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SOL (MSHA) V. DAY BRANCH COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 89-130
A. C. No. 15-15348-03544

v.

Docket No. KENT 89-132
A. C. No. 15-15348-03546

DAY BRANCH COAL COMPANY INC.,
RESPONDENT

Docket No. KENT 89-144
A. C. No. 15-15348-03547

Day Branch Coal Co., No. 4

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S.
Department of Labor, Nashville, Tennessee, for the
Petitioner,
Mr. James Trosper, Safety Director, Day Branch Coal
Company, for the Respondent.

Before: Judge Fauver

The Secretary of Labor seeks civil penalties for alleged
violations of safety standards under 110(a) of the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

At the hearing, the parties moved to settle the following
citations for the penalty amounts shown:

Citation	Civil Penalty
3172960	\$213
3166462	\$195
3167520	\$136
3166465	\$136
3166466	\$136
3180305	\$ 20
998707	\$ 20

The motion was approved, and those amounts will be included
in the order below.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. Respondent operates an underground coal mine, known as Mine No. 4, which produces coal for sale or use in or substantially affecting interstate commerce.
Order No. 3166381

2. On January 10, 1989, MSHA Mine Inspector Robert W. Rhea found that miners had worked or traveled under unsupported roof in the face of the Number 2 room of the 003 section. Loose coal had been scooped up and stored across the 20-foot-wide face of the Number 2 room. The last row of permanent roof support was installed 50 feet outby the face.

3. Inspector Rhea discussed this condition with the mine foreman in the Number 2 room of the 003 section on January 10, 1989. The inspector and the foreman could not determine the miner or miners who had traveled under the unsupported roof, how the loose coal had come to be scooped to the face and ribs, and who had rock-dusted the ribs and floor. The loose coal seen by Inspector Rhea and the foreman would not have occurred naturally. Because scoop tracks were clearly visible on the mine floor under the unsupported roof, Inspector Rhea and the mine foreman agreed that the loose coal had probably been scooped toward the face and ribs by the battery-powered scoop.

4. Inspector Rhea issued Order No. 3166381 under 104(d)(2) of the Act, citing a significant and substantial violation of 30 C.F.R. 75.202. The inspector also charged the operator with high negligence.

Citation No. 3166382

5. During the inspection on January 10, 1989, Inspector Rhea observed that caution boards or other warning devices were not in place in the Number 3 room on the 003 section to warn miners that they had reached the end of permanent roof support. The coal seam in this area was too low for the miners to walk upright. Since the miners had to work on their hands and knees, their ability to see where the unsupported roof began was particularly impaired. Inspector Rhea issued Citation No. 3166382, citing a significant and substantial violation of 30 C.F.R. 75.208.

Citation No. 3166383

6. Inspector Rhea observed, in the Number 1 room on the 003 section, that the last row of permanent roof supports was installed 15 feet from the face. He believed the roof control plan required roof supports up to four feet of the face, and therefore issued Citation No. 3166383, citing a significant and substantial violation of 30 C.F.R. 75.220.

Citation No. 3166384

7. In the Number 2 and Number 5 rooms of the 003 section, Inspector Rhea found that 30-inch support timbers were used to support a 36- to 38-inch roof. The undersized timbers were balanced on half-round split posts. Someone had tried to hide the unsteady footing of the timbers by packing mud around the split post bases. The remaining gap between the timber and the roof was stuffed with three or four wooden wedges. The inspector issued Citation No. 3166384, citing a significant and substantial violation of 30 C.F.R. 75.206(e).

Citation No. 2843066

8. On December 21, 1988, MSHA Inspector Russell and two miners rode a scoop to leave the mine; the scoop traveled at about four miles per hour. The coal seam was between 36 and 38 inches high along the roadway the scoop traveled, which was the primary escapeway from the mine. Because of the height of the coal, Inspector Russell had to ride on the scoop lying on his back, facing the roof. In that position, he observed that the heads of 20 or 25 roof bolts had been cut off by the scoop at some prior time, and the roof plates had fallen from the roof. Inspector Russell was able to count the number of breaks to the outside. Once outside, he calculated the number of sheared-off roof bolts and missing roof plates, based on the number of breaks he had passed, the number of feet between breaks, and the placement of roof bolts and plates required by the approved roof control plan.

9. Inspector Russell issued Citation No. 2843066, citing a significant and substantial violation of 30 C.F.R. 75.202.

Citation No. 3166461

10. On January 19, 1989, during an electrical inspection, MSHA Inspector Elija Myers found that the water deluge system installed on the Number 2 underground conveyor belt drive was inoperative when tested.

11. Inspector Myers issued Citation No. 3166461, citing a significant and substantial violation of 30 C.F.R. 75.1100-3.

DISCUSSION WITH FURTHER FINDINGS

Section 110(i) of the Act provides six criteria to consider in assessing a civil penalty. One of these is the operator's compliance history. I have previously ruled that the operator's history of payments of civil penalties which have become final is part of its compliance history. This operator has a very poor history of payments of final civil penalty assessments. An updated copy of Government Exhibit 1 shows that, in the 24 months preceding the order and citations in these cases, Respondent was assessed civil penalties of \$14,457.00, but paid only \$6,700.05. This record of significant noncompliance with final assessments will be considered in assessing civil penalties for the violations found in these cases.

Order No. 3166381

The only eyewitness who testified as to facts concerning this order was the MSHA Inspector. The inspector found physical evidence that a miner or miners had worked or traveled 50 feet under unsupported roof. Loose coal was pushed against the face and ribs; the area was rockdusted; there were tire tracks of the coal scoop; there was no roof support and no evidence that timbers had been installed or dislodged. No timbers were present in an area of 20 x 50 feet.

Inspector Rhea discussed this situation with the mine foreman, at the site where the condition was found. They agreed that the loose coal must have been scooped by the battery-powered scoop.

The inspector found high negligence because of the high duty everyone in a coal mine has not to work or travel under unprotected roof. As Inspector Rhea testified, "Unsupported roof, to me, is the most dangerous environment in a coal mine" Tr. 63.

The men and materials needed to abate this condition were immediately available; after the order was issued, the roof supports were in place within 30 minutes.

The evidence sustains the inspector's finding of high negligence and an "unwarrantable" violation (which the Commission has ruled to be "aggravated" conduct beyond ordinary negligence).

Because of the plain danger of going under 50 feet of unsupported roof, the inspector also found a "significant and

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substantial" violation (which the Commission has interpreted as involving a reasonable likelihood of a serious injury). The operator offered opinion evidence that this was not a significant and substantial violation because the roof in the mine was generally stable and the inspector did not find abnormal roof conditions at the site. The inspector testified that going under unsupported roof in an underground coal mine is highly dangerous, and if done in his presence he would issue an imminent danger order. The evidence sustains the inspector's finding that the violation was significant and substantial.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$1,500 is appropriate for this violation.

Citation No. 3166382

The inspector observed that caution boards or other warning devices were not in place to warn miners of unsupported roof. The need for the warning devices was especially great because the miners were working in coal so low they had to crawl to do their work. Respondent acknowledged that there should have been a caution board at the edge of unsupported roof to warn mine personnel of the unsupported area (Tr. 50), but sought to excuse the absence of the caution boards on the basis of assumed roof stability. This position is inconsistent with the statement of Day Branch's safety director that he had seen or heard of roof falls in areas that previously had been considered "stable" (Tr. 55).

Roof stability is not recognized in the regulation as an exemption from compliance. The regulation acknowledges only one exception to the posting of warning devices to mark the beginning of unsupported roof i.e. when roof supports are being installed. This exception does not apply to the situation found by the inspector because mining of the area had been completed and the roof-bolting machine had already been moved out by the last open crosscut.

The inspector found this violation to be "significant and substantial" because of the high degree of risk in going under unsupported roof. The evidence sustains the inspector's finding.

The manpower and materials required to abate this violation were immediately available. Once the violation was cited, it took only five minutes to hang the caution board to mark the beginning of unsupported roof.

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Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$300 is appropriate for this violation.

Citation No. 3166383

The inspector found noncompliance with Day Branch's roof control plan. The last row of permanent roof supports had been placed 15 feet from the face of the Number 1 Room. The roof control plan required supports four feet from the face.

Timbers were the sole method of roof support in this room. The plan called for installation of two rows of timbers at the face of the Number 1 Room as the continuous miner retreated. At the time the condition was cited, the continuous miner had already been backed out by the last open crosscut in the Number 3 Room; there was no equipment in the Number 1 Room.

There was evidence that miners had been working in the room, in that the face had been cut some time prior to the inspection, probably on the previous shift. The inspector found, from the condition of the coal face and the absence of any equipment in the room, that work in the room had been completed and that the mining cycle would be complete when the crosscut had been cut through. There was no evidence that efforts were under way to install the missing timbers.

At the hearing, the parties agreed to amend this citation to delete the last phrase of the condition or practice cited, i.e. "immediately after the continuous miner had been withdrawn from the face" (Tr. 8), because it "is inapplicable in view of the roof control plan that was in effect at the time this was issued" (Id.).

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$300 is appropriate for this violation.

Citation No. 3166384

The inspector observed support timbers installed on unstable footing in Rooms 2 and 5 of the 003 section. These presented dangerous and inadequate roof support. Day Branch miners had used 30-inch timbers to support a roof 36-38 inches high. If the undersized timbers had to be used, solid footing could have been created for them by setting them on flat materials such as header boards, which are six inches wide, three inches thick, and 24 inches long (Tr. 41). Instead, split cylindrical posts were placed on the mine floor, and the timbers were installed on top of them (Tr. 39). The cylindrical surface of the split posts

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was used for the footing of 15 to 20 timbers. In addition, the 15 to 20 timbers were installed with three to four cap wedges stuck between the top of a timber and the roof (Tr. 39, 45). Mud from the wet floors in the rooms had been piled up against the timbers, hiding the split posts on which the timbers rested (Tr. 46). The inspector discovered this violation when he brushed up against timbers, dislodging several (Tr. 40, 42). Had the operator's preshift examiner felt a few of the timbers to check their stability, he would have readily discovered that they had been set improperly. It is important to note that these timbers were the sole means of roof support in these rooms.

The effect of the insecure and improperly installed roof timbers was that the roof was virtually unsupported. This created a significant and substantial violation.

The 003 section of the mine was an active section. There was evidence that miners had been working in the area. The improperly installed timbers were just in by the last open crosscut.

The manpower and materials necessary to correct the violation were immediately available. Longer timbers were stored in a break about 150 to 200 feet away. Once cited, the violation was corrected within 15 minutes.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$300 is appropriate for this violation.

Citation No. 2843066

The route traveled by the inspector as he left the mine on December 21, 1988, was the primary travelway and escapeway. Miners traveled this entry regularly. Its safe condition should have been of particular concern to Day Branch. The regulations require that the area be examined every eight hours.

The cited defects in the roof bolt supports were easily detectable. The bolt shafts where the 20 or 25 bolt heads had been sheared off were shiny and readily visible. Where the bolt heads had been sheared off, the large square head plates had fallen from the roof.

The roof bolt defects compromised the roof support system. The compromised protection made a roof fall reasonably likely. In the event of a roof fall, serious injury to miners could reasonably be expected.

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The evidence sustained the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$325 is appropriate for this violation.

Citation No. 3166461

The regulation cited in this citation requires that fire fighting equipment be maintained in a usable and operative condition. The deluge system which Inspector Myers found to be inoperative is an automatic fire-suppression system consisting of thermally-controlled water sprays installed near the belt drive. If the temperature near the belt drive reaches 212 degrees, the water sprays should activate to cool overheated parts or to put out fires. The heat sensors are located at the belt power rollers which drive the belt.

The deluge system was equipped with a test switch. When operative, the test switch will override the thermal controls and turn the water sprays on. When Inspector Myers pressed the test switch, he found that the deluge system was not connected to a power source. Without power, the entire system was inoperative.

Inspector Myers determined that the violation was reasonably likely to contribute to a fire accident and smoke or fire injuries. There was a definite danger of fire near the conveyor belt drive because of accumulations of grease, oil and loose coal. The belt was fire-resistant, but not fireproof. If it overheated, it would burn.

The deluge system was required to be checked once a week, with a record of the weekly examinations. Inspector Myers found no record that the system had been checked.

There was no other automatic fire suppression system in place near the belt drive. Nor was there conventional fire fighting equipment at hand. Because miners were not stationed to work at the belt drive at all times and because established air currents would have carried smoke out of the mine, a fire at the belt drive could have burned undetected for a substantial period, long enough to become out of control.

The evidence sustained the inspector's finding of a significant and substantial violation.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a penalty of \$325 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over these proceedings.
2. Respondent violated the cited safety standards as alleged in the order and citations involved herein.

ORDER

WHEREFORE IT IS ORDERED that:

1. The order and citations involved in these proceedings are AFFIRMED.
2. Respondent shall pay the above assessed penalties of \$3,906 within 30 days of this Decision.

William Fauver
Administrative Law Judge