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RANGER FUEL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RANGER FUEL CORPORATION,	Contest of Order of Withdrawal
CONTESTANT	Docket No. WEVA 79-378-R
v.	Order No. 645907
SECRETARY OF LABOR,	June 14, 1979
MINE SAFETY AND HEALTH	Beckley No. 1 Mine
ADMINISTRATION (MSHA),	RESPONDENT

DECISION

Appearances: Gary W. Callahan, Esq., The Pittston Company Coal Group, Lebanon, Virginia, for Contestant
Stephen P. Kramer, Esq., Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor for Respondent

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801 et seq., upon the application of Ranger Fuel Corporation (Ranger) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act.(FOOTNOTE 1) An evidentiary hearing was held in Beckley, West Virginia, on January 29, 1980, at which the parties appeared and presented evidence.

The issue is whether there is sufficient evidence to support the validity of Order of Withdrawal No. 645907 issued to Ranger on June 14, 1979. The parties stipulated in this case as to the existence of a valid

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section 104(d)(1) order which is the condition precedent to the issuance of a withdrawal order under section 104(d)(2). The order at bar charged a violation of mandatory standard 30 C.F.R. 75.1710-1(a)(4) and alleged that

The 1 left section continuous mining machine was being operated in the No. 2 working place with the machine operator beside the miner and the remote control unit sitting [sic] on the machine. Any machine with a remote control system must be provided with a cab or canopy when the controls are placed on the machine.

The cited regulation provides, as relevant herein, that:

All self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine shall * * * 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.

Ranger does not deny that its continuous mining machine was being operated as stated in the order, but contends that the cited standard does not apply to mining machines with remote controls, and that in any event, the alleged violation was not the result of an "unwarrantable failure."

The essential facts are not in dispute. MSHA inspector Charles Meadows was conducting a regular inspection of the Beckley No. 1 Mine on July 30, 1979, and while in the 1 Left Section observed a continuous-mining machine operating without a cab or canopy. The miner operator, Gregory Stover, was standing beside the machine with the remote control console on top of the machine. Stover admitted at hearing that he was operating the machine in this manner. Under the circumstances, the fact of the violation is proven as charged. There is no exception provided in the cited regulation for remote-controlled face equipment. The fact that MSHA may have permitted the use of such equipment in certain other circumstances is immaterial.

Meadows had previously issued citations on April 9, 1979, and July 25, 1979, for similar violations. After each citation, he told the miner operator and the section foremen how to properly use the remote control console. He explained that if the controls were placed on the mining machine, the machine would have to be provided with a cab or canopy, and if it were to be used as a remote unit, it would have to be operated from beyond the boom of the miner. Meadows explained the hazards in operating the miner with the remote control panel on a machine not provided with a cab or canopy could come from a roof fall, from the machine pinning the operator against a rib, by the operator getting a foot caught under it, or from a shuttle car bumping the machine into the operator.

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Mine foreman William Ray Tillie testified on behalf of the operator that after the earlier violations issued by Meadows he told his workers not to place the remote controls on the miner while they were running or tramping it and warned that if they were caught violating the rule "some kind of action would have to be taken." Even after these warnings, however, Tillie caught his men violating the order and took no disciplinary action. Shelby Tolliver, mine superintendent, concurred that no disciplinary action had ever been taken against any violators of this rule. Tillie conceded that he had told the operators that he agreed with their view that it was sometimes safer to operate the equipment while standing next to it. Thus, at the same time he was reprimanding them for operating in violation of the regulation and company policy, he agreed with them that it was in fact safer to do just that.

Gregory Stover, the operator caught by Meadows violating the canopy standard on June 14, 1979, admitted that he had been warned by management not to operate the machine in the manner cited, but nevertheless continued on a daily basis to operate that way. No disciplinary action was ever taken against him.

Under the circumstances, I have no difficulty finding that Ranger knew or should have known that the miner operators were continuing to follow the cited practice in spite of the so-called warnings. The alleged warnings were given in such a way that the operators were given license to disobey them. No disciplinary action had ever been taken for repeated violations of the warnings in spite of the fact that these violations were admittedly known to management. The evidence shows that the violations continued unabated on a daily basis. For these reasons, I find that the violation was caused by the "unwarrantable failure" of the operator.

Ranger argues that it is sometimes safer to operate the remote miner in the manner cited as a violation, i.e., with the control console upon or near the machine. Based on the evidence presented in this case, I cannot agree with this contention. In any event, if the operator believed that such was the case, it should have filed a petition for modification under section 101(c) of the Act. By its failure to pursue this course of action, I can only believe that the operator is as unconvinced by its argument as I am. Under all the circumstances, Order of Withdrawal No. 645907 was, and is, valid.

Gary Melick
Administrative Law Judge

~FOOTNOTE 1

Section 104(d)(2) provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent

inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."