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SOL (MSHA) V. YOUGHIOGHENY AND OIL COAL
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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. LAKE 85-63
A.C. No. 33-00968-03591

v.

Nelms No. 2 Mine

YOUGHIOGHENY AND OHIO COAL
COMPANY,
RESPONDENT

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
Petitioner; Robert C. Kota, Esq., St. Clairs-
ville, Ohio, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for one alleged violation
of a mandatory safety standard, that contained in 30 C.F.R.

75.400. Respondent concedes that a violation occurred. I
contests the classification of the violation as significant and
substantial, and contends that the civil penalty proposed is
inappropriately high. Pursuant to notice, the case was heard in
Wheeling, West Virginia, on November 14, 1985. Carl Minear
testified on behalf of Petitioner; Donald Statler testified on
behalf of Respondent. The parties waived the filing of post
hearing briefs, but each argued its position on the record
after the evidence was introduced. I have considered the
entire record and the contentions of the parties, and make the
following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding Respondent was
the operator of an underground coal mine in Harrison County, Ohio,
known as the Nelms No. 2 Mine.

2. Respondent is of moderate size. It produces approximately
550,000 tons of coal annually.

3. In the 24 months prior to the violation involved in this proceeding, Respondent had 79 paid violations of 30 C.F.R. 75.400, the standard involved in this proceeding.

4. The imposition of a penalty in this proceeding will not affect Respondent's ability to continue in business.

5. The area covered by the order charging the violation involved herein was regularly examined by a union fireboss. Reports of such examinations on September 22, October 1, October 4, October 8, October 11, and October 15, 1984 did not refer to any accumulations of loose coal and coal dust. A report of an examination on October 18, 1984 states that "entries between 3 South seals and shaft and Main West seals and 3 South because of the top and ribs peeling they look like they were never rockdusted but were substantially dusted at one time. My opinion it would be a waste of labor and material since a real hazard does not exist." The report of examination on October 19, 1984 states: "Part of entry to the top and ribs peeled and covered all rockdust. I believe no hazard exists here. And I'm assuming this is the belief of all other inspectors, escorts, firebosses and safety personnel who have travelled this entry, since no citation needing rockdusted." The report of examination on October 22, 1984 does not refer to accumulations or need for rockdust.

6. MSHA inspectors inspected the area in question on 20 occasions between June 1978 and September, 1984. No citations or orders were issued charging an accumulation of loose coal, coal dust or other combustible materials.

7. On October 24, 1984, Federal Mine Inspector Carl Minear found loose coal and coal dust, 6 to 36 inches deep and 16 feet wide on the mine floor in entries 9, 10, 11 and 12 and the connecting crosscuts for a distance of 2200 feet, and the 4 Main West return entries between the return air shaft and 3 South seals, a distance of about 3000 feet. These accumulations resulted from coal sloughage and were black in color, indicating that rock dust had not been applied. Float coal dust was not present. The inspector issued a 104(d)(1) order of withdrawal charging a violation of 30 C.F.R. 75.400.

8. The subject mine liberates in excess of one million cubic feet of methane in a 24 hour period. The area involved in the order including the seals (which seal off abandoned portions of the mine) is particularly apt to liberate methane. However, there was a double set of seals here, giving added protection against methane. At the time the order was issued

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methane readings varied from 1.1 percent to 1.5 percent. No methane readings in the 5 to 15 percent range have ever been detected in the area in question.

9. The Inspector testified that the area in question looked as though it had never been rockdusted or that it had not been rockdusted in many years. In fact, company records indicate that it was rockdusted a total of eight times in 1981, 1982 and 1983. The coal sloughage was such that it covered the rock dust completely. At some time prior to the order, walkways had been made through the areas in question by shovelling the sloughage over against the ribs.

10. The area in question was approximately 5000 feet from the active sections in the mine. It was approximately 200 feet from the track entry.

11. Normally no miners travel the area except the fireboss. No machinery or equipment enters the area with the exception of the tools (including possibly a flame safety lamp) carried by the fireboss.

12. The order was terminated by rockdusting the area involved.

ISSUES

1. Whether the violation was properly designated significant and substantial?

2. What is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Respondent was subject to the provisions of the Mine Act in the operation of its Nelms No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The violation of 30 C.F.R. 75.400 charged in the order of withdrawal issued October 24, 1984 did in fact occur.

3. The violation found was properly designated significant and substantial. The hazard involved here is a mine fire, which could result from an ignition caused by a nonpermissible flame safety lamp in the presence of methane. The violation contributed to the hazard because of (1) the substantial amount of combustible materials and the large area involved, and (2) the gassy nature of the mine and especially the seals area. Should an ignition occur, a fire would be

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likely because of the accumulations, and there is a reasonable likelihood that it would result in serious injury to miners. See Mathies Coal Co., 6 FMSHRC 1 (1984).

4. The violation was serious for the reasons set out above.

5. Petitioner contends that the violation resulted from Respondent's negligence since it knew that the accumulations had existed for a long period of time. However, I conclude that its negligence was greatly diminished because MSHA inspectors had traveled the area and observed the accumulations for many years without issuing citations. I conclude the Respondent's negligence was minimal.

6. Respondent has a substantial history of previous violations of the standard in question. This is particularly significant in a gassy mine.

7. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is \$500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision, the sum of \$500 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge