FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JUL 26 1984

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. RENT 84-151 A. C. No. 15-03881-03520
v.	Pyro No. 9 Slope William Station
PYRO MINING COMPANY, Respondent	

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

An expedited hearing was held 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 with respect to two notices of contest filed by Pyro Mining Company in Docket Nos. KENT 84-87-R and RENT 84-88-R. I rendered a bench decision, but the final decision containing the bench decision was not issued until May 15, 1984, because the transcript of the expedited hearing was not received until May 1, 1984.

The hearing with respect to the issues raised in the contest proceeding was consolidated with the civil penalty issues which would be raised when the Secretary of Labor filed a proposal for assessment of civil penalty seeking to have penalties assessed for the two violations which had been cited in the orders of withdrawal which were the subject of the notices of contest. I stated on page one of the decision issued in the contest proceeding that I would decide the civil penalty issues on the basis of the record made in the contest proceeding after I had received the civil penalty case pertaining to the violations involved in the contest proceeding. The civil penalty case was thereafter assigned to me on June 27, 1984, in the above-entitled proceeding, and if the Secretary of Labor's proposal for assessment of civil penalty had requested that penalties be assessed for only the two violations cited in the two orders already considered at the hearing held in the contest

proceeding, this supplemental decision would be able to dispose of all issues raised in Docket No. KENT 84-151. The proposal for assessment of civil penalty seeks, however, to have a penalty assessed with respect to a third violation alleged in a citation which was not the subject of the hearing held in the contest proceeding. Therefore, this decision will dispose of only the two violations involved in the contest proceeding in Docket Nos. KENT 84-87-R and KENT 84-88-R.

For the reason stated in the preceding paragraph, a prehearing order will be issued with respect to the third violation involved in Docket No. KENT 84-151 and a subsequent hearing will be held with respect to the issues pertaining to-that citation if the parties do not settle all issues concerning the third violation involved in Docket No. KENT 84-151.

Issues

In most civil penalty cases, the issues are whether violations occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. In this proceeding, however, Pyro Mining Company (hereinafter referred to as Pyro) stipulated at the hearing held in the contest proceeding that the violations occurred and that the only issue it was raising was whether the inspector had properly issued the orders under unwarrantable-failure section 104 (d)(l) of the Act (Tr. 4; 133). 1/ I held in my decision issued May 15, 1984, in Docket Nos. KENT 84-87-R and KENT 84-88-R that Order No. 2338185 was properly issued under section 104(d)(l) and that Order No. 2338186 was not properly issued under section 104(d)(l) of the Act. Paragraph (B) of my decision vacated Order No. 2338186 insofar as. it purported to have been issued under section 104(d)(l) of the Act and modified the order to a citation issued under section 104(a) of the Act with a check mark in the "significant and substantial" block shown on such citation. 2/

1/ All references to transcript and exhibits are to the record made at the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R.

2/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(l) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

Since Pyro has already stipulated that the violations occurred, the only issue remaining for me to consider in this supplemental decision is what civil penalty should be assessed for each violation. Four of the six assessment criteria set forth in section 110(i) of the Act may be given a general evaluation which will be applicable to both violations. The proposed assessment sheet in Docket No. KENT 84-151 shows that Pyro produces about 1,665,000 tons of coal annually at the Pyro No. 9 Slope and produces over 3 million tons of coal annually on a company-wide basis. Those figures support a finding that Pyro is a large operator and that penalties in an upper range of magnitude should be assessed in this proceeding to the extent that they are determined under the criterion of the size of the operator's business.

Pyro did not introduce at the hearing any evidence pertaining to its financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, ____ F.2d ____, 7th Circuit No. 83-1630, issued June 11, 1984, that if operator fails to present any evidence concerning its financial condition, that a judge may presume that the operator is able to pay penalties. Therefore, I find that payment of civil penalties will not adversely affect Pyro's ability to continue in business. Consequently, it will not be necessary to reduce any penalties determined pursuant to the other criteria under the criterion of whether the payment of penalties will cause the operator to discontinue in business.

The criterion of whether an operator demonstrates a good-faith effort to achieve rapid compliance after a violation is cited is generally evaluated on the basis of whether the operator abates the violation within the period of time given by the inspector. Inspectors do not provide an abatement period in withdrawal orders. Since both of the violations here under consideration were cited in withdrawal orders, it is not possible to evaluate the criterion of good-faith abatement on the basis of whether Pyro corrected the violations within the time given by the inspector. The inspector's testimony, however, shows that both of the violations were abated promptly. The violation cited in Order No. 2338185 was abated within 30 minutes after the violation was cited by the hanging of red ribbons which serve as a warning of unsupported roof in Pyro's mine (Tr. 14; Exh. 1). The other violation was abated in a period of 2 hours and 25 minutes by installation of two rows of roof bolts in an area of unsupported roof. The inspector remained at the site of the unsupported roof until the bolts had been installed and he believed that Pyro had done the necessary abatement work as rapidly as it could have been accomplished in view of the fact that a mechanic was working on the roof-bolting machine's brakes and also was repairing the machine so as to make it apply a proper amount of torque to the roof bolts being installed (Tr. 76-77).

The evidence discussed above supports a finding that Pyro demonstrated a good-faith effort to achieve compliance after each violation was cited. It is my practice to reduce a penalty otherwise determined under the other criteria if an operator shows an outstanding effort to achieve rapid compliance and to increase the penalty determined under the other criteria if the operator fails to make a good-faith effort to achieve rapid compliance. If the operator makes a normal good-faith effort to achieve compliance, as occurred in this instance, I neither increase nor decrease the penalty under the criterion of good-faith compliance.

No exhibits were presented to show Pyro's history of previous violations, but the parties stipulated that Pyro has been cited for 21 previous violations of section 75.200 in the period between January 9, 1983, and the citing on January 24, 1984, of the two violations of section 75.200 here involved (Tr. 4-6). S. REP. NO. 95-181, 95th Cong., 1st Sess. 43 (1977), made the following comment about using the criterion of history of previous violations in assessing penalties:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation. 3/

It has been my practice to assess a part of a civil penalty under the criterion of history of previous violations when there is an indication, as there is here, that the operator has repeatedly violated the same section of the regulations which is under consideration. It is a fact, however, that Congress reviewed some statistics showing the amounts of the penalties which MSHA had imposed for the repeat violations referred to in the legislative history. In this proceeding, I only have a stipulation of "21 prior of 75.200" (Tr. 6) to use as the basis for assessing a portion of the 'penalty under the criterion of history of previous violations. The Commission majority in U. S. Steel Corp. v. MSHA, 6 FMSHRC , decided June 26, 1984, Docket No. LAKE 81-102-RM, et al., reduced one of my civil penalties from $1,500 to $400 because they did not think there was substantial evidence to support my findings. In light of the majority's ruling in the U. S. Steel case, I conclude that there is not sufficient evidence to support findings for

3/ Reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 631 (1978).

assessing any part of the penalty under the criterion of history of previous violations.

Order No. 2338185

I have already considered above the four criteria of the size of the operator's business, the question of whether payment of penalties will cause the operator to discontinue in business, the operator's good-faith effort to achieve compliance, and the operator's history of previous violations. Consideration of the remaining criteria of negligence and gravity requires specific discussion of the violations here at issue. Order No. 2338185 was issued on January 24, 1984, under section 104(d)(l) of the Act and cited a violation of section 75.200 because (Exh. 1):

> The approved roof control plan (dated 8/12/83, see page 4, paragraph 12C) was not being followed on the No. 5 Unit, ID No. 005, in that the last open crosscut between Nos. 5 and 4 entries (100 feet inby Spad No. 1380 #5 entry) was unsupported for an area of approximately 15 ft. long by 20 ft. wide and the area had not been dangered off, so as to warn persons that the area was unsupported.

In my decision issued May 15, 1984, in the contest proceeding, at pages 8 and 9, I upheld the issuance of Order No. 2338185 under the unwarrantable-failure provisions of the Act because the section foreman on the shift preceding the writing of the order had failed to assure that devices were installed to warn miners of the fact that the roof was unsupported.

A mitigating factor in assessing the degree of negligence may be found in the fact that the preshift examiner, who inspected the crosscut here involved just prior to the writing of the order, noticed that the roof was unsupported and indicated in the preshift book (Exh. C) that the area of unsupported roof had been dangered off. Nevertheless, mechanics were working on the section at the time the order was issued and the inspector could find no warning devices outby the crosscut (Tr. 54; 59). The inspector said that two other roof falls had occurred in the No. 5 Unit and that his specific purpose for being in the No. 5 Unit on the day the order was written was to examine the site of an unintentional roof fall which had just been cleaned up prior to the inspector's arrival in the No. 5 Unit (Tr. 40; 44).

The inspector further testified that during close-out inspection conferences held on April 22, 1983, May 12, 1983, June 16, 1983, and November 11, 1983, he had warned Pyro's

supervisory personnel of the fact that the miners were failing to hang the required warning devices at the site of unsupported roof (Tr. 82). There is considerable evidence, therefore, to support a finding that a high degree of negligence was associated with the violation of section 75.200 cited in Order No. 2338185. Consequently, an amount of $500 will be assessed for that violation under the criterion of negligence.

The preponderance of the evidence shows that the roof in the crosscut was hazardous. The inspector testified that he saw "Nothing that would indicate to me it was fixing to fall in .... However, you had at least two falls on this section that I knew about" (Tr. 44). The mechanic who had been sent to repair the roof-bolting machine which was being used in the crosscut at the time the order was written testified that there were "heads'" or "big pieces of rock that hang from the roof" near the site where the roof-bolting machine was working to install roof bolts in the unsupported roof and that he asked the operator of the roof-bolting machine to back the machine toward the No. 5 entry so that it would be in a safer place than it was then situated for him to repair it (Tr. 102-103).

The operator of the roof-bolting machine gave the following testimony about the condition of the roof (Tr. 114-115):

> He [the mechanic1 said, "I got to work on the brakes." Right up above where I had put the pins, there was two big heads in the middle of the crosscut, and which recently I've had one to fall out and almost get me. So I backed the pinner up, and Mike said, "No, there is some bad top here." so I just pulled the pinner through the crosscut.

The testimony of the inspector and two of Pyro's witnesses shows that the roof was very hazardous in the crosscut where Pyro's section foreman had failed to have the warning devices installed. In view of the evidence showing that the violation was very serious, I believe that a penalty of $1,000 should be assessed under the criterion of gravity. Since, however, the Commission majority in the U. S. Steel case, hereinbefore cited, have indicated that they think my assessment of civil penalties. is excessive, I shall reduce that amount to $500.

Inasmuch as a large operator is involved, a total penalty of $1,000 does not appear to be excessive, bearing in mind that an amount of $500 is being assigned under the criterion of negligence and an additional amount of $500 is being assigned under the criterion of gravity.

Citation No. 2338186

In my decision issued on May 15, 1984, in the contest proceeding, I found, at page 10, that the preponderance of the evidence failed to show that Pyro should be held liable for the negligence of the operator of the roof-bolting machine when he acted aberrantly and pulled the roof-bolting machine through the area with unsupported roof in his effort to find a place where the mechanic could repair its brakes without being exposed to hazardous roof. Nacco Mining Co., 3 FMSHRC 848 (1981). At the end of that shift during which the roof-bolting machine's operator had pulled it through the area of unsupported roof, Pyro's management issued a company citation reprimanding him for having done so and suspended him from work for 1 day (Tr. 121-122).

I also noted in my decision in the contest proceeding that the Commission in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), had distinquished between relying upon the acts of a rank and file miner-for the purpose of finding that a violation had occurred, as opposed to relying upon the acts of a rank and file miner for the purpose of imputing negligence to the operator. In other words, an operator is liable for the occurrence of a violation without regard to fault (U. S. Steel Corp., 1 FMSHRC 1306 (1979)), but the negligence of a rank and file miner should not be imputed to the operator for the purpose of assessing penalties.

For the foregoing reasons, my decision in the contest proceeding modified Order No. 2338186 to a citation issued under section 104(a) of the Act with a check in the block showing that the violation was "significant and substantial". As I have noted above, the Commission has already held that the negligence of a rank and file miner should not be attributed to the operator for assessing civil penalties. Consequently, no portion of the penalty for the violation of section 75.200 involved in Citation No. 2338186 should be assessed under the criterion of negligence. I believe that assignment of no portion of the penalty under the criterion of negligence is especially warranted in-this case in view of Pyro's having cited the miner for the violation and its action of having suspended him for 1 day for the unfortunate act done in haste in an effort to place the roof-bolting machine in a safe place for the mechanic to repair it.

The gravity of the violation involved in Citation No. 2338186 is precisely the same as that considered above in assessing a penalty for the violation of section 75.200 cited in Order No. 2338185 because the unsupported roof under which the operator of the roof-bolting machine passed in trying to find a safe working place for making repairs is the same area of unsupported roof which was involved in the violation cited

in Order No. 2338185. There is a difference in assessing the penalty, however, because in the previous violation, Pyro's management was responsible for the fact that no device had been installed to warn miners to avoid passing under the unsupported roof in the last open crosscut. In this instance, while the unsupported roof exposed the operator of the roof-bolting machine to possible death from a roof fall, he was exposed to that hazard through no fault of Pyro's management.

The following question and answer show that it would be improper to assess a large penalty under the criterion of gravity in this instance (Tr. 121):

> **Q.** Had you ever been told by anybody in management not to go under unsupported roof?
>
> **A.** Yes, sir. I knew better. I just wasn't thinking at the time. He didn't--I wasn't wanting him working under those heads, and top was bad behind him. So I just automatically pulled it through. And after I realized, when I got him through, realized what I had done, I turned the pinner around and started pinning from my way in so I wouldn't back my pinner back.

It should also be noted that the pulling of the roof-bolting machine through the area of unsupported roof occurred on a non-producing shift (Tr. 94-95), that the operator of the roof-bolting machine had been sent by a foreman to the No. 5 Unit to do the roof bolting as "catch-up" work (Tr'. 112), and that there was no section foreman on duty in the No. 5 Unit at the time the roof was being bolted (Tr. 113).

In light of the circumstances described above, I believe that a minimal penalty of $25 should be assessed under the criterion of gravity, taking into consideration that a large operator is involved and that assessment of a penalty is mandatory under the Act. Tazco, Inc., 3 FMSHRC 1895 (1981).

WHEREFORE, it is ordered:

Within 30 days after issuance of this decision, Pyro Mining Company shall pay civil penalties totaling $1,025.00 for the violations listed below:

Order No. 2338185 1/24/84 § 75.200	$1,000.00
Citation No. 2338186 1/24/84 § 75.200	25.00
Total Penalties Assessed in This Proceeding . .	$1,025.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

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