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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

YOUGHIOGHENY AND OHIO COAL COMPANY, CONTESTANT v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	CONTEST PROCEEDING Docket No. LAKE 85-76-R Order No. 2330257; 4/25/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. YOUGHIOGHENY AND OHIO COAL COMPANY, RESPONDENT	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 85-37 A.C. No. 33-00968-03582 Docket No. LAKE 85-93 A.C. No. 33-00968-03609 Nelms No. 2 Mine

DECISION

Appearances: Robert Kota, Esq., St. Clairsville, Ohio,
for Contestant/Respondent;
Patrick M. Zohn, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio,
for Respondent/Petitioner.

Before: Judge Maurer

These consolidated cases are before me pursuant to section 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act). Docket No. LAKE 85Ä37 is a civil penalty proceeding filed by the petitioner against the respondent seeking a civil penalty assessment in the amount of $500 for an alleged violation of 30 C.F.R. 75.403 as noted in section 104(d)(1) Citation No. 2331148. The primary issues before me in this case are whether Youghiogheny and Ohio Coal Company (Y & O) violated the regulatory standard at 30 C.F.R. 75.403 and, if so, a determination must be made as to the appropriate civil penalty to be assessed for that violation considering the criteria under section 110(i) of the Act. Docket No. LAKE 85Ä76ÄR and LAKE 85Ä93 are before me to contest an order of

withdrawal issued to Y & O pursuant to section 104(b) of the Act (Order No. 2230257) and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA) for that order and the section 104(a) citation underlying that order (Citation No. 2330248). In these cases MSHA seeks a civil penalty of $305 for alleged violation of 30 C.F.R. 71.100. In the notice of contest case, the issues are whether a valid order was issued and whether it should be sustained, vacated, or modified. In the civil penalty case, the issues are whether a violation occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

An evidentiary hearing was held in Wheeling, West Virginia, on October 24, 1985. The parties filed post hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

STIPULATIONS

The parties stipulated to the following (Tr. 10):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. The Y & O Coal Company is a moderate-sized operator.

3. The Y & O Coal Company is an operator as defined by 3(d) of the 1977 Mine Act.

4. The Nelms No. 2 Mine of the Y & O Coal Company is a mine as defined by 3(h) of the 1977 Mine Act.

5. The amount of penalty assessed would not impair the operator's ability to continue in business.

I. Docket No. LAKE 85Ä37 (Citation 2331148)

This citation was issued by MSHA Inspector Frank J. Kolat on September 5, 1984, and alleges as follows:

> The floor, roof and ribs in the crosscut between E to D entry were inadequately rock dusted in the #7 Seam Mains left side (015Ä0) working section. Starting at 15 + 47 crosscut between E to D entry for a distance of 45 feet, also D entry the floor starting at 15 + 04 and extending inby for a distance of 66 feet. These areas were more than 40

feet outby the faces. Three (3) samples were collected to substantiate this citation. Butch Dyer was the section foreman that mined coal on this section on midnight shift. Ralph Dutton was the section foreman today on dayshift, and Bill Wright was the unit manager in charge.

Inspector Kolat testified at the hearing that on September 5, 1984, he, accompanied by Mr. Andy Jacubic from Y & O's safety staff and Mr. Larry Ward from the union safety committee entered the Nelms No. 2 Mine and proceeded to an area of the mine known as the No. 7 Seam, 3 section left side No. 015. This was an active working section. They arrived on the section at approximately 9:15 a.m. Kolat inspected six entries in this section-AÄ1, A, B, C, D and E. While inspecting D entry he found the floor was black for a distance of 109 feet from the face. Additionally, he found the floor, roof, and ribs were black for approximately 45 feet in the crosscut between D to E. However, as respondent points out, the inspector was less than convincing during his cross-examination as to whether the area needing rockdusting in D entry was 109 feet, 66 feet, or 86 feet, or somewhere in between. The preponderance of evidence on this point indicates to me that the petitioner has borne his burden of proof to the extent that 86 feet plus some unspecified distance beyond in D entry needed rockdusting to be in compliance with 30 C.F.R. 75.403 (FOOTNOTE 1) and I so find. I note that the respondent does not contest the fact that there was a violation of 30 C.F.R. 75.403, but maintains that only 66 feet needed rockdusting and of that only 6 feet was required to be immediately rockdusted since the operator is required to clean and rockdust only within 40 feet of the face and then another cut of coal may be taken which equals 60 feet. Likewise, with regard to the area inadequately rockdusted in the crosscut between E and D entry, respondent does not dispute the regulatory violation,

but maintains that only approximately 13 feet needed rockdusting while the inspector testified it was about 45 feet. The weight of the totality of the evidence on this point I find to be on the side of the petitioner, and I find that approximately 45 feet of the crosscut between D and E entry needed immediate rockdusting to be in compliance with the cited regulation.

Inspector Kolat took methane readings at the face areas of the entries and found 0.1% to 0.3% at the faces. He also took three dust samples; the first, from the floor of the crosscut between D and E entries was 15% incombustible; the second, from the roof and ribs of the crosscut between D and E entries was 16.2% incombustible; and the third, from the floor of D entry, was 26% incombustible. These results do indeed fall far below the 65% incombustible content required by 30 C.F.R. 75.403.

Accordingly, I find that a violation has been proven. An appropriate civil penalty must also be assessed if a violation is found and a determination must be made as to whether that violation was "significant and substantial."

On that morning, respondent had nine men and some mining equipment operating on this section. They had a roof bolting machine operating in C entry at the face and a scoop car operating in A and B entries. However, the respondent's unrebutted evidence which I find to be credible is that this equipment was in permissible condition. Further, there is no evidence that there was any float dust in the area.

A decision as to whether a violation has been properly designated as being significant and substantial must be made in light of the Commission's rulings in that area. The term "significant and substantial" was first defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) at page 825, where the Commission stated:

> We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

In Mathies Coal Co., 6 FMSHRC 1 (1984), the Commission applied the definition of "significant and substantial" in four steps. The first step was whether a violation occurred, and I have already dealt with that by finding that a violation of 30 C.F.R. 75.403 indeed occurred. The second step is whether the violation contributed a measure of danger to a discrete safety hazard. In this case, Inspector Kolat testified that the nine miners working on that section had been subjected to an additional hazard because of the potential increased danger of explosion and fire especially in light of the fact that this is a gassy mine, liberating over one million cubic feet of methane in a twenty-four hour period. I find that there was a discrete safety hazard and the violation did contribute an additional measure of danger. The third step in applying the definition is whether there is a reasonable likelihood that the hazard contributed to will result in injury, and the fourth step is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. While I have found that there were no immediate ignition sources proven to exist at the time the citation herein was issued, I nevertheless find on the basis of Inspector Kolat's testimony the existence of a reasonable likelihood of increased danger of explosion or fire resulting in serious injuries or fatalities. This was an active section, 86+ feet of the floor in D entry and 45 feet of the floor, roof, and ribs in the crosscut between D and E entries were black and had an incombustible content ranging from 15% to 26% when the standard requires a minimum percentage of 65%. Further, this is a gassy mine, liberating over one million cubic feet of methane in a twenty-four hour period. As the inspector testified, if you would have a gas pocket at the face, ignition from whatever source would reasonably likely lead to an explosion or fire exacerbated by the highly volatile nature of the unrockdusted areas that would or could carry the fire on through the section. Accordingly, I find the violation is "significant and substantial". For the same reasons, I find a high degree of gravity associated ith the violation, that is, the occurrence of the event against which the cited standard is directed was "reasonably likely."

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation. It is stipulated herein that the operator is moderate-sized and that the amount of penalty will not affect the operator's ability to continue in business. A computer printout summarizing a history of 32 prior violations of 30 C.F.R. 75.403 at the Nelms No. 2 Mine over a two year period (GXÄ2) indicates to me that a chronic problem of non-compliance with this particular standard exists. Further, I find that the management of Y & O had actual knowledge of the violation at issue prior to the issuance of the subject citation even though the condition was not recorded by the previous night shift section foreman on his onshift report nor by the day shift foreman on either his preshift or onshift report, as it should have been. The company's position on this issue is that the day shift foreman had every intention to clean and rockdust the areas involved before mining. However, the citation was issued first and I find that the operator is chargeable with a high degree of negligence in failing to correct this condition which it's management knew existed, especially in light of its violation history in this area. I have already stated my findings on gravity, supra, and further find that the operator did expeditiously clean up these areas and bring them into regulatory compliance after the citation was issued. Considering all of these facts, I conclude that a penalty of $400 is appropriate.

Although the parties in their closing arguments asked me to make a ruling on whether the citation herein was properly classified as an "unwarrantable failure," inasmuch as the operator did not contest this section 104(d)(1) citation pursuant to section 105(d) of the Act, I am without authority to consider the special "unwarrantable failure" finding in this civil penalty proceeding. See Pontiki Coal Corporation v. Secretary, 1 FMSHRC 1476 (1979) and Wolf Creek Collieries Company, PIKE 78Ä70ÄP (1979). There is, however, ample evidence to support such a finding herein.

II. Docket Nos. LAKE 85Ä76ÄR and LAKE 85Ä93 (Citation 2330248 and Order 2330257)

These cases involve the issuance of a section 104(a) citation (No. 2330248) on March 14, 1985, and a related

section 104(b) order (No. 2330257) issued on April 25, 1985, for an alleged violation of 30 C.F.R. 71.100.(FOOTNOTE 2)

The Citation

The citation herein was issued by MSHA Inspector Nick Vucelich and alleged as follows:

> Based on the results of three (3) valid dust samples collected by MSHA inspector the average concentration of respirable dust in the working environment of the designated work position 902Ä0Ä392, was 4.2 mg/m3 which exceeded the applicable limit of 2.0 mg/m3. Management shall take corrective action to lower the respirable dust and then sample each production shift until five (5) valid samples are taken and submitted to the Pittsburgh Respirable Dust Processing Laboratory. The following list of samples were those used to determine the citation.

On the 7th, 11th, and 13th of March 1985 Inspector Vucelich conducted respirable dust sampling tests of Y & O's tipple operator. The operator wears a sampling pump while working at various locations on the surface, including the sampling plant, for approximately seven hours. The tipple operator on the 7th was Edward Krankovich. On the 11th and 13th it was Gary Fisher. The tipple operator's duties include cleaning the sampling plant for about one hour per shift where coal on conveyor belts is crushed by a hammermill. The sampling plant is an L-shaped windowless building approximately 40 feet wide, 70 feet long and about 40 feet from floor to ceiling, with a door on either end. As the coal enters the building, the hammermill crushes it. The tipple operator's job in this building is to sweep the coal dust off the walls, floors, and equipment with a broom and hand brush.

Mr. Fisher testified at the hearing and stated that the sampling plant was extremely dusty at the time the citation

was issued and had been since it was installed and put on line some two years before. It took him on average one hour per shift to clean the plant and after it was back in operation for an hour he states you couldn't hardly tell anyone had been in there. He was concerned about the atmosphere in the sampling house because with all the float dust in suspension there was danger of an explosion.

The results of the three aforementioned respirable dust sampling tests were 3.3 milligrams of respirable dust on March 7, 1985; 1.5 milligrams on March 11, and 8.0 on March 13, 1985. Theaverage was 4.2 milligrams. This amounts to a violation of 30 C.F.R. 71.100 which requires that exposure level be maintained at 2.0 milligrams or less. The operator again admits that there was a violation of the cited standard and accepts the fact that the samples showed this.

On March 14, 1985, after he received the results of the sampling, Inspector Vucelich issued the 104(a) citation herein and gave the company twenty working days to abate the same.

The operator was and had been aware of the excessive dust in the sampling plant and was attempting to alleviate the problem. They tried various corrective measures such as washing it down with a water hose, installing limit switches on the feed conveyor to shut down the hammermill when there was no coal on the conveyor, and using small industrial-type vacuum cleaners. None of these things worked. Ultimately, they installed a total dust collection system at a cost of $45,000.

Inspector Vucelich made a finding of moderate negligence on this citation because the hazard presented, i.e., an extremely dusty environment, could cause an occupational illness called coal worker's pneumoconiosis or "black lung," and these conditions had prevailed in the sampling plant for some two years, since it was opened in 1983. He made a gravity finding of "reasonably likely" and marked this as a "significant and substantial" violation because the level of respirable dust in the sampling plant was such that it was reasonably likely to lead to serious health problems for the tipple operators who spend approximately one hour a day in that environment and/or could cause an ignition of coal dust.

In its defense, Y & O contends that even though the samples demonstrate a violation of 30 C.F.R. 71.100, the negligence finding, the gravity finding and the "S & S" finding on the

citation are not supported by the evidence. I disagree. It is undisputed that the operator knew of the extremely dusty conditions in its sampling plant for the two years of its existence. Even given the fact that this was a difficult engineering problem to solve and a relatively expensive one to correct, two years is simply too long to have allowed this situation to exist. As for the danger to the health of the tipple operators who had to spend approximately one hour per shift in that environment for a period of two years, it is evident to me that it is reasonably likely there has been some adverse impair to their health of a serious nature, i.e.,chronic lung disease (pneumoconiosis). The additional danger of an explosion caused by the suspended float dust also existed for this extended period of time. I find that the violation has been proven as charged.

The Withdrawal Order

During the abatement period, the operator took and submitted samples as follows:

March 20, 1985	1.4 milligrams
March 21, 1985	1.5 "
March 22, 1985	3.9 "
April 8, 1985	1.5 "
April 9, 1985	3.9 "

The average respirable dust concentration of these five samples is 2.4 milligrams which was still out of compliance with the pertinent regulation.

Therefore, on April 25, 1985, Inspector Vucelich issued a section 104(b) withdrawal order alleging as follows:

> Results of the five (5) most recent samples received by ADP and collected by the operator from the working environment of the designated work position surface area No. 902Ä0 occupation code 392 shows an average concentration of 2.4 mg/m3. Due to the obvious lack of effect by the operator to control respirable dust, the period of reasonable time for abatement of this violation is not further extended and all miners working in the area shall be withdrawn until the violation is corrected.

When Inspector Vucelich issued the aforementioned order, it is clear and undisputed that the violation had not been abated within the time specified in the citation, i.e., by 8 a.m. on April 15, 1985. The question before me then is whether the inspector acted reasonably in refusing to extend

the time for abatement. The reasonableness of his actions must be determined on the basis of the facts confronting him at the time he issued the order. United States Steel Corporation, 7 IBMA 109 (1976).

In determining whether the period for abatement should have been extended by Inspector Vucelich at that time, the following factors should be considered: (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have had upon operating shifts. Consolidation Coal Company, BARB 76Ä143 (1976).

The overriding consideration in this regard is, of course, the degree of danger that any extension would have caused the tipple operators. It is obvious that any extension of the abatement period would have commensurately extended the individuals' exposure to the hazards enumerated above.

The second consideration is the diligence of the operator in attempting to meet the time originally set for abatement. Inspector Vucelich testified that the excessively dusty condition had existed for some two years and in his opinion just issuing a regular citation and giving extensions was not getting the problem resolved. He stated that, "with this (b) Order we started to get results." Accordingly, I conclude that Y & O did not make a diligent effort to abate the condition until the section 104(b) order was issued.

Lastly, the third factor to consider is the disruptive effect that an extension of abatement time would have on operating shifts. There are no allegations made by the parties on this point and no evidence was taken apropos of this issue. Therefore, I find that any adverse effect the order had is far outweighed by the other factors considered herein. I therefor conclude that Inspector Vucelich did not act unreasonably in not extending the time for abatement. Accordingly, Order of Withdrawal No. 2330257 was properly issued and is affirmed.

Appropriate Penalty

Under section 110(i) of the Act, the following criteria are to be considered in assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent,

(4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation. The operator and the mine here at issue are moderate in size and it is stipulated that the amount of penalty assessed would not impair the operator's ability to continue in business. The only other violation of the cited standard in evidence in this record is one in April of 1984. However, the record is replete with evidence that the operator had actual knowledge of the excessively dusty conditions in the sampling plant for some two years. I specifically find that the operator was highly negligent in failing to abate the cited condition within the time specified for abatement after it knew of the condition for two years. It is therefore obvious to me that Y & O failed to exercise good faith to achieve timely abatement and indeed did not achieve abatement until after the order of withdrawal had been issued. The health hazard and potential for an ignition of suspended coal dust was allowed to continue to exist for a very long period of time. These conditions posed a danger of at least serious injury to at least two miners. Considering all of these factors, I conclude that a penalty of $400 is appropriate.

ORDER

Citation No. 2331148 is AFFIRMED. Likewise, Citation No. 2330248 and Order No. 2330257 are hereby AFFIRMED. Youghiogheny and Ohio Coal Company is ORDERED to pay a penalty of $800 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

1 30 C.F.R. 75.403 provides:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourse shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

2 30 C.F.R. 71.100 provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with 71.206 (Approved sampling devices; equivalent concentrations).