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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	CIVIL PENALTY PROCEEDING Docket No. KENT 85-187 A.C. No. 15-13881-03570
v.	Pyro No. 9 Slope William Station
PYRO MINING COMPANY, RESPONDENT	

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 two alleged violations of certain mandatory safety standards 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 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 within the time allotted (Tr. 26).

Procedural Ruling

The subject of this civil penalty proceeding is a section 104(d)(2) "unwarrantable failure" order issued by Inspector Stanley on May 21, 1985. The petitioner seeks a civil penalty assessment for a violation of mandatory safety standard 30 C.F.R. 75.316, as stated on the face of the order. In support of hi order, Inspector Stanley made reference to a previously issued section 104(d)(1) Order No. 2508757, issued at the mine on May 9, 1985 (Exhibit PÄ10).

The parties stipulated that there was no intervening "clean inspection" of the mine during the period May 9, 1985, the date of the underlying order, and May 21, 1985, the date the order in this case was issued.

Petitioner's counsel asserted that since the underlying order of May 9, 1985, has been contested by the respondent, he was unclear as to whether or not the validity of that order had to be first established in order to support the order issued by Inspector Stanley on May 21, 1985.

In a ruling made from the bench, I advised the parties that the "unwarrantable failure" aspect of the order which is

the subject of this civil penalty case is not in issue in this proceeding. I ruled that the validity of the order is not an issue to be determined in a civil penalty case, and that the validity of the preceding underlying order is irrelevant. The parties were advised that the issue here is whether or not a violation of mandatory standard section 75.316, has been established, and if so, the appropriate civil penalty which should be assessed for that violation, considering the civil penalty criteria found in section 110(i) of the Act.

Discussion

Section 104(d)(2) Order No. 2507449, issued on May 21, 1985, cites a violation of 30 C.F.R. 75.316, and the condition or practice is stated as follows:

> The ventilation and methane and dust control plan was not being followed in the working section in south entries off 2 east off 2 north of main east (ID 0030) in that permanent-type stoppings were not erected up to and including the third connecting crosscut outby the faces between the intake and return as required. There were 3 open crosscuts which had no permanent stopping in them and the faces were driven far enough through the crosscuts.

Section 104(d)(2) Order No. 2507452, issued on May 20, 1985, cites a violation of 30 C.F.R. 75.400, and the condition or practice is stated as follows:

> Loose coal was permitted to accumulate on the floor of the Nos. 1 through 5 entry in the working section in east entries off 4 north (ID 002Ä0). The coal was from rib to rib and 8 to 14 inches deep. The accumulation was from the faces outby for 50 to 60 feet. In the feeder entry the coal was accumulated from the face to the feeder (120 feet).

Petitioner's Testimony

MSHA Inspector Louis W. Stanley testified as to his background and experience, and he confirmed that he inspected the mine on May 16, 1985, and issued the order in question. He stated that he inspected the return side of the number three unit and found that permanent type stoppings had not been erected up to and including the third connecting crosscut

outby the faces. He identified exhibit PÄ9 as the applicable ventilation and methane and dust-control plan, and exhibit PÄ17 as a sketch of the area where the violation occurred. He testified that he found a line curtain installed where the permanent stopping should have been erected, and he confirmed that he discussed the violation with Mr. Doug Harris, the respondent's safety representative who was with him during the inspection (Tr. 192Ä197).

Mr. Stanley testified that the section foreman admitted that he was aware of the fact that the required stoppings had not been installed and advised him that men had been assigned to obtain material to build the stoppings. Mr. Stanley saw no evidence of any construction taking place, and there were four or five men on the section. The section was a conventional mining section, and coal was drilled, shot, and then loaded out. When Mr. Stanley arrived on the section, the power was on all of the equipment, and a loading machine and coal drill were at the face, and a cutting machine was outby. Although someone advised him that no work had been done that morning, the section foreman admitted that coal had been shot at one place in the number four entry. Mr. Stanley stated that he found 2.4 percent methane in the number four entry and issued a section 107(a) imminent danger order because of the methane. The methane was cleared up after a curtain was hung across the last open break through and into the number four entry (Tr. 200).

Mr. Stanley stated that he issued the unwarrantable failure order because of the admission by the section foreman that an entire shift had been worked without installing the required permanent stoppings. He confirmed this by noting that the face had been advanced past the third crosscut and coal had been removed from these areas inby the last open crosscut (Tr. 201). The reason for requiring the stoppings is to insure positive air ventilation at the faces, and to prevent curtains being torn down, thereby short circuiting the air. Failure to maintain proper ventilation will allow methane and coal dust to accumulate, thereby presenting a hazard of an ignition or explosion (Tr. 201Ä203).

Mr. Stanley confirmed that he did not consider the violation to be "significant and substantial" because his air readings indicated a sufficient quantity of air present in the area and he did not believe that an accident was likely (Tr. 203). He confirmed that coal had been mined on the previous shift and he did so by checking the onshift mine records (Tr. 205). The required stoppings were erected within 35 minutes of the issuance of the violation (Tr. 205).

On cross-examination, Mr. Stanley testified to the air readings which he took, and he confirmed that the unit was not "running" when he first arrived. He confirmed that coal had been mined during the previous shift and that the mine foreman admitted that had he not appeared on the scene coal would have continued to be mined and the stoppings would have been constructed on the intake. Mr. Stanley also determined that coal had been extracted from the last open crosscut inby for a distance of 50 to 60 feet, and he confirmed that 2.4 percent methane is not within an explosive range (Tr. 209Ä211). He confirmed that only one required stopping had not been constructed, and he identified the location by placing an "X" on his sketch (exhibit PÄ17) (Tr. 213).

Mr. Stanley identified a previous citation he issued at the mine on March 5, 1985, citing a violation of section 75.316, for a missing brattice and he explained why he considered that one to be "S & S," and the one in issue in this case to be unwarrantable (Tr. 213Ä215).

Respondent's Testimony

David Winebarger, respondent's Director of Support, identified exhibit RÄ2 as a sketch of the operating unit as it appeared on the day the violation was issued. He stated that the belt was installed that same morning, and confirmed that the line brattices shown on the sketch were required to be installed on the return when there are three open breaks. He also confirmed that there were no permanent brattices on the intake up to the loading point, and that five or seven brattices had to be installed that day. He stated that no coal had been loaded up to the time Inspector Stanley arrived on the scene, but that power was on the equipment, and adequate air was present across the last open crosscut. The belt was running in order to load out coal which needed to be cleaned up. He indicated that he ordered the crew not to run coal until the brattices were installed, and also instructed them to build seven brattices (Tr. 217Ä224).

On cross-examination, Mr. Winebarger stated that Inspector Stanley arrived on the unit after he (Winebarger) had been there and that he informed Mr. Stanley that coal was not being run and that he intended to install the brattices. Mr. Winebarger testified as to the activities taking place both before and after Mr. Stanley's arrival (Tr. 224Ä229).

Findings and Conclusions

Fact of Violation - Order No. 2507449

Respondent's representative conceded that the ventilation plan required the installation of a permanent stopping at the location noted by Inspector Stanley, and that the failure to install the stopping in question constituted a violation of the plan. However, he took the position that as long as coal is not being mined, there is no requirement for the stoppings. He argued that since no coal had been mined immediately prior to the arrival of Inspector Stanley, the respondent was not required to construct the stoppings. He also argued that construction of the stopping could not take place while coal was being mined because this would violate the plan, but he conceded that the stopping was required to be constructed before the start of any coal production (Tr. 231Ä232).

When asked to explan his position that a stopping is not required unless coal is being produced, respondent's representative referred to Paragraph A, pg. 1 of the plan (Tr. 232). The plan provision in question, exhibit PÄ9, provides as follows: "Permanent stoppings shall be maintained up to and including the third crosscut outby the face on the return side and up to the loading point on the intake side."

Mr. Winebarger was asked to point out the plan provision that provided for the construction of stoppings only when coal was being mined, and he responded "I don't know" (Tr. 237). Mr. Winebarger stated that coal was last produced on the unit on the 4:00 p.m. to 12:00 shift on May 20, 1985, the day before the citation was issued, and on the midnight shift of May 21, 1985 (Tr. 234). Although the morning shift from 7:00 a.m. to 5:00 p.m. on May 21, was a production shift, Mr. Winebarger insisted that no coal was produced, but he confirmed that at 8:50 a.m., work was being performed on the unit, including the cleaning up and loading out of coal by means of the belt, a loader, and shuttle cars (Tr. 235Ä236).

Respondent's representative stated that three crosscuts were mined several days prior to the issuance of the violation, and that the last one was opened up during the second night shift prior to the inspector's arrival on the scene. He conceded that the opening of these crosscuts constituted the mining of coal (Tr. 238), but believed that the stopping was required to be constructed when the crosscut is cleaned up and travelable (Tr. 239).

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Respondent's representative conceded that the third crosscut had been completely mined through at the time the inspector arrived on the scene. He argued that in the normal course of business the required stopping would have been constructed before further coal production took place and that this indicates good faith on the respondent's part (Tr. 243, 253). In response to questions from the bench, respondent's representative stated further as follows (Tr. 256Ä257):

> BY THE COURT: %y(2)27 At the time the inspector arrived on the scene, it was clear to him that the third crosscut outby the face, there was no permanent stopping there, is that correct.
>
> MR. HILL: That's correct.
>
> BY THE COURT: Technically, that was a violation or realistically that was a violation in his eyes correct.
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> MR. HILL: Correct.
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> BY THE COURT: You agree with that.
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> MR. HILL: That's correct, he wrote it.
>
> BY THE COURT: Given those facts, it was a violation, wasn't it.
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> MR. HILL: That's correct.
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> BY THE COURT: You were three crosscuts out by the face and no permanent stopping had been erected.
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> MR. HILL: Correct.
>
> BY THE COURT: That violates the ventilation plan, doesn't it.
>
> MR. HILL: That's correct.

Petitioner's counsel took the postion that when the third crosscut was mined through, it became a crosscut, and that at that point in time the third stopping was required to be constructed. Since it was not constructed when the inspector viewed it, a violation has been established and the fact that coal was not being produced at that precise moment is irrelevant Tr. 240Ä242).

Inspector Stanley was recalled and he confirmed that the last open crosscut outby the face was completely opened and travelable at the time he issued the violation. Had it not been opened, but simply cut into, he would not have issued the violation. He confirmed that once he determined that the last open crosscut was completed, he then determined the location of the third crosscut outby the face where the stopping was required, and when he found that it was not constructed as required by the plan, he issued the violation. Mr. Stanley stated that the fact that coal was not being mined is irrelevant, and he believed that the respondent raised this issue only to support its contention that it intended to construct the stopping in question (Tr. 264Ä265). In his opinion, had the respondent intended to construct the stopping, the required materials would have been present and it would have been constructed when the crosscut was opened up. Instead, the respondent ran the previous production shift for four or five cuts of coal without the stopping being constructed in violation of the plan during the previous shift (Tr. 266Ä267).

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 failure by the respondent to construct the stoppings in question constituted a violation of the requirements of its approved ventilation and methane and dust-control plan. It is clear that the stopping up to and including the third connecting crosscut outby the faces between the intake and return was not constructed as required by the plan, and the respondent conceded that this was the case. A violation of the requirements of the plan constitutes a violation of mandatory safety standard 30 C.F.R. 75.316 as charged in the order issued by Inspector Stanley.

I find nothing in the plan to support the respondent's contention that the active mining of coal has to be taking place before the stopping requirements come into play, and this defense is REJECTED. The evidence establishes that at the time the inspector arrived at the scene, coal had been produced on the immediate preceding shift, the critical crosscut had been completely mined through and developed, and work was taking place on the unit when the inspector viewed the violative conditions, including the loading out of coal on the belt and with the use of shuttle cars and a loader. At that point in time, the plan required the stopping in question to be completed and in place. Under all of these circumstances, the violation IS AFFIRMED.

Order No. 2507452

With regard to Order No. 2507452, respondent's representative stated that the respondent does not contest the violation and admits that it occurred as alleged by the inspector (Tr. 8). Respondent requested that it be permitted to pay the full amount of the proposed civil penalty assessment made by MSHA for the violation, and the petitioner's counsel agreed to this proposed disposition. The respondent agreed to the negligence and gravity findings made by the inspector at the time the order was issued. Under the circumstances, I considered the 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 assessment totalling $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. In addition, exhibit PÄ1, which is a computer print-out of the respondent's compliance record for the period January 1, 1983 through January 6, 1985, reflects six additional violations which occurred within 2 years of the violations issued in this case, two of which are for violations of section 75.316, and one for a violation of section 75.400.

Taking into account the size of this respondent, I do not consider the respondent's history of compliance to be a particularly 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 taken the respondent's compliance record into account in the civil penalty assessments made for the violations in question.

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

The parties have stipulated as to the scope of the respondent's mining operations and agreed that the payment of civil penalties will not adversely affect the respondent's

ability to continue in business. I adopt these agreements 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. I agree and conclude that the respondent exercized good faith in abating the violations.

Negligence

With regard to Order No. 2507449, 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

With regard to Order No. 2507449, I conclude and find that the failure of the respondent to construct the stopping in question was a serious violation. Although the inspector found an adequate supply of air on the unit, the failure to install the stopping presented the possibility of improper ventilation in the unit, thereby contributing to a possible ignition or explosion hazard.

Penalty Assessments

Respondent has agreed to pay the full $1,000 assessment for Order No. 2507452, issued on May 30, 1985, for a violation of 30 C.F.R. 75.400.

On the basis of the foregoing findings and conclusions with respect to Order No. 2507449, issued on May 21, 1985, for a violation of 30 C.F.R. 75.316, respondent is assessed a civil penalty in the amount of $975.

ORDER

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

of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge