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

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

v.

PEABODY COAL COMPANY,
RESPONDENT

Civil Penalty Proceeding

Docket No. LAKE 82-18
A.C. No. 11-00598-03105

Eagle No. 2 Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois, for Petitioner
Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case was commenced by the filing of a Petition for the assessment of a civil penalty for an alleged violation of the mandatory safety standard contained in 30 C.F.R. 75.304, requiring an on-shift examination of each working section for hazardous conditions and the immediate correction of any such conditions. Pursuant to notice, the case was heard in St. Louis, Missouri on February 17, 1982. Federal Mine Inspector Harold Gulley, Thomas Dobbs, and Federal Mine Inspector Supervisor Mike Wolfe testified on behalf of Petitioner. Foremen Marvin Rash and Bill Chubb, Mine Manager Bob McPeak, Superintendent Forrest Younker and Environmental Technician Marty McDonald testified on behalf of Respondent.

Respondent waived its right to submit a posthearing brief and made a closing argument on the record. Petitioner filed a posthearing brief. Based upon the entire record including the testimony and exhibits introduced at the hearing, and the contentions of the parties, I make the following findings of fact and conclusions of law.

APPLICABLE REGULATORY PROVISIONS

30 C.F.R. 75.200 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.

30 C.F.R. 75.202 provides as follows:

The operator, in accordance with the approved plan, shall provide at or near each working face and at such other locations in the coal mines as the Secretary may prescribe an ample supply of suitable materials of proper size with which to secure the roof of all working places in a safe manner. Safety posts, jacks, or other approved devices shall be used to protect the workmen when roof material is being taken down, crossbars are being installed, roof bolt holes are being drilled, roof bolts are being installed, and in such other circumstances as may be appropriate. Loose roof and overhanging or loose faces and ribs shall be taken down or supported. Except in the case of recovery work, supports knocked out shall be replaced promptly.

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30 C.F.R. 75.304 provides as follows:

At least once during each coal-producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. Any such conditions shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such conditions to a safe area, except those persons referred to in section 104(d) of the Act, until the danger is abated. Such examination shall include tests for methane with a means approved by the Secretary for detecting methane and for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary.

30 C.F.R. 75.1722 provides as follows:

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

(b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

(c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Findings of Fact

1. At all times relevant to this proceeding, Respondent was the operator of an underground coal mine in Gallatin County, Illinois, known as the Eagle No. 2 Mine.

2. Respondent is a large mine operator. The subject mine is a medium sized mine. Its products enter interstate commerce.

3. From August 13, 1979 to August 24, 1981, Respondent had 551 paid violations of mandatory health and safety standards. Thirty-two of these violations involved 30 C.F.R. 75.200; 18 involved 30 C.F.R. 75.202; 6 involved 30 C.F.R. 75.304 and 14 involved 30 C.F.R. 75.1722(a).

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4. On August 13, 1981, the conveyor chain and sprocket on the ratio feeder in the 5 South off 3 Main East section of the subject mine had an exposed area measuring approximately 3-1/2 inches by 16 inches not protected by a guard. The feeder was energized and in service.

5. Inspector Gulley issued a citation charging a violation of 30 C.F.R. 75.1722 because of the condition described in Finding of Fact No. 4.

6. The condition described in Finding No. 4 had been present for more than one shift and Respondent should have known of it.

7. The condition was moderately hazardous. A number of miners would be expected to travel between the feeder and the ribs. Although they would be unlikely to put their hands in the unguarded area, a slip or fall could result in their doing so unintentionally and injuring a finger, hand or arm.

8. Inspector Gulley issued a citation on August 13, 1981, charging a violation of 30 C.F.R. 75.202 because of overhanging ribs and face in four different entries in the 5 South off the 3 East Section of the subject mine.

Discussion

There is little question but that there were overhanging faces and ribs in the entries as cited. Respondent's positions concerning the overhangs are (1) in conventional mining using air docks rather than explosives, overhangs at the face are unavoidable; (2) the mining conditions were such with numerous sulphur balls present in the coal seam as to make straight cutting difficult; (3) the overhanging faces and ribs in question were not hazardous; (4) the area in question was "dangered off" and the overhanging areas would have been taken down in the normal mining cycle. The standard is clear and requires overhangs to be taken down or supported, regardless of whether they occur unavoidably (as Respondent contends) or could be avoided or minimized by better mining practices (as MSHA contends).

I accept the opinion of Inspector Gulley that these conditions were hazardous. There is a sharp dispute as to whether there was a danger sign warning miners to stay out of the area. Inspector Gulley and Miner's representative Thomas Dobbs testified that there were no danger signs; Foreman Marvin Rash and Environmental Technician Marty McDonald testified that there were danger signs. I accept the testimony of Gulley and Dobbs in part because I find it difficult to believe that danger signs were present and company representatives did not point them out when told of an impending citation. I note also that Foreman Rash was not present at the crosscut where the conditions were cited at the time the citation was issued.

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9. I find that there were overhanging ribs and faces in four different entries in the 5 South off the 3 East section of the subject mine on August 13, 1981, and that these conditions were hazardous to miners.

10. The conditions described in Finding No. 9 were known to Respondent.

11. Inspector Gulley issued a citation on August 13, 1981, charging a violation of 30 C.F.R. 75.200 because of a violation of the roof control plan: (1) the face of No. 5 entry was not bolted to within 6 feet of the face and it was cut, drilled, and shells were put in holes; (2) an area in the crosscut between entries 2 and 3 measured was not bolted although it measured 18 feet 9 inches.

Discussion

Once again there is a conflict in the testimony as to whether the area in question was dangered off. For the reasons given with respect to the cited violation of 30 C.F.R. 75.202, I accept the testimony of Inspector Gulley and Mr. Dobbs, and find that there were not danger signs in the area at the time the citation was issued.

12. I find that the conditions in the face of No. 5 entry and in the crosscut between entries 2 and 3 in the 5 South off 3 East Section in the subject mine were as described in the citation referred to in Finding No. 11.

13. The conditions described in the citation referred to immediately above were hazardous. They could have resulted in serious injuries to miners. They were obvious and were known or should have been known, to Respondent.

14. On August 13, 1981, Inspector Gulley issued another citation alleging a violation of 30 C.F.R. 75.304 because he concluded, based on the conditions for which the three previous citations were issued, that Respondent did not perform a proper on-shift examination.

15. Inspector Gulley returned to the mine on August 24, 1981. He issued two citations. One citation charged a violation of the roof control plan because an entry was driven 26-1/2 feet wide when the plan limited it to 20 feet wide and two crosscuts were wider than permitted by the plan. The area was not "dangered out" and timbers were not set as required by the plan. I find that the conditions were as charged, that they created a hazard and that they were known to Respondent. The second citation charged a violation of 30 C.F.R. 75.202 because of overhanging ribs from 48 inches to 60 inches in all the faces in entries 1 to 6 and in the last open crosscut. I find that the conditions were as charged, that they created a hazard, and that they were known to Respondent.

16. Because he concluded that the conditions he found demonstrated that Respondent had again not conducted a proper on-shift examination, Inspector Gulley issued an order of withdrawal on August 24, 1981, charging a failure to abate the citation alleging a violation of 30 C.F.R. 75.304 issued on August 13, 1981.

Issues

1. Whether the evidence establishes that Respondent failed on August 13, 1981, during the coal producing shift, to examine each working section for hazardous conditions, and to immediately correct any such conditions?

2. If a violation was established, what is the appropriate penalty?

(a) Does the evidence establish a failure to abate the violation charged?

Conclusions of Law

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. Respondent is a large operator, and this conclusion will be reflected in any penalty assessed.

3. Respondent has a moderately serious history of prior violations, and this conclusion will be reflected in any penalty assessed.

4. The Violation

The basic issue in this case is whether a violation of 30 C.F.R. 75.304 can be established by inference. The only direct evidence is the testimony of Respondent's foreman that he did in fact conduct an on-shift examination. The inspector's conclusion that Respondent failed to conduct such an examination, or failed to conduct it properly, is based on what he observed after the fact. The terms of the mandatory standard require (1) an examination for hazardous conditions and (2) an immediate correction of such conditions. I conclude that a violation of these requirements may be established by evidence of uncorrected hazardous conditions existing during a coal producing shift. I conclude further that the evidence in this record establishes that Respondent failed to conduct the required examination on August 13, 1981, and failed to immediately correct hazardous conditions. A violation of 30 C.F.R. 75.304 was established.

5. The Penalty

The inspector cited three violations of mandatory safety standards on August 13, 1981, prior to citing the violation involved herein. I have found that they all involved hazardous conditions. The violations of 30 C.F.R. 75.200 and 75.202 were serious; the violation of 30 C.F.R. 75.1722(a) was less serious. In any event failure to conduct proper on-shift examinations for hazardous conditions is itself serious. The conditions cited had been found on many previous occasions. MSHA supervisory Inspector Wolfe testified that the subject mine had been guilty of poor mining practices for many months, especially with respect to overhanging ribs and faces. I conclude that the violation was the result of Respondent's negligence.

The conditions found by Inspector Gulley on August 24, 1981, establish that Respondent (the fact that different foreman were involved is irrelevant) continued its poor mining practices and failed to sufficiently concern itself with proper on-shift examinations. A closure order was required before the practice was corrected. I conclude that Respondent did not attempt in good faith to achieve rapid compliance after notification of a violation.

Based on these findings and conclusions, an appropriate penalty for the violation is \$500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay within 30 days of the date of this decision, the sum of \$500 as a civil penalty for the violation of 30 C.F.R. 75.304 found herein to have occurred on August 13, 1981.

James A. Broderick
Administrative Law Judge