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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. KENT 89-192  
A.C. No. 15-11548-03572

v.

No. 22 Mine

LEECO, INCORPORATED,  
RESPONDENT

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee  
for Petitioner;  
Martin J. Cunningham, III, Esq., Reece, Lang,  
Aker & Breeding, P.S.C., London, Kentucky for  
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil for  
penalty filed by the Secretary of Labor pursuant to Section  
105(d) of the Federal Mine Safety and Health Act of 1977, 30  
U.S.C. 801 et seq., the "Act," charging Leeco, Incorporated  
(Leeco) with one violation of its Roof Control Plan under the  
regulatory standard at 30 C.F.R. 75.220 and seeking a civil  
penalty of \$7,000. The general issue before me is whether Leeco  
violated the cited regulatory standard and, if so, the  
appropriate civil penalty to be assessed in accordance with  
Section 110(i) of the Act.

At hearing Leeco filed a motion to dismiss which was granted  
at hearing in a bench decision. That decision is set forth below  
with only non-substantive corrections:

I'm going to grant the motion. The motion is  
essentially one to dismiss for failure to charge a  
violation of law as charged in the citation.  
Ordinarily, such a motion should of course be made  
before trial, but under the circumstances here there  
was some ambiguity in the citation itself as to what  
precise provisions of the Roof-Control Plan actually  
were alleged to have been violated. Under the  
circumstances the delay is understandable and I

will allow the motion to be made at this time now that the specific charges are known.

The citation before me, Citation No. 3030482 states as follows:

The temporary supports installed in the area of the accident were not in compliance with the approved Roof-Control Plan, in that the inby row of three had been installed eight to nine feet inby the first row of four. The approved plan requires temporary supports in rows of four, not more than five feet apart.

Now clearly that citation charges a violation of the Roof-Control Plan and nothing else, and as stated at hearing by the Secretary's Counsel the violation alleged is that on Page 24 of the Roof-Control Plan which is Government Exhibit No. 1 [attached hereto as Appendix I]. As clarified further at hearing the specific charge of a violation of the Roof-Control Plan appears to be that the second row of temporary supports, that is, the temporary supports identified as No. 6 and 7 on the diagram, Government Exhibit 2, [attached hereto as Appendix II] were set in excess of 5 feet from the first row of supports.

As an aside I also note that the specific testimony related to that allegation also differs significantly from the allegation of the citation. The testimony by the Inspector who wrote the citation is that the No. 6 temporary support was 6 feet inby the nearest first row support, and the No. 7 temporary support was 6 1/2 feet from the nearest first row support, whereas it is charged in the citation that these temporary supports were 8 to 9 feet inby the first row of supports. Be that as it may, as pointed out by Mr. Cunningham, counsel for the operator, the Plan on its face does not require more than one row of temporary supports where the cut at issue is less than 24 feet deep. It is conceded by the Government that the cut at issue was indeed less than 24 feet deep. It is also admitted by the Government that the second row of temporary supports was not even required by the Plan, but was in excess of the Plan's requirements. The fact

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that the second row of temporary supports does not comply with other provisions of the plan is therefore immaterial as far as I can see. As another aside here, they have not shown that having those additional second row of temporary supports even though they perhaps may have been on greater than 5 foot centers, were less safe than not having them at all.

In any event, under the circumstances of this case, I cannot find that there has been a violation of the Roof-Control Plan. I do not agree with the Government's representations that the violation charged in this citation was also a violation of some other part of the standard at 30 C.F.R. 75.220. I believe the Government's representation was that the alleged violation in this case also represented a failure on the part of the mine operator to have taken additional precautions if there were unusual hazards. It seems to me that even if that were charged the fact that the operator did erect additional temporary supports, even though perhaps in excess of the 5 foot requirement, does show that some additional protection was provided.

The Government also maintains that once having made the decision to install additional supports the mine operator must then comply with the 5 foot center requirement of the Plan. I cannot read any such requirement into the Plan and I therefore reject that contention. Under the circumstances, I'm going to grant the Motion to Dismiss and vacate the citation.

ORDER

Citation No. 3030482 is VACATED and this Civil Penalty Proceeding is DISMISSED.

Gary Melick  
Administrative Law Judge  
(703) 756-6261

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APPENDIX I

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APPENDIX II