

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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May 4, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 94-1210  
Petitioner : A.C. No. 15-08216-03627  
v. :  
: No. 2 Mine  
DIXIE FUEL COMPANY, :  
Respondent :

## DECISION

Appearances: Thomas A. Grooms, Esq., U.S. Department of Labor,  
Office of the Solicitor, Nashville, Tennessee, for  
the Petitioner;  
H. Kent Hendrickson, Esq., Rice & Hendrickson,  
Harlan, Kentucky, for the Respondent.

Before: Judge Weisberger

### Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging two violations by Dixie Fuel Company (Respondent) of 30 C.F.R. Section 75.202(a). Subsequent to notice, the case was scheduled for hearing in Johnson City, Tennessee, on March 7, 1995. At the hearing, Petitioner made a motion to approve a settlement agreement regarding Citation No. 4249321. Respondent has agreed to pay the full assessed penalty of \$189. I have considered the representations and documentations submitted relating to this citation, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the motion to approve settlement is granted.

The remaining matter in this case, Citation No. 4249322, was heard on March 7, 1995. Andron Wilson testified for Petitioner. Michael McMillan, Lewis Eugene Blevins, and Eddie Sargent testified for Respondent. Counsel for both parties elected not to file a post hearing brief.

### Findings of Fact and Discussion

I. Violation of Section 75.202(a), supra

On March 22, 1994, Andron Wilson, an MSHA Inspector, inspected Respondent's No. 2 mine, an underground coal mine. In essence, he testified that the roof was loose and broken in an approximately 300 foot area of entry Nos. 4 and 5. He said that a lot of loose rock had already fallen, and that "a lot of them that were left were cracked and hanging down" (Tr. 36). He estimated that the largest chunks of rock were 24 inches by approximately 30 inches. According to Wilson, the rocks "averaged" (Tr. 37) up to 8 inches thick. He stated that he could hear chunks of rocks falling when he made his inspection.

The roof was supported according to Respondent's roof control plan. Sixty inch bolts had been inserted into the roof on 4 foot centers. Also, steel straps, 20 inches wide and 16 feet long, were held to the roof by bolts. The distance between the bolts was 40 inches. Wilson indicated that "normally" there is an "average" of 32 inches of "open roof" between straps (Tr. 35).

Although no mining was taking place at the time, two men were working in the No. 4 entry. According to Wilson, there were "many areas" of unsupported roof, and loose dry rock containing cracks and gaps throughout the section at issue where Michael McMillian, the section foreman, had directed the workforce to "set up this section" (Tr. 36).

Wilson issued a Section 104 (d)(1) citation alleging a violation of 30 C.F.R. ' 75.202(a) which provides, as pertinent, as follows: "[t]he roof, . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof . . . ."

Michael McMillian, who was a bolter and foreman on March 22, 1994, and who accompanied Wilson, stated that he did not see any hazardous conditions in the roof of entry No. 4. He said that nothing was falling from the roof. He testified that he looked at the entries along with Wilson and that the condition of the roof was "not as bad as he (Wilson) was saying it was because we had straps in it" (Tr. 83). He stated that, regarding the safety of the roof, "I did not see anything wrong with it at the time" (Tr. 89).

Lewis Eugene Blevins, Respondent's Superintendent, who also was present with Wilson, indicated that before the inspection on March 22, there was no likelihood of an accident or injury occurring in the area due to rock falls. However, on cross-examination, he was asked whether at the start of the shift on March 22, the area in question needed scaling, and he answered as follows: ". . . you might have found one or two little pieces you might needed to scale" (sic) (Tr. 108). He further elaborated as follows: "[w]ell, that would be hard to say if

it needed scaling. You would have to -- when you make your examination, then you would determine if it needed scaled or not, which I didn't see nothing that needed scaled down" (sic) (Tr. 109).

I find the testimony of Respondent's witnesses insufficient to impeach or significantly contradict the testimony of Wilson regarding his observations. Further, I find that there is insufficient evidence in the record to impugn any improper motive on the part of Wilson regarding his opinion that the conditions he observed were hazardous to miners working in the area. I thus find that although the roof had been supported by bolts and straps, the conditions were such that the roof was not adequately controlled to have protected the miners working in the area from the hazardous conditions associated with loose and broken roof. For these reasons, I conclude that Respondent did violate Section 75.202(a), supra.<sup>1</sup>

According to Wilson, had the conditions in the roof not been abated the loose and broken rocks would have eventually fallen, time causing serious injuries.

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<sup>1</sup>In essence, according to Blevins, the roof had formed an arch between the straps of the roof. He opined that if loose rock is pulled around the straps, which provide the bases for the arches, the roof bolts would become dislodged. Compliance with Section 75.202(a) does not require the pulling of loose rock around footnote No. 1 cont'd.

straps. Hence, even if arches were present in the roof, Respondent is not relieved from complying with the terms of Section 75.202(a), supra requiring the support or control of the roof to protect miners from the hazards related to roof falls.

## II. Significant and Substantial

According to McMullian, after the inspection Wilson told him to pry down loose rock and that "a lot of it wasn't as loose as what he (Wilson) thought it was", and that "we was having to force it down", as "there wasn't nothing that was loose" (sic) (Tr. 86). McMillian indicated that in his 9 years of experience working at the mine, he does not recall any injuries resulting from draw rock "between these straps" (Tr. 85). In the same fashion, Blevins testified that, in his 10 years at the mine, he could not recall any problems or injuries from rock falls in the area in question. He opined that there was no likelihood of an accident from a rock fall. He indicated that he would feel comfortable working in the area "as it was" on March 22 (Tr. 100).

I have considered the above testimony of Respondent's witnesses concerning the likelihood on an injury resulting from the cited conditions. However, due to the extent and size of loose material as set forth in Wilson's testimony, I conclude that the violation was significant and substantial (See, Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984)).

## III. Unwarrantable Failure

The area in question was preshifted prior to its being cited by Wilson. According to Wilson, Blevins and McMillian did not deny that there were any problems with the roof. Both McMillian and Blevins, in essence, opined that the cited conditions were not hazardous. According to Wilson, when he discussed the cited conditions with McMillian and the need to remove the loose rock, McMillian told him that "... if I pull it today, its just going to need pulled again tomorrow" (sic) (Tr. 39). McMillian explained that if rock is pulled off the straps, the roof loosens and has room to move.

Given the extent of the roof area that had loose and broken roof, the fact that the roof had been inspected that morning on a preshift examination, and the fact that men were working in the area, I conclude that the violation herein resulted from more than ordinary negligence, and reached the level of unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997, 2203-2204 (1987).)

I find that a penalty of \$3,500 is appropriate for this violation.

ORDER

IT IS ORDERED that, within 30 days of this decision,  
Respondent pay a total penalty of \$3,689.

Avram Weisberger  
Administrative Law Judge

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