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

COLORADO WESTMORELAND, INC., CONTESTANT	CONTEST OF CITATION PROCEEDINGS
v.	DOCKET NO. WEST 81-240-R Citation No. 789250
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	DOCKET NO. WEST 81-241-R Citation No. 789251 (Consolidated)
	MINE: Orchard Valley

DECISION

Appearances:

Charles W. Newcom, Esq., Sherman & Howard, 2900 First of Denver
Plaza 633 Seventeenth Street, Denver, Colorado 80202,
For the Contestant

Robert J. Lesnick, Esq., Office of the Solicitor
United States Department of Labor, 1585 Federal Building
1961 Stout Street, Denver, Colorado 80294,
For the Respondent.

Before: Judge John A. Carlson

STATEMENT OF THE CASE

These consolidated cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"), arose from an inspection of contestant's underground coal mine. The Secretary of Labor's inspector issued two citations alleging violations of contestant's (Westmoreland's) approved roof control plan. The standard published at 30 C.F.R. 75.200, requires compliance with such a plan. The violations were designated "unwarrantable" under section 104(d)(1) of the Act, and the second citation was coupled with a withdrawal order under section 104(d).

Westmoreland duly contested the citations and the order and a full hearing on the merits was had. No jurisdictional issues were raised. Extensive post-hearing briefs were filed by both parties.

SUMMARY AND DISCUSSION OF
THE EVIDENCE

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The Secretary's inspector made his inspection on April 15, 1981. The approved roof control plan (joint exhibit 1) requires that entry widths be cut to 20 feet or less, and that roof bolts be installed on 5 by 5 foot centers. It also provides that where ". . . the distance between outer bolts and the rib exceeds five feet, additional bolts or timbers will be installed." (FOOTNOTE 1)

Westmoreland witnesses did not dispute the inspector's testimony that the entryway between rooms 7 and 8 measured approximately 26 feet wide at its widest point at the time of inspection. Witnesses for both parties agreed that rib sloughage had occurred. Beyond that point, however, witnesses for the two parties differed sharply on most material facts.

The inspector insisted, first of all, that the roof control plan requires that "roadways" be 20 feet or less in width. Westmoreland correctly contends, however, that the plan contains no such injunction. It requires only that entryways (which may also serve as haulageways) may not be cut to a width greater than 20 feet. Although the citation was written in terms of a "roadway" violation the inspector ultimately acknowledged that the plan speaks only to the width of the original cut (Tr. 37, 38).

The essence of Westmoreland's defense is this: that all cuts were within the prescribed 20 foot limits, but that on the morning of the inspection a phenomenon known as "bounce" caused a sudden sloughage from the ribs and a consequent widening of the entry area; and that miners were already at work setting additional timber along both sides of the area in question when the inspector arrived.

Thus, throughout the hearing witnesses addressed much of their testimony to the questions of when and how the admitted sloughage occurred, when the operator took steps to correct it, and what those steps were.

Westmoreland's section foreman claimed that timbering was already in progress at the end of the previous shift at a point near room 7, and that timbers were set near the ribs as a routine precaution against rib sloughage (Tr. 81). He maintained that he put two men to work continuing the timbering with the beginning of the morning shift; and that at 7:15 a.m. he had measured the width of the entryway and found it to be 18 feet. According to this witness, a severe "bounce" or sudden shifting of the mine strata, occurred early in the shift, causing extensive rib sloughage between rooms 7 and 8 and widening the roof (Tr. 62-63). A second bounce, shortly thereafter, caused more sloughage. The bouncing, he claimed, was also severe enough to knock down the tubing between the 7th and 8th crosscuts (Tr. 63).

The inspector, however, was convinced that the sloughage was the product of a gradual process (squeeze or heave) (Tr. 48-49, 145-146). He based this opinion on his general experience in underground mining coupled with specific expertise gained from tutelage under a now-retired inspector who was an acknowledged MSHA authority on bouncing. Bouncing was unlikely, he said, at depths above 1,500 feet (the area in question here was 700p); and was also unlikely except in proximity to the face. Moreover, the size of the coal pieces were too large to be typical of bounce.

Westmoreland points out, however, that the inspector had paid but few visits to this particular mine, and that all of its witnesses substantiated the section foreman's claims. Two roof bolters and the underground supervisor testified that bouncing, an almost daily phenomenon in the mine, had indeed occurred that morning. These witnesses and the operator's safety coordinator further pointed to rock dust as evidence of the abrupt and recent character of the sloughage. The undisputed evidence established that the ribs, roof and faces had been fully rock dusted at the end of the previous shift. Had the sloughage occurred gradually over a period of several days, as the inspector inferred, sloughed materials would have been dust-covered. The inspector made no effort to contradict the uniform testimony of Westmoreland's employees that all sloughage areas on the morning of the inspection were dust-free.

I am convinced that the sloughage occurred in the way described by the operator -- abruptly on the morning of the inspection. The direct evidence of Westmoreland's several employees is far more persuasive than the inferences drawn by the inspector.

It is nevertheless true, of course, that when the inspector arrived the area between rooms 7 and 8 was not in compliance with the literal requirements of the roof control plan. The roof was too wide and was not yet supported. Does this, without more,

signify violation? Given all the

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circumstances, I think not. Read in its entirety, the roof control plan appears to contemplate situations where mined areas widen owing to natural causes beyond the operator's control. At page 17 for example, it provides:

Where pillar corners have sloughed off excessively, more than five feet from the nearest support, they will be supported with additional bolts or timber posts.

This implies, certainly, that the operator has a reasonable time in which to correct roof support deficiencies arising from sloughage.

Generally, under the Act, operators may not successfully defend against a violation of a mandatory standard on the basis that it occurred without negligence or fault. United States Steel Corp. 1 FMSHRC 1306 (1979); Heldenfels Brothers, Inc. 2 FMSHRC 851 (1980), aff'd 636 F. 2d 312 (5th Cir. 1981, unpublished).

That general rule cannot apply here, however. The standard demands compliance with the roof control plan; but the plan itself contemplates remedial measures for sloughage. It would follow, then, that if the operator takes those measures, and does so with dispatch and in conformity with procedures established elsewhere in the standards for setting of additional supports and for cleaning up rib sloughage, no liability ensues.

I would view the matter differently had Westmoreland been dilatory or had it proved indifferent to the hazards resulting from the sudden creation of unsupported roof areas. The credible evidence shows, however, that after the bounce no mining occurred in or beyond the sloughage area and crews set to work quickly to clean up the loose material from the floor and to set additional supports. (FOOTNOTE 2) Also, the record allows no inference that the means used to remove the sloughage and set the additional timber did not accord with other parts of the plan which dictate safe and acceptable procedures for those tasks. (See, for example, page 10A, Roof Control Plan). On the contrary, the inspector acknowledge that no one was working under an unsupported top (Tr. 21).

Accordingly, the evidence does not show a failure by Westmoreland to

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comply with its roof control plan. Citation 789250 should therefore be vacated.(FOOTNOTE 3)

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Later the same morning the inspector issued his second citation which he coupled with a withdrawal order under Section 104(d)(1). (FOOTNOTE4) This citation and order concern alleged conditions and miners' conduct in room 8 immediately located around the corner, so to speak, from the entryway discussed earlier. According to the inspector, the outer edges of the "T" bars (the ATRS System) which furnished temporary protection to roof bolting personnel while bolting was in progress were more than 5 feet from the ribs of the room. Thus, under the terms of the roof control plan, no one could be under the unsupported portion of the roof between those outer edges and the rib. Westmoreland's witnesses did not dispute that the measured distances between the rib and the outer edges of support system were approximately nine feet to ten feet (Tr. 31).

These witnesses sharply challenged the inspector's testimony, however, that he saw the two roof bolters standing outside the protection furnished by the machine. According to the operator's witnesses, the bouncing which affected the entryway width had also widened room 8, leaving sloughage, and causing them to clean up the outer corner of the room before the bolter could be positioned in the room. A subsequent bounce caused them to pull the bolter out because of additional sloughage. According to both members

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of the bolting crew, they had positioned the machine and were beginning to drill and place the first center bolts when the inspector first appeared at room 8. Both men emphatically denied being anywhere but under the ATRS system (Tr. 121, 126, 130). According to the bolters, had they not been interrupted by the inspector, they would have installed the center bolts, would then have backed the machine, moved it back in at a different angle, and then proceeded to set the outer bolts on one side. This procedure would have been repeated to bolt the other side. The two men admitted that they could have swung the booms on the bolter out beyond the protection of the ATRS to bolt nearer the rib, but asserted they did not do so. They maintained that that procedure was never followed if the distance between the edge of the ATRS and the rib line exceeded five feet (Tr. 128, 136). Westmoreland's safety coordinator and its underground supervisor, both of whom were present during this phase of the inspection, claimed that neither bolter stepped outside the ATRS system (Tr. 88, 98). The second of these witnesses also stated that neither during the inspection nor the closing conference did the inspector mention that bolters were beyond the protection of the ATRS.

The only issue here is whether the bolters, or either of them, were outside the protection afforded by the ATRS system. (FOOTNOTE 5) For the reasons which follow, I hold they were not. First, I am somewhat impressed by the uniformity of the testimony of the four Westmoreland witnesses on this issue. Ordinarily, the testimony of that many witnesses will reveal some inconsistency. Of far greater importance, however, were certain weaknesses in the inspector's testimony.

The inspector testified with particularity concerning where he saw the two bolters, marking their positions on exhibit 3, and claiming with certitude that both were standing on the mine floor while operating the bolter (Tr. 147, 154-156). That all of the operator's witnesses testified to the contrary does not necessarily carry the day for Westmoreland; credibility may not be measured by a mere witness count. The content of

789251. The inspector appeared unclear as to which citation covered the corner. It appears to be mentioned in both citations. For the purposes of this decision it makes little difference, but I specifically hold that the unsupported area on the corner was more properly covered in the initial citation since additional timbers were installed there rather than additional bolts (Tr. 96, 115-117). This was the method of correction selected by the operator for the areas between rooms 7 and 8.

~FOOTNOTE_FOUR

4 As pertinent, the citation and withdrawal order read:

The approved roof control plan was not complied with in the No. 8 roof of the 5th east section as Larry West and Larry Rogers, roof bolters, were observed installing roof bolts to the left and right of the outer contact point of the ATRS system was 9 feet and 10 feet to the rib, and temporary roof supports were not installed, the entry width was 27 feet. The No. 8 roof where roof bolting was being done. Technically this second action may be classifiable simply as a withdrawal order, but is described in this decision as a citation since the parties routinely referred to it as such in the pleadings, trial and briefs.

~FOOTNOTE_FIVE

5 At one point the inspector testified that he should have issued two citations: one for the breadth of the unsupported roof, another for the presence of the men outside the ATRS (Tr. 30). During the inspection he required that the men leave the machine and set temporary supports (Tr. 30). But he later clarified his position, stating that no violation would have occurred had the men remained under the ATRS (Tr. 52-54).