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SOL (MSHA) V. DUQUESNE LIGHT
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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 Proceedings Docket No. PITT 78-439-P A.O. No. 36-02374-02023V
v.	Docket No. PITT 78-440-P A.O. No. 36-02374-02024V
DUQUESNE LIGHT COMPANY, RESPONDENT	Warwick Mine - Portal 3

DECISION

Appearances: Inga Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Henry J. Wallace, Esq., Reed, Smith, Shaw and McClay, Pittsburgh, Pennsylvania, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The cases were commenced by the filing of petitions for the assessment of civil penalties. The petition in Docket No. PITT 78-439-P alleged a single violation of a mandatory safety standard; that in Docket No. PITT 78-440-P alleged four violations. Motions were made for the approval of a settlement agreement with respect to the violation alleged in PITT 78-439-P and with respect to two of the alleged violations in PITT 78-440-P.

Pursuant to notice, a hearing on the merits was held in Pittsburgh, Pennsylvania, on March 20, 1979, with respect to the two remaining alleged violations in PITT 78-440-P. Federal mine inspector James S. Conrad testified for Petitioner. Mike Chekosky, Nicholas Levo, and Rudolph Malinsky testified for Respondent.

At the conclusion of the hearing, counsel for Petitioner and counsel for Respondent orally on the record proposed findings of fact and conclusions of law for my consideration. All proposed findings and conclusions not incorporated herein are rejected.

THE SETTLEMENT AGREEMENT

In Docket No. PITT 78-439-P, a violation of 30 CFR 75.400 on August 23, 1977, was charged because of an accumulation of loose coal and coal dust at the belt tailpiece, approximately 17 feet long, 7 feet wide and up to 10 inches deep. Float coal dust was not present. Counsel stated that the condition was moderately serious and was caused by ordinary negligence. The proposed assessment was $1,250. The settlement agreement was for $750. Counsel stated that the assessment procedure in effect at the time of the violation, which has since been changed, resulted in an automatic high assessment for an alleged unwarrantable failure violation by a large operator. I will approve the agreement with respect to this violation.

In Docket No. PITT 78-440-P, a violation of 30 CFR 75.400 on October 26, 1977, was charged because of an accumulation of loose coal and coal dust at the belt drive extending 24 feet inby and 18 feet outby the belt drive, 10 feet wide and up to 18 inches deep. Counsel stated that negligence was not certain and the gravity of the violation was diminished because the accumulation was saturated with water. The original assessment was for $8,000, the proposed settlement was for $750. Counsel stated that the original assessment was excessive under the present assessment policy and again was almost solely based on the size of the operator and an alleged unwarrantable failure violation. I will approve the agreement with respect to this violation.

Also in Docket No. PITT 78-440-P, a violation was charged of 30 CFR 75.200 on October 4, 1977, because a trailing cable was anchored from a resin roof bolt in violation of the approved roof control plan. The proposed assessment was $8,000, the settlement agreement was for $500. Counsel for the Secretary stated that because the bolt was a resin bolt, there was minimal damage to the roof support resulting from the anchoring of the cable. Counsel for Respondent argued that the condition did not constitute a violation of a mandatory standard and presented no hazard at all. I will approve the agreement with respect to this violation. I will state here that the amounts originally assessed for these violations are greatly out of line with the facts disclosed in the files and in the motions.

REGULATIONS INVOLVED

30 CFR 75.1710-1 provides in part:

> (a) Except as provided in paragraph (f) of this section, all self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine on and after January 1, 1973, shall, in accordance with the schedule of time specified %y(3)5C, be equipped with substantially constructed canopies

or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

* * * * * * *

> (f) An operator may apply to the Assistant Administrator-Technical Support %y(3)5C for approval of the installation of devices to be used in lieu of substantially constructed canopies or cabs on self-propelled electric face equipment. The Assistant Administrator-Technical Support may approve such devices if he determines that the use thereof will afford the equipment operator no less than the same measure of protection from falls of roof, face, or rib, or from rib and face rolls as would a substantially constructed canopy or cab meeting the requirements of this section.

30 CFR 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accmulate in active workings, or on electric equipment therein.

THE CONTESTED VIOLATIONS

On the basis of the testimony and other evidence introduced with respect to both of these alleged violations, I make the following:

FINDINGS OF FACT

1. At all times relevant to thse proceedings, Respondent Duquesne Light Company was the operator of an underground mine in Greene County, Pennsylvania, known as the Warwick Mine - Portal 3.

2. At all times relevant to these proceedings, Respondent produced about 694,000 tons of coal per annum, and employed approximately 575 employees. Respondent is therefore a large operator and penalties otherwise appropriate will reflect this fact.

3. The subject mine had a history of 494 paid violations between January 1970 and November 1977, including 12 paid violations of 30 CFR 75.1710 and 71 paid violations of 30 CFR 75.400. In both instances, I find that Respondent has a significant history of prior violations and any penalties assessed herein will reflect that finding.

4. There is no evidence that any penalties ordered herein would affect Respondent's ability to contuinue in business and I therefore find that they would not.

5. The evidence establishes in the case of both violations alleged herein that Respondent abated the conditions in good faith.

Order No. 7-0212, alleging a violation of 30 CFR 75.1710

6. On August 23, 1977, the Assistant Administrator for Technical Support of the Mining Enforcement and Safety Administration (predecessor to the Mine Safety and Health Administration) approved Respondent's application for approval of the use of a temporary roof support system in lieu of canopies over the drilling controls on the twin boom Galis 3510 roof drills in the subject mine. The approval was subject to seven stated conditions, including the following:

> a) The TRS is placed firmly against the roof before the bolter operator proceed inby permanent support.
> b) The controls necessary to position and set the automated temporary support are located in such a manner that they can be operated from under permanent support.

7. On November 3, 1977, James S. Conrad, Jr., a Federal mine inspector and a duly authorized representative of the Secretary, conducted a regular inspection at the subject mine.

8. On November 3, 1977, roof bolting operations had begun at the crosscut 57 feet to the left of survey station 8261 on the 7 right section of the subject mine. The roof bolting machine was an FMC Galis twin boom roof bolter.

9. The roof in the area described in Finding No. 7 was approximately 8 feet high. The excessive height was caused by the fall of a mud seam in the rock formation. The normal mining height was 54 inches.

10. The roof in the area in question was sound.

11. At the time and in the place in question, Respondent had installed a crossbar 16 feet long against the roof, with mechanical jacks at each end and two roof bolts in the middle of the crossbar.

12. At about 10:30 a.m. on November 3, 1977, roof bolting operations with the Galis twin boom bolter had commenced. Three of the four hydraulic jacks on the bolter were not firmly against the roof and no canopy was present on the bolter.

DISCUSSION

The inspector testified that after he arrived in the area in question, the roof bolters trammed their machine approximately 40 feet into the area that was to be bolted. Thereafter, they brought wooden blocks to the area which they intended to use with the jacks. A block was installed on only one of the four jacks and therefore only one of the jacks was in contact with the roof, when they proceeded to drill the hole for the left roof bolt. I accept the inspector's testimony that this procedure occurred and reject the suggestion of Respondent's witness, who was not an eyewitness, that the inspector actively induced the alleged violation.

13. On September 15, 1978, Respondent's approved roof control plan covering the use of twin-boom Galis bolters with automated temporary support systems was amended to provide that "in rare instances where the ATRS on roof-bolting machines cannot reach the roof, crossbars on legs shall be considered equivalent to the ATRS."

DISCUSSION

The practice approved on September 15, 1978, is the practice that Respondent was following in this case. This is evidence that the violation charged was less than serious, but obviously does not establish that a violation did not occur.

14. The practice described in Finding No. 12 was not serious because the roof was sound and the area in question was supported by a crossbar with jacks at each end and roof bolts in the center.

15. Respondent was aware of the practice described in Finding No. 12, but because of a reasonable doubt as to whether the practice was permissible under the roof control plan and the permitted automated temporary roof support system in lieu of canopies, the negligence was slight.

16. The alleged violation was cited in a withdrawal order. The evidence shows the condition was abated promptly and in good faith.

Order No. 7-0214, alleging a violation of 30 CFR 75.400

17. On November 9, 1977, there was an accumulation of loose coal and coal dust under the No. 3 belt in the west mains section of the subject mine at two different locations, totalling approximately 500 feet in length, 3 feet in width and 1 to 11 inches deep.

18. The area described in Finding No. 17 was largely wet, but the loose coal and coal dust were combustible.

19. The loose coal and coal dust described in Finding No. 17 were rubbing against approximately 30 bottom rollers in the belt. Some of the rollers were frozen.

20. There was float coal dust deposited on rock-dusted surfaces at intervals along the belt line 2,000 feet in length. This float coal dust was not in suspension. The color of the float dust on the rock-dusted surfaces ranged from light gray to dark gray.

21. The condition described in Finding No. 17 was not serious because of the wetness in the area.

22. The condition described in Finding No. 20 was moderately serious.

23. Respondent was aware of the conditions described in Finding Nos. 17 and 20. The conditions were such that had existed for several shifts and were not taken care of during Respondent's regular cleanup program.

24. The conditions described in Finding Nos. 17 and 20 were abated by Respondent promptly and in good faith.

CONCLUSIONS OF LAW

1. Respondent was at all times pertinent to these proceedings subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 in the operation of its Warwick Mine - Portal 3.

2. The undersigned administrative law judge has jurisdiction over the parties and subject matter of these proceedings.

3. The practice found herein to have occurred on November 3, 1977, in Finding No. 12 constituted a violation of the mandatory safety standard contained in 30 CFR 75.1710-1.

4. The condition found herein to have existed on November 9, 1977, in Finding Nos. 17 and 20 constituted a violation of the mandatory safety standard contained in 30 CFR 75.400.

5. The penalties hereafter assessed are based on my findings that the violations occurred, and on a consideration of the following criteria with respect to each violation: the operator's history of prior violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the operator in attempting to achieve rapid compliance.

ORDER

Based on the foregoing findings of fact and conclusions of law and the motion for approval of a settlement agreement, Respondent is ORDERED to pay the following penalties within 30 days of this decision:

DOCKET NO. PITT 78-439-P

NOTICE OR ORDER	DATE	30 CFR STANDARD	PENALTY
7-0159 (Settlement agreement)	08/23/77	75.400	$ 750

DOCKET NO. PITT 78-440-P

7-0193 (Settlement agreement)	10/26/77	75.400	750
7-0185 (Settlement agreement)	10/04/77	75.200	500
7-0212	11/03/77	75.1710	400
7-0214	11/09/77	75.400	800
		Total	$3,200

James A. Broderick
Chief Administrative Law Judge