FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 11, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-187
	:	A.C. No. 15-16715-03507
v.	:	
	:	No. 2 Mine
DANIEL LEE COAL COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner.

Before: Judge Barbour

This civil penalty proceeding arises under section 105(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act). The Secretary of Labor (Secretary), on behalf of his Mine Safety and Health Administration (MSHA), petitions for the assessment of a civil penalty for a violation of mandatory safety standard 30 C.F.R. ' 75.220. The standard requires the operator of an underground coal mine to adopt and to comply with a roof control plan approved by MSHA. The Secretary alleges that on July 11, 1990, Daniel Lee Coal Company (Daniel Lee) violated the standard at its No 2 Mine, an underground coal mine located in Letcher County, Kentucky, when it changed the type of roof bolts used at its mine without first notifying MSHA.

PROCEDURAL HISTORY

The Secretary's petition for assessment of civil penalty was received in the Commission's Docket Office on April 1, 1991. On September 3, 1991, Harold D. Bolling, the company's chief executive officer, filed an entry of appearance on behalf of the company. Three days later Bolling filed a response to the Secretary's petition. In the response he denied generally the Secretary's allegations.

On October 17, 1991, the case was erroneously stayed pending the resolution of a case that was then before the Commission for decision. The error was not discovered until after the instant matter had been dismissed. The Secretary therefore moved to reinstate his petition. On November 16, 1993, the Commission granted the motion, reopened the case and remanded the matter to the Chief Judge. On November 17, 1993, the Chief Judge ordered the parties to confer and to advise him on or before December 22, 1993, of the results of the conference. The Chief Judge noted that failure to comply could result in a default.

Approximately one month later, counsel for the Secretary filed with the Commission a copy of a cover letter that was attached to a joint settlement motion. The letter indicated the parties had agreed to settle the case. However, nothing further was heard from the parties and on September 2, 1994, the Chief Judge ordered the Secretary to show cause why the matter should not be dismissed for failure to prosecute.

On September 15, 1994, counsel responded that she had made numerous attempts to get Harold Bolling to return the settlement motion for filing and that, "[t]he failure to forward a written settlement in this matter is due to the dilatory action of the [R]espondent" (Secretary's Response to Order to Show Cause 2). On September 21, 1994, the Chief Judge found the response to be adequate and assigned the case to me.

The matter was scheduled to be heard on October 13, 1994, in Pikeville, Kentucky. The company's copy of the notice of hearing was mailed to Bolling at his business address. The return receipt indicates that it was received on September 26, 1994. The receipt is signed by Betsy Addington, Bolling's agent. On October 5, 1994, the company's copy of the notice of hearing site was sent by facsimile copy, as well as by registered mail, to Bolling at the same address. The return receipt indicates the "hard copy" was received by Bolling on October 11, 1994. Again, Betsy Addington signed for Bolling.

At 8:30 a.m., on October 13, 1994, the matter was called for hearing in Pikeville. Counsel for the Secretary entered her appearance. Harold Bolling did not. At my request, counsel for the Secretary described her attempts to contact Bolling. Counsel explained that on September 28, 1994, she had called his office. Counsel was told that Bolling was "in court," but that he would return counsel's telephone call that day. He did not.

Counsel stated that she called again on September 29 and was told that Bolling was "in court." She also was told to

telephone Bolling after 4:00 p.m. She did, and there was no answer (Tr. 11-12).

Counsel explained that on September 30 she spoke with Bolling's secretary on two occasions. According to counsel, the secretary was concerned because she had spoken with my office and understood there was to be a conference call. (I had tried to arrange such a call among counsel, Bolling and me that day.) The secretary told counsel that Bolling was out of the office and that she expected he would call counsel or me. He did not (Tr. 12-13).

I recessed the hearing for one half hour and asked counsel to contact Bolling by telephone to determine his intentions. In the meantime, I placed a telephone call to my office to determine if Bolling had attempted to reach me there. When the hearing resumed, I reported that Bolling had not attempted to contact me and counsel reported that Bolling's secretary told her that Bolling was not in the office and that there was nothing on his calendar to indicate he intended to attend the hearing. Counsel stated she made two additional calls during the recess and was told that Bolling had not arrived at the office and that no one had any knowledge of his intentions or his whereabouts (Tr. 14-16).

I expressed consternation at Bolling's failure to appear or to otherwise contact me or counsel, and the hearing proceeded as scheduled (Tr. 17-18).

ORDER NO.	DATE	30 C.F.R. '	PROPOSED PENALTY
3160289	7/11/90	75.220	$400

THE SECRETARY'S WITNESSES AND EVIDENCE

NANCY EDMONDS

Nancy Edmonds is a coal mine inspection supervisor for MSHA, She is also the custodian of records at the agency's Paintsville, Kentucky, Subdistrict Office. In her capacity as records custodian, she identified the roof control plan in effect at Daniel Lee's No. 2 Mine on July 3, 1990 and Order No. 3160289, an order issued to Daniel Lee on July 11, 1990, and signed by MSHA Inspector Norman Page (Gov. Exh. Nos. 1 and 2; Tr. 22-23).

AFFIDAVIT OF NORMAL PAGE

Counsel explained that Page was unable to appear as a witness due to a medical emergency involving his son. Counsel therefore presented Page's affidavit. In the affidavit, Page stated that on July 11, 1990, when inspecting the 001 working section of the No. 2 Mine, he determined the company had changed the roof bolts from 48 inch resin-grouted bolts to 36 inch mechanical bolts. The 36 inch bolts had been used for a distance of approximately 150 feet in the Nos. 1 though 3 entries and

in the connecting crosscuts. The approved roof control plan sanctioned only the use of 48 inch resin-grouted bolts in this area.

The roof had surface cracks and water was seeping through it. The condition of the roof indicated to Page that the roof might be unstable. Because of the condition of the roof, Page believed that changing the type of roof support without first obtaining MSHA's approval was reasonably likely to result in a serious accident (Gov. Exh. No. 3).

In addition, because the difference between the two types of roof bolts was visually obvious, Page believed mine management would have known that the 36 inch roof bolts were being used (Gov. Exh. No. 3).

BUSTER STEWART

Buster Stewart is an MSHA roof control specialist. As such, it is his job to evaluate roofs and to determine what should be included in MSHA-approved mine roof control plans (Tr. 27). Stewart confirmed that under the plan approved for No. 2 Mine, 48 inch resin-grouted roof bolts were to be used to support the roof in the subject area (Tr. 29). Stewart explained that when a resin-grouted roof bolt was inserted in the roof, the resin or glue was released and spread into the cracks in the roof strata. The glue helped to hold the roof in place. When resin-grouted bolts were used in sequence, they were like having "five or six 2 by 4s ... glued ... all together ... form[ing] a beam across" (Tr. 31). Stewart described a resin-grouted bolt as "the best roof support" (Tr. 33).

A mechanical roof bolt uses a chuck to secure the roof. (The bolt functions in a manner similar to a toggle bolt.) In Stewart's opinion, the problem with mechanical bolts was that if they were not anchored in firm roof, they would pull out (Tr. 34-35). The mine has a shale roof, and Stewart believed that with such a roof it was difficult to find firm material in which to anchor mechanical roof bolts (Tr. 51-52).

Stewart testified he had read Page's affidavit. Stewart stated that when Page described water coming through the roof it meant to Stewart that there were interior cracks in the roof (Tr. 38). Resin-grouted bolts could seal the cracks (Tr. 38-39). With mechanical bolts a roof fall was possible (Tr. 39-40).

When an operator wants to change the type of roof bolts, MSHA will first conduct a stratus scope test to determine the roof's consistency. In addition, MSHA will conduct a "pull

test" to determine the holding power of the proposed bolts (Tr. 40-41).

Because the equipment used to install mechanical roof bolts is different from that used to install resin-grouted bolts, Stewart believed a mine foreman would have known which kind of bolt was being used (Tr.42). In addition, because the section foreman makes sure the roof bolting machine operator is supplied with roof bolts and with glue, the section foreman also would have been aware of the type of roof bolts used (Tr. 43, 46-47). Finally, Stewart believed that it would have taken at least three shifts to roof bolt the area cited in the order (Tr. 49).

THE VIOLATION

Section 75.220 requires each mine operator to develop and follow a roof control plan approved by MSHA. Here, the roof control plan for No. 2 Mine in effect on July 11, 1990, provided for the use in different areas of 36 inch conventional roof bolts and 48 inch resin-grouted bolts (Gov. Exh. No. 1 at 4-5). The plan also stated, "MSHA shall be notified and an investigation made and approval granted before resin bolting can be discontinued" (Id. at 5). It is the Secretary's contention, as stated in the order, that 48 inch resin-grouted roof bolts were required in the cited area. The evidence supports this assertion and I accept it. It is also the Secretary's contention that 36 inch mechanical roof bolts were used without MSHA being notified and without an investigation being made. The evidence likewise supports this assertion and I except it. I conclude, therefore, that Daniel Lee was in fact operating in contravention of its approved roof control plan and that the violation of section 75.220 existed as charged.

SIGNIFICANT AND SUBSTANTIAL

The violation was cited in an order of withdrawal issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. ' 814(d)(1). One of the inspector's findings in issuing the order was that the violation constituted a significant and substantial (S&S) contribution to a mine safety hazard. A four-part test for determining whether a violation is S&S was enunciated by the Commission in Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). It is well known and need not be repeated here.

I have concluded that the violation of section 75.220(a) existed as charged. Moreover, the evidence easily establishes a discrete safety hazard. As Stewart persuasively explained, the failure to use 48 inch resin-grouted roof bolts subjected miners on the 001 section to the hazard of injury from falling roof. Moreover, given the laminated shale roof and the water seeping

through it, I accept Stewart's opinion that the mechanical roof bolts might not hold and that roof falls were reasonably likely.

Such falls are the most common cause of death in the nation's mines, and I conclude therefore that the violation properly was designated S&S.

GRAVITY

The concept of gravity involves analysis of both the potential hazard to miners and the probability of the hazard occurring. The potential hazard was one of death or serious injury caused by falling roof. The probability was high due to the makeup of the roof and the fact that the roof was leaking water. This was a very serious violation, and the fact that Daniel Lee took it upon itself effectively to alter its plan without consulting MSHA augments the violation's gravity.

UNWARRANTABLE FAILURE AND NEGLIGENCE

In issuing the order, the inspector found that the violation was caused by the unwarrantable failure of Daniel Lee to comply. To establish that a violation resulted from an operator's unwarrantable failure, it must be proven that the operator engaged in aggravated conduct that was more than ordinary negligence (Emery Mining Corp., 9 FMSRHC 1997, 2203-2204 (December 1987)).

I conclude that Daniel Lee's failure to comply with its plan resulted from more than a failure to exercise the care required by the circumstances. Stewart detailed the obvious differences between resin-grouted and mechanical roof bolts. Steward further described the differences in the equipment used to install the bolts. An operator is presumed to know the requirements of the its roof control plan, which means that Daniel Lee is presumed to have known which type of roof bolts were required at the various areas of No. 2 Mine.

Because the differences in the types of roof bolts and in the equipment used to install them were obvious, I can only conclude that the mine foreman and/or section foreman deliberately chose to install the conventional bolts despite the fact they were prohibited, or that the foremen were totally oblivious to what was happening on the 001 section and thus were highly negligent. In either event, they unwarrantably failed to comply with the standard by exhibiting more than ordinary negligence.

HISTORY OF PREVIOUS VIOLATIONS

In the 24 months prior to July 11, 1991, Daniel Lee was

cited for 137 violations. For a mine the size of the No. 2 Mine, this is a large number of prior violations (Gov. Exh 4). In addition, at my request, counsel supplemented the record with information regarding the compliance history of Harold Bolling and Daniel Lee. Counsel advised me that MSHA regards Bolling as the controlling entity of five mines: Moriah Branch Coal Company, No. 1 Surface Mine; Daniel Lee, Mine No. 1; Daniel Lee, Mine No. 2; Daniel Lee, Mine No. 3 and Daniel Lee, Surface Mine No. 1. Counsel also stated that the last payment of a civil penalty was received from Bolling on May 23, 1991. Further, as of October 24, 1994, MSHA closed its files on $24,323.26 in uncollected penalties from these entities(see Letter of October 31, 1994 and attachments) (When asked whether the Secretary had brought a collection action against Daniel Lee (and Bolling), counsel replied, "Not to our knowledge ... . Unfortunately, he doesn't owe us as much as some other people" (Tr. 56). Because the Secretary has written off the uncollected civil penalties, the amount currently due the Secretary from Daniel Lee is $1,684.28. Id. Nevertheless, and as explained below, the uncollected penalties are a most significant assessment consideration.

SIZE OF BUSINESS

Counsel stated the No. 2 Mine, employed approximately nine persons who worked one shift (Tr. 59; Letter of October 31, 1994). In addition, it is clear from the supplemental information supplied by counsel that Bolling and Daniel Lee operated other mines and that Bolling controlled or controls another mining company.

ABILITY TO CONTINUE IN BUSINESS

The effect of assessed penalties on the ability of an operator to continue in business is a matter to be proven by the operator. Here, of course, there was no such proof.

When asked whether the company was still in business, counsel replied, "Not to my knowledge" (Tr. 57). If in fact Daniel Lee has ceased operation, imposition of a civil penalty for a past violation may still be appropriate. Cessation of mining does not mean a company intends to forego operations at some future time, either at the same location or at some other location, using the same or another name (See Steele Branch Mining, 15 FMSHRC 1667, 1701 (August 1993)(ALJ Koutras)). Therefore, I conclude any penalty assessed will not affect Daniel Lee's ability to continue in business.

GOOD FAITH ABATEMENT

The violation was abated the following day. This constituted good faith abatement.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a penalty of $400. Given the seriousness of the violation and the more than ordinary negligence of mine management, as well as the other civil penalty criteria, this proposal would have been appropriate had there not been another very important factor to consider. This factor -- the operator's compliance record -- mandates the penalty assessed be substantially more than that proposed.

The Act mandates a civil penalty be assessed for each violation. The statutory enforcement scheme is premised upon the assumption that compliance is encouraged and violations deterred by the payment of penalties. Payment is the culmination of the citation and assessment process. Thus, consideration of an operator's history of previous violations should include the operator's history of payment. As I have noted previously, when an operator has a poor payment history for which the record provides no explanation, I can only assume it is the result of contempt for the Act and for the Commission, a contempt that is here mirrored by Bolling's totally unexplained failure to appear. Bob & Tom Coal Company, Inc., 16 FMSRHC 1974, 1990 (September 1994); see also May Resources Incorporated, 16 FMSHRC 170 (January 1994) (ALJ Fauver)).

Because of Daniel Lee's and Bolling's abysmal history in this regard, I will greatly increase the penalty from the amount I might otherwise have imposed and assess a civil penalty of $9,000 for the violation of section 75.200.

Finally, this is the first case in which Bolling was to have appeared before me, as well as the last in which similar behavior on his part will not trigger a disciplinary referral to the Commission (29 C.F.R. ' 2700.80).

David F. Barbour
Administrative Law Judge

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