CCASE:
SOL (MSHA), v. LJ'S COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
503 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. KENT 90-356 A. C. No. 15-16477-03526
v.	
LJ'S COAL CORPORATION, RESPONDENT	Docket No. KENT 90-399 A. C. No. 15-16477-03528 Docket No. KENT 90-400 A.C. No. 15-16637-03529 No. 3 Mine Docket No. KENT 90-401 A.C. No. 16-16637-03505 No. 4 Mine

DECISION

Appearances: W. F. Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee for the Petitioner;
Carl E. McAfee, Esq., LJ's Coal Corporation, St. Charles, Virginia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon petitions for assessment of civil penalty filed by the Secretary (Petitioner), alleging violations of various mandatory standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to a notice of hearing, issued on November 16, 1990, these cases were scheduled for hearing on December 18, 1990. On December 11, 1990, a message was received from counsel for Petitioner, indicating that the parties settled these cases. On January 14, 1991, Petitioner filed a joint motion to approve settlement. On January 18, 1991, in a conference call I initiated between counsel for both parties, it was explained that, inasmuch as the motion did not contain sufficient facts to support the proposed settlements, it could not be granted. On February 4, 1991, the parties filed a supplement to the motion to approve settlement. On February 25, 1991, an order was issued denying the motion to

approve settlement on the ground that neither the motion nor the supplement provided any facts in support of the appropriateness of the proposed penalties. Subsequent to notice, these cases were scheduled for hearing, and were subsequently heard in Tazewell, Tennessee, on June 18, and 19, 1991. Robert W. Rhea, Robert E. Jones, and Elijah Myers, testified for Petitioner. The operator (Respondent) did not call any witnesses, nor did it offer any documentary evidence.

Findings of Fact and Discussion

I. Docket No. KENT 91-356

Order No. 3377046

On January 18, 1990, a section 104(d)(1) order was issued to Respondent, alleging a violation of a mandatory standard at its No. 3 Mine. There were no intervening clean inspections between January 18, 1990 and March 8, 1990.

On March 8, 1990, Robert W. Rhea, an MSHA Inspector, inspected the belt at the 001 section at Respondent's No. 3 Mine. He testified that there was no guard on the tail piece of the roller. According to Rhea, the roller in question is 24 inches in diameter and holds the belt down to the tail piece. He indicated that production was in process, and a scoop was dumping coal on the belt when he arrived. He observed a metal structure against a rib. The section foreman, Dwayne Nicely, informed him that this structure was the guard.

Rhea observed one employee breaking rock with a sledge hammer approximately 10 feet from the tail roller. He indicated that the height of the coal seam, being between 42 and 48 inches, and the fact that the floor in the area in question contained loose coal and rock, made it difficult to move around. In essence, it was his opinion that a person working in the area might come in contact with the moving roller, causing a serious injury. Rhea issued a section 104(d)(1) order, alleging a violation of 30 C.F.R. 75.1722.

As pertinent, section 75.1722, supra, provides that, in essence, exposed moving machine parts which may be contacted by persons and which may cause injury shall be guarded, and that guards shall be securely in place while the machinery is being operated.

Respondent did not proffer any witnesses or documentary evidence. Based upon the testimony of Rhea, I conclude that the tail roller in question, was not guarded, and this condition exposed moving parts that might be contacted by persons working in the area, especially considering the low height of the seam,

and the uneven surface of the floor. Accordingly, it has been established that Respondent violated section 75.1722, supra.

According to Rhea, any loose clothing, gloves, tools, or battery light cord, worn by a miner, coming in contact with the unguarded belt, would cause the miner to be pulled into the roller, causing dismemberment or death. Considering the proximity of the miners working in the area to the unguarded tail roller, and the low height of the roof, and the surface of the floor containing loose coal and rocks, I conclude that it has been established that there was a reasonable likelihood of a hazard of contact with the moving tail roller, and a reasonable likelihood that such a hazard would have resulted in an injury of a reasonably serious nature. Hence, I conclude that it has been established that the violation herein was significant and substantial. (See, Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984)).

According to Rhea, on "numerous occasions," he had cited the same violation and discussed it with the section foreman, Dwayne Nicely (Tr. 37, 38). He said that during two or three inspections between January 18, 1990, and March 8, 1990, he talked with Nicely about the guarding of the tail piece. He indicated that when he issued the citation on March 8, 1990, he asked a miner at the tail roller whether he was aware of the roller and whether he thought that it needed a guarding, and the miner indicated in the affirmative and stated that the guarding was at the rib. Hence, I find that Respondent was aware of the need for the guarding at the location in issue, and was also aware that the guarding was not in place. There are no facts to explain why Respondent did not replace the guard. I conclude thus that the violation resulted from Respondent's aggravated conduct. Accordingly, I find that the violation herein to be the result of Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)).

Considering the gravity of the violation, and its degree of negligence, as testified to my Rhea, and considering the remaining statutory factors, I conclude that a penalty herein of $800 is appropriate.

b. Citation No. 3377047

Rhea testified, in essence, that on March 8, 1990, he observed a cavity in the roof of the last open crosscut in the No. 3 entry. He described the cavity as 20 to 30 feet wide, 20 to 30 feet long, and approximately 20 feet in depth. He said that such a cavity was evidence that a rock fall had occurred. According to Rhea, Nicely indicated to him that a roof fall had occurred that week i.e., the week of March 8th, which had entrapped a roof bolting mahcine. Rhea said that Nicely told him that the roof fall had not been reported. Rhea issued a citation alleging a violation of 30 C.F.R. 50.10 which in essence

requires an operator to "immediately" contact MSHA "if an accident occurs." 30 C.F.R. 50.2(h)(a) defines accident, as pertinent, as ". . . an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;" "active workings" is a term defined in 30 C.F.R. 75.2(g)(4) as "any place in a coal mine where miners are normally required to work or travel".

Based on the testimony of Rhea that has not been rebutted or impeached, I find that a roof fall had occurred which was not reported. There is no evidence that this roof fall was planned, and since it entrapped a roof-bolting machine, I conclude that it occurred in a area where miners were required to work and did impede passage. Accordingly, since this roof fall had not been reported, I conclude that Respondent did violate section 50.10, supra.

Taking into account the significant amount of the rock fall as evidenced by the cavity in the roof observed by Rhea, and the fact that Respondent had knowledge of the roof fall as evidenced by Nicely's statement to Rhea that efforts had been made to remove a bolter entrapped by the roof fall, and the fact that no evidence was adduced by Respondent in order to mitigate its negligence, I conclude that the level of its negligence in regard to the violation herein was high. Rhea testified to the hazards miners were exposed to occasioned by their having to work to retrieve the entrapped bolter under an area without roof supports. However, Petitioner did not adduce evidence through Rhea or any other witness or document, with regard to the gravity of the violation herein, i.e., failure to report a roof fall as opposed to hazards attendant upon the roof fall itself. I find that a penalty of $400 is appropriate for the violation.

c. Orders Nos. 3377049, 3277050, 3377051, and 3377052

According to Rhea, when he examined the No. 1 entry on March 8, 1990, he observed hillseams approximately 50 to 75 feet from the coal face, and covering an area of the roof of approximately 30 by 25 feet. Rhea stated that the width of the hill seam varied from a "crack," to, up to 3 to 4 inches (Tr. 128). In this connection, he said that three of the hillseams were 3 to 4 inches wide. Rhea defined hillseams as vertical fractures in the roof.

According to Rhea, the area in question was supported only by bolts. There were no cross bars, steel straps, or cribs. Rhea issued an order alleging a violation of the roof control plan ("the plan").

In the No. 2 entry Rhea observed more than two hillseams in the last open crosscut. He said they were approximately the same type and width as those he testified to in the No. 1 entry,

(Order No. 3377049, infra). He indicated that the only roof supports were roof bolts.

Rhea also observed an area of a hillseam 8 feet wide by 20 feet in the No. 2 entry that was totally unsupported. This area was located one crosscut inby the section dumping point, and was 100 feet outby the hillseams he had observed at the last open crosscut.

Rhea said he also observed hill seams in the No. 4 entry inby the last open crosscut, and their condition was the same as in entries one and two. Rhea issued separate orders for failure to follow the roof plan in entries 1, 2,(Footnote 1) and 4 respectively.

Paragraph 3 of page 5 of the plan (Government Exhibit 5), specifically provides that when "hillseams" are encountered, cross beams or steel straps are to be used. Inasmuch as Rhea's testimony that there were no beams or straps in areas of hillseams, has not been impeached or rebutted, I conclude that Respondent herein did violate its roof-control plan in entries 1, 2, and 4.

According to the uncontradicted testimony of Rhea, all haulage has to go through the area in question in order to get to the face, and, hence, miners are required to travel in the area in question. He said that there was a danger of a roof failure where the hillseams intersect, and an injury was reasonably likely to occur, considering the fact that there was a roof fall in the No. 3 entry, and the fact that the hillseams were "numerous," (Tr. 123) and the fact that the roof conditions stretched across the last open crosscut. Rhea also said that the combination of hillseams across all the entries increased the danger of a roof fall especially considering that only 50 feet separated the entries. Should a roof fall occur, there would be a reasonable likelihood of a injury of a reasonable serious nature due to the fact that, at a any one time, according to Rhea, four miners are present in the area. Inasmuch as Rhea's testimony has not been contradicted or rebutted I conclude, that it establishes that the violations herein are significant and substantial (See, Mathies, supra).

Rhea indicated that the hillseams were obvious and that water was dripping out of them. Rhea related that he discussed the condition with Nicely who indicated that he was aware of what was required in the ventilation plan, and acknowledged that he had hillseam problems in all areas of the section. Rhea testified that Nicely was sure the section was going to be moved within the next few days, due to the massive roof fall that had occurred in entry No. 3 over the weekend. There is no evidence,

however, that Respondent abandoned these entries and that they were no longer working sections. Taking into account the extent of the hillseams, their width, and the fact that water was dripping out of them, I conclude that Respondent was negligent to a high degree in not having complied the terms its roof plan, requiring the provision of additional support to the area in question. This is especially true inasmuch as Respondent did not adduce any facts which would tend to mitigate its negligence. Due to the fact that the hillseams were not supported in the fashion required by the roof control plan, which could result in a roof fall causing serious injuries to miners, I conclude that the violations herein were of a high level of gravity. I find that a penalty of $800 is proper for each violation found herein. (Footnote 2)

d. Citation No. 3391846

MSHA Inspector Robert E. Jones, testified that on March 20, 1990, he inspected the elevated roadway, on the surface of Respondent's No. 3 Mine. He testified that this roadway, which is the only access to the mine, is 6 miles in length, and that 3 miles of this road, go up a steep grade which he estimated as being more than 15 percent "in places" (Tr. 209). He said that he observed truck traffic on the road.

Jones testified that he observed no berms at "intermittent" (Tr. 213) locations. He said that in narrow places where the road had been washed out, there were no berms or guard rails. He said that the road bed is flat, and that as it travels up to the mine there is a ditch on the right side of the road, and a "outer bank or the hill side" on the left side that slopes down (Tr. 217). Jones issued a citation alleging a violation of 30 C.F.R. 77.1605(k), which provides as pertinent, that berms or guards shall be provided on the outer bank of elevated roadways. Based on Jones' testimony that had been neither rebutted nor contradicted, I find that Respondent herein did violate section 77.1605(k), supra.

Essentially, according to Jones, as a consequence of the lack of berms, an accident is reasonably likely to occur due to the grade of the road and its steep banks. He said that if a truck left the roadway due to the absence of berms, and went over the side of the hill, "there wouldn't be any hope" (Tr. 215). In this connection he indicated that he also took into account the width of the road bed which he indicated averaged about 15 feet, but that in some it was not more than 10 to 12 feet wide.

Jones, in his testimony, did not specifically indicate the location of the areas that did not have a berm. Nor did he describe their location with reference to any drop off from the roadway. Nor did his testimony specify the extent and length of any area in the roadway that did not have a berm. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial.

Taking into account that the violation herein might lead to a truck running off road and seriously injuring personnel inside, I find that the violation was of a moderate level of gravity. I find Respondent slightly negligent in that Rhea conceded that Respondent did a good job with the berm and that due to the weather the berms are hard to maintain, although "it could be done" (Tr. 219). I conclude that a penalty of $100 is appropriate for this violation.

II. Docket No. KENT 90-399

a. Order No. 3377161

On April 12, 1990, Jones issued Order No. 3377161 alleging, in essence, that the deluge water spray system on the No. 2 belt would not operate properly when tested, and hence was in violation of section 75.1100-3 which provides that all firefighting equipment shall be maintained in a usable and operative condition. (Footnote 3)

The system at issue contains sprays located approximately 8 feet apart, which are activated only by exposure to heat, and can only be tested in that fashion. Water pressure is supplied by way of a pump which is located outside the mine.

Jones indicated that a plug, 1-inch in diameter, had been removed from the bar connecting the spray system "together", (Tr. 236) and water was coming out of the hole where the plug had been removed. Jones concluded that accordingly, pressure was weakened all along the line. However, on cross-examination, Jones indicated that there was pressure in the system. He conceded that the only way to know whether the system works, is to open the valve at the end of the 50 foot line. He indicated that he did not open this valve, nor were the sprays tested by applying heat.

Hence, although it is possible that as a consequence of the plug having being removed there was weakened pressure, I find that it has not been established that the system was in an

inoperative condition and was not usable. Hence, I conclude that it has not been established that the Respondent herein violated section 75.1100-3.

b. Citation No. 3377351

Jones testified, in essence, that an update of Respondent's dust-control plan was due to be submitted April 6, 1990. He said but that the MSHA mine file for the subject mine was checked by him on May 30, 1990, and the record did not indicate that such a plan was submitted. Respondent did not assert or adduce any evidence that such a plan was submitted.

30 C.F.R. 75.316, provides that a dust-control plan ". . . shall be reviewed by the operator and the Secretary at least every 6 months." On the record before me, I conclude that the operator did not submit an updated plan at the 6-month due date. Accordingly, it was not possible for the Secretary to review such a plan with the operator, and hence, the operator herein violated section 75.316.

Jones indicated, however, that Respondent herein did have a valid plan with projections extending 6-months beyond May, 1990 and that the plan indicated good ventilation. Also on cross-examination, it was elicited that at the date the citation was issued, Respondent was in the process of mining out, and that on June 22, 1990, the mine was sealed. Taking these factors into account, I conclude that a penalty of $20 is appropriate for this violation.

III. Docket No. KENT 90-400 (Order No. 3376874)

In the 001 section of Respondent's No. 3 Mine, coal is removed by way of pillar extraction. The sequence in which coal is mined by taking a 10 by 20 foot cut out of a 40 by 40 foot pillar, is illustrated in Government Exhibit 16. According to Rhea, an operator using such a system is permitted to either cut in sequences from right to left as illustrated on Government Exhibit 16, or from left to right. The roof-control plan, (the plan") states that, "all pillars will be mined from the same direction" (Government Exhibit 5, page 13). The plan illustrates two parallel rows, each containing four breaker pillars, along with four posts in a diagonal line, all to be placed in the last open crosscut, outby the left split of a pillar that is being mined. In this connection, the plan provides as follows "breaker timbers to be installed before mining of corresponding mining sequence number." (Exhibit P.13, supra).

On April 17, 1990, when the section was inspected by Rhea, production was in process, the first in the series of cuts had already been taken from the four pillars in the section, and breaker timbers had been installed outby the left sided split of

blocks one and four as depicted in the plan (Exhibit 5, page 13, supra). There were no breaker timbers installed in the last open crosscut outby the left side split of pillars one and three in the position depicted in the plan, i.e., outby the left side split with the row of timbers furthest to the left in a line with the left side of the left split. However, the same number of post called for in the plan, had been installed in the last open crosscut, outby the right split of pillars one and three, respectively. Rhea also observed haulage traffic going in an outby direction, down entries two and four.

Rhea issued an order alleging a violation of the plan, ". . . in that the No. 1 & 2 pillar block (sic) and the No. 4 & 5 pillar blocks were being mined from one roadway." In this connection, the order further alleges, with regard to the plan, that it ". . . stipulates in sketch No. 8, page 13, that one pillar split shall be mined from one roadway only."

Page 13 of the plan (Exhibit 5, supra) does not contain any language specifically stipulating that a split shall be mined from one roadway only. Indeed there is no language specifically relating mining from a pillar to any specific roadway. The only language in the plan with regard to the direction in which the pillars are to be mined consists of the stipulation on Page 13, supra, that the pillars can be mined from either side and that "all pillars will be mined from the same direction." (Emphasis added) Rhea indicated the path to be taken by a miner, in cutting pillars one, two, three, and four, going from right to left, and utilizing breaker timbers as illustrated in the plan (see the arrows on Government Exhibit 16). However, he did not testify to having observed the direction in which all of the pillars were cut. Indeed, he did not testify to having observed the direction in which any of the pillars were being cut. Also, his testimony did not set forth any explanation which would tend to indicate that, by virtue of the placement of post in the areas observed outby blocks one and three, as opposed to their placement in the area depicted in the plan, all pillars would then be mined not from the same direction.

According to sketch 8, of the plan (Exhibit 5 supra) the breaker timbers that are to be installed, are to be placed in the last open crosscut, outby the left side split. As observed by Rhea, only the timbers set at pillars two and four were in the area illustrated on the plan, and the timbers installed at pillars one and three were outby the right side split rather than the left. Accordingly, I conclude that Respondent did violate the plan as alleged.

According to Rhea, the breaker timbers placed by Respondent at the pillars one and three, did not provide "maximum" (Tr. 349) support especially in the intersections between pillars one and two, and three and four, respectively. According to Rhea, the

lack of support in an intersection results in a weakened roof, and a greater danger of roof fall in the intersection. There is no allegation by Petitioner that the breaker timbers installed by Respondent were improperly installed, or were of a lesser quantity or covered a lesser area than that stipulated to by the ventilation plan. It also would appear that the pillars installed by Respondent, outby the right split of pillar No. 1 provided support to the intersection between the last open crosscut and Entry No. 5. Similarly, it would appear that the timbers installed outby the right split of pillar No. 3 provided additional support to the intersection between the last open crosscut and Entry No. 3. I thus find the evidence insufficient to establish that the violation was significant and substantial.

Rhea indicated in essence that in a discussion with Nicely, he asked him if he understood the plan and he said "absolutely." (Tr. 338). Rhea said that he asked Nicely why he pulled the breaker timbers from the No. 2 and No. 4 entries, and Nicely told him that he (Nicely) had stored or dumped loose materials consisting of rocks, mud and coal in the No. 1 and No. 5 entries. Accordingly, Rhea's testimony indicates that Respondent's action in not following the plan was taken intentionally, and in spite of its understanding of the requirements of the plan. Respondent did not adduce any testimony or documentary evidence to mitigate its negligence, or to contradict or impeach Rhea's testimony. Accordingly, I find that the violation herein was as a result of Respondent's unwarrantable failure (See, Emery supra).

Inasmuch as Rhea's testimony has indicated that failure to provide maximum roof support can lead to a roof fall, and since the intersection between the last open crosscut, and entries two and four had not received the maximum support stipulated by the plan, I conclude that the gravity of the violation is moderately high. Further, I find that Respondent's negligence was high, and that a penalty of $950 is appropriate for this violation.

IV. Docket No. KENT 90-401

On April 30, 1990, Elijah Myers, an MSHA electrical specialist inspected the electrical systems of Respondent's No. 4 Mine. He inspected a 480-volt three-phase generator and observed that there was neither a ground field nor a grounding resistor installed. He observed that although there was a neutral wire, it ended when the lead came out of the generator. He said that it was "very evident" (Tr. 385) that a cable from the bolter was attached to a wire from the generator. He also said that a ground wire did not go to the roof bolter, and a pilot wire was not hooked up going to the bolter. Myers issued Citation No. 3384008, alleging a violation of 30 C.F.R. 75.901.

Section 75.901, supra, provides in essence, that "Low and medium voltage three phase alternating current circuits used

underground shall contain either a direct or derived neutral which shall be grounded through a suitable resistor at the power center, and a grounding circuit, ... " Myers testified that the three phase circuit herein, was being used to power a roof-bolting machine, and there was no grounding i.e., neither a ground field nor a ground resistor was provided. This testimony was not inpeached or contradicted. Accordingly, I conclude that Respondent herein did violate section 75.901, supra.

According to Myers, the absence of a ground field leads to a hazard of electrocution, inasmuch as the amount of current is not dissipated, and accordingly, a person coming in contact with the bolter, could contact 277 volts and be electrocuted. I hence find the violation to be significant and substantial (See, Mathies, supra).

Myers indicated that Gary Williams, Respondent's certified electrical person, told him that he had operated the roof-bolting machine and had installed the generator. According to Myers Williams said he knew that the generator was not installed right, and, "knew all this stuff had to be on it." (Tr. 389). This testimony has been neither rebutted nor impeached. I thus find Respondent to have been highly negligent in connection with the violation herein. Further, considering the gravity of this violation, as contributing to the hazard of an electrocution, I find that a penalty of $500 is appropriate.

Inasmuch as there was no breaker observed by Myers, he also issued a section 104(a) citation, alleging a violation of 30 C.F.R. 75.900, which in essence, provides for the protection by circuit breakers of power circuits serving three phase alternating current equipment. Myers' testimony that a circuit breaker was not present, was not contradicted or impeached. Hence, it must be concluded that Respondent did violate section 75.900 supra.

Myers explained that in the absence of a circuit breaker, in the event of a overload, power would continue to flow, creating a danger of electrocution. He indicated that if the roof bolter would run over the cable, it would short out and put 277 volts on of the frame of the bolter. He said that if the bolter would be touched, the one touching it would be electrocuted. I conclude that the violation was significant and substantial. The appropriate penalty for this violation, considering its gravity, and the negligence of the Respondent as set forth above, infra, is $500.

The testimony of Myers, which was not impeached or contradicted, establishes that a ground monitor, to monitor the ground wire to make sure it was not separated or broken, was not in existence. Hence, I find that the citation in this regard issued by Myers, alleging a violation of 30 C.F.R. 75.902, was

properly issued, as it has been established that there was no fail safe ground check in violation of section 75.902, supra. Essentially, for the reasons I set forth above, infra, I conclude that the violation herein was significant and substantial. Considering the gravity of this violation and the Respondent's negligence as set forth above, infra, I conclude that a penalty of $500 is appropriate.

ORDER

It is ORDERED that:

(1) Citation No. 3391846 and Order No. 3376874 be amended to reflect the fact that the violations set forth therein are not significant and substantial.

(2) Order No. 3377161 be DISMISSED.

(3) Respondent pay within 30 days of the date of this decision $6,970 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge

Footnotes start here:-

1. Two locations separated by approximately 100 feet.

2. The cited violative conditions were in four distinct separate areas, and hence four citatinos were properly issued.

3. The order, which on its face alleges a violation of section 75.1101, was modified on April 3, 1990, to show instead a violation of section 75.1100-3, supra.