

CCASE:
SOL (MSHA) v. GREEN RIVER COAL
DDATE:
19910806
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

v.

GREEN RIVER COAL COMPANY,
INC.,
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 90-97
A. C. No. 15-13469-03730

Docket No. KENT 90-120
A. C. No. 15-13469-03737

Docket No. KENT 90-444
A. C. No. 15-13469-03756

No. 9 Mine

DECISION

Appearances: W. F. Taylor, Esq., Office of the
Solicitor, U. S. Department of
Labor, Nashville, TN, for the
Petitioner;
B. R. Paxton, Esq., Central City,
KY, for the Respondent.

Before: Judge Fauver:

The Secretary of Labor seeks civil penalties for alleged safety violations in these consolidated cases, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Respondent moved to strike the Secretary's posthearing brief on the ground that government counsel failed to include references to the transcript. The Secretary was allowed time to add such references. Counsel for the Secretary did so, and the motion to strike is DENIED.

In filing a new brief with references to the transcript, the Secretary's counsel stated in the cover letter that "we find that [the procedural regulations and the Act] do not require transcript references in briefs filed with the Commissions Judges. *** [M]any, many, times, because of budget constraints, this office is prohibited from purchasing trial transcripts and the post-trial briefs are, therefore, written based upon the attorney's trial notes."

I find counsel's position to be in error. The professionalism required of an attorney to submit page references to the transcript

~1248

does not need a procedural rule. This judge expects attorneys to submit professionally prepared briefs, not to be based on guesswork or surmise and not to cause the other parties and the trial judge to search the hearing record for support for the counsel's recollection or "notes" as to what was said at the trial. The Mine Act is a very important piece of legislation. It authorizes the Commission to adjudicate very serious and complicated matters involving safety and health in the mines and the due process rights of parties, including allowing a mine to remain closed for violations or to be reopened, determination of violations, assessment of civil penalties with a limit of \$50,000 for each violation, reinstatement of miners with substantial awards of back pay, attorney fees and other litigation costs, etc. Litigation under this statute is not to be reduced to the government's guesswork as to what was proved or disproved in a formal, accusatory hearing. (Footnote 1)

If, in the future, the government does not choose to obtain a transcript, it may use the Commission's public reading room to read the transcript and make references to it.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

Citation No. 3420966

1. At all relevant times Respondent operated an underground coal mine, known as Green River Coal #9, which produced coal for sale or use in or affecting interstate commerce.

2. Federal Coal Mine Inspector Bobby Clark inspected the mine on May 9, 1990, accompanied by Respondent's Safety Director, Mike McGregor, and the miners' representative, Ron Nelson. As the men walked inby (toward the working section) at the 8A seals, the alarm on Inspector Clark's methane detector sounded, showing a presence of 1.4 percent methane. He was in front of the No. 4 seal. Inspector Clark checked each seal as he passed it and the methane gas reading remained 1.4 percent. He checked the return entry, about 100 feet inby the first seal, and the methane gas accumulation was still 1.4 percent. Inspector Clark inspected each seal and determined that no leaks were present. He concluded that the methane was in the return airsplit from the No. 2 working section, and told McGregor that he was issuing a citation under 30

~1249

C.F.R. 75.309(a), which provides in pertinent part:

If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. * * *

3. Later in the day, after Inspector Clark returned to the surface, he observed that the fire boss who examined the area on May 8, 1990, had recorded in the examiner's book on that date the presence of 1.5 percent methane gas all across the area in front of the 8A seals and his report was countersigned by Foremen Cates and Whitfield. He then determined that the citation should be issued under 104(d)(1) of the Act, charging an unwarrantable violation.

Citation No. 3420800

4. Inspector George W. Siria inspected the mine on December 13, 1989, accompanied by Respondent's Safety Director McGregor and miners' representative Nelson. Before they arrived at the working section, they were told there was no power on the section and a roof fall may have struck the power transmission cable.

5. When he reached the section, Inspector Siria examined the roof, took an air reading and started making methane checks. He found methane in excess of 1.0 percent in nine locations, which he pointed out to McGregor. He issued 104(a) Citation No. 3420800 charging a violation of 30 C.F.R. 75.302, which provides:

(a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

(b) The space between the line brattice or other approved device and the rib shall be large enough to permit the flow of a sufficient volume and velocity of air to keep the working face clear of flammable,

~1250

explosive, and noxious gases, dust and explosive fumes.

(c) Brattice cloth used underground shall be of flame-resistant material.

Citation No. 3421762

6. Inspector Siria observed accumulations of coal dust and loose coal in the same section where he found excessive methane. Based on these observations, he issued 104(d)(1) Citation No. 3421762, charging a violation of 30 C.F.R. 75.400, which 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 accumulate in active workings, or on electric equipment therein.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 3420966

The key issue is whether the one percent methane level of 30 C.F.R. 75.309(a) or the two percent level of 75.312-2(d) applies to the place where Inspector found 1.4 per cent methane inby the 8A seals.

The government contends that the inspector found 1.4 percent methane in a split of air returning from No. 2 working section inby the first seal, and therefore 30 C.F.R. 75.309(a) applies. That section provides:

If, when tested, a split of air returning from any working section contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in the mine so that such returning air shall contain less than 1.0 volume per centum of methane. Tests under this 75.309 shall be made at 4-hour intervals during each shift by a qualified person designated by the operator of the mine. In making such tests, such person shall use means approved by the Secretary for detecting methane.

~1251

Respondent contends that the methane was being liberated from an abandoned area inby the 8A seals, and therefore 30 C.F.R.

75.312-2(d) and 75.309-2 apply. These sections provide:

30 C.F.R. 75.312-2(d)

The methane content in any return aircourse other than an aircourse returning the split of air from a working section (as provided in 75.309 and 75.310) should not exceed 2.0 volume per centum.

30 C.F.R. 75.309-2

The methane content in a split of air returning from any working section shall be measured at such point or points where methane may be present in the air current in such split between the last working place of the working section ventilated by the split and the junction of such split with another airsplit or the location at which such split is used to ventilate seals or abandoned areas.

The focus thus sharpens to the question whether the area contended by Respondent to be an abandoned area (see Exhibit R-1, area marked from "X" to "Y") was an abandoned area within the meaning of 75.309-2.

"Abandoned area" is defined in 30 C.F.R. 30.75.2(h) as follows:

"Abandoned areas" means sections, panels, and other areas that are not ventilated and examined in the manner required for working places under Subpart D of this Part 75.

If an operator contends that an area is abandoned, or is to become abandoned, 75.330 provides that the operator must follow a "plan . . . approved by the Secretary and adopted by such operator so that, as each working section of the mine is abandoned, it can be isolated from the active workings of the mine with explosion-proof seals or bulkheads."

Respondent's Safety Director testified that an abandoned area existed about 2500 feet outby the No. 2 working section, and inby the place where Inspector Clark reported methane. He described it as an area where "we had either roof falls or the condition of the roof was such that we couldn't go in and make these safe and we couldn't mine them safely." Tr. 77. He further stated "the examiner was making his weekly exam staying in the timber walkway." Id. The examination books reported that this area was being examined weekly.

When the citation was issued by Inspector Clark, Respondent did not say that this was an abandoned area, so that he could investigate the claim. Nor did it offer proof at the hearing that it was following an approved plan for designating this area as abandoned and sealing it from active workings. In addition, the return airway was clearly an "active working" within the meaning of 30 C.F.R. 75.2(g)(4), which provides: "[a]ctive workings' means any place in a coal mine where miners are normally required to work or travel." I find that the area Respondent claims to be abandoned was not "abandoned" within the meaning of the Act or regulations. The area cited by the inspector was an airsplit returning air from a working section and inby the first sealed or abandoned area within the meaning of 75.309-2. The Secretary proved a violation of 75.309(a), because 1.5 per cent methane had been detected by the operator on May 8, 1990, and the operator had not complied with 75.309(a) by making changes so that the "returning air shall contain less than 1.0 volume per centum of methane."

Unwarrantable Violation

The Commission has held that an "unwarrantable" failure to comply means "aggravated conduct constituting more than ordinary negligence." Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987); Youghioghney & Ohio Coal Co., 9 FMSHRC 2007, 2010 (1987). As defined in the legislative history, an "unwarrantable" failure is "failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1512 (1975); see also id., at 1602; and see: Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 620 (1978).

After Inspector Clark returned to the surface, he discovered that the fire boss who examined the area on May 8, 1990, recorded in the examiner's book on that date the presence of 1.5 percent methane gas all across the area in front of the 8A seals, and this report was countersigned by two Green River supervisors, Foremen Cates and Whitfield. He determined that the citation should be issued under 104(d)(i) of the Act, charging an unwarrantable violation.

Respondent's Safety Director, McGregor, testified that his inquiries indicated the foremen signed the examiner's book on May 8, 1990, before it was completed for that date and they did not see the entry reporting 1.5 percent methane. Tr. 87-88. The foremen, Whitfield and Cates, did not testify at the hearing.

I do not credit the Safety Director's hearsay testimony as

~1253

reliable evidence of an explanation for Respondent's failure to heed the examiner's report of 1.5 percent methane. Respondent is accountable for the information provided in the examiner's book, and its supervisors are required to read the examiner's report and countersign it. Absent the testimony of the supervisors as to their reasons for not taking action as required by 75.309(a), with the opportunity of government counsel to cross-examine, I find that the examiner's report is imputable to Respondent. The methane was being liberated from an unsealed area where roof falls could build up methane to an explosive level. Prompt action was required. Respondent's failure to heed the report of excessive methane was aggravated conduct, sustaining the inspector's finding of an unwarrantable violation.

A Significant and Substantial Violation

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U. S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. See my decision in Consolidation Coal Company, 4 FMSHRC 748-752 (1991). The statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, states that an S&S violation exists if "the violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" (104(d)(1) of the Act; emphasis added). Also, under the statute, (1) an "imminent danger" is defined as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated, " (Footnote 2) and (2) an S&S violation is less than an imminent danger. (Footnote 3) It follows that the Commission's use of the phrase "reasonably likely to occur" or "reasonable likelihood" does not preclude an S&S finding where a

~1254

substantial possibility of injury or disease is shown by the evidence, even though the proof may not show that injury or disease is more probable than not.

As stated above, the methane was coming from an unsealed area where roof falls could build up methane to an explosive level. Under continued mining conditions, sources of ignition would be present. The violation presented a substantial possibility of resulting in a mine explosion or fire caused by methane ignition. It was therefore a significant and substantial violation.

Section 104(b) Order

When Inspector Clark issued Citation No. 3420966, he believed a reasonable time to reduce the methane level to below one percent was 24 hours. However, his supervisor directed him to allow only two hours for abatement. Respondent began immediate abatement work when Inspector Clark first told McGregor that he found 1.4 percent methane and would be issuing a citation. Respondent reduced the methane level by building eight seals and four concrete blocks across the area later claimed to be abandoned. This was done by 6:00 p.m. on the following day, well within the 24 hours expected by the inspector. When the inspector returned three hours after he issued the citation, abatement work was in progress, but the inspector did not extend the abatement period. Instead, he issued 104(b) Order No. 3420967, for failure to abate within the time provided in the citation.

I find that Respondent demonstrated good faith and reasonable speed in abating the methane condition after the inspector brought it to Respondent's attention.

In the absence of a finding of imminent danger, which was not the case here, it was arbitrary for Inspector Clark's supervisor to direct him to allow Respondent only two hours to abate the condition cited in the citation. The order shall be vacated.

Considering all the criteria for a civil penalty in 110(i) of the act, I find that a penalty of \$1,200 is appropriate for the violation proved under Citation No. 3420966.

Citation No. 3420800

On December 13, 1989, Inspector George W. Siria issued 104(a) Citation No. 3420800, which charged:

Properly installed and adequately maintained line brattice or other approved devices were not continuously used from the last open crosscut to provide adequate ventilation to the working section. There was CH₄ present in the following places when checked one foot

~1255

from roof, face & rib, No. 1. = 1.0%, 2. = 1.2%, 2 x L = 1.0%, 6 = 1.1%, and 6 x R 1.0% this was on the No. 2 unit, ID. 007.

The citation charges a violation of 30 C.F.R. 75.302, which provides in pertinent part:

Properly installed and adequately maintained line brattices or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes [Emphasis added.]

At the hearing, the inspector acknowledged that the brattices were properly installed and maintained (Tr. 120, 123). The ventilation problem was that someone had left a man door open some distance outby the last open crosscut. After the door was closed, in two hours or so the methane level was reduced below one percent.

Since the problem was an improperly opened man door outby the last open crosscut, and not line brattice or other ventilation devices inby the last open crosscut, I find that the Secretary did not prove a violation of 75.302, which applies only "from the last open crosscut" toward the working face.

Citation No. 3421762

On December 13, 1989, Inspector Siria issued 104(d)(1) Citation No. 3421762, for a violation of 30 C.F.R. 75.400. There were accumulations of loose coal and coal dust 6 to 12 inches deep along the ribs in the Nos. 1 through 8 entries to a point about 75 feet outby the working faces, a large coal spillage in the crosscut in No. 7 entry, loose coal and coal dust around the belt, and cribs constructed on loose coal. These accumulations were obvious, substantial, and should have been prevented from developing.

Respondent contends that the accumulations were not dangerous because the power was off. However, the gravity of conditions observed by an inspector is evaluated by assuming continued normal mining operations. Assuming continued mining operations, the accumulations of coal dust and loose coal presented a substantial possibility of resulting in or propagating a mine fire. This is sufficient to establish a "significant and substantial" violation, as discussed above. The testimony of the Respondent's Safety Director that the coal dust was wet, and most of it was "mud" (Tr. 139), does not disprove an S&S violation. Loose coal is not "mud" and can propagate a mine fire. Once a fire spreads, the heat can rapidly dry loose coal or coal dust and further propagate a fire. A mine fire is one of the principal dangers in underground coal

~1256

mining. Permitting substantial accumulations of fuel for a fire underground is a "significant and substantial" violation. Given the obvious conditions involved here, the extensive amount of accumulations, and the danger to the miners, the evidence shows aggravated conduct, sustaining the inspector's finding of an unwarrantable violation.

Considering all the criteria for a civil penalty is 110(i) of the Act, I find that a penalty of \$1,000 is appropriate for the violation proved under Citation No. 3421762.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. Respondent violated 30 C.F.R. 75.309 as alleged in Citation No. 3420966.
3. Respondent violated 30 C.F.R. 75.400 as alleged in Citation No. 3421762.
4. The Secretary failed to prove a violation of 30 C.F.R. 75.302 as alleged in Citation No. 3420800.
5. Order No. 3420967 is invalid as being arbitrary and unreasonable.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 3420967 is VACATED.
2. Citation No. 3420800 is VACATED.
3. Citation Nos. 3420966 and 3421762 are AFFIRMED.
4. Respondent shall pay civil penalties of \$2,200 within 30 days from the date of this decision.

William Fauver
Administrative Law Judge

1. A different situation exists when the parties present oral arguments before a transcript is prepared. Such is not the case here.
2. Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977; emphasis added.
3. Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger"