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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	Civil Penalty Proceeding
v.	Docket No. WEVA 81-234-P A.C. No. 46-04949-03012F
GAMBLE COALS, INC., RESPONDENT	No. 2 Mine
AND	
GAMBLE COALS, INC., APPLICANT	Contest of Citations
v.	Docket No. WEVA 81-68-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	No. 2 Mine

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner
John E. Busch, Esq., for Respondent

Before: William Fauver, Administrative Law Judge

These proceedings involve the same two citations. In WEVA 81-234-P, the Secretary seeks a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. In WEVA 81-68-R, the company seeks review and vacation of the citations under section 105(d) of the Act. The cases were consolidated and heard at Charleston, West Virginia. Both parties were represented by counsel, who have submitted proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Gamble Coals, Inc., operated a coal mine known as the No. 2 Mine in Randolph County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce. The mine produced about 83,000 tons of coal per year and employed about 65 miners.

2. The No. 2 Mine was developed in a block system. Entries were developed on 87-1/2 foot centers and crosscuts were mined on 90 degree angles and developed on 55 foot centers. Entries were designed to be 26 feet wide. Coal was mined at the No. 2 Mine with a Wilcox Mark 20 PJ continuous miner with a bridge conveyor and a universal advance conveyor was attached to a belt conveyor. Mining involved developing a center entry, breaking crosscuts to the right and left of a site line in the center entry, and then advancing outside entries. The miner, universal advance conveyor, and bridge conveyor moved from side to side during the process and an 8-foot free travel area at the end of the bridge conveyor allowed the conveyor belts to slide back and forth.

3. Supports, usually posts and 8 x 12-inch wooden headers, were placed in two rows along the sides of the conveyor. Normally, as the machine moved toward or away from the face, the bridge conveyor would also shift positions, requiring posts to be removed from its path and immediately replaced on the other side of the bridge.

Respondent's roof-control plan required the following inter alia:

Temporary support . . . shall be installed from tail of miner to within 4 feet of the face as coal is removed. Due to construction and operation of machine, the temporary posts must be repositioned several times. Before a support is repositioned, equivalent support shall be set.

4. On August 13, 1980, the site line in the No. 5 entry was accidentally moved off center. As a result, the entry was driven off center to the left. When the problem was discovered, it was remedied, but the width of the entry exceeded the approved 26-foot width in the roof-control plan for about 40 feet. The excessive width ranged from 32 to 39 feet, and in the break was 38 to 39 feet.

5. The coal seam in the No. 5 Entry was 38 to 40 inches. Bad roof conditions were observed in the No. 5 entry in the early part of August, requiring extensive roof-bolting and timber support.

6. On August 14, 1980, Respondent's day shift was mining in a crosscut between the No. 5 Entry and the No. 6 Entry. Before the start of the shift, there was a visible crack in the roof in the No. 5 Entry, running from right to left just outby 5 Cross Right and extending to the rib on the left side of the entry.

The crew installed some additional timbers in this area, but additional roof bolts were not installed around the crack. The shift foreman,

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Percy Lanham, directed the crew to mine just outby the corner of the 5 Cross Right and to continue to the face of 5 Headway. The crew backed the miner out and turned 5 Left at Cross Right. During this move, timbers were moved and replaced to permit travel of the conveyor.

7. The crew moved the bridge conveyor four to five times and each time removed and replaced posts as the conveyor was moved. The section foreman observed roof cracks outby the crosscut. When he left the area, at about 2:55 p.m., the area was well-timbered and he observed timbers within 2 feet of and inby the crack mentioned in Finding 6, above.

8. The day shift foreman left the crew about 1:30 p.m., 1 hour before the end of the shift, to begin his preshift examination before the next shift arrived. His crew had mined four to five cuts of coal (16 to 18 feet) inby the crack before he left. There were four to five timbers around the crack when he left. During his examination, he observed bad top in the No. 5 Entry from right to left just outby 5 Cross Right and extending to the rib on the left side, and a slip on the outby edge. The rock was loose with water around its edges. He tested the roof by the sound and vibration method.

9. When the day shift ended, he told the section foreman to prepare a preshift report to include a warning of bad top in the No. 5 heading. The day-shift section foreman told the section foreman for the next shift that there was good top in 5 Crosscut Right, but that, on the left side of the No. 5 Entry, there were two visible cracks that he considered dangerous. This section foreman discussed these conditions with his crew before they started working, and told them how and where timbers were to be set.

10. As of the start of the second shift (about 5 p.m.), the area was well-timbered. There were additional supports to compensate for the excessive width in the entry and to support the two cracks on the left side. Ed Ware and Don Taylor tested the roof inby the cracks by the sound and vibration method and it sounded good. The mining machine was about 40 feet in the crosscut on the right side toward the No. 6 entry. The bridge conveyor unit was about 35 feet from the universal advance conveyor and the two units joined at an angle less than 90 degrees. The bridge conveyor extended from the universal advance conveyor and passed by the right rib to the mining machine.

11. The second shift crew normally consisted of seven miners: two facemen, two bridgemen, two timberman, and a miner operator. On August 14, the two front timbermen were Richard Daniels and Tom Barrackman. Walter Eckard was one of the bridgemen.

12. The crew had a dinner break about 7 p.m. Before they resumed work, extra supports were brought to the section. At about 8 p.m., Ed Ware walked up the left side of the bridge and told the operator, Danny Ware, that one cut remained to be mined

in this area. Upon returning toward the No. 5 Entry, he removed one row of posts along the conveyor, using an ax. Originally there were two rows of posts in this area--one row along the bridge conveyor,

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which Ed Ware removed, and one row along the rib. As he removed the timbers, he threw them across the bridge to Walter Eckard so that they could be replaced. Ed Ware then signaled the operator to start moving back. As the miner started back toward the No. 5 Entry, the conveyor knocked out the other row of posts. At that moment, while Mr. Eckard was installing posts on the right side, one or two of the 8 x 12 wooden headers fell on the bridge. Ed Ware went to remove them but, before doing so, he noticed the top begin to dribble and flakes of rock begin to fall. He shouted a warning to Mr. Eckard, turned, and ran. Mr. Eckard was setting posts on the right side of the bridge. Don Taylor had just come around the corner of the crosscut and gone behind the brattice when he heard Ed Ware shout the warning. Mr. Taylor immediately threw himself against the rib and the roof fell, killing Mr. Eckard.

13. Just before the fall, the miner operator, Danny Ware, had backed the miner away from the face and saw Ed Ware remove a row of posts. The machine continued back 3 to 4 feet and Danny Ware looked back and saw Walter Eckard setting timbers on the right side. Mr. Ware continued back a few more feet and, before he tightened the wire rope, the machine knocked out the second row of posts on the left side. At that instant, Danny Ware turned around and pulled the righthand jack setter to pull the miner closer to the rib and, within about 20 seconds, the roof fell in.

14. Two roof cracks were visible before the fall. The roof section that fell extended from the roof crack closer to the face to the right rib; the rock that crushed Mr. Eckard was 32 feet wide, 14 feet long, and tapered from 1 to 30 inches.

15. Federal Inspector Robert L. Wilmoth received a telephone call from Merle McManus, the Assistant District Manager, notifying him of the fatality. and arrived at the mine at about midnight, when he issued a section 103(k) investigative order of withdrawal.

16. At about 9:30 p.m., on August 14, Federal Inspector Paul H. Moore also was notified by phone of the accident at the No. 2 Mine. On August 15, at about 9 a.m., he arrived at the mine with Richard Vasicek, the chief of the special investigation group, District 3, and met three other MSHA inspectors and a state inspector. Inspector Wilmoth interviewed Ed Ware, the bridgeman, Don Taylor, the section foreman, and Danny Ware, the miner operator. Also present were Grant King from the State Department of Mines, the Inspector-at-Large, the Assistant Inspector-at-Large, and Mr. Gamble. Inspector Moore sat in during these interviews for about 20 minutes.

17. Inspector Moore left the interviews after about 20 minutes and went underground with Mr. Vasicek. They arrived at the section at about noon. The Respondent's engineers were already taking measurements and, when they finished, the inspector took his own measurements with the help of Mr. Vasicek and two state inspectors. They took the measurements by

stretching a steel tape along the universal advance conveyor to serve as a center line and, at various points along the center line, they measured right and left with another tape to the roof supports and ribs.

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18. On August 20, 1980, Inspector Moore charged Respondent with a violation of 30 C.F.R. 75.200 (violation of approved roof-control plan). The citation (No. 805484) reads in part:

On the 001 section, widths in excess of 30 feet were mined in the No. 5 entry for a distance of approximately 40 feet. The width ranged from 32 to 39 feet. The maximum width allowed by the roof-control plan approved on 12/16/79 is 26 feet.

The cited condition was proved by a preponderance of the evidence. This condition was abated by training all underground personnel at the No. 2 Mine.

19. Also on August 20, 1980, Inspector Moore charged Respondent with another violation of 30 C.F.R. 75.200 (violation of approved roof-control plan). This citation (No. 805485) reads in part:

During the investigation it was revealed that supports (temporary supports) were not set to provide equivalent support before removing installed posts during operation of the mining machine. The approved roof-control plan specifies that equivalent support be set before supports (posts) are repositioned.

The cited condition was proved by a preponderance of the evidence. This condition was found to be abated by training all underground personnel at the No. 2 Mine.

On August 28, 1980, Citation No. 805485 was modified as follows:

Citation No. 805485 dated 8/20/80 is modified to read and include the following: The accident investigation further revealed that a slicken slided formation approximately 32 feet long and 14 feet wide was present in the intersection of No. 5 entry with the cross cut 5 to 6 on the 001 section where a fatal roof fall occurred. Additional supports had not been installed. An adverse roof condition was known to exist. The section was under the supervision of Don Lee Taylor, section foreman. Type of action of citation No. 805485 dated 8/20/80 shows 104(a), should show 104(d)(2).

The above factual allegations were proved by a preponderance of the evidence. The citation was changed to include "unwarrantable failure" and "significant and substantial" findings. The inspector modified the citation because he believed through subsequent investigation that not only had timbers been removed without being replaced, but additional supports, including roof bolts, were not provided in an area that had bad roof conditions.

DISCUSSION WITH FURTHER FINDINGS

Respondent is charged with two violations of 30 C.F.R. 75.200, which provides

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.

With reference to Citation No. 805484, the Secretary contends that Respondent violated its approved roof-control plan by allowing the No. 5 Entry width to exceed 26 feet. The Secretary contends that, for a distance of about 40 feet in the entry, the width ranged between 32 and 39 feet and the excessive width created overburden pressures on the roof, contributing to the roof fall and fatality on August 14, 1980. The Secretary proposes a penalty of \$2,500 for this alleged violation.

With reference to Citation No. 805485, the Secretary contends that Respondent violated its approved roof-control plan by failing to set equivalent support before removing posts during mining activities in the No. 5 Entry on August 14, and by failing to provide additional supports on the right side of the crack in the entry. The Secretary contends that Respondent had too few timbermen and failed to supervise adequately the movement of the conveyors to prevent an accidental bumping of a row of posts supporting the crack in the entry. The Secretary also contends that Respondent was aware of bad roof in the No. 5 Entry, but failed to install roof bolts along the right edge of the crack. The Secretary argues that the sound and vibration method of testing the roof is not foolproof and greater precautions should have been taken. The Secretary argues that it was customary to bolt both sides of a crack or slip, especially with this type of conveyor

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system, because the posts installed near the crack would have to be removed to move the conveyor. The Secretary proposes a penalty of \$10,000 for this alleged violation.

Respondent admits that the No. 5 Entry was driven off-center with excessive widths for about 40 feet, but argues that the excessive widths in the entry did not contribute to the roof fall on August 14. Respondent also admits that it failed to install equivalent supports as the conveyor was moved, and that this probably contributed to the roof fall; however, Respondent argues that it tested the roof in the No. 5 Entry by an approved method (sound and vibration) and placed supports around a visible crack in accordance with standard procedure. Respondent contends that, although the area to the left of the crack was dangerous, there was no proof that the area to the right of the crack was also dangerous. Respondent contends that its approved roof control plan required additional timbering and spot bolting where required in the discretion of the supervisor and that, in his discretion, the roof to the right of the crack appeared visually sound and sounded good.

Although conceding certain violations of the roof-control plan, Respondent contends that foreseeability of the violations was not proven and, therefore, the allegation of "unwarrantable failure" to comply should not be sustained and penalties should not be premised on a finding of an unwarrantable failure.

I conclude that the government proved the excessive-width violation as alleged in Citation 805484, and that such violation was serious in that it created a substantial risk of roof fall and could significantly contribute to a mine hazard. I also conclude that this violation could have been prevented by the exercise of reasonable care, including better mine supervision and training. It was due, therefore, to an unwarranted failure to comply with the standard.

I also conclude that the government proved the violations alleged in Citation 805485 and its modification, # 805485-2. The evidence showed that supports were not set to provide equivalent support before moving installed posts during operation of the mining machine, and that, additional supports were needed but not installed to the right of the roof crack in the No. 5 entry intersection with 5 cross right. These violations constituted a serious hazard of roof fall and could have been prevented by the exercise of reasonable care, including better mine supervision and training. They were due, therefore, to an unwarranted failure to comply with the standard.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceedings.

2. In Docket No. WEVA 81-234-P, Respondent violated its roof control plan and 30 C.F.R. 75.200 by exceeding the width requirements of the roof control plan as alleged in Citation

805485 and by failing to provide and maintain necessary roof support as alleged in Citation 805484 and its modification, # 805484-2.

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3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$2,500 for the violation found as to Citation 805485 and \$5,000 for the violations found as to Citation 805484 and its modification, # 805484-2.

ORDER

WHEREFORE IT IS ORDERED that in Docket No. WEVA 81-234-P, Gamble Coals, Inc., shall pay the Secretary of Labor the above-assessed civil penalties, in the amount of \$7,500, within 30 days from the date of this decision.

IT IS FURTHER ORDERED that, in Docket No. 81-68-R, the citations and modification involved are AFFIRMED and the contest proceeding is DISMISSED.

WILLIAM FAUVER
JUDGE