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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 CO.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 85-90
A.C. No. 33-00968-03605

Nelms No. 2 Mine

DECISION

Before: Judge Melick

This case is before me on remand by the Commission on December 12, 1985, to "enter the necessary findings as to each of the six statutory penalty criteria supporting" the \$750 penalty assessment for the violation of the regulatory standard at 30 C.F.R. 75.305.(FOOTNOTE.1)

The violation as charged in Order No. 2330535 reads as follows:

The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Youghiogheny & Ohio Coal Company (Y & O) does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged and that the person making such examinations is required to place his initials and the date and time at the place

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examined. Y & O maintains that except for the period between March 13, 1985 and April 9, 1985, proper examinations had been made. It is not disputed however that during an underground inspection of the Nelms No. 2 Mine conducted by MSHA Inspector James Jeffers on April 9, 1985, neither Jeffers nor Y & O Safety Director Don Statler were able to locate any dates, times or initials of mine examiners or any other evidence that any part of the 1,300 feet of the right and left air courses had ever been examined in accordance with the cited standard.(FOOTNOTE.2)

Jeffers and Statler returned to the surface and examined the books in which the examinations of the cited air courses were required to be recorded. Assistant Mine Safety Director Robert Oszust joined in the examination. At that time neither Don Statler nor Robert Oszust was able to show Jeffers any evidence of entries corresponding to inspections of the cited air courses. Indeed Y & O continued to admit as recently as when it filed its Answer in these proceedings on September 12, 1985, that the examinations had not been recorded. At the hearings in this case however, only 13 days later, Statler testified that entries in the record book did exist and that they corresponded to examinations of the air courses on February 6, 1985, February 16, 1985, February 21, 1985, February 27, 1985, March 6, 1985 and March 13, 1985.

The entries are not however so unambiguous as to permit the unquestioned acceptance of this testimony. Moreover the one person who could have clarified this matter and answered the more important question of whether the air courses were actually inspected was not called as a witness by the mine operator and his absence was not explained. This person was Bill Dennis, the fire boss who it is now purported conducted the first five of the examinations. Under the circumstances Statler's testimony in this regard is without a credible foundation.

Within this framework I conclude that, with one exception, the required weekly examinations of the air courses had not been made from February 6, 1985 to April 9, 1985. The one exception is based upon Statler's testimony that he saw substitute Fire Boss Roy Kohler perform an examination of the air courses on March 13, 1985. Statler also admits however that he does not know whether any weekly examinations were performed between March 13 and April 9, 1985, and concedes that there were no entries in the record book corresponding to any examination between those dates.

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According to the undisputed testimony of Inspector Jeffers, the failure to conduct weekly examinations could lead to the accumulation of float coal dust in the cited air courses. Indeed it is undisputed that float coal dust was in fact present throughout at least 500 to 600 feet of the right return air course at the time of this inspection and was admittedly an unsafe condition and a violation of the standard at 30 C.F.R. 75.400.

According to Jeffers areas of the mine containing ignition sources such as electrical equipment including ventilation fans, a battery charger and a rock dusting machine, were vented directly into the air courses. He opined that the accumulations of float coal dust in the air courses could propagate fire or explosions from those areas exposing the seven miners working inby to serious injuries. Jeffers also observed that there had been a prior ignition at this mine of hydrogen gas from one of the battery chargers. Statler testified that he was not aware of such ignition sources but did not contravene Jeffer's testimony in this regard. Under the circumstances I find that the violation herein was quite serious. The hazard was particularly aggravated by the lengthy period during which the examinations had not been performed. Indeed each failure to conduct a weekly examination at each required location could have properly been charged as a separate violation subject to a separate civil penalty.

The violation was also the result of operator negligence. The fact that proper examinations were not being performed should have been obvious from the absence of required notations in the air courses. In addition the existence of admittedly violative amounts of float coal dust over 500 to 600 feet of the right return air course in an area frequented by supervisory personnel should have led to the discovery of this violation. Indeed Safety Director Statler conceded that a section foreman should have discovered the float coal dust in the air course and was "surprised" that it had not been found.

In addition since both the Mine Safety Director and his assistant were apparently unable to determine (until the Safety Director testified at hearing) from the ambiguous entries in the record book that proper examinations of the air courses were being made it is apparent that at the very least the entries were not adequate to clearly show to management that the examinations were in fact being made. For this additional reason the mine operator should have been alerted to the problem and seen to it that the examinations were being made and were clearly recorded as having been made. The admitted absence of any entries in the record book for the period subsequent to March 13, 1985, should also have

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been known to management in light of the requirement for supervisors to countersign those entries.

In assessing the penalty in the decision below I also considered the undisputed evidence concerning the remaining 4 criteria. It was stipulated that the mine operator was of "moderate" size and that the proposed penalties would have no affect on its ability to continue in business (Tr. 5). The undisputed history report of violations (Ex. G-11) shows that overall the operator had a record preceding the date of the order at bar of 3,592 paid violations including 12 paid violations of the regulatory standard at issue. For the 2 years preceding the order at bar there were 515 paid violations including 4 paid violations of the standard at issue. This is not a good record.

I also gave credit in assessing a \$750 penalty for the operators demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. The order in this case indicates on its face that both the left and right return air courses were subsequently examined by a representative of the mine operator and the results were recorded in the approved book.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 The penalty criteria are as follows:

"The operator's history of previous violations, the appropriateness of such penalty to the size of business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. 820(i).

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2 Statler testified that he found one notation pad on the outby side of the A Entry return regulator but there is no indication that there were any entries on that pad.