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SOL (MSHA) V. PYRO MINING
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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.

PYRO MINING COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 85-181
A.C. No. 15-13881-03568

Pyro No. 9 Slope
William Station

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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 civil penalty assessments against the respondent for three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Evansville, Indiana, on December 3, 1985. The parties waived the filing of posthearing briefs. However, I have considered the oral arguments made by the parties during the hearing in the adjudication of this case.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, and

(2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty 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. 95Ä164, 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 at all times relevant to this case, the overall coal production for the respondent's operating company was 5,020,840 tons, and that the production for the Pyro No. 9 William Station Mine was 2,041,542 tons.

The parties stipulated that the payment of the assessed civil penalties will not adversely affect the respondent's ability to continue in business. They also stipulated that the violations were abated in good faith (Tr. 26).

Procedural Ruling

During the course of the hearing in this case, the parties raised the question of the validity of the section 104(d)(2) unwarrantable failure order issued by the inspector. In a bench ruling, I held that the "unwarrantable failure" issue in connection with the order is not an issue in a civil penalty case. I also ruled that the validity of the underlying order is irrelevant, and I advised the parties that the issue here is whether or not a violation of mandatory safety standard 30 C.F.R. 75.316 occurred, and if so, the appropriate civil penalty whic should be assessed taking into account the civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 25C8809, issued on May 16, 1985, cites a violation of 30 C.F.R. 75.316, and the condition or practice is stated as follows:

> The approved ventilation, methane and dust control plan (approved 2/28/85 see page 1 paragraph A) was not being followed on the

No. 5 unit, I.D. 005 because permanent stoppings were not installed up to the loading point (tailpiece of the belt) on the intake side. The permanent stoppings terminated two crosscuts outby the loading point.

Section 104(a) "S & S" Citation No. 2508577, issued on June 3, 1985, cites a violation of 30 C.F.R.   75.400, and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit Sec. ID 003 in that an accumulation of loose coal approximately 4 feet wide, 14 feet long and 18 inches in depth was present on the north side of the ratio feeder. The accumulation of loose coal was on a trailing cable of one of the joy shuttle cars.

Section 104(a) "S & S" Citation No. 2508574, issued on May 23, 1985, cites a violation of 30 C.F.R.   75.400, and the condition or practice is stated as follows:

> A violation was observed on the No. 3 unit ID No. 003 in that an accumulation of loose coal approximately 3 to 8 inches in depth, 10 feet wide, and 30 feet long was present in front of the ratio feeder in the belt entry of this unit. Loose coal also had accumulated around side of feeder on and around the main contact switch panels.

Petitioner's Testimony

MSHA Inspector James Franks testified that he conducted a section 103(i) spot inspection of the mine on May 16, 1985, and confirmed that he issued section 104(d)(2) Order No. 2508809 because of a violation of the respondent's ventilation and methane and dust-control plan. The mine was on a "spot inspection" status because it liberates in excess of 200,000 cubic feet of methane in a 24Ähour period. He identified exhibit PÄ9 as the applicable plan in question and confirmed that the respondent failed to install permanent stoppings up to the loading points between the intake aircourse and beltline as required by Paragraph A, pg. 1 of the plan. Two crosscuts had been developed and no stoppings were installed as required by the plan.

Mr. Franks identified exhibit JÄ1, as a sketch of the area where the violation occurred. The sketch was made from

notes that he took during the inspection, and he identified the two stoppings or brattices which were not installed as required by the plan. He indicated that the stoppings were required to be constructed with concrete blocks and mortar up to the loading point in order to provide a smoke-free intake escapeway for the use of miners in the event of an emergency such as a mine fire. The failure to provide the required stoppings increased the chances of a fire spreading. One of the crosscuts had no curtain across it, and it was possible that the other one did. The stoppings are also required to isolate the belt in the event of a fire, and to insure adequate ventilation and air control on the beltline (Tr. 135Ä143).

Mr. Franks stated that coal was being mined at the time of his inspection, and that four entries were being driven to develop a longwall. He observed no stopping materials or work being performed to erect the stoppings in question, and he discussed the matter with the face boss and with respondent's safety manager Tom Hughes. They informed him that they intended to install the stoppings, but Mr. Franks saw no evidence of any work being done to accomplish this (Tr. 145).

Mr. Franks explained the reasons for issuing a section 104(d)(2) order, and while he believed that the respondent was going to install the stoppings, he saw no evidence of any materials in the area and saw no work taking place which would indicate when this would be done. His impression was that the respondent wanted to run coal and build the stoppings when they got around to doing it. Under the circumstances, he believed that there was a high degree of negligence and that is why he issued the order (Tr. 147).

Mr. Franks confirmed that he did not consider the violation to be "significant and substantial" because the ventilation was good and he found no dangerous amounts of methane present at the faces. He did not believe that the circumstances presented indicated a reasonable likelihood of an accident (Tr. 147).

Mr. Franks stated that coal production ceased at 2:00 a.m. on May 16, 1985, but would have continued again at 7:00 a.m. Five people were on the unit for the purpose of installing a beltline and the stoppings, and he estimated that it would take 45 minutes to an hour to install a stopping at one crosscut, assuming the materials were at the location (Tr. 149).

On cross-examination, Mr. Franks confirmed that he found an adequate supply of air and no dangerous amounts of methane on the unit. He confirmed that five men were used to install the beltline between 2:00 a.m. and 7:00 a.m. on May 16, and while he agreed that it may not have been practical to put the stoppings in before the beltline was installed, he believed that it could have been done. He confirmed that other mines install stoppings before a beltline is completed, but conceded that the respondent's longwall system presents some problems in this regard, particularly when shuttle cars are used (Tr. 154).

Although Mr. Franks could not recall the presence of an air lock by the beltline, he conceded that one could have been present. The purpose of the air lock is to control the air current and to keep the air from going away from the faces and down the beltline. Mr. Franks confirmed that the two required stoppings were installed and abatement was achieved within an hour of the issuance of the violation (Tr. 157). Although he could not recall a scoop at the end of the track with cement blocks on it when he first arrived at the scene, he conceded that it was possibly present and that his delay in arriving at the scene of the violation could have been caused by the fact that the travelway was blocked by the scoop and blocks. He did not know how long it took to bring the blocks to the stopping areas, and he could not recall seeing anyone working in one of the breaks before he issued the order (Tr. 157Ä160).

Mr. Franks confirmed that he marked the gravity section of the order "unlikely" and did not consider the violation to be "significant and substantial" (Tr. 163Ä164).

In response to further questions, Mr. Franks confirmed that coal was being loaded on the beltline, and that a continuous miner and possibly three shuttle cars were being used during the time he was at the scene. He expressed surprise that production was not halted in order to construct the stoppings. He did not consider the use of temporary brattice curtains to be dangerous (Tr. 170). Petitioner's counsel confirmed that an air lock was in fact installed as shown on the sketch and that Inspector Franks was simply unclear as to this (Tr. 172).

Respondent's Testimony

Thomas E. Hughes, respondent's safety manager, testified that he was familiar with the cited conditions and he confirmed that the beltline had been installed on the morning of

May 16. He confirmed that he travelled with Inspector Franks, and when they arrived at the end of the track of the number five unit, the third shift was leaving, and a supply trip and a scoop added to the congestion in the area. He and the inspector were held up because of this congestion. Mr. Hughes confirmed that the unit was running and that Mr. Franks was concerned that it was running with two open stoppings. The unit was then shut down. Although he recalled some blocks in one of the "open holes" on the unit, he could not recall that any brattice men were on the unit. However, preparations were being made to construct the stoppings (Tr. 176), and the brattice men would be assigned to do this work (Tr. 177).

On cross-examination, Mr. Hughes confirmed that he was not present when the beltline was installed, and he explained that someone could have told him that it was installed the evening before, or he may have read that in a report (Tr. 178Ä179).

Findings and Conclusions

Fact of Violation-Order No. 2508809

The respondent does not dispute the fact of violation in this case (Tr. 183Ä184). In mitigation of the violation, respondent's representative argued that the respondent intended to install the stoppings regardless of the presence of the inspector on the scene (Tr. 184). In support of this argument, respondent asserted that the blocks for the construction of the stoppings were either stored on the unit or about to be transported to the stopping areas while the inspector was at the scene (Tr. 165Ä166). Respondent candidly admitted that it contested the violation in order to mitigate the proposed $1,000 penalty assessment levied by MSHA for the violation (Tr. 164).

The unrebutted testimony of Inspector Franks clearly establishes that the required permanent stoppings were not installed up to the loading point or tailpiece of the beltline on the intake side of the unit in question. The respondent's approved ventilation and methane and dust-control plan required that permanent stoppings be installed at that location, and the failure by the respondent to follow its plan constitutes a violation of mandatory safety standard 30 C.F.R.   75.316 as charged in the order issued by the inspector. Accordingly, the violation IS AFFIRMED.

Section 104(a) Citation Nos. 2508577 and 2508574

During the course of the hearing, the respondent stated that it no longer wished to contest the coal accumulations violations and admitted that they occurred as stated by the inspector in the citations. Respondent requested that it be permitted to pay the full amounts of the proposed civil penalty assessments made by MSHA for the violations, and petitioner's counsel agreed to this proposed disposition (Tr. 7Ä8).

The respondent agreed to the negligence and gravity findings made by the inspector at the time the citations were issued, and I took note of the fact that the cited coal accumulations were cleaned up and abated within 30 minutes of the issuance of the citations.

I considered this matter as a joint settlement proposal pursuant to Commission Rule 30, 29 C.F.R.   2700.30, and after consideration of the six statutory criteria found in section 110(i) of the Act, the settlement was approved from the bench, and it is herein reaffirmed.

History of Prior Violations

Exhibit PÄ2 is a computer print-out summarizing the respondent's compliance record for the period June 4, 1983 through June 3, 1985. That record reflects that the respondent paid civil penalty assessments totaling $93,693 for 918 violations. Eighty-three of these prior violations were for violation of mandatory safety section 75.316, and 187 are for violations of section 75.400.

Taking into account the size of this respondent, I do not consider its history of compliance to be a good one, and I believe that the respondent needs to pay closer attention to its coal accumulations cleanup procedures and the requirements of its ventilation and methane and dust-control plans. I have considered the respondent's compliance record in assessing the civil penalties in this case.

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

The parties have stipulated to the size and scope of the respondent's mining operations and they agreed that the payment of civil penalties will not adversely affect the respondent's ability to continue in business. I adopt these stipulations as my findings on these issues.

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations in this case were corrected in good faith by the respondent within the time fixed by the inspectors. The stopping violation was abated within an hour of its issuance, and as previously noted, the coal accumulations violations were abated within 30 minutes of the issuance of the citations. I conclude that the respondent exercised rapid good faith abatement of the violations.

Negligence

With regard to the stopping violation, Inspector Franks believed that the respondent exhibited a high degree of negligence in failing to construct them before the unit was placed in operation. In mitigation of its negligence, the respondent argued that it fully intended to construct the stoppings and had the materials available. Although this may be true, the inspector believed that the available manpower on the unit was insufficient for such a project, and he saw no evidence of any actual work in progress to construct the stoppings. However, he conceded that constructing the stoppings on an operating longwall section presented some practical problems, and he believed the respondent's contention that it fully intended to construct the stoppings. The inspector's view is that the stoppings should have been constructed when the section ceased operating on the shift prior to his arrival on the scene, and I am convinced that the inspector's arrival prompted the immediate movement of materials necessary for the construction of the stoppings. I conclude that at the time the violation was discovered, the respondent had made preparations for the construction of the stoppings, and that the arrival of the inspector simply speeded up the process. Once the work began, the stoppings were completed within an hour.

I have considered the respondent's preparatory efforts in constructing the stoppings, including the presence of materials for this work on the unit, as factors mitigating the civil penalty assessed for the violation. However, I conclude and find that the respondent knew or should have known of the stopping requirements of its own ventilation plan, and that its failure to construct the required stopping before the inspector found the violative condition is the result of its failure to exercise reasonable care.

Gravity

I conclude and find that the failure by the respondent to construct the required stoppings in question constitutes a serious violation. While it is true that the inspector did not consider the violation to be "significant and substantial," found no dangerous amounts of methane, and that adequate air and an air lock were present on the unit, the stoppings were required to maintain a smoke-free escapeway in the event of a fire and to insure the adequate control of air ventilation on the beltline.

Civil Penalty Assessments

The respondent has agreed to pay the full $168 assessment for Citation No. 2508574, May 23, 1985, 30 C.F.R. 75.400, and the full $168 assessment for Citation No. 2508577, June 3, 1985, 30 C.F.R. 75.400.

On the basis of the foregoing findings and conclusions with respect to Order No. 2508809, May 16, 1985, 30 C.F.R. 75.316, respondent is assessed a civil penalty in the amount of $900.

ORDER

The respondent IS ORDERED to pay the civil penalties in the amounts indicated above within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge