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SOL (MSHA) v. PYRO MINING
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER v. PYRO MINING COMPANY, RESPONDENT	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-403 A.C. No. 15-14492-03570 Docket No. KENT 90-426 A.C. No. 15-14492-03571 Baker Mine Docket No. KENT 90-404 A.C. No. 15-13920-03675 Docket No. KENT 90-424 A. C. No. 15-13920-03677 Docket No. KENT 90-425 A. C. No. 15-13920-03678 No. 9 Wheatcroft Mine

DECISION

Appearances: W. F. Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
William Craft, Safety Consultant, Madisonville, Kentucky, for Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, of 1977, 30 U.S.C. 801 et seq., the "Act," in which the Secretary has proposed civil penalties for alleged violations by Pyro Mining Company (Pyro) of regulatory standards. The general issue before me is whether Pyro committed the violations as alleged and, if so, the amount of civil penalty to be assessed.

Docket No. KENT 90-403

At hearings the parties submitted a proposal for settlement of the two citations at issue in this case in the amount of $156 -- a reduction in penalty of $78. The motion was granted at

hearing on the basis of the Secretary's representations supplementing the pleadings in the case. Under the circumstances the proposal for settlement is approved and the corresponding penalty will be incorporated in the order following this decision.

Docket No. KENT 90-404

Citation No. 3420686 was also the subject of a motion for settlement at hearing in which the operator agreed to pay the proposed penalty of $241 in full. This motion was also granted at hearing based on the representation submitted. Accordingly this motion for settlement is also approved and the corresponding penalty will be incorporated in the order following this decision.

Citation No. 3420699 alleges a "significant and substantial" violation of Pyro's roof control plan under the standard at 30 C.F.R. 75.220 and charges as follows:

> Brows of a roof fall on No. 2 unit had only 3 metal straps installed. Roof control plan dated December 7, 1989, shows a minimum of 4 straps when these are used. Shown in sketch on p.8. Two brows were like this.

It is not disputed that the relevant roof control plan required at least four straps for roof support in the cited areas (See Government Exhibit No. 9).

In its post hearing brief Pyro does not dispute the violation as charged but maintains that it was not a "significant and substantial" or serious violation. In its brief it states as follows:

> Government Exhibit No. 8 shows the cavity encompassing six (6) brows. Four (4) straps on each would total twenty-four (24) straps. Twenty-two (22) had been installed, or 91á percent in addition to Mr. Pyles testimony that additional timbers had been installed in the crosscuts. The faces of the entries were inactive. Rooms were being worked as shown on the east side of the sketch, Government Exhibit No. 8. Some of the rooms being worked were outby the fall area. Two (2) intake entries were behind the permanent line of stoppings. One (No. 2) was completely open, and if necessary, could be traveled in lieu of No. 1. The law requires at least one intake escapeway (Sec. 75.1704 30 CFR). Pyro provided two (2) in this case. It is very unlikely that twelve (12) people would travel No. 1 entry, beneath the cavity at one time. According to the Commission Ruling in the Mathies decision, we respecfully question the S&S designation.

Inspector Jerrold Pyles of the Federal Mine Safety and Health Administration (MSHA) who issued the citation, testified that he found the violation to be "significant and substantial" based in part on the history of roof falls in the cited area and the concurrent existence of another serious roof control violation i.e. excessively wide areas in an area of proven unstable roof (See Citation No. 3420700 discussed infra.). These considerations in an area designated as the primary escapeway exposed not only the twelve miners who would likely use this designated and marked escapeway but also the weekly examiner to roof fall hazards. Under the circumstances the violation clearly meets the criteria for a "significant and substantial" and serious violation. See Mathies Coal Co. 6 FMSHRC 1 (1984). The inspector's designation of this violation as resulting from moderate negligence is not challenged. Under the circumstances and considering the criteria under section 110(i) of the Act I find the proposed penalty of $400 to be appropriate.

Citation No. 3420700 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.203 and charges as follows:

> Additional roof support was not installed where widths exceeded what is specified in roof control plans. The widths stated is [sic] 20 feet; the entry measured was found to be 24 feet over a 30 foot distance. This was in No. 2 Unit ID 002, plan in effect dated 12/7/79.

The cited standard, 30 C.F.R. 75.203, provides in subsection (e) as follows:

> Additional roof support shall be installed where-(1) the width of the opening specified in the roof control plan is exceeded by more than 12 inches; and (2) the distance over which the excessive width exists is more than five feet.

It is undisputed that the relevant roof control plan provides that the entries shall be no more than 20 feet wide (Exhibit G-9, p.6). It is also undisputed that the cited 24 foot widths herein existed over 30 feet linear distance. This admitted violation was found in the area also cited for inadequate strapping and with a history of roof falls. As Inspector Pyles observed, the combination of roof control violations in this area with a history of roof falls and unstable roof in the designated escapeway with 12 miners working on the unit, warrants a finding that this violation is also "significant and substantial" and serious.

In its post hearing brief Pyro again admits the violation but maintains that the violation was neither "significant and

substantial" nor serious. It argues as follows:

> Government Exhibit No. 8 shows that the faces of the entries were inactive, and rooms on the east side of the sketch, some outby the wide places, were being worked. Also, two (2) entries in intake air were present behind the line of permanent stoppings, making it unnecessary to travel the No. 1 entry at anytime. It would be highly unlikely that twelve (12) people would be in an area, thirty (30þ) feet in length at the same time. We do not consider this as an S&S citation according to the Commission ruling in the Mathies Decision.

Pyro's argument does not however take into consideration the evidence that the entries could be reworked at any time and that the subject area was the designated primary escapeway and subject to weekly examinations. Since the area was marked by reflectors as the designated escapeway it is likely therefore that miners would use that route in the event of an emergency. Under the circumstances I find that the violation indeed is "significant and substantial" and quite serious. Mathies Coal Co., supra.

The inspector's findings of moderate negligence are not disputed and they are supported by the record. Inspector Pyles noted that timbers had previously been set in the excessively wide areas to bring the widths within the required dimensions however those timbers had become dislodged for unknown reasons and were lying on the mine floor. Considering all the criteria under section 110(i) of the Act I find a penalty of $400 to be appropriate.

Docket No. KENT 90-424

The one citation at issue in this case, Citation No. 3545766, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.503 and charges that: "the foot control switch cover (step flange) had an opening in excess of .006 of an inch measured with .007 gauge on the S-39 shuttle car located on No. 3 Unit."

The cited standard, 30 C.F.R. 75.503, provides that: "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by Section 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open cross cut of any such mine." It is not disputed in this case that the cited shuttle car was the type of equipment required to be maintained in a permissible condition so long as it is equipment which is "taken into or used inby the last open cross cut".

In its post hearing brief Pyro argues that the cited shuttle

car "was not in or inby the last open crosscut" and presumably therefore there was no violation of the cited standard. In its Answer filed in these proceedings however the operator made the following admissions:

> This is a valid citation, however, it should be non S&S. In order for there to be a likelihood of an explosion, the car would have to operate in an explosive environment. The haul roads were wet down and the only time the car was inby the last open crosscut, it was behind a loader with an operating methane detector.

The mine operator is bound by such admissions. The cited shuttle car was also energized when discovered by Inspector Pyles and there was sufficient evidence from which he could, in any event, have inferred that it was intended for use inby. See Secretary v. Solar Fuel Company, 3 FMSHRC 1384 (1981). The citation is accordingly affirmed.

I have evaluated the mitigating arguments in Pyro's post hearing brief, however I find the testimony of Inspector Pyles to be more persuasive. According to Pyles an opening in the switch cover of .007 inch would allow sparks or an arc to enter the mine atmosphere and thereby cause an explosion in the presence of certain levels of methane or coal dust. Bottle samples also demonstrated that methane is indeed liberated at this mine. The record also shows that a few months preceding the citation at bar there had been a coal dust or methane explosion at this mine.

Inspector Pyles also observed that the cited shuttle car was energized, that methane can suddenly inundate an area without warning and that even though there may have been a "methane detector" on the loading machine (which is ordinarily operated in conjunction with the shuttle car) it would not automatically de-energize the shuttle car. Considering the credible evidence I find that indeed the violation was "significant and substantial" and serious.

The inspector's findings of moderate negligence are not disputed. Considering the criteria under section 110(i) I find that the proposed penalty of $275 is indeed appropriate.

Docket No. KENT 90-425

The one citation at issue in this case, Citation No. 3420625, alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.1316(b) and charges as follows:

> Boreholes were apparently not cleared and their depth and direction determined due to two (2) bore holes in adjacent faces had apparently drilled through

into each other due to when blasting the left x-cut the blast came through the opposite side bore hole, injuring John Parker, section foreman in the adjacent entry. No. 2 unit, ID 002. Event took place on 3-12-90. Cutting machine operator was also in same entry as Parker but not injured.

The cited standard, 30 C.F.R. 75.1316(b), provides that "[b]efore loading bore holes with explosives, each bore hole shall be cleared and its depth and direction determined." Company representative David Sutton reported the blasting accident to Inspector Pyles on March 12, 1990, and Pyles made his inspection on the following day. According to Pyles the citation was issued on April 5, 1990, on orders from the MSHA Assistant District Manager and from his supervisor and was based upon the accident report filed by Pyro safety manager Sutton (Exhibit G-17). That report states in part that: "adjacent entry drill holes met -- employee failed to come out of place when being flagged."

Inspector Pyles acknowledged at hearing that Sutton also told him that the shot firer reported that he had indeed checked the direction and depth of the drill holes before loading the holes with explosives. Pyles also acknowledged that everything could have been done in accordance with the cited regulation and that the blow-through might nevertheless have occurred. Indeed Exhibit R-6, a diagram, shows how boreholes could have been drilled at an angle and have intersected but upon testing would not have revealed whether they were clear through. Under the circumstances I do not find that the Secretary has met her burden of proving a violation of the cited standard. Citation No. 3420625 must be accordingly vacated.

Docket No. KENT 90-426

Citation No. 3420045 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.400 and charges that "[c]ombustible materials such as oil cans and trash were permitted to accumulate on the No. 9 track across from the No. 2 Unit supply road."

The cited standard, 30 C.F.R. 75.400, provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible material, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment."

According to MSHA Inspector Cheryl McMackin, during the course of her inspection of the Baker Mine July 10, 1990, she observed, for the second day in a row, a large accumulation of paper, cardboard, wood, oil cans and other combustibles in the cited crosscut. The accumulation had increased from the day

before. When asked about the trash, foreman Qualls indicated that it had not been cleaned up because they had been busy on a construction project and were starting a new unit. Qualls also told McMackin that the trash was located at a "collection point" and that they intended to remove it. Under the circumstances I find that the credible and essentially undisputed testimony of Inspector McMackin is sufficient to prove the violation as charged.

In reaching her conclusions that the violation was also "significant and substantial", McMackin observed that there were ignition sources near the accumulations i.e. several electrical cables, an electrical junction box and rollers on the conveyor, and noted that this was near the secondary escapeway. She noted that smoke from a fire in this area would procede toward the working areas and that two miners were working in the immediate vicinity of the accumulation. Under the circumstances I find that the violation was indeed "significant and substantial" and serious. Mathies, supra.

I concur in the findings of moderate negligence. It is not disputed that the cited area was a "trash pick-up area", that the size of accumulations actually increased over the two day period observed and that it was readily visible from the adjacent track entry which virtually everyone must use passing into and out of the mine.

In reaching the conclusions herein I have not disregarded Pyro's post hearing brief. Much of the argument therein is based however upon speculation not supported by the record. In any event I find the expert testimony of Inspector McMackin, uncontradicted by other expert testimony, to be credible and fully supportive of her findings. Considering the criteria under section 110(i) of the Act I find a penalty of $150 to be appropriate.

Citation No. 3420047 alleges a "significant and substantial" violation of the standard at 30 C.F.R. 75.503 and charges that "[t]he EIMCO scoop Company No. R-121, operating on the No. 1 unit (ID 001-0) was not maintained in a permissible condition and the head light assembly was missing." The cited standard provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by Section 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine". In its post hearing brief Pyro does not dispute the testimony of Inspector McMackin but argues that because the scoop was not actually found in or inby the last open crosscut there was no violation. This argument is without merit. The undisputed testimony of Inspector McMackin is that during the course of her inspection she heard the scoop operating inby the last open crosscut. This evidence is sufficient from which it may

reasonably be inferred that the scoop was indeed operating inby the last open crosscut. Her testimony that the scoop was used regularly in the face area to clean up gob and rock is also not disputed. Finally, Inspector McMackin actually observed the scoop pulling through the curtain with the bucket in the direction of entering the last open crosscut. This evidence clearly supports the inference that the cited equipment was equipment which is taken or used inby. See Secretary v. Solar Fuel Co. supra.

The violation was clearly "significant and substantial" on the basis of the undisputed testimony of McMackin. According to McMackin the cover was missing from the headlight assembly and you could clearly see inside of the assembly. She noted that the electric light would be subject to arcing and sparking and in the atmosphere of the Baker Mine which routinely liberates methane, the violation was particularly egregious. She also noted that the scoop was energized and in operation and that the section was then producing coal. McMackin had taken methane readings and found .2 percent methane at the return. She noted that 12 men were working on the section at the time and that the missing head light cover was "obvious". Within this framework it is clear that not only was the violation quite serious and "significant and substantial" but that it also involved significant negligence. Under the circumstances I find that the Secretary's proposed penalty of $98 is clearly inadequate. Considering the criteria under section 110(i) and such a serious violation involving significant negligence, a penalty of $400 is warranted.

ORDER

Citation No. 3420625 is VACATED. The remaining citations are affirmed and Pyro Mining Company is directed to pay civil penalties of $2,022 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge