CCASE:

SOL (MSHA) V. BILL W. STODDARD

DDATE: 19790626 TTEXT: 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. DENV 78-527-P A.C. No. 42-00081-02014V

v.

Co-op Mine

BILL W. STODDARD, W. J. OWENS, ELLERY KINGSTON, ELDEN KINGSTON, GERALD HANSEN, AND JOHN GUSTAFSON, D/B/A CO-OP MINING COMPANY,

RESPONDENTS (FOOTNOTE 1)

DECISION

Appearances: James L. Abrams, Esq., Office of the Solicitor, U.S.

Department of Labor, for Petitioner

Carl E. Kingston, Esq., Salt Lake City, Utah, for

Respondents

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The Mine Safety and Health Administration (MSHA) filed a petition for the assessment of a civil penalty on July 31, 1978, alleging that Respondents committed a violation of 30 CFR 75.400. On January 16, 1979, Respondents filed their answer contesting the violation. A hearing was held in Salt Lake City, Utah, on May 18, 1979, at which the parties were represented by counsel.

Evidence was received regarding Citation No. 7-0045 (December 12, 1977), which alleged a violation of 30 CFR 75.400.(FOOTNOTE 2) This regulation requires that "ÕcÊoal 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 accumulate in active workings, or on electric equipment therein."

On the basis of the evidence presented, and in light of the statutory criteria, a decision was made from the bench finding a violation and assessing a penalty of \$100. The following is a summary of the findings made regarding the citation:

- (a) A violation did occur (Tr. 86). The finding of the existence of the accumulations was based on the uncontradicted testimony of Inspector Lawrence Ganser (Tr. 16-17, 25, 76, 85-86). The inspector's estimate that the accumulations had existed over a shift or two was accepted (Tr. 20, 86).
 - (b) The operator is small to medium in size (Tr. 8, 87).
- (c) There is a history of prior violations. Some of these are of 30 CFR 75.400, although not a significant number. Petitioner's Exhibit No. 1 shows that there have been three violations of this standard assessed for \$106, \$375, and \$125. They were settled for \$106, \$110, and \$67, respectively (Tr. 7, 90). This was not a bad history (Tr. 87).
- (d) The penalty assessed will not affect the ability of the operators to continue in business (Tr. 87).
- (e) Good faith efforts were made to achieve rapid compliance (Tr. 88).
 - (f) The violation was serious (Tr. 88).
- (g) There was some negligence on the operators' part (Tr. 88).

Consideration has been given to the fact that the belt in this case was new and problems had occurred with its use (Tr. 40-42, 52-54, 87).

(h) Based on the circumstances which failed to show any exceptional factor requiring a more than normal penalty, the operator should be assessed \$100 (Tr. 90-91).

The decision made from the bench finding a violation of 30 CFR 75.400 and assessing a penalty of \$100 is hereby AFFIRMED. It is ORDERED that Respondents, within 30 days of the date of this decision, pay the penalty of \$100 assessed in this proceeding.(FOOTNOTE 3)

Franklin P. Michels
Administrative Law Judge

FOOTNOTES START HERE

~FOOTNOTE_ONE

1. At the beginning of the hearing, Petitioner moved to amend the caption in this case, Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Co-Op Mining Company, to reflect that the business was a partnership. Respondents did not object to this proposed change and agreed to submit a letter which would provide the names of the partners (Tr. 4-6). This letter was filed on May 25, 1979, and the caption has been amended accordingly.

~FOOTNOTE TWO

2. Lawrence J. Ganser, the inspector who issed the citation, testified as a witness for the Petitioner (Tr. 14-38, 77-81). Bill W. Stoddard (Tr. 39-64, 83-84) and Nathan Atwood (Tr. 65-79) testified for Respondents.

~FOOTNOTE THREE

3. A question was raised on the matter of scheduling the hearing (Tr. 92-98). Counsel for the Solicitor seemed to raise an issue on the matter of the number of times the hearing was rescheduled. This is all a matter of record and it remains a puzzle why counsel believed it should be further recorded in the transcript.

The hearing was first scheduled for May 16 in Salt Lake City, Utah. It was later changed to Price, Utah, still for May 16. Subsequently it was rescheduled for Salt Lake City, first for May 16, 1979, and later to May 18, a Friday.

Such a number of changes is not the ordinary practice of the presiding Judge and, in fact, I know of no other case where this has happened. It was necessitated by the changes which occurred with regard to the group of cases set for hearing at that time. Only a few days prior to the week of hearings, the presiding Judge learned that another scheduled case was to take a full two days, Tuesday and Wednesday, and possibly another day in the week. There was no way, therefore, that all the cases could be heard, unless this case was rescheduled for Friday afternoon of that week of hearings.

Counsel further complains that he was not orally notified of the change. My instructions to my law clerk have always been to notify the parties by telephone when a late change is made in scheduling, and I fully believed this had been done. If that was not done in this instance, it was a regrettable oversight, and I have taken steps to prevent such a happening in

the future. In any event, the Solicitor was notified by certified mail by an order issued May 11, 1979, and received on May 15, 1979. This was a full three days prior to the hearing and a day prior to the previously scheduled date. Counsel has given no facts showing he was in any way prejudiced by the change in dates.