

CCASE:
ROX COAL V. SOL (MSHA)
DDATE:
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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

ROX COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. PENN 94-192-R
	:	Citation No. 3712004; 1/24/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 94-193-R
ADMINISTRATION (MSHA),	:	Order No. 3959742; 1/24/94
Respondent	:	
	:	Docket No. PENN 94-194-R
	:	Order No. 3959743; 1/24/94
	:	
	:	Diamond T C Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-360
Petitioner	:	A.C. No. 36-08214-03537
v.	:	
	:	Diamond T C Mine
ROX COAL INCORPORATED,	:	
Respondent	:	

DECISIONS

Appearances: John M. Strawn, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania for the Respondent;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania,
for the Contestant/Respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by Rox Coal Incorporated (hereafter Rox Coal), pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, challenging the legality of one section 104(d)(1) "S&S" citation and two section 104(d)(1) "S&S" orders issued on January 24, 1994, citing Rox with three alleged "unwarrantable failure" violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The civil penalty case concerns proposed penalty assessments filed by the

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petitioner pursuant to section 110(a) of the Act, seeking penalty assessments against Rox for the alleged violations. A consolidated hearing was held in Somerset, Pennsylvania, and the parties appeared and participated fully therein. The parties subsequently informed me that they agreed to settle their disputes and they filed their settlement proposals pursuant to Commission Rule 31, 29 C.F.R. 2700.31.

Issues

The issues presented in these proceedings are whether the cited conditions or practices constituted violations of the cited safety standards; whether the alleged violations were "significant and substantial"; whether the alleged violations resulted from Rox's "unwarrantable failure" to comply with the cited standards; and the appropriate civil penalties to be imposed for the violations, taking into account the penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; 30 U.S.C. 301 et seq.
2. Sections 104(d), 105(d), and 110(a) and (i) of the Act.
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. Rox Coal is subject to the Act and the presiding judge has jurisdiction in these proceedings.
2. The subject citation and orders were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Rox Coal at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
3. Rox Coal demonstrated good faith in the abatement of the citation and orders.
4. The assessment of civil penalties in these proceedings will not affect Rox Coal's ability to continue in business.
5. The appropriateness of the penalties, if any, to the size of Rox Coal's business should be based on the company's

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annual production tonnage of 2,478,856, and the Diamond TC mine annual production tonnage of 225,074.

6. The Diamond TC Mine was assessed 102 violations over 111 inspection days during the 24 months preceding the issuance of the subject citation and orders.

7. The parties stipulate to the authenticity of their exhibits, but not to their relevance, nor to the truth of the matters asserted therein.

Discussion

Docket No. PENN 94-192-R

Section 104(d)(1) "S&S" Citation No. 3712004, issued at 9:00 a.m., on January 24, 1994, cites an alleged violation of 30 C.F.R. 75.203(d), and the condition or practice cited is described as follows:

Proper mining methods are not being followed in the 4 Right Two Main active section.

The working face of the crosscut between the No. 1 and No. 2 entries has been mined through from the No. 2 entry to an unsupported area of the the No. 1 entry. The condition occurred inby survey station No. 1031 of the No. 1 entry. Also, the crosscut from the No. 3 entry to the No. 2 entry, inby survey station 1022 of the No. 3 entry has been mined into an unsupported area of the No. 2 entry.

In order for this citation to be terminated all employees shall be reinstructed in proper mining methods and aspects of the approved roof control plan.

Docket No. PENN 94-193-R

Relying on the previously issued section 104(d)(1) Citation No. 3712004, the inspector issued a section 104(d)(1) "S&S" Order No. 3959742, at 9:45 a.m., on January 24, 1994, citing an alleged violation of 30 C.F.R. 75.220(a)(1), and the cited condition or practice states as follows:

The approved roof control plan (March 9, 1992), in effect at the subject mine was not being followed in the 4 right submains working section (Safety precaution No. 20, page 8). Inby the next crosscut of Survey Station No. 1022 in the No. 3 entry a visible clay vein, 1 to 4 feet wide, extended rib to rib across the entry. Two crosscuts, T-5 channels or equivalent were not installed on each side of clay vein. Also, at the

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working face of No. 3 entry a clearly visible clay vein 1 to 5 (sic) wide approximately 40 feet long ran up the middle of the entry. Bacon skins were installed in this area but they are not equivalent to which is required in safety precaution No. 20. Also, there was an area approximately 15 feet where nothing was installed according (sic) precaution No. 20.

Docket No. PENN 94-194-R

Following the issuance of the aforementioned section 104(d)(1) citation and order, the inspector issued section 104(d)(1) "S&S" Order No. 3959743, at 9:50 a.m., January 24, 1994, citing an alleged violation of 30 C.F.R. 75.360(b)(3), and the cited condition or practice states as follows:

Improper (sic) pre-shift examinations were not being made in the 4 right submains working section in that when conducting an inspection in the section obvious hazards of the approved roof control plan was observed and citations/orders were issued on these conditions. The areas the preshift examiner placed his dates, time, and initials. The record book had no hazards observed.

The order was subsequently modified on February 15, 1994, and the following was added to the description of the cited conditions or practices:

An adequate preshift examination was not being made in the 4 Right Submains working Section.

In support of the alleged violations, the Secretary presented the testimony of Acting Subdistrict Manager Theodore W. Glusko (Tr. 11-142); and MSHA electrical inspector William Kerfoot (Tr. 144-178).

Rox Coal presented the testimony of mine assistant safety engineer David Flick (Tr. 178-202); roof bolter operator Robert Smith (Tr. 203-215); section foreman Ralph Young (Tr. 215-224); and section foreman Michael J. Phillips (Tr. 222-237).

The parties subsequently informed me that they proposed to settle the disputed citation and orders and the petitioner filed a motion seeking approval of the proposed settlements. Upon approval of the proposed settlements associated with the civil penalty proceeding (Docket No. PENN 94-360), Rox Coal has agreed to withdraw its contests challenging the disputed citation and orders.

In support of the proposed settlement dispositions of the section 104(d)(1) citation and orders, the petitioner states that based on the testimony presented at the trial of these matters,

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the parties are in agreement that there is insufficient evidence to establish gross negligence or aggravated conduct by Rox Coal with respect to the three cited violations. Under the circumstances, the petitioner states that MSHA has agreed to reclassify the section 104(d)(1) citation and orders as section 104(a) citations, with corresponding proposed penalty assessment reductions.

Conclusions

After careful review and consideration of the pleadings, the testimony and evidence presented at the hearing, as reflected in the trial transcript, and the arguments presented in support of the proposed settlements, I conclude and find that the proposed settlement dispositions are reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.31, the motion filed by the petitioner IS GRANTED, and the settlements ARE APPROVED.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Section 104(d)(1) "S&S" Citation No. 3712004, January 24, 1994, citing a violation of 30 C.F.R.

75.203(d) IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of \$300, in settlement of the violation.

2. Section 104(d)(1) "S&S" Order No. 3959742, January 24, 1994, citing a violation of 30 C.F.R.

75.220(a)(1), IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of \$300, in settlement of the violation.

3. Section 104(d)(1) "S&S" Order No. 3959743, January 24, 1994, citing a violation of 30 C.F.R.

75.360(b)(3), IS MODIFIED to a section 104(a) "S&S" citation, and as modified IT IS AFFIRMED. Rox Coal IS ORDERED to pay a civil penalty assessment of \$300, in settlement of the violation.

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IT IS FURTHER ORDERED that payment of the aforesaid civil penalty assessments shall be made by Rox Coal to MSHA within thirty (30) days of the date of these decisions and Order, and upon receipt of payment, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

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