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GEX COLORADO INC. V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GEX COLORADO, INCORPORATED,
CONTESTANT

v.

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

RESPONDENT

NOTICE OF CONTEST

104(d)(1) CITATION NO. 0786800
MAY 1, 1980, 75.200

DOCKET NO. WEST 80-306-R

Mine: Roadside Mine 05-00281

APPEARANCES:

Curt Neumann, Acting Safety Director, appearing pro se,
GEX Colorado Incorporated, Grand Junction, Colorado
for the Contestant

Ann M. Noble, Esq., Office of Henry C. Mahlman, Regional
Solicitor, United States Department of Labor, Denver,
Colorado
for the Respondent

Before: Judge John J. Morris

DECISION

Petitioner, GEX Colorado Incorporated, contests the unwarrantable failure designation of a citation issued by respondent, Mine Safety and Health Administration, on May 1, 1980. An expedited hearing was held in Grand Junction, Colorado on May 20, 1980. MSHA's answer(FOOTNOTE 1) admits the issuance of the citation but denies the remaining portions of GEX's notice of contest.

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Citation 786800 alleges that GEX violated 30 C.F.R. 75.200 which provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Ray Brandon, Pet Darland, Eugene Lopez, and Kenneth Short testified for GEX.

Matthew Biandeck testified for MSHA.

The parties waived the filing of post trial briefs.

Issue

The issue is whether the citation should have been issued as an unwarrantable failure by GEX in not complying with the cited standard. (Tr. 3).

Findings of Fact

Based on the record I find the following facts to be credible.

1. GEX's method of coal mining involves pillar recovery. A large portion of the coal is removed and the roof is then allowed to collapse. (Tr. 32).

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2. Pillars, originally 45 feet by 100 feet, are split into three pieces. The final pillars are 45 foot by 20 foot (Tr. 32).

3. The canopy of GEX's 33 foot continuous miner was covered when the unsupported roof caved in (Tr. 14,22,30).

4. The regular machine operator was attending a meeting at the time of this accident (Tr. 36).

5. The substitute operator, who had been instructed in running the miner, did not know he had passed the last permanent roof support (Tr. 38,39).

6. A company rule prohibits the use of the continuous miner beyond the last permanent roof support (Tr. 33,34,37).

7. In the ordinary course of events the continuous miner would not be under the unsupported roof (Tr. 33).

8. Ray Brandon, the GEX section foreman, who was in the immediate area, was not in a position to observe that the continuous miner had moved beyond the last permanent roof support (Tr. 34).

9. The foreman heard the timber squeak and he hollered for the operator to get out.

DISCUSSION

The case involves a credibility determination. For the reasons hereafter discussed I have determined that the unwarrantable failure portion of the citation was improvidently issued and it should be vacated.

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MSHA's case for the issuance of its unwarrantable failure designation rests on the evidence that the section foreman stated, after the roof collapse, that he was aware the miner operator was under unsupported roof. Further, he was not going to lie about it (Tr. 14, 15). The evidence did not establish when the section foreman knew the continuous miner was under the unsupported roof (Tr. 20).

In GEX's case the section foreman does not deny the statements attributed to him by the inspector. He thinks the statement was a matter of hindsight. At trial he could not recall at any time seeing the continuous miner pass out under the unsupported roof (Tr. 35).

The statement of the section foreman attributed to him by the inspector is clearly admissible as an admission against interest as well as an excited utterance [Rule 804(b)(3); 803(2) Federal Rules of Evidence]. However, I am equally persuaded by the demeanor and the testimony of the section foreman. His failure to deny the statement, in my view, adds credibility to his other testimony.

The issues here are close but the evidence indicates this was an inadvertent violation.

One of the elements of an unwarrantable failure citation is that the mine operator must know or should have known of the violation of Alabama By-Products Corporation, v. Mine Workers, BARB 78-601 (July 1979, Lasher, J).

Petitioner's evidence on this issue is not persuasive.

For the foregoing reasons I enter the following

ORDER

The unwarrantable failure portion of Citation 78600 is VACATED.

John J. Morris
Administrative Law Judge

~FOOTNOTE 1
Transcript 2-3.