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

ALABAMA BY-PRODUCTS CORPORATION,  
APPLICANT

Application for Review

Docket No. BARB 78-601

v.

Mary Lee No. 1 Mine

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

AND

UNITED MINE WORKERS OF AMERICA  
(UMWA),

RESPONDENT

DECISION

Appearances: James Birchall, Esq., for Applicant  
Terry Price and George D. Palmer, Esqs., Office  
of the Solicitor, U.S. Department of Labor, for  
Respondent

Before: Judge Lasher

I. Statement of the Case

Applicant seeks review of Order No. 239581, dated July 5, 1978, issued by MSHA inspector William J. Vann and which alleges a violation of 30 CFR 75.200. The order was issued pursuant to section 104(b)(1) of the Federal Mine Safety and Health Act of 1977, (FOOTNOTE 1) citing Applicant with failure to comply with its roof control plan "in that the controls of the continuous miner had moved 6 feet beyond the last row of permanent roof support in the crosscut between Nos. 1 and 2 right aircourses on the 5075 section." MSHA and UMWA both filed timely answers to the application. UMWA did not appear at the hearing and was dropped as a party. Both Applicant and MSHA were represented by counsel at the hearing which was held in Birmingham, Alabama, on February 1, 1979.

## II. Findings of Fact and Discussion

Applicant admits that the violation charged by Inspector Vann did occur.(FOOTNOTE 2) By its application, Applicant seeks to have the section 104(b)(1) order reviewed for the sole purpose of challenging the prerequisite finding that the violation was "caused by an unwarrantable failure" of the operator to comply with the mandatory safety standard cited. By express agreement of the parties, the validity of the underlying 104(d)(1) citation is not in issue. Neither party takes the position that MSHA must establish, as part of a prima facie case of violation, that 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." See *UMWA v. Kleppe*, 532 F.2d 1403 (1976).

Inspector Vann testified that he arrived at the section at approximately 7:55 a.m. on July 5, 1978, in the company of Steve Freeman, the assistant mine foreman, and that he arrived at the violation site at 8:05 a.m. The continuous miner was not being operated when he arrived at the violation site because it had pulled a cable and pinched a lead which cut off the main breaker deenergizing the continuous miner. He indicated that the head of the cutter was approximately 20 feet beyond the last row of roof supports and that it was approximately 6 feet from the last row of roof supports to the controls of the continuous miner (Tr. 56, 57). The continuous miner was situated between the No. 1A aircourse and the No. 2 aircourse on the left side of the crosscut. When Inspector Vann arrived, the continuous miner operator, Chuck Chism, and his helper, Drew McElrath, were setting timbers in the area. Chism told Inspector Vann that he did not realize he was out from under roof supports until he crawled out from under the canopy of the continuous miner (Tr. 66, 79), presumably after the main breaker had cut off and deenergized the machine. The continuous miner helper, McElrath, told Inspector Vann that he was busy setting timbers and had removed a cable at the time (Tr. 69), presumably in explanation of his failure to signal Chism that he was going under unsupported roof.(FOOTNOTE 3)

Jimmy Hyché, day shift mine foreman for Applicant, testified that the duties of a continuous miner helper include watching for the operator of the continuous miner, setting timbers, keeping the cable attached to the miner out of the way of the miner, and directing the operator where to proceed in situations when the operator can see for himself. When he arrived at the violation site on July 5, 1978, Mr. Hyché indicated that Chism, Inspector Vann, and Chism's helper, McElrath, were present. According to Hyché, Inspector Vann asked Chism if Leo Blake, the section foreman, had instructed him to cut coal from under the roof beyond the law row of roof supports. Chism's reply was that Blake had not done so. Chism also told Hyché that he "couldn't see." Hyché indicated that the distance from the law row of permanent roof support to the cutter head was approximately 24 feet and that the distance from the last row of roof supports to the controls of the continuous miner was only 3 feet. Hyché said that one reason Chism could not see the last row of roof supports and proceeded beyond it was because the canopy on the continuous miner extends over the operator's head, obstructing his vision.

Clarence Key, who had operated the continuous miner in question prior to the time Chism replaced him on it, testified that Section Foreman Blake was "above average" as a section foreman and that Blake had always instructed him not to go beyond roof supports. Key also testified that Chism had been his helper and was a good one.

Section foreman Leo Blake, testifying on behalf of Applicant, indicated that it would take the continuous miner only 30 seconds to move out from under unsupported roof if the continuous miner was not actually cutting coal. He testified that he had instructed the miners under his supervision "hundreds of times" in connection with not working under unsupported roof. He also indicated that the helper (McElrath) was apparently pulling curtains down instead of doing his job.

Based on the pleadings and stipulations of the parties, I find preliminarily that the violation did occur as alleged in the withdrawal order, that for purposes of this proceeding, the underlying 104(d)(1) citation and order were properly issued, and that the violation cited in the subject order did not constitute an imminent danger but was, at the same time, "of such nature as could significantly and substantially contribute to the cause and effect of a mine hazard."

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The parties have thus narrowed the issues to one: Whether the violation of the roof control plan resulted from an unwarrantable failure of the Applicant to comply with its provisions.

Following the Kleppe decision, supra, the Interior Board of Mine Operations Appeals, in Zeigler Coal Company, 7 IBMA 280 (1977) at 295-296, determined that an inspector should find a violation of a safety standard was caused by unwarrantable failure to comply with such standard where he finds any of the following circumstances:

[T]hat the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it had failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

The Board went on to hold that the inspector's judgment in determining "unwarrantable failure" must be based upon a thorough investigation and must be reasonable.

As I divine it, MSHA's theory of unwarrantable failure is that the violation was visible and that it should have been detected in the pre-dayshift examination since the violation allegedly occurred on the prior shift.

However, after carefully considering the record, and, in particular, the transcript references pointed to by MSHA (Tr. 13, 21, 22, 26, 27, 51, 52, 56, 100), I am unable to find or infer as MSHA seems to urge, that the continuous miner moved beyond the last row of permanent roof supports during the shift prior to the one on which it was observed by Inspector Vann. Although there were two eye-witnesses, neither of them, the continuous miner operator, Chism, nor his helper, McElrath, were called by MSHA to testify when the violation occurred. Furthermore, based on Inspector Vann's own account of his conversation with Chism and McElrath at the time he issued the order, it appears more likely that the violation occurred shortly before the inspector arrived on the scene (Tr. 51, 52, 65, 67, 69, 70, 77). Also, had the violation occurred on the prior shift, it would have been written up in the fireboss book (Tr. 20, 46).

According to the inspector, Chism told him that he was not aware that he was under unsupported roof until he climbed from underneath the canopy of the machine. There is evidence that the canopy obstructs the vision of the continuous miner operator, and that the helper, McElrath--whose function in part was to tell Chism when he was near unsupported roof (Tr. 101)--was only temporarily assigned to Chism (Tr. 101-104). The testimony of Applicant's witnesses, Hyché, Key, and Blake, that the violation occurred in only a few minutes (Tr. 42, 106) is far more convincing than the testimony of the inspector which is not based

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on direct knowledge, is inferential and in important respects, hypothetical in nature (Tr. 84),(FOOTNOTE 4) and, which in turn, is the only support for MSHA's somewhat contrived theory that the violation occurred on the prior shift.

The more persuasive evidence in this proceeding leads me to conclude that this was an inadvertent violation which occurred shortly before the inspector arrived on the scene despite genuine efforts on the part of the mine operator to avoid such (Tr. 41, 46, 110-115). I thus find that the violation in question was not caused by the unwarrantable failure of the Applicant to comply with the safety standard in question, and that there is merit in the application for review.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

Order of Withdrawal No. 239581, dated July 5, 1978, is VACATED.

Michael A. Lasher, Jr.  
Judge

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FOOTNOTES START HERE

~FOOTNOTE\_ONE

1 83 Stat. 742, 30 U.S.C. 801 et seq.

~FOOTNOTE\_TWO

2 The provision of the roof control plan (Exh. M-4) violated (appearing on page 11 thereof), requires that the "operating controls positioned on the %y(3)5C continuous mining machines shall not advance inby the last row of permanent roof support."

It is a well established principle of mine safety law that a violation of the provisions of an approved control plan constitutes a violation of 30 CFR 75.200. Affinity Mining Company v. MESA et al., 6 IBMA 100 (1976).

~FOOTNOTE\_THREE

3 McElrath was not Chism's permanent helper. The helper's job had been filled by Chism himself until approximately 4 weeks prior to July 5, 1978, when Chism was promoted to operator of the continuous miner. On July 5, 1978, the helper's job had not been permanently filled. McElrath had been employed as a miner for approximately 3 years and had attended numerous safety meetings and performed many different jobs. His classification on July 5, 1978, was "timber helper," and he was a fulltime employee.

~FOOTNOTE\_FOUR

4 I am unable to find evidentiary support for the key hypothetical question, i.e., how many carloads of coal would be required to move a block of coal 50 inches high, 4 feet deep,

and 10 feet wide (Tr. 21, 22, 84). Thus, the transcript reference given by MSHA for the "10-feet wide" figure appears on page 13:

"Q. What is the approximate width of the front end of the miner?

"A. The cutter head?

"Q. Right.

"A. Approximately ten foot."

I am unable to find from this testimony that a 10-foot wide area of coal was removed.

Although not clearly stated, MSHA's theory apparently is that 10 carloads of coal would have been required to remove such a block of coal (Tr. 22), and that since only two carloads were removed the morning of the violation (Tr. 52), the rest would necessarily have had to have been removed on the prior shift the evening before.