

CCASE:
BADGER COAL v. SOL (MSHA)
DDATE:
19810420
TTEXT:

~1041

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BADGER COAL COMPANY,
CONTESTANT

v.

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

Contest of Order of Withdrawal

Docket No. WEVA 80-675-R

Order No. 805795

Badger No. 14 Mine

DECISION

Appearances: David J. Romano, Young, Morgan and Cann, Clarksburg,
West Virginia, for Contestant
Catherine M. Oliver, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for
Respondent

Before: Judge Melick

This case is before me upon the notice of contest filed by
the Badger Coal Company (Badger) under section 105(d) of the
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et
seq., the "Act," challenging the validity of an order of
withdrawal issued pursuant to section 104(d)(1) of the Act.(FN.1)

The order here at issue actually alleges three separate violations of the mandatory standard at 30 C.F.R. 75.200. While the relevant part of that standard facially requires only that the operator adopt a roof-control plan approved by the Secretary of Labor, it has been construed to mean that the operator must also comply with its approved plan. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976). As clarified at hearing, the order first charges that the roof-control plan was violated in that the "measured width of the roadway into the No. 6 pillar block on the three miner section was 19 feet and 6 inches and only a single row of posts were [sic] installed on the left side of the roadway." The operator's plan then required that the final split in a pillar that is being full-pillar retreat mined be limited to a single roadway 14 feet wide and that double rows of posts be installed before starting that final split.

The plan itself is silent as to whether these requirements for the final split are applicable where the remaining block of coal or "stump" is of sufficient size so as to provide adequate roof support in itself. MSHA conceded in closing argument, however, that if that stump of coal was at least 12 feet by 20 feet in size then it would not have been necessary to comply with those provisions of the roof-control plan cited herein. Thus, whether there was a violation of the operator's roof-control plan as charged here depends in part upon whether that remaining stump in the pillar being retreat mined was less than 12 feet by 20 feet in size. In this regard, Badger's safety director, John McKnight, testified that the stump was 12 feet by 20 feet. Delbert Campbell, Badger's safety inspector who accompanied MSHA inspector George Schrader on the day at issue, concluded that the stump was "twenty foot square." It is noteworthy that McKnight and Campbell had been sequestered during the hearing and therefore were not subject to the influence of the other's testimony. Moreover, the significance of their testimony in this regard was not apparent until later in the hearing when MSHA conceded there would be no violation if the stump was of sufficient size.

On the other hand, when Inspector Schrader was asked about the size of this stump, he responded: "It's been awhile, Your Honor, I just couldn't say." He later approximated that it was 4 to 6 feet wide on one side, 10 feet wide on the other side and, from his sketch, about 20 feet long. (FN.2) In light of the inspector's admitted uncertainty, I accord lesser weight to his estimates. Under all the circumstances, I find the testimony of Campbell and McKnight to be the more credible and I therefore conclude that the stump of coal remaining in the pillar at issue was at least 12 feet by 20 feet in

~1043

size. Accordingly, there was no need for the final split in that pillar to have been limited to a single 14-foot roadway protected by double rows of posts as might otherwise have been required by the roof-control plan. The first violation alleged in the order is therefore vacated.

The order charges, secondly, that "breaker posts were not installed across the roadway on the right side of the No. 6 pillar block which was mined out." According to Schrader, those posts should have been located at the position indicated on Government Exhibit G-1 by the numbers 9 through 16. Schrader admitted at hearing, contrary to what he depicted on his sketches, that the cited area was actually in an entry adjacent to a permanent barrier pillar protecting a gas well. That location corresponds to what is depicted in the roof-control plan as unsupported gob. Under the circumstances, I do not find that the roof-control plan required breaker posts to have been located where the inspector has suggested. The second violation alleged in the order is therefore also vacated.

The order charges, lastly, that breaker posts were not installed across the roadway into the mined-out area between the No. 3 miner (021) section in by the last open crosscut, 4 and 5 blocks. Although Badger contended at hearing that the order did not provide adequate notice of the specific location of this alleged violation and that the order should therefore have been partially dismissed (see *MSHA v. Jim Walter Resources, Et Al.*, 2 FMSHRC 1827 (1979), regarding the sufficiency of notice), I find that its challenge is not to the sufficiency of the notice per se but rather to the question of whether the condition cited actually existed at the location specified by the inspector in his order. The only issue before me then is whether the violation existed as charged.

Whether or not there was a violation here does indeed depend on the precise location of the cited condition. If the location was as depicted by the numbers 1 through 8 on Government Exhibit G-1, and as alleged by MSHA, then there was a violation of the roof-control plan. If on the other hand the cited area was as depicted by the letter "C" on Operator's Exhibit No. 4, and as alleged by Badger, then clearly there was no violation. After evaluating the testimony from the sponsors of these opposing views, I find that Badger's contention should prevail. I am impressed by the consistency of the testimony from Badger's witnesses McKnight and Campbell, regarding the layout of the mine and the location of significant features therein. Understandably they were able to demonstrate a more thorough and accurate knowledge of their mine and their testimony in this regard is corroborated by engineering drawings prepared from surveys. The testimony of, and the sketches by, Inspector Schrader on the other hand are fraught with inconsistencies. As previously noted, Schrader was unaware of the location of a rather significant feature, a barrier pillar, in the immediate vicinity of the conditions cited. Indeed, this barrier was erroneously depicted in his sketches as partially mined-out blocks of coal. I observe also that other significant coal pillars were given

numbers on one of Schrader's original sketches that did not coincide with the numbers given corresponding pillars in the subsequent sketch prepared by him for the hearing. Schrader admitted to these and other inconsistencies.

~1044

I am persuaded by these factors to believe that Schrader was indeed disoriented when he prepared the last charge in the order. Accordingly, I cannot give any weight to his testimony regarding the location of this alleged violation. Since that precise location is critical to the Government's case, that case must fail. The third violation alleged in the order is therefore also vacated.

ORDER

Order of Withdrawal No. 805795 and the violations cited therein are VACATED.

Gary Melick
Administrative Law Judge

AA

~FOOTNOTE_ONE

1 Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation did not cause imminent danger, such 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, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

~FOOTNOTE_TWO

2 Although the witnesses did not seem to agree on the precise location of this stump as depicted on the various mine maps in evidence, it is nevertheless apparent that McKnight and Campbell were indeed describing the same stump as Schrader. Campbell was with Schrader and actually helped him measure the roadway at issue. Schrader told him that the width was 19 feet 6 inches and that it constituted a violation. It was the only violation of that same specific nature. In addition, Schrader subsequently pointed out the precise location of this violation to McKnight.