occurrence of a roof fall, but the inspector believed that additional supports in the form of cribs

were needed because of the adverse conditions which existed in the area. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of $50 which respondent has agreed to pay in full (Tr. 4). Inasmuch as the roof had been resupported after the roof fall, but had not been supported as well as the inspector believed to be desirable, it appears that the Assessment Office proposed a reasonable penalty and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217821 alleged a violation of section 75.1303 because a misfired shot had not been removed from the left rib of the No. 1 entry before mining was conducted inby the misfired shot. The Assessment Office considered the violation to have been moderately serious, to have been associated with a low degree of negligence, and proposed a penalty of $50 which respondent has agreed to pay in full (Tr. 4). I would normally expect the failure to remove a misfired shot to be a more serious violation than it was considered to be in this instance, but the Assessment Office assigned penalty points under section 100.3 for the criteria of negligence and gravity exactly as those criteria had been evaluated by the inspector who wrote the citation. The inspector was present when the misfired shot was removed and was in a position to observe the circumstances surrounding the violation better than anyone else. In such circumstances, I find that the penalty was properly proposed and that respondent's agreement to pay the full amount should be approved.

Citation No. 2217824 alleged a violation of section 75.202 because brows in the vicinity of overcasts in the track, belt, and return entries needed additional support. The Assessment Office considered the violation to have been moderately serious, to have been associated with ordinary negligence, and proposed a penalty of $74 which respondent has agreed to pay in full (Tr. 5). The Assessment Office assigned penalty points in accordance with the evaluation made by the inspector who wrote the citation. He was in a position to determine the seriousness of the violation and to appraise the operator's degree of negligence. Therefore, I find that the penalty was properly proposed and that respondent's agreement to pay the penalty in full should be approved.

Docket No. KENT 84-71

The proposal for assessment of civil penalty filed in Docket No. KENT 84-71 seeks assessment of a penalty for a single violation of section 75.604 which was alleged in Citation No. 2337395 because five splices in the trailing cable attached to the cutting machine were not effectively insulated and sealed

to exclude moisture. The Assessment Office assigned penalty points in accordance with the inspector's evaluation of negligence and gravity. Therefore, I find that the penalty of $85 was properly proposed and that respondent's agreement to pay the penalty in full (Tr. 5) should be approved.

Docket No. KENT 84-72

The proposal for assessment of civil penalty filed in Docket No. KENT 84-72 seeks assessment of penalties for six alleged violations of the mandatory health and safety standards. Two of the citations (Nos. 2337926 and 2337927) alleged violations of section 75.400. The Assessment Office assigned penalty points in accordance with the inspector's evaluation of negligence and gravity. The inspector considered the violation alleged in Citation No. 2337927 to be more serious than the one alleged in Citation No. 2337926 because he believed that the loose coal accumulations described in Citation No. 2337927 exposed more persons to injury than the accumulations described in Citation No. 2337926. The inspector considered that both violations were associated with ordinary negligence. Respondent has agreed to pay in full the proposed penalties of $74 and $91 for the violations alleged in Citation Nos. 2337926 and 2337927, respectively. I find that the penalties were properly proposed and that respondent's agreement to pay the penalties in full should be approved.

Citation No. 2337929 alleged a violation of section 75.517 because the insulation on the trailing cable to the cutting machine had been damaged sufficiently to expose bare conductor wires. The inspector considered the violation to have been serious and to have been associated with a high degree of negligence. His evaluation resulted in a proposed penalty of $112 under the assessment formula in section 100.3. Respondent has agreed to pay the proposed penalty in full (Tr. 8). I find that the penalty was properly proposed and that respondent's agreement to pay the penalty in full should be approved.

Respondent's answer to the Secretary's proposal for assessment of civil penalty filed in Docket No. KENT 84-72 withdrew respondent's request for a hearing with respect to the violation of sections 75.604 and 75.701 alleged in Citation Nos. 2337944 and 2337945, respectively. Respondent's withdrawal of its request for hearing has the technical effect of leaving the matter before me for approval because section 110(k) of the Act provides that a proposed penalty which has once been contested so as to bring it before the Commission cannot be compromised, mitigated, or settled without the approval of the Commission. Both of the violations pertained to creation of shock hazards because of poor insulation in one instance and lack of a frame

ground in the other instance. The inspector considered both violations to have been moderately serious and to have been associated with ordinary negligence. His evaluations resulted in proposed penalties for each violation of $74 which respondent has agreed to pay in full (Tr. 7). I find that the penalties were properly proposed and respondent's agreement to pay the penalties in full should be approved.

The final violation to be considered in Docket No. KENT 84-72 is a violation of section 75.316 alleged in Citation No. 2337388 which was written pursuant to the unwarrantable-failure provisions of section 104(d)(1) of the Act. The Assessment Office waived application of the penalty formula described in section 100.3 with respect to the violation alleged in Citation No. 2337388 and proposed a penalty of $1,000 on the basis of narrative findings written pursuant to section 100.5. At the hearing, counsel for the Secretary of Labor stated that he had discussed with the inspector who wrote Citation No. 2337388 the conditions surrounding his writing of the citation and the Secretary's counsel said that the citation incorrectly implies that the cutting machine was not equipped with water sprays when, in fact, it was so equipped. The Secretary's counsel also stated that respondent's management was in the process of advancing the waterline at the time the citation was written. Additionally, the Secretary's counsel stated that, while the ventilation and dust control plan does specify that the cutting machine has to be equipped with four water sprays, the plan does not specifically state that the machine can be used only if the waterline is connected to the machine.

The Secretary's counsel stated that even though it would make little sense to have water sprays on a machine without having them connected to a waterline, he believed the ambiguous wording of the plan had caused the violation to be rated as much more serious than it was. In such circumstances, the Secretary's counsel moved that I modify the citation to a citation written pursuant to section 104(a) of the Act and that the modified citation should be written without checking the block on the face of the citation indicating that the violation was a significant and substantial violation (Tr. 9-11).

I believe that the Secretary's counsel provided sufficient reasons to justify the grant of his motion that I modify Citation No. 2337388 from one issued pursuant to section 104(d) to a citation issued pursuant to section 104(a). The inspector who wrote the citation did not consider the violation to have been very serious because he evaluated the gravity of the violation to be the same as has previously been discussed above when penalties of $50 have been proposed by the Assessment Office for violations in citations written pursuant to section 104(a).

The only reason the Assessment Office waived the provisions of section 100.3 and proposed a penalty of $1,000 under section 100.5 was that the inspector believed that a high degree of negligence was involved. The explanation given by the Secretary's counsel, however, indicates that respondent's ventilation and dust control plan is ambiguous as to the question of attachment of the waterline to the cutting machine in the face area. Since the ventilation and dust control plan contains ambiguous language which makes it inappropriate to find that respondent's management was necessarily indifferent or showed a lack of due diligence in having the cutting machine connected to the waterline, I believe that the citation was improperly issued under the unwarrantable-failure provisions of the Act and that the citation should be modified, as hereinafter ordered, to a citation issued under section 104(a) of the Act.

When the parties stated that they had not agreed upon a specific penalty for the alleged violation of section 75.316, but had only agreed that the citation should be modified to a citation issued pursuant to section 104(a) without a designation of significant and substantial, I noted that I had written a decision (FOOTNOTE 1) in which I held that the Commission and its judges are not bound by the provisions of section 100.4 (FOOTNOTE 2) so as to be required to assess a penalty of only $20 if we have before us a civil penalty proceeding involving a citation issued under section 104(a) without a designation that the violation is significant and substantial. (FOOTNOTE 3)

Citation No. 2337388, as modified, cites a violation of section 75.316 because the cutting machine was being used without having the waterline connected to it. The parties have stipulated that the violation was not significant and substantial,

or of a nature which could have been expected to cause an injury of a reasonably serious nature as the term "significant and substantial" has been defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981). In such circumstances, only a very small portion of the penalty should be assessed under the criterion of gravity. Most of the penalty should be assessed under the criteria of the operator's size and the fact that ordinary negligence must be considered to have been associated with failure to attach the waterline prior to using the machine even if the ventilation plan did not specifically state that attachment of the waterline was a prerequisite for using the machine to cut coal. I have previously stated above that no penalty in this proceeding should be increased under the criterion of history of previous violations. The penalty should not be increased under the criterion of good-faith abatement because the violation was corrected within the 30-minute period allowed for abatement by the inspector. Therefore, I believe that a penalty of $50 should be assessed for the violation of section 75.316 alleged in Citation No. 2337388.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The parties' motion for approval of settlement is granted and the settlement agreement is approved.

(B) The motion made by counsel for the Secretary of Labor for modification of Citation No. 2337388 is granted and Citation No. 2337388 dated August 19, 1983, is modified to a citation issued under section 104(a) of the Act without a designation of significant and substantial.

(C) Pursuant to the parties' settlement agreement and the grant of the parties' other requests in this proceeding, Pyro Mining Company shall, within 30 days from the date of this decision, pay civil penalties totaling $734.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 83-248

Citation No. 2217774	4/18/83	75.202	$ 50.00
Citation No. 2217821	4/20/83	75.1303.....	50.00
Citation No. 2217824	4/22/83	75.202	74.00
Total Settlement Penalties in Docket No. KENT 83-248			$174.00

Docket No. KENT 84-71

Citation No. 2337395	9/27/83	75.604	$ 85.00
Total Settlement Penalties in Docket No. KENT 84-71			$ 85.00

Docket No. KENT 84-72

Citation No. 2337388	8/19/83	75.316	.....	$ 50.00
Citation No. 2337926	10/25/83	75.400	.....	74.00
Citation No. 2337944	10/25/83	75.604	.....	74.00
Citation No. 2337927	10/26/83	75.400	.....	91.00
Citation No. 2337945	10/27/83	75.701	.....	74.00
Citation No. 2337929	10/28/83	75.517	.....	112.00

Total Settlement and Assessed Penalties in Docket No. KENT 84-72 .... $475.00

Total Settlement and Assessed Penalties in This Proceeding $734.00

Richard C. Steffey
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 U.S. Steel Mining Co., Inc., Docket Nos. WEVA 82-390-R, et al., issued April 30, 1984, pages 19-25.

~FOOTNOTE_TWO

2 30 C.F.R. 100.4 provides, in pertinent part, as follows: "An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. * * *"

~FOOTNOTE_THREE

3 The Commission held in Consolidation Coal Co., 6 FMSHRC 189 (1984), that MSHA's inspectors may designate on a citation written pursuant to section 104(a) of the Act that a violation is "significant and substantial". That phrase is derived from section 104(d)(1) of the Act which specifies that an inspector must find that any violation cited pursuant to section 104(d) "* * * is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard * * *"