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SOL (MSHA), PETITIONER v. PYRO MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 91-12 A.C. No. 15-13920-03680
v.	
PYRO MINING COMPANY, RESPONDENT	Docket No. KENT 91-13 A.C. No. 15-14492-03572

DECISION

Appearances: W.F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor (Secretary); William M. Craft, Mine Safety and Health Consultant, Madisonville, Kentucky for Pyro Mining Company (Pyro).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks penalties for seven alleged violations of mandatory safety standards contained in the above dockets. Docket No. KENT 92-12 involves the No. 9 Wheatcroft Mine; Docket No. KENT 92-13 involves the Baker Mine. When the cases were called for hearing on March 19, 1991, the Secretary submitted an oral motion on the record for approval of a settlement between the parties with respect to all the alleged violations in Docket No. KENT 91-12. The first two citations in the docket charge violations of 30 C.F.R. 75.313 because methane monitors were inoperative. The violations were originally assessed at $192 each. Both violations were judged significant and substantial. The motion proposes a reduction in the penalties to $96 each, and a modification of the citation to eliminate the significant and substantial finding. No methane was detected in the area and the motion stated there was no reasonable likelihood of injury. The third and fourth citations charging violations of 30 C.F.R. 75.1725 and 75.302 were assessed at $192 each and Pyro agrees to pay those amounts. The final citation charged a violation of 30 C.F.R. 75.400 because of coal dust and float coal dust along the belt. The motion proposes a reduction in the penalty from $335 to $165, and a deletion of the significant and substantial finding on the ground that the accumulation was not as extensive or dangerous as originally believed.

I stated on the record that I would approve the settlement agreement.

Pursuant to notice, Docket No. KENT 91-13 was called for hearing in Nashville, Tennessee, on March 19, 1991. Inspector Cheryl Smith McMackin and Clifford D. Burden were called as witnesses by the Secretary. Charles Dame was called as a witness by Pyro. Both parties argued their positions on the record at the conclusion of the hearing and waived their rights to file post-hearing briefs with proposed findings of fact and conclusions of law. I have considered the entire record and the contentions of the parties in making the following decision.

FINDINGS OF FACT

I

PRELIMINARY FINDINGS

At all times pertinent hereto, Pyro was the owner and operator of an underground coal mine in Webster County, Kentucky, known as the Baker Mine. Pyro is a large operator. The Baker mine liberates 500,000 cubic feet of methane in a 24 hour period. Because of this, it is subject to spot inspections every 15 days at irregular intervals under section 103(i) of the Mine Act. Between September 10, 1988 and September 9, 1990, Pyro had 1581 paid violations of mandatory health and safety standards. Between July 16, 1988 and July 16, 1990, the Baker Mine had 7 cited violations of 30 C.F.R. 75.305 and 13 cited violations of 30 C.F.R. 75.316. This history is not such that penalties otherwise appropriate should be increased because of it.

II

CITATION 3420048/ORDER 3420053

In early July 1990, a roof fall occurred in the return air course in the No. 1 Unit of the Baker Mine. The fall was about six feet high and extended 35 to 50 feet along the entry.

This was the return air course of an active unit, but the faces were inactive when the citation involved in this proceeding was issued. On July 12, 1990, Federal Mine Inspector Cheryl McMackin was conducting a regular inspection of the Mine and was unable to travel the air course because of the roof fall. She tried to circumvent the area of the fall, but was prevented in part by other roof falls. It was therefore not possible to walk the entire return air course in the No. 1 unit. She discussed the matter with Pyro's Safety Manger, Charles Dame, and decided to further discuss the matter with her MSHA supervisors.

On July 16, 1990, Inspector McMackin returned to the mine and to the return air course of the No. 1 Unit. The condition had not changed from that which existed on July 12. She issued a section 104(a) citation charging a violation of 30 C.F.R. 75.305. At the time the citation was issued the air was following its proper course. Methane in the amounts of .2 to .3 percent was found in the dead end faces beyond the roof fall. It was not possible to see or adequately communicate from one side of the roof fall to the other. On this issue, I accept the testimony of Inspector McMackin:

> Q. Could you communicate back and forth through the area?
>
> A. Not in a conversation. I could hear that he was over there.
>
> Q. Was he yelling?
>
> A. Yes.
>
> Q. Did you yell back at him?
>
> A. Yes, I did. (R. 46)

And, discount that of Mr. Dame:

> The Witness: I couldn't see her physically. I could see her speak.
>
> Judge Broderick: Did you communicate with each other?
> The witness: Yes, sir. (R. 123)

The inspector considered the violation to be significant and substantial, because in the area where travel was impossible, an examiner would be unable to evaluate the methane liberation, oxygen content in the atmosphere, and hazards in the roof. She fixed the date for termination of the violation as July 23, 1990.

Inspector McMackin returned to the mine on July 24, 1990. She met Mr. Dame prior to going underground, and he told her the condition cited on July 16 had not been corrected. No request was made for an extension of time to correct the condition. McMackin and Dame went underground and found that the condition cited on July 16 was unchanged. She issued a section 104(b) order of withdrawal for failure to abate the cited violation. After she came out of the mine, Baker Mine Superintendent Potter told her that a petition for modification had been filed which would have permitted mining to continue with the cited condition. She ascertained by consulting MSHA offices that such a petition had not been filed. Later C.D. Burden, Safety Director, said

that the petition was prepared but not yet mailed. Still later on the same day, before the inspector left the mine, an addendum to the ventilation plan was approved by MSHA concerning rerouting the return air course so that it could be travelled. However, the addendum failed to show roof falls which had occurred in the middle entries, and thus the return still could not be entirely examined. Another addendum was submitted and approved by MSHA on July 25, changing the air course in a way that it could be travelled in its entirety. This abated the condition cited, and Inspector McMackin terminated the citation and order.

III

CITATION 3420049

The MSHA approved ventilation plan for the Baker mine provides in part that airlock doors shall be so arranged that the passage of equipment along the entries will not cause interruption of the air current. Doors are required to be in pairs to form an airlock. On July 16, 1990, Inspector Cheryl McMackin issued a citation charging a violation of 30 C.F.R. 75.316 because the inby door of the pair of doors installed in the 2nd East submain track entry was chained open. The two doors were approximately 300 feet apart. The inspector took an air reading with the outby door closed and recorded approximately eleven hundred cubic feet of air per minute travelling down the entry. When the outby door was open there was an increase of approximately 30,000 feet per minute of air going down the entry. The ventilation system of the Baker Mine is tied in with the ventilation system of the Wheatcroft No. 9 mine. An increase in the amount and velocity of the air resulting from the doors being open could change the direction of air in the belt entry, could circumvent the C.O.-monitoring system, and make it difficult to determine in the event of a fire, where the fire was. The area in question was travelled regularly in that it was the main access to the mine's two producing units. The violation was abated within the time prescribed in the citation by repairing the door controls. There had been an electrical or mechanical failure in the controls.

REGULATIONS

30 C.F.R. 75.305 provides in part as follows:

> In addition to the preshift and daily examinations required by this Subpart, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory standards, shall be made at least once each week by a certified person designated by the operator in the return of each split of air where it enters the main return, on pillar

falls, at seals, in the main return, at least one entry of each intake and return air course in its entirety, idle workings, and insofar as safety considerations permit, abandoned areas.

* * *

30. C.F.R. 75.316 provides in part as follows:

> A ventilation system and methane and dust control plan and revisions thereto suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator.

* * *

ISSUES

1. Whether the evidence shows that as of July 16, 1990, it was not possible to make a weekly examination of at least one entry in the 4th East return air course in its entirety?

2. If a violation of 30 C.F.R. 75.305 was established, whether the time for abatement should have been extended prior to the issuance of a withdrawal order under section 104(b)?

3. If a violation of 75.305 was established, what is the appropriate penalty therefor?

4. Whether the evidence shows a violation of the approved ventilation plan on July 16, 1990, because the inby door of a pair of airlock doors could not be closed?

5. If a violation of 75.316 was established, what is the appropriate penalty therefor?

CONCLUSIONS OF LAW

I

At all times pertinent to this case, Pyro was subject to the provisions of the Mine Act in the operation of the Baker Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

II

30 C.F.R. 75.305 requires that a weekly examination be made of at least one entry of each return air course in its entirety. In the case of Rushton Mining Company v. Secretary, 11 FMSHRC 1301 (1989), I held that the standard does not mandate that the air course be travelled in its entirety, but that it be

adequately examined in its entirety. In the same decision I held that where an area in the air course is impassible, and it is not possible to adequately examine the area visually, a violation of the standard is established. In the present case an area in the return air course extending 35 to 50 feet along the entry was impassible. Further, it was not possible to sight across this area, or to easily communicate from one side to the other. The 35 to 50 foot area of the air course could not be examined. Therefore, I conclude that it was not possible to adequately examine the entire air course.

I accept the Secretary's argument that the return air course in the No. 1 Unit of the subject mine was a single entry. The fact that a portion of that entry, designated by Pyro as entry No. 6, was open and travelable does not meet the requirements of the standard. Therefore since the return air course entry could not be examined in its entirety, I conclude that a violation of 30 C.F.R. 75.305 has been established.

The return air course was the return of an active unit, but the faces were inactive and coal was not being produced when the citation was issued. The air was travelling in its proper course, and there was minimal methane in the area of the roof fall. The Secretary has not established that there was a reasonable likelihood that the hazard contributed to by the violation will result in a serious injury. United States Steel Mining Company, 7 FMSHRC 1125 (1985). Therefore, the violation was not properly designated as significant and substantial.

Nevertheless, because a mine examiner was unable to evaluate the methane liberation, oxygen content, and roof hazards in the entire air course, the violation was serious. The Secretary concedes that Pyro's negligence was low.

Pyro did not abate the violation within the time provided in the citation, so a section 104(b) order was issued. Although a Petition for Modification had been prepared, it had not yet been filed, and the inspector was not informed of it before issuing the order. An addendum to the ventilation plan ultimately was approved changing the return air course and by-passing the areas of the roof falls. This did not occur however until after the order was issued. Pyro did not request an extension of time to abate the citation. The time fixed for abatement was not unreasonable. Therefore, the order was properly issued. See Rushton Mining Company, 9 FMSHRC 325, 329 (1987). A request for change in a ventilation requirement does not excuse a violation.

I conclude, considering the criteria in section 110(i) of the Act, that an appropriate penalty for the violation is $500.

III

The approved ventilation plan for the Baker Mine provides that: "Overcasts, undercasts, and/or airlock doors shall be so arranged that the passage of equipment along the entries will not cause interruption of the air current. Doors, where doors are installed, shall be in pairs to form an airlock." (GX 9, page 3). An Addendum to the plan was approved June 26, 1990, and included a map showing the airlock doors (GX 10). The Mine Safety Manager testified that between the date of the addendum and the date of the citation, the airlock doors became unnecessary and were not used because a new air shaft was created. However, the inspector testified that when both doors were opened, the quantity and velocity of air substantially increased. In any case, there was a violation of the approved ventilation plan, and therefore a violation of 30 C.F.R. 75.316.

The Secretary has not established that there is a reasonable likelihood that the hazard contributed to by the violation will result in serious injury. See United States Steel Mining Company, supra. Therefore, the violation was not properly designated as significant and substantial. I also conclude, on the basis of the testimony of Mr. Dame, that it was not serious. It was the result of Pyro's negligence. It was promptly abated. Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $100.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation 3420048 and 3420049 issued July 16, 1990, are MODIFIED to delete in each citation the finding that the violation was significant and substantial, and, as modified, the citations are AFFIRMED.

2. Order 340053 issued July 24, 1990, is AFFIRMED.

3. Pyro shall within 30 days of the date of this order pay the following civil penalties to the Secretary:

CITATION	30 CFR	AMOUNT
3420048/3420053	75.305	$500
3420049	75.316	100
	TOTAL	$600

James A. Broderick
Administrative Law Judge