

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 84-93
Petitioner : A.C. No. 36-00967-03564
v. :
: Clyde Mine
BCNR MINING CORPORATION, :
Respondent :

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
B. K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act" for two violations of the regulatory standard at 30 C.F.R. § 75.200. The general issues before me are whether the BCNR Mining Corporation (BCNR) has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e. whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The parties have submitted the case on a stipulation of facts and have agreed that the general issues may be resolved upon these facts and the determination of a specific legal issue, i.e. whether Safety Precaution No. 20 of Respondent's approved roof control plan applies to certain cross bars or beams that had been installed as roof support prior to the incorporation of Safety Precaution No. 20 into the approved roof control plan. It is stipulated that the cross bars or beams cited had in fact been installed before the incorporation of Safety Precaution No. 20 into the approved roof control plan. Safety Precaution No. 20 reads as follows:

"On haulageways, all crossbars or beams shall be installed with some means of support that will prevent the beam or crossbar from falling in the event the supporting legs are accidentally dislodged."

The facts as stipulated by the parties are as follows:

I. Factual Background

On November 18, 1983 MSHA Inspector Thomas H. Devault, while making an inspection of the Clyde Mine, noticed approximately 50 steel beams between the 16 Flat overcast and the upright pump 200 feet inby the overcast which were not secured from falling in the event support legs to the beams would be dislodged. As a result, he issued Citation 2105238 at 8:35 a.m. on November 18, 1983 to the Clyde Mine.

On December 2, 1983, while on an inspection checking the abatement of the citation which had been issued on November 18, 1983, Inspector Devault issued a second citation as the result of his observing approximately 30 steel beams located at a point starting 500 feet inby the pump and continuing inby for a distance of 300 feet which were not secured from falling in the event that support legs would be dislodged. Thus, Citation 2105239 was issued at 11:15 a.m. on December 2, 1983.

The said citations were issued pursuant to Section 104(a) of the Act for "significant and substantial" violations of 30 C.F.R. § 75.200, for violation of safety precaution #20 of the Approved Roof Control Plan which states as follows:

"On haulageways, all crossbars or beams shall be installed with some means of support that will prevent the beam or crossbar from falling in the event the supporting legs are accidentally dislodged."

A copy of the roof control plan dated September 13, 1982 is attached hereto, made a part hereof and marked Exhibit "A".

Citation 2105238 was terminated on December 2, 1983 after the mine inspector observed that wire ropes had been installed as straps to provide additional support to the cited steel beams. Citation 2105239 was

terminated on January 19, 1984 when a mine inspector observed that all cited steel beams had been adequately secured and prevented from falling in the event that their supporting legs were knocked out.

Safety precaution #20 was adopted by Approved Roof Control Plan on October 7, 1976. Prior to that date, the safety protection afforded by the said precaution was afforded only by Safeguard 1 GFM which was issued to the Clyde Mine on August 14, 1973. The said safeguard provides as follows:

"Numerous crossbars, steel rails and I beams supported by posts or cribs which could be dislodged in the event of a derailment of a trolley locomotive or a trip of mine cars were observed along the track haulageways of this mine. Cabs or other suitable means of protecting the operators of all trolley locomotives from falling material in the event of a derailment shall be provided at this mine."

On December 16, 1973, the Mine Operator implemented a policy of abating the conditions cited in the said Safeguard by installing roof straps to prevent the "crossbars, steel beams and I beams" from falling. This method of abatement was approved by MSHA as a "suitable means of protecting . . . operators" as required by the Safeguard.

The haulageways requiring strapping extended approximately 12 miles. Following issuance of the safeguard and the Operator's initiation [sic] of abatement efforts in December 1973, citations alleging violations of the Safeguard were extended and/or modified about 100 times as strapping operations continued.

However, on December 15, 1982 a Section 104(b) Order was issued to the Mine for its alleged failure to continue the strapping operation in a timely fashion. That Order was contested and is presently the subject of a notice of contest and penalty contest case under Docket Nos. Penn 83-56-R and Penn 83-139 before Judge William Fauver. That Order was terminated on April 19, 1983.

Thereafter, three § 104(a) citations were issued to the Clyde Mine alleging violation of Safety Precaution #20 of the Approved Roof Control Plan. Those cita-

tions are: Citation 2104665 issued on April 21, 1983, Citation 2104668 issued on May 2, 1983 and Citation 2104672 issued on May 11, 1983. Following their issuance, the mine sat idle for a period of months before Citations 2105238 and 2105239 were issued.

Additional facts concerning the conditions alleged as violations are as follows:

The entry in which the beams are located contains the track haulage road. The entry varies from approximately 16 to 20 feet wide. Men, equipment, and supplies are hauled through this area by means of an electric trolley haulage system. The trolley wire is located on the right side of the entry (looking inby) and is approximately 2-3 feet from the rib. Approximately 3 feet of clearance is provided between the track and the rib on the tight side and about 4-5 feet on the wide side. The height of the entry from floor to bottom of beams is approximately 6 feet. The track is generally the same height as the mine floor.

The beams are lengths of steel track set against the roof crosswise to the direction of the entry. Wooden posts are set under the ends of the beams to hold the beams and the roof above them. The beams are approximately 15-20 feet long and are spaced approximately 5 feet apart.

The trolley locomotives and trip cars which move on the tracks of the track haulage derail from time to time. When they do, they can strike (and have struck) the wooden posts supporting the overhead beams causing the overhead beams to fall, posing a serious hazard to locomotive operators and any other miners in the vicinity.

When the beams were originally installed along the roof of the track haulage entry, some of them were supported by being set on a support system fastened into the rib near the roof. However, over time, due to ordinary weathering, the coal rib and roof suffered sloughage and fell making the original support system inadequate. Wooden posts (legs) were then set from the floor to support the steel beams.

This process occurred over a period of many years. The haulage entry was initially drawn (mined) approximately 40 years ago and the track haulage was installed

shortly thereafter. The beams were installed over a course of years as roof conditions along the haulage changed. By 1970, the original support for the beams had been replaced by the wooden legs.

II. Facts with Respect to the Size of the Operator and History of Prior Violations

Respondent, BCNR Mining Corporation and its Clyde Mine is an Operator which as of March 21, 1984, was producing 196,923 production tons of coal annually.

During the two year period preceding issuance of Citation 2105238, 678 violations were issued to the Clyde Mine. During the two year period preceding issuance of Citation 2105239, 683 violations were issued to the Clyde Mine.

It may be presumed, based upon the legal issue presented by the parties that the Respondent's position is that the roof control plan approved on October 7, 1976, applies only prospectively in the sense that pre-existing conditions, even though in violation of the plan, are exempt from enforcement action under the plan. Respondent does not, however, cite any legal impediment to the enforcement action for conditions which continued to exist after the effective date of that plan. The violations cited were alleged to have occurred well after the effective date of the roof control plan. I am indeed baffled by Respondent's contention, for even if the roof control plan had incorporated a criminal violation the enforcement action herein was directed to conditions existing after the effective date of the plan and therefore would not have been barred by the Constitutional provisions against ex post facto laws. Accordingly, I reject the Respondent's unsupported argument and affirm the "significant and substantial" violations cited herein. Considering the stipulated facts in light of the criteria under Section 110(i) of the Act, I find that the proposed penalties of \$126 for each citation are appropriate.

ORDER

Citation Nos. 2105238 and 2105239 are affirmed. The BCNR Mining Corporation is hereby ordered to pay civil penalties of \$252 within 30 days of the date of this decision.



Gary Mellick
Assistant Chief Administrative Law Judge

Distribution:

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