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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

v.

YOUGHIOGHENY & OHIO COAL
COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 85-59
A.C. No. 33-00968-03588

Nelms No. 2 Mine

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the
Solicitor, U.S. Department of Labor,
Cleveland, Ohio, for the Petitioner;
Robert C. Kota, Esq., Youghioghenny & Ohio Coal
Company, St. Clairsville, Ohio, for the
Respondent.

Before: Judge Koutras

Statement of the Case

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), charging the respondent with an alleged violation of mandatory safety standard 30 C.F.R. 75.200. The respondent filed a timely answer and a hearing was convened in Wheeling, West Virginia. The parties waived the filing of written posthearing proposed findings and conclusions, but were afforded an opportunity to make oral arguments on the record at the conclusion of the hearing. Their respective arguments have been considered by me in the course of this decision.

Issue

The issue presented in this case is whether the respondent violated the cited mandatory safety standard in question, and if so, the appropriate civil penalty that should be

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assessed based upon the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 96-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated that the respondent and the subject mine are subject to the jurisdiction of the Act, that the respondent is a moderate size operator, and that any civil penalty assesment made for the violation in question will not adversely affect the respondent's ability to continue in business (Tr. 6).

Discussion

The section 104(a) Citation No. 2206129, issued by MSHA Inspector Ray H. Morrison in this case on January 7, 1985, cites a violation of 30 C.F.R. 75.200, and the conditions or practice cited is described as follows:

The roof was not adequately supported in the track entry of No. 6 section in the following locations: The roof was broken along the left rib at 18+60 inby to 19+00 feet; the roof was broken along the left rib from 16+50 to 16+70 a distance of 20 feet, and at 16+90 inby to 17+10 for a length of 20 feet.

Petitioner's Testimony and Evidence

Ray Morrison, testified that he is an MSHA inspector and roof control specialist, and he detailed his background and experience which includes 24 years in the coal mining industry as a loader, cutter, machine operator, and mine foreman. He confirmed that he conducted a spot roof control inspection at the mine on January 7, 1985, and stated that the inspection was conducted because there were some roof control problems and roof falls in the mine. He was accompanied on his inspection by Bob Merrifield and Carl Minear, MSHA roof control specialists, and John Woods, the respondent's safety

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director. Mr. Morrison stated that the mine roof support was inadequate in that the respondent was using 54-inch roof bolts and MSHA was seeking a change in the plan to require the respondent to use 7 foot bolts.

Mr. Morrison testified that the number 6 section was one of the areas where the respondent had roof control problems, and he described the track entries and roof bolting pattern, and confirmed that 54 inch bolts were being used for roof control. Mr. Morrison stated that he observed fractures in the roof strata at the 16+90 and 16+50 locations, and he indicated that the roof had "dropped down" and was sagging at all three locations described in the citation. It sagged from 6 to 10 inches at the fracture points. The fractures or "cutters" were located approximately 12 inches off the rib line for about 20 feet at each of the three locations. He also observed excessive water dripping from the fractures at the 19+00 location, and he stated that water causes roof deterioration and roof separations. He also believed that sagging roof conditions indicate roof failure.

Mr. Morrison confirmed that he issued the citation because of the presence of roof fractures along the left rib, the sagging roof, and the presence of water at the locations which he described. The area where he detected water dripping from the roof was a heavily travelled track entry used by the miners as a travelway to and from the working faces. Mr. Morrison stated that he issued the citation on his own and did not consult with Mr. Merrified.

Mr. Morrison stated that 10 men were on the working section at the time of his inspection, and he believed that the cited conditions presented a potential roof fall hazard. He confirmed that there were 13 reported intentional roof falls in the mine in 1984, and that he inspected some but not all of them. He identified exhibit G-3, as the roof fall reports, and indicated that two or three of them occurred on the number 6 section, but that they were outby the track areas cited in this case.

Mr. Morrison stated that roof support posts were installed to abate the citation, and while rehabilitation work had taken place on the entry in question, he was not aware of any such work being planned or done on the day of his inspection. The rehabilitation work included the installation of roof bolts and trusses, and he confirmed that posts had been installed at the area where he observed water seeping through the roof fractures.

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Mr. Morrison stated that the track entry is required to be examined during the preshift and onshift inspection, and since it takes some time for the roof to show signs of failure, he believed that the cited conditions existed for at least 1 week. However, he believed that the respondent exhibited moderate negligence because of the fact that extensive rehabilitation work was done to address the roof problems.

Mr. Morrison was of the opinion that a roof fall was reasonably likely to occur, and if it did, a miner would suffer permanently disabling injuries. He believed the cited roof conditions constituted a significant and substantial violation because the areas were heavily travelled, and the sagging roof, with water dripping, indicated serious roof problems, including a roof failure (Tr. 10-35).

On cross-examination, Mr. Morrison conceded that the respondent was addressing its roof control problems and that it was using different approaches in attempting to solve them. He was not aware when MSHA last reviewed the respondent's roof-control plan, and it was his view that longer roof bolts were required for roof support. He confirmed that longer notched bolts had been used in the past, but that they failed. He was also aware of prior tests conducted by the respondent with grouted and resin bolts, and that some of these had failed at 42 inches. Mr. Morrison was of the personal view that the roof-control plan is inadequate, but conceded that the roof bolts which were used were in compliance with the plan. However, he did not believe that the roof was adequately supported, and that is why he issued the citation. He conceded that unintentional roof falls are not per se violations of the roof-control plan.

Mr. Morrison stated that the only rehabilitation work he observed at the locations were some roof support posts which are shown on the sketch of the area (exhibit G-2). He did not review the onshift or preshift examination books at the time of his inspection, and he conceded that there is a difference of opinion in this case as to what is required to adequately support the roof. The roof cracks he observed were located 3 inches or less from the nearest roof bolt, and while there was a lot of roof trussing taking place, he did not know the extent of such trussing throughout the mine.

Mr. Morrison conceded that the respondent had done a lot of work on its roof, but given the conditions which he found, he believed they were negligent for not doing more. He also conceded that the respondent had installed more roof bolts than were required under the roof plan, but he felt that this

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was not adequate. He did not know whether any further trussing would have been done in the track and belt entries, and was of the view that most of the trussing in the areas in question was done as a last resort and not on a systematic basis (Tr. 35-53).

On re-direct examination, Mr. Morrison stated that the roof areas which were sagging were roof bolted, and that the plates were in place at the end of the bolts. He stated that when sagging occurs "everything comes down at that point" (Tr. 54). In response to further questions, he stated that the roof problems in the mine were the result of the natural physical characteristics of the roof strata and that "the strata in this particular area of the mine is very bad" and that "it's the worst type strata than what they had in other areas of the mine previous to this" (Tr. 55).

Respondent's Testimony and Evidence

John Woods, respondent's safety director, testified as to his background and experience of some 22 years in mining. He confirmed that he accompanied Inspector Morrison during the inspection of January 7, 1985, but expressed disagreement with Mr. Morrison's assertions that the roof was inadequately supported. Mr. Woods stated that it is not unusual to encounter "cutters" or cracks in the roof, and simply because they are present does not always indicate evidence of roof failure. The cutter at the 19+00 location was lightly rock dusted, and he surmised that it had appeared earlier than the day of the inspection. Mr. Woods stated that management was aware of the problems with the roof on the section and that the conditions were being closely monitored. Roof trussing had taken place in other roof areas, as well as in the nearby areas where Mr. Morrison issued his citation. Mr. Woods stated that he asked UMWA safety committeeman Donald Arnold to look at the roof conditions and to give him an opinion as to whether it was safe, and that Mr. Arnold indicated that he saw nothing wrong with the roof.

Mr. Woods could not state the distance from the roof crack observed by Mr. Morrison and the nearest roof bolt. He confirmed that abatement was achieved by installing anchor bolts and posts at the cited areas. He confirmed that small cracks were found in the roof approximately a foot or a foot and a half above the roof bolt anchor point, but that the crew who did the work advised him that the roof was sound enough to anchor the bolts. This led him to conclude that while the roof "was slightly broken at one and one-half feet,

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and above that, solid strata to anchor in." Mr. Woods confirmed that there were three prior roof falls on the section, and he stated that they were "just places we didn't get" (Tr. 66); (Tr. 62-69).

On cross-examination, Mr. Woods stated that the only place where there was water in the roof was at the 19+00 location. However, he confirmed that additional posts were set at that location, and he agreed with Inspector Morrison's observations that water was dripping from one of the roof locations, as well as the existence of cracks and "cutters" at the other locations noted in his citation. He also agreed that the roof was "hanging down" for approximately 10 inches, but disagreed that it was "sagging in the middle." Although he stated that he saw no sagging, he indicated that "it would be hard to say, I imagine it was there. I don't know" (Tr. 70). He agreed that the track entry would be the general travelway that the miners used to go to the working section (Tr. 73).

Mr. Woods agreed that there were problems with the roof, but disagreed with Inspector Morrison's conclusion that the conditions posed a roof fall hazard. Mr. Woods did not believe that the conditions constituted a violation of section 75.200 (Tr. 70-74). He conceded that the minimum roof bolting pattern under the plan was 48 inches between bolts, but that if conditions warranted, additional steps had to be taken. These included closer spacing, longer bolts, or cross-bar trusses.

In response to further questions, Mr. Woods stated as follows (Tr. 78):

JUDGE KOUTRAS: What he is driving at is that if you went in this area, let's assume that you agreed with the Inspector before he came there that these cracks and whatnot indicated to you that the roof was about to fall in, what would you have done?

THE WITNESS: Either posted it or used longer bolts.

JUDGE KOUTRAS: You would have taken additional measures, right?

THE WITNESS: Right.

JUDGE KOUTRAS: To support the roof?

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THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But, if you went there and observed these conditions and felt that there was no hazard, you wouldn't have done that additional work?

THE WITNESS: I wouldn't, no.

Dale Ingold, respondent's Manager of Mining Engineering, testified as to his mining background and experience, and he confirmed that he holds a B.S. degree in engineering, mine foreman's papers issued by the State of West Virginia, and that he is a registered engineer in the State of Ohio. Mr. Ingold stated that the respondent was aware of certain roof control problems in the mine and that in 1982 and 1983, it retained the firm of John F. Griffin Geological Associates to conduct a study of the roof conditions, particularly in those areas where unusual roof conditions were encountered. Additional consultants were also hired to conduct roof control stress tests and studies in connection with certain horizontal stress problems which were discovered in the mine. Further, the developing mine entries were turned to accommodate these problems, and ongoing experiments were conducted with different types of roof bolts. In addition, timbering and trusses were used as additional roof support where required, and after the citation was issued, an alternate roof-control plan was implemented.

Mr. Ingold stated that the presence of "cutters" in the roof strata is not of itself an indication of a bad roof or an imminent fall. However, once such conditions are encountered, one has to observe for additional signs of roof failure or weakening, and if any appear, additional steps may have to be taken (Tr 79-85).

On cross-examination, Mr. Ingold stated that a roof sag, coupled with a cutter with water dripping out of it, is indicative of "additional roof breaking some place" and that "the ground control methods are not adequate" (Tr. 85). Had the sagging existed along a travelway, as described by Inspector Morrison, Mr. Ingold believed that it would warrant additional watching of the area, but he would not take any additional measures that had already been done (Tr. 86). However, should the conditions worsen, then he agreed that something had to be done in the inby areas. In this case, additional posts were installed at the area where the inspector observed roof sagging and water. In his view, the conditions described by

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both Mr. Woods and Inspector Morrison in the outby areas did not warrant additional roof control measures, and he conceded that this assessment on his part was not by personal observation (Tr. 87). He confirmed that he was not present during the inspection and did not view the conditions cited by Inspector Morrison (Tr. 88).

Petitioner's Arguments

Petitioner's counsel asserted that the facts in this case support the inspector's findings of a violation, as well as his conclusion that the violation was "significant and substantial." Counsel argued that Mr. Morrison's testimony establishes that there were bad roof conditions at three areas along the track entry where miners travelled to the active working areas, and that three shifts would use this heavily travelled walkway. The existence of cutters along the rib, a roof sag of some 6 to 10 inches at another point, with water dripping from the roof, support the fact that a hazardous roof fall condition existed. Further, in view of the fact that the respondent has admitted that it was having roof control problems in the cited section of the mine, and that three unintentional roof falls had occurred in the general area of the mine, it is not an unreasonable inference to draw that the conditions were ripe for an incident of a roof fall that could lead to a serious injury.

Petitioner's counsel asserted that while there may be a difference of opinion, the inspector's job is to point out violations and take enforcement action where warranted. His job is not that of a consultant to advise the operator as to what is required to adequately support the roof. Conceding that the respondent may have installed roof bolts closer than required by its roof-control plan, the plan does specify that as working conditions merit it, additional support should be provided. Counsel pointed out that the inspector's "moderate negligence" finding was made in recognition of the fact that the respondent had done some work on its roof control problem. The fact that 95 percent of an area is rehabilitated or rebolted, does not mean that the 5 percent area along an active travelway, which is not, cannot cause serious injury. Counsel concludes that it was not unreasonable for Inspector Morrison, with his 23 years of experience in the mines, including his years as an inspector and mine foreman, to find that the conditions constituted a "textbook example of a significant and substantial violation" (Tr. 89-92).

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Respondent's Arguments

Respondent's counsel agreed that the crux of this case lies in the difference of opinion between Mr. Woods' assessment of the conditions cited by Inspector Morrison and the need for additional roof support, and the assessment made by the inspector as to those conditions and his judgment that additional roof support should have been provided (Tr. 89).

In defense of the citation, respondent's counsel argued that the testimony in this case does not support a finding of a violation of section 75.200. Counsel asserted that the respondent was following its approved roof-control plan, was aware of the roof control problems, and was observing the areas in question. The areas had not been missed and there were no reports of any hazard conditions made in the preshift, onshift, or fire boss reports. Counsel asserted further that the respondent was aware of the crack in the roof and that a lot of work was taking place to insure the stability of the roof. The additional support posts were adequate to support the roof, both before and after the citation was issued. Counsel conceded that the respondent may have resisted the use of longer roof bolts, but insisted that it did so because it did believe that this was the safest thing to do, and the outside consultants confirmed that longer roof bolts was not the answer to the roof control problems. However, once the studies were concluded, the information was incorporated into the latest revision of the roof-control plan, and this was agreed to by MSHA. Assuming a violation of section 75.200, counsel argued that the violation was not significant and substantial because the respondent was following its roof plan. Counsel concluded that the case turns on a difference of opinion as to whether or not the respondent was doing enough to insure adequate roof support (Tr. 92-94).

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. 75.200, which provides in pertinent part as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such

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system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

(Emphasis added).

The respondent is not charged with a violation of its roof-control plan. While there is disagreement as to the use of 54-inch roof bolts, the fact is that the applicable roof-control plan did not prohibit the use of these bolts, and the respondent was following the plan in this regard. Inspector Morrison confirmed that he issued the citation because of the roof conditions which he observed during his inspection of the track entry, namely the fractures along the left rib, the sagging of the roof, and the roof water condition at the intersection which had additional roof posts. He relied on the second sentence of section 75.200, which is underscored above, to support his findings of a violation. Thus, the issue presented is whether or not the evidence presented supports a conclusion that the roof was not adequately supported. The parties recognize that the issue is one of a "difference of opinion" as to the roof conditions observed by the inspector, and whether or not they support his belief that the roof was not adequately supported.

All of the witnesses who testified in this case made reference to the existence of roof "cutters." The Dictionary of Mining, and Related Terms, U.S. Department of the Interior, 1968 Edition, at pg. 294, defines the term "cutter" in pertinent part as follows:

b. A joint, usually a dip joint, running in the direction of working; usually in the plural. Fay. c. At Mount Pleasant, Tenn., an opening in limestone, enlarged from cracks or fissures by solution, that is filled by clay and usually contains valuable quantities of brown phosphate rock. Fay. d. A solution crevice in limestone underlying Tennessee residual phosphate deposits. A.G.I. Supp. e. A joint in a rock that is parallel to the dip of the strata. C.T.D. * * * n. Applied to closed or inconspicuous seams along which the rock may separate or break easily. BuMines I.C. 8182, 1963, p. 7.

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By definition, the term "cutter" indicates the presence of roof strata or seams which dip, and which contain separations or breaks. Mr. Woods believed that the existence of such a condition does not necessarily mean that the roof has failed, and he confirmed that such conditions are not unusual. Mr. Ingold testified that the presence of such a condition is not indicative of a bad roof or an imminent fall, but conceded that additional steps must be taken to insure the stability of the roof once the condition is known, and in the event other signs of possible roof failure are detected. He conceded that a roof sag, coupled with the existence of cutters with water dripping from them are signs of additional roof breakage and indicate that the ground control methods are not adequate (Tr. 85). Inspector Morrison believed that these conditions indicated the existence of roof failure. With regard to Mr. Woods' statement that the safety committeeman was of the opinion that the roof conditions were safe, I give this no weight at all since the committeeman did not testify and his credibility remains untested.

Mr. Woods conceded that the roof conditions in question were such as to cause mine management to monitor them very closely. Mr. Woods conceded further that the roof was broken in several places and that the roof bolters had problems with anchoring the supports since the roof kept breaking above the roof bolt anchor points. He also confirmed that he was aware of at least three prior unintentional roof falls, and candidly admitted that they were "places we didn't get." Given these circumstances, I believe it is reasonable to conclude that the roof conditions cited by Inspector Morrison could realistically have resulted in another unintentional roof fall and would have been another incident or example of "a place we didn't get."

Mr. Woods agreed with Inspector Morrison's observations concerning the existence of cracks or cutters in the roof, and that water was dripping from the roof at the track entry location used by miners as a travelway to and from their working areas. Mr. Woods also agreed that the roof was hanging down, and while he disagreed that it was sagging in the middle, he later equivocated when he stated that "it would be hard to say. I imagine it was there. I don't know" (Tr. 70).

After careful consideration of all of the testimony and evidence adduced in this case, I conclude and find that the petitioner has established by a preponderance of the evidence that the roof areas cited by Inspector Morrison were not adequately supported. While it may be true that Mr. Woods and

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Mr. Morrison had a difference of opinion as to the adequacy of the roof support which was installed at the time of the inspection, I find Inspector Morrison's testimony to be credible, and in fact, Mr. Woods was in agreement with his observations concerning the roof conditions. I take note of the fact that Mr. Ingold was not present during the inspection and did not view the roof conditions. However, his testimony concerning the hazards of cutters and the presence of water, particularly with respect to the fact that they may contribute to additional roof breakage and failure, and indicate the need for additional support, supports Inspector's Morrison's assessment of the roof conditions in question. The citation IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties have stipulated that the respondent's mining operation is moderate, and that the proposed civil penalty assessment will not adversely affect its ability to continue in business. I adopt these stipulations as my finding and conclusion on this issue.

History of Prior Violations

Exhibit GX-5 is an MSHA computer print-out detailing the respondent's compliance record for the period January 1, 1983 to January 6, 1985. The information on the print-out reflects that the respondent was issued 56 section 104(a) citations for violations of the roof control requirements of section 75.200, for which it paid a total of \$2,353 in civil penalty assessments. Although 37 of the citations were "single penalty" citations for which the respondent paid assessments of \$20 for each violation, 19 of the citations were "significant and substantial" (S & S) violations. A second print-out reflects that for the period prior to January 7, 1983, the respondent paid civil penalties in the amount of \$68,106, for 438 violations of section 75.200.

I take note of the fact that the petitioner's submissions concerning the respondent's history of prior violations is limited to violations of section 75.200. For an operation of its size, I am of the view that the respondent's compliance record with respect to section 75.200, is not a good one, and this is reflected in the civil penalty which has been assessed for the violation in question. While one may conclude that the violations are the result of the natural roof conditions which exist in the mine, one may also conclude that the roof conditions are such which need constant

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attention in order to preclude the existence of hazardous conditions, and that the respondent needs to give more attention to those conditions on a daily basis.

Good Faith Compliance

Although the inspector extended the time for abatement in this case because the respondent needed additional time to support the roof at several of the cited locations, abatement was ultimately achieved in a timely manner. Accordingly, I conclude and find that the respondent abated the cited conditions in good faith.

Negligence

Inspector Morrison conceded that the respondent was aware of its roof control problems and was attempting to solve them by utilizing different roof control measures. I have considered this fact in mitigation of the respondent's negligence in this case. However, the fact remains that with respect to the specific conditions cited by Mr. Morrison, Mr. Morrison was of the view that they should have been detected during the preshift or onshift examinations, and that they appeared to have been present for at least 2 days. Considering the mitigating circumstances, he believed that the negligence was moderate. I agree with the inspector's assessment and find that the cited conditions resulted from the respondent's failure to take reasonable care, and that this constitutes ordinary negligence.

Gravity

The inadequately supported roof conditions were present at the track entry used by the miners as a means of travel to and from their work stations. Under the circumstances, the work crews were exposed to the hazard of a roof fall, particularly at the location where water was dripping from the fractured roof at the 19+00 location. In view of these conditions, I conclude and find that the violation was serious.

Significant and Substantial Violation

Inspector Morrison believed that the violation was significant and substantial because the sagging roof, with water dripping from fractures, indicated the existence of serious roof problems, including the reasonable likelihood of a roof failure or fall. Since the areas were heavily travelled, he concluded that a roof fall or failure would result in permanently disabling injuries. Given the fact that the mine has

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a history of bad roof conditions, including recent documented unintentional roof falls, I conclude and find that Inspector Morrison's "S & S" finding is fully supported, and IT IS AFFIRMED.

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 a civil penalty assessment in the amount of \$250 is appropriate and reasonable for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$250 for the violation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge