CCASE:
SOL (MSHA) v. WHITE OAK COAL
DDATE:
19851204
TTEXT:

~2039

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. VA 85-21 A.C. No. 44-05385-03522
v.	No. 3 Mine
WHITE OAK COAL COMPANY, RESPONDENT	

DECISION

Appearances: Mark R. Malecki, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding 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). Petitioner seeks a civil penalty assessment in the amount of $500 for an alleged violation of mandatory safety standard 30 C.F.R. 75.200, as stated in a section 104(d)(1) Citation No. 2153645, served on the respondent by MSHA Inspector Larry Coeburn on December 6, 1984. The condition or practice cited is as follows:

> The approved roof-control plan was not being complied with on the 001 active working section in that the following conditions existed:
>
> (1) The No. 2 and No. 3 entries were driven from 22 to 24 feet wide beginning at the inby corner of the last open crosscuts and extending inby for 25 feet in the No. 2 entry and 30 feet in the No. 3 entry.

(2) The No. 5 entry was mined from 22 to 23 feet wide beginning at the inby end of the last connecting crosscut inby for 30 feet.

(3) Roof bolts were installed to within 5 to 6 feet of the left coal rib in the No. 5 entry beginning at the inby corner of the last connecting crosscut extending inby for 20 feet.

(4) Reflectorized warning devices were not installed on the last row of permanent roof supports in the Nos. 1, 2, 3, 4, 5, 6, & 7 entries as required by the approved plan.

The approved plan stipulates entry widths shall not exceed 20 feet and roof bolts will be 4 feet from face and ribs.

The respondent filed a timely notice of contest and requested a hearing. Pursuant to notice served on the parties, a hearing was convened on October 3, 1985, in Duffield, Virginia. The petitioner appeared, but neither the respondent or his counsel entered an appearance. Under the circumstances, the hearing proceeded without them and the respondent was subsequently held in default.

Issue

The issue presented in this case is whether or not the respondent has violated the cited mandatory safety standard, and if so, the appropriate civil penalty that should be imposed for the violation. The matter concerning the respondent's failure to appear at the hearing and its default in this case is discussed in the course of the decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Petitioner's Testimony and Evidence

The following petitioner exhibits were offered and received in evidence in this case:

1. A copy of respondent's MSHA approved roof-control plan (P-1).

2. A copy of the citation and termination issued by the inspector, including a "citation review" form signed by the inspector and his supervisor (P-2).

3. A copy of the inspector's notes regarding the cited conditions or practices (P-3).

4. A copy of the petitioner's prehearing Request for Admissions, and the respondent's responses thereto (P-4).

5. An MSHA computer print-out reflecting the respondent's compliance record for the period December 6, 1982 through December 5, 1984 (P-5).

6. An MSHA "Proposed Assessment Data Sheet" summarizing the respondent's compliance record, including information concerning the respondent's operation of the No. 3 Mine (P-6).

7. A sketch of the 001 active working section depicting the locations where the alleged roof conditions existed at the time of Inspector Coeburn's inspection (P-7).

MSHA Inspector Larry Coeburn testified as to his experience and background, and he confirmed that he inspected the mine on December 6, 1984, and that he issued the citation in question. He confirmed that he is a member of MSHA's District No. 5 roof fall accident investigation team, that he is familiar with the respondent's roof-control plan, and that his duties as an inspector include the review and evaluation of mine roof-control plans submitted to MSHA for approval. He confirmed that his inspection on December 6, was a regular mine inspection, and he stated that he had previously inspected the mine five or six times.

Mr. Coeburn testified that the mine is in the "Upper Banner Coal Seam," and he stated that the coal seam height in the mine ranges from 36 to 40 inches, and that the mine roof consists of shale which ranges from 3 to 24 inches in thickness. He described the overall roof conditions as laminated

shale with slips and breaks. He confirmed that he reviewed the applicable mine roof control provisions prior to his inspection. He described the roof conditions which he observed as stated on the face of his citation, and explained why he issued the citation. He referred to a sketch of the active working where the cited roof conditions were observed, and he confirmed that the sketch accurately portrays what he observed (exhibit P-7).

Mr. Coeburn stated that he visually observed the wide places in the entries which he cited, and he stated that he confirmed his visual observations by measuring the distances noted with a tape. He also confirmed that he measured the distance of the placement of the roof bolts to support his observations that they were not within the required 4-foot distances from the rib, and he observed no supplemental roof support installed in the cited wide entries.

Mr. Coeburn stated that the cited wide entries and lack of adequate roof support were readily observable, and he believed that a trained foreman should have detected the violative conditions during his required preshift and onshift inspections. The extent of the mining cycle at the time of his inspections led him to conclude that the conditions existed for not less than 2 days. In his opinion, the cited roof conditions and excessive wide entries presented a roof fall hazard, and he believed that it was "reasonably and highly likely" that an unintentional roof fall would have occurred had he not acted to cite the conditions.

Mr. Coeburn explained that in his experience, most roof falls in the mines occur at intersections where entries are driven wide, and by doing this, an operator removes more roof materials than are necessary to drive an entry, and that the removal of this material necessarily takes away the natural roof support. He explained that the approved roof-control plan which requires that an entry shall be driven 20 feet wide takes into account the roof conditions for the mine, and when the entry is driven for widths in excess of the 20-foot requirement, roof support is also taken away. In the instant case, the lack of additional support in the wide areas, the excessive distances for roof bolt placement, and the fact that the coal is mined by undercutting and blasting, all contributed to the likelihood of a roof fall.

Mr. Coeburn confirmed that he found no roof reflectors in place at the cited locations, and he indicated that such reflectors are required by the roof-control plan. He explained that the reflectors are used as warning devices to

put miners on notice that the areas beyond the reflectors are not permanently supported. The failure to install such devices could result in a miner walking into an area which is not supported, thereby exposing him to a hazard. He described these areas as places where a miner would normally be at any time during his working shift, and he believed that it was very likely that a miner would walk into these areas if the reflectors were not in place to warn him.

Mr. Coeburn identified the applicable roof-control plan (exhibit P-1), and he stated that the applicable provisions concerning wide entries appear at page 4, paragraph Q, the applicable provisions concerning reflectors appear at page 5, paragraph 3(a), and the applicable roof bolt spacing requirements appear at page 14, sketch No. 3. He confirmed that respondent's representative Benny Owens, who accompanied him during the inspection, offered no excuses for the cited conditions.

With regard to the existence of "duck's nests," or indentations in the rib which may be caused by erratic cutting methods, Mr. Coeburn stated that the entries he measured were deliberately mined at the widths which he measured and noted in his citation, and that they were not caused by "duck's nests."

Mr. Coeburn stated that one or two miners would be present in the normal course of mining at each of the locations cited, and that in the event of a roof fall, one could except a fatality to result. Since the areas cited are considered to be "low coal" areas, any miners in the area would be slouched or on their knees, and this would contribute to the hazard since they would be slowed down in any attempts to escape a roof fall.

Ewing C. Rines, confirmed that he is an MSHA supervisory inspector, and he testified as to his background and experience. Although he did not inspect the mine on December 6, he has been in the mine on three occasions for the year prior to this time, and he was familiar with the citation issued by Inspector Coeburn.

Mr. Rines testified that by driving an entry wider than permitted by the roof-control plan, part of the main roof support is removed, thereby weakening the roof. He pointed out that approved roof-control plans are only the minimum requirements, and that the likelihood of a roof fall increases as the entries are driven wider than the minimum widths required by the plan. He confirmed that numerous roof

fall investigations which he has conducted reflect that falls begin at intersections which have already been weakened by the removal of materials to facilitate the construction of the entries.

Mr. Rines described the Upper Banner seam as a seam of coal composed of a laminated roof strata which contains many "slip planes." These conditions have been taken into consideration in requiring the entries to be driven 20 feet wide, and driving them any wider simply increases the probability of an unintentional roof fall. Since blasting is going on all the time, this contributes to a real potential for a roof fall in those mine areas where the entries are driven wider than required by the roof-control plan. In view of the fact that miners were working in the areas where the entries were driven wide, Mr. Rines agreed with Inspector Coeburn's assessment of the hazards presented, and he agreed that a permanently disabling injury or fatality would result from a roof fall.

Findings and Conclusions

The respondent admits that it is the owner and operator of the subject mine, and that the operations of the mine are subject to the Act (Admission Nos. 1 and 2 filed August 14, 1985).

The respondent denied that I have jurisdiction to hear and decide this case. Absent any support for this conclusion, I conclude that I do have jurisdiction to hear and decide this case, and the respondent's unsupported conclusion to the contrary is rejected.

The respondent admits that a true copy of Citation No. 2153645 was served on the respondent or its agent as required by the Act. Respondent also admitted to the authenticity of a copy of the citation served on it by the petitioner (Admissions No. 5 and No. 7).

Fact of Violation

Respondent's response to my show-cause order IS REJECTED, and I conclude and find that the respondent has failed to establish any valid reasons for its failure to appear at the scheduled hearing in this case. Accordingly, pursuant to Commission Rules 29 C.F.R. 2700.63(a) and (b), I find that the respondent is in default and has waived all further rights to be heard on the civil penalty matter before me for adjudication. I have decided this case on the basis

of the evidence and testimony adduced by the petitioner in support of the violation in question.

After consideration of the unrebutted testimony of the witnesses presented by the petitioner during the hearing, as well as the evidence and arguments advanced by the petitioner in support of its case, I conclude and find that the petitioner has established a violation of mandatory safety standard 30 C.F.R. 75.200, as stated in the section 104(d)(1) Citation No. 2153645, issued by Inspector Coeburn on December 6, 1984. The evidence adduced by the petitioner establishes that the respondent failed to follow its approved roof-control plan by (1) driving the entries wider than permitted by the plan, (2) by installing roof bolts wider than the 4-foot spacing permitted under the plan, and (3) failing to install roof reflectors as required by the plan. A violation of the roof plan provisions constitutes a violation of 30 C.F.R. 75.200. Accordingly, the citation IS AFFIRMED.

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

The respondent admits that petitioner's proposed civil penalty of $500 will not affect its ability to continue in business (Admission No. 6).

The respondent admits that the size of its company is under 100,000 tons of coal production per year, and that the size of the mine subject to this proceeding is between 50,000 and 100,000 tons of coal production (Admission No. 14).

I conclude that the respondent is a small operator and that the payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

The respondent admits that the history of compliance as reflected in petitioner's computer print-out for the 2-year period prior to the December 6, 1984, citation is accurate (Admission No. 13).

The computer print-out reflects that the respondent has paid civil penalty assessments in the amount of $1,245 for 32 of the 36 violations at the mine during the period December 6, 1982 through December 5, 1984. Three of these prior assessments are for violations of section 75.200, but I note that two were assessed as "single penalty" violations

for which the respondent paid a total of $40 in penalties. The remaining citation was assessed at $63, and it was paid. I also note that with the exception of the section 104(d)(1) citation which was issued in this case, respondent's history of compliance as reflected in the print-out consists entirely of section 104(a) citations, most of which are "single penalty" $20 violations.

In view of the foregoing, I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty which I have assessed for the violation in question.

Good Faith Compliance

Inspector Coeburn confirmed that he returned to the mine the day after the inspection to ascertain whether abatement had been achieved. He found that the respondent had installed a double row of roof support posts in the affected entries which were driven wide, and that additional permanent roof support was installed in the entries where the bolts were more than 4 feet from the rib. Mr. Coeburn also confirmed that the required reflectors had to be obtained from other areas in the mine, and that they were installed at the locations noted in his citation. He also confirmed that he discussed the roof control requirements with the miners, and he was satisfied that the respondent exercised good faith compliance in abating the violation.

Under the circumstances, I conclude that the respondent abated the cited violation in good faith and that compliance was achieved within the time fixed by the inspector.

Negligence

Inspector Coeburn testified that the roof conditions in question were readily observable and that based on the mining conditions which he observed, he believed the conditions had existed for no less than 2 days. He also believed that the conditions should have been detected by a trained foreman during the preshift and onshift inspections. Under the circumstances, I conclude and find that the respondent knew or should have known of the violative conditions and that its failure to correct the conditions which resulted in the violation constitutes a high degree of negligence on its part. I have taken this into account in the civil penalty assessed for the violation.

Gravity

The testimony of Inspector Coeburn supports a conclusion that the cited roof conditions and wide entries presented a potential roof fall hazard for the miners who would be travelling or working in the areas in question. With regard to the lack of reflectors, Mr. Coeburn's testimony also indicated that miners would more than likely walk by the areas where there were no reflectors, thereby exposing them to a hazard of being under unsupported roof. Under the circumstances, I conclude and find that the violation in question was very serious and I have taken this into account in the civil penalty assessed for the violation.

Significant and Substantial

Inspector Coeburn testified that the excessive wide entries, coupled with the roof conditions which he observed, presented a reasonable likelihood of a roof fall which would have inflicted injuries to the miners working in the affected areas of the mine. Under the circumstances, I conclude and find that Mr. Coeburn's "significant and substantial" finding is fully supported by the record, and IT IS AFFIRMED.

Respondent's Failure to Appear at the Hearing

This case was originally scheduled for hearing in Pikeville, Kentucky, on September 12, 1985. The notice of hearing was issued on July 10, 1985, and was served on the respondent on July 15, 1985. In view of certain outstanding discovery matters, and at the specific request of the parties, the hearing was continued to October 3, 1985, and the hearing site was changed to Big Stone Gap, Virginia. I subsequently determined that Duffield, Virginia, would be a convenient hearing site for the parties, and an amended notice of hearing was issued on September 24, 1985, and was served on respondent's counsel on September 28, 1985.

By letter dated September 3, 1985, mine operator Jerry C. Deel requested that I consider "a settlement of $150 on the matter." He also advised that "it would be further damaging financially for me to have to miss work and come to court on Thursday, September 12, 1985." Copies of the letter was forwarded by me to counsel for the parties on September 10, 1985, and respondent's counsel received it on September 14, 1985. Counsel were advised to inform me of any settlement proposal as required by my original notice of hearing issued

on July 10, 1985. Since no further information was forthcoming from the parties regarding any firm settlement proposal, the matter proceeded to hearing as scheduled.

On the morning of the hearing, Thursday, October 3, 1985, petitioner's counsel advised me that respondent's counsel McAfee informed him that morning that Mr. Deel, the mine operator, could not afford the time to be away from the mine and that he would not appear at the hearing. Petitioner's counsel also advised me that counsel McAfee stated that the respondent was willing to pay the full amount of the civil penalty assessed in this case, but that since Mr. Deel would not appear, he (McAfee) saw no reason for his appearance on behalf of his client. According to petitioner's counsel, Mr. McAfee requested him to inform me that the respondent was willing to pay the assessed penalty. Petitioner's counsel informed me that Inspector Coeburn advised him that mine operator Deel usually works outside the mine and the inspector knew of no reason why Mr. Deel could not be present at the hearing (Tr. 5).

At approximately 9:40 a.m., on Thursday, October 3, 1985, I placed a telephone call to counsel McAfee's office in Norton, Virginia. The person who answered the phone informed me that Mr. McAfee was out of the office and when I inquired as to his whereabouts, she informed me that his schedule indicated that he "had a hearing scheduled for 9:30 a.m." I then requested to speak to Mr. McAfee's secretary. I informed her that I was awaiting Mr. McAfee's appearance at the hearing, and she informed me that he was not in the office and that she would try to locate him at his home. She asked me to hold, and apparently placed a call to his residence. She then informed me that Mr. McAfee was not at home and asked for a telephone number where I could be reached. I advised her that I was at the Ramada Inn in Duffield, Virginia, and informed her that I would convene the hearing and proceed without Mr. McAfee. I also requested her to inform Mr. McAfee of this fact and to also inform him that I intended to default the respondent and would hold Mr. McAfee personally accountable for failing to appear at the hearing or to notify me that he would not appear. His secretary indicated that she would give him the message.

On October 4, 1985 I issued an Order to Show Cause to the respondent's counsel requiring him to show cause as to why the respondent should not be defaulted for its failure to appear at the scheduled hearing, and why counsel for the

respondent should not be referred to the Commission for possible disciplinary action pursuant to Commission Rule 29 C.F.R. 2700.80, because of counsel's failure to appear pursuant to notice and for counsel's failure to advise me that he would not appear.

By letter and enclosure filed with me on October 17, 1985, counsel McAfee filed a response to my show-cause order. In a separate letter dated October 11, 1985, and received by me on October 17, 1985, counsel McAfee requested that I inform him of "what disciplinary rule I have violated in your opinion so that I might further respond to your allegation in the Order to Show Cause."

By letter dated October 17, 1985, I advised counsel McAfee of the basis for my possible disciplinary referral, furnished him with a copy of the Commission's decision in Disciplinary Proceeding Docket D-84-1, a case involving a similar referral by me, 7 FMSHRC 623, and afforded him an additional 10 days within which to respond further if he so desired.

In his initial response filed October 17, 1985, counsel McAfee states as follows at paragraph 3:

> On October 3, 1985, at approximately 7:30 a.m., counsel for Respondent received a telephone call from the Respondent advising him that they would accept the proposed penalties in lieu of lengthy litigation. At that time, counsel for Respondent did not have the file which reflected who the administrative law judge was and only knew that counsel for Petitioner was staying at the Ramada Inn in Duffield, Virginia. Counsel for Respondent attempted to contact counsel for Petitioner and after several attempts, he was located in the dining room of the Ramada Inn. At that time, counsel for Respondent advised counsel for Petitioner of the Respondent's decision to accept the proposed penalties and requested counsel for Petitioner to notify the administrative law judge of that fact. (Emphasis added).

For the reasons which follow, I find counsel McAfee's statement that on October 3, 1985, the very morning of the hearing, he did not know who the presiding judge was to be rather astounding:

1. A second amended notice of hearing issued by me on September 24, 1985, advising the parties of the time and place of the hearing was served on counsel McAfee by certified mail on September 28, 1985 (certified postal return receipt in file).

2. A letter from me dated September 10, 1985, addressed to the parties and enclosing a copy of a letter received from the respondent was served on counsel McAfee by certified mail and it was received on September 14, 1985. (Certified postal return receipt in file).

3. An amended notice of hearing and notice of continuance issued by me to the parties on September 3, 1985, was served on counsel McAfee on September 5, 1985. (Certified postal return receipt in file). That notice made reference to a previous telephone conference with counsel for the parties which took place on August 30, 1985.

4. Counsel McAfee was a party to the telephone conference referred to in paragraph 3 above, and the purpose of that conference was to accomodate counsel. Although the amended hearing notice cited Big Stone Gap, Virginia, as the hearing location, the second amended notice specifically advised counsel that Duffield, Virginia, would be the location of the hearing, and counsel McAfee does not suggest that he was confused.

In paragraph 1 of his response, counsel McAfee makes reference to the telephone conference in question, and he states that it was "with an administrative law judge." At the time of the conference, I assumed that counsel McAfee knew that I was on the other end of the telephone and that he and petitioner's counsel were jointly speaking with me.

5. By letter and enclosure filed with me on August 14, 1985, counsel McAfee filed copies of his responses to the petitioner's request for admissions. Since the letter was addressed to me, I assume that counsel McAfee

knew that this case was assigned to me for adjudication.

Counsel McAfee has failed to respond to my letter of October 17, 1985, affording him an additional 10 days to file a response to my Show Cause Order of October 4, 1985. The postal service return certified mailing receipt reflects that the letter was received on October 19, 1985. I assume that counsel McAfee has opted not to respond further.

In the original notice of hearing served on the parties on July 10, 1985, I specifically advised the parties that any proposed settlement should be filed with me no later than 10 days in advance of the commencement of the hearing. The notice of hearing advised the parties that any settlement proposals filed later than 10 days prior to the hearing would be rejected and that the parties would be expected to appear at the scheduled hearing. Although counsel McAfee's appearance in the case occurred on August 12, 1985, when he filed a response to the petitioner's request for admissions, I assume that the respondent mine operator Jerry Deel furnished counsel McAfee with a copy of the hearing notice. In any event, by letter to counsel for the parties dated September 10, 1985, and served on counsel McAfee on September 14, 1985, he was specifically advised that any settlement proposals were to be filed with me in accordance with the July 10, 1985, hearing notice.

In view of the foregoing, I conclude and find that counsel McAfee has failed to advance any acceptable excuse for his failure to appear at the scheduled hearing. I further conclude and find that counsel McAfee's unilateral decision not to appear amounts to a flagrant disregard of a Commission judge's authority and orders and that such conduct by a member of the bar practicing before the Commission should not be condoned. Accordingly, the matter will be referred to the Commission for consideration of appropriate action pursuant to 29 C.F.R. 2700.80.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and considering the statutory criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $600 is reasonable and appropriate for the violation which has been affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $600 for a violation of mandatory safety standard 30 C.F.R. 75.200, as noted in the section 104(d)(1) Citation No. 2153645, served on the respondent on December 6, 1984. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order.

IT IS FURTHER ORDERED THAT:

> In view of counsel Timothy W. McAfee's failure to appear at the scheduled hearing pursuant to notice duly served on him, the matter is referred to the Commission pursuant to Rule 80, 29 C.F.R. 2700.80. See: Secretary of Labor v. Co-op Mining Company, 1 FMSHRC 971 (July 1979) (Disciplinary Proceeding No. D-79-2); Commission Disciplinary Proceeding No. D-84-1, 7 FMSHRC 623 (May 1985).

George A. Koutras
Administrative Law Judge