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

DELMONT RESOURCES, INCORPORATED,
CONTESTANT

Contest of Citation

v.

Docket No. PENN 80-268-R

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

DECISION

Appearances: Harvey A. Zalevsky, Esq., Greensburg, Pennsylvania, for
Contestant:
David Bush, Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for
Respondent

Before: Administrative Law Judge Broderick,
on remand from the Commission

STATEMENT OF THE CASE

This proceeding were originally heard by Judge John F. Cook on September 16, 1980. Judge Cook issued a decision on April 23, 1981, in which he found that the contested citation was properly issued under the Federal Mine Safety and Health Act of 1977, that the violation charged in the citation was caused by the unwarrantable failure of Contestant to comply with the safety standard, but that the evidence did not support a finding that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. On the basis of the latter finding, Judge Cook modified the citation from one issued under section 104(d) to one under section 104(a).

The Secretary filed a petition for discretionary review, seeking review of the Judge's finding that the violation was not "significant and substantial." The United Mine Workers of America sought review on the same ground. Both petitions were granted by the Commission on June 2, 1981.

The Commission remanded the case on May 3, 1982, "to give the parties an opportunity to present evidence relevant to the National Gypsum test" (on the meaning of significant and substantial). Following remand, the case was assigned to me. Pursuant to notice a hearing was held in Washington, Pennsylvania on June 29, 1982. Anthony Russo and Roger Uhazie testified on behalf of the Secretary of Labor. Homer Miller, Kenneth Cutlip and John Cunnard testified on behalf of Contestant. The United Mine Workers of America did not appear at the hearing. Both parties filed posthearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision:

I accept as res judicata the conclusion of Judge Cook that the "evidence establish(es) a practice at the Delmont mine in violation of the roof-control plan's 18-foot width requirement for entries and crosscuts. The evidence is sufficient to establish the existence of the individual conditions comprising the practice only at those locations where measurements were actually taken." (Judge Cook's decision, p. 13). The Judge found three such locations on January 15, 1980, in each of which the conditions existed for a distance of 2 to 3 feet: (1) the second open crosscut between No. 2 and No. 3 entries; (2) the last open crosscut between No. 1 and No. 2 entries; (3) a "spot" in No. 1 entry approximately 60 feet outby the face. In each of these locations, the crosscut or entry was from 19 to 21 feet wide, and there were no additional supports.

The issue before me in this proceeding is whether this practice as shown by the conditions referred to above is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

FINDINGS OF FACT

1. On the date of the violation, January 15, 1980, the immediate roof in the No. 1 entry was composed of sandstone. The roof conditions were good and there was no evidence of cracks or scaly material in the roof.

2. The excessive widths found to be involved in the violation resulted from the mine floor in the area sloping to the right which caused the miner to drift toward the right rib when cutting the coal.

3. In at least two of the areas of excessive width found by Judge Cook, the last row of roof bolts were from 4 to 6 feet from the right rib. The approved roof control plan called for bolts not more than 3 feet from either rib.

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4. There was a fault running across the overburden in entries 2 and 3, consisting of a separation of sandrock, so that the sandrock went up into the covering strata instead of running parallel to the coal seam. As of January 15, 1980, it was not clear in what direction the fault was running, or whether it would intersect entry No. 1.

5. An unintentional roof fall occurred in the subject mine in March 1980 in a crosscut between entries No. 1 and 2.

6. The practice of driving entries wider than permitted by the roof control plan, without additional roof supports, creates a greater stress on the roof and is more likely to cause the strata above to deteriorate and separate than would be the case if the roof control plan were followed.

7. The failure to maintain supports within 3 feet of the rib results in an area of unsupported roof which creates a greater stress on adjacent roof.

STATUTORY PROVISION

Section 104(d)(1) provides in part 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 he also finds that, while the conditions created by such violation do 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

ISSUE

1. Whether the practice followed by Contestant of driving entries wider than the 18 feet prescribed by the roof control plan as evidenced by the three locations of excessive width found by Judge Cook was reasonably likely to result in an injury or illness of a reasonably serious nature?

THE NATIONAL GYPSUM DECISION

The Commission, in a decision issued April 7, 1981, Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822, interpreted the significant and substantial provisions of section 104(d) as follows:

We hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Id.*, at 825.

Under this test it is necessary (1) to consider the particular facts surrounding the violation; (2) to determine whether an injury or illness is reasonably likely to occur as a result of the hazard; (3) if so, to determine whether the injury or illness will be of a reasonably serious nature.

CONCLUSIONS OF LAW

The hazard contributed to by the violation found in this case is a roof fall. If a roof fall occurred, a resulting injury would clearly be of a reasonably serious nature. The only substantial question in the case is whether under the conditions present, a roof fall was reasonably likely to occur.

The evidence in this record establishes that roof falls are quite unpredictable. What appears to be good roof may unexpectedly fall even if supported in accordance with the roof control plan. A sandstone roof is more stable and much safer than a soapstone roof. However, unsupported roof, of whatever kind, is per se a safety hazard and likely to fall and cause injury to miners.

The practice of driving entries at widths in excess of those called for in the roof control plan creates an area of unsupported roof since the roof bolt supports only a small area of roof (the plan in question calls for bolts on "4 foot centers." The theory is that a bolt provides support to the roof only for 2 feet to either side). The rib acts as a roof support for a distance of 1 to 2 feet. Therefore, a practice of installing the first row of bolts more than 4 feet from the rib creates an area of unsupported roof between the rib and the bolt.

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I conclude that the practice constituting the violation of the roof control plan found by Judge Cook was reasonably likely to result in a roof fall which would injure a miner. There is the further fact that a fault was running through the roof strata and it was not certain at the time the citation was issued what course it was following. Should it intersect with No. 1 entry what was a solid sandstone roof would become a much less stable soapstone roof, and a fall would become even more likely. I have already found that if an injury occurred it would be reasonably serious.

Therefore, I conclude that the violation found by Judge Cook to have occurred, and to have been the result of Contestant's unwarrantable failure to comply with the regulation in question, was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

ORDER

Based on the above findings of fact and conclusions of law, Citation No. 624406 issued under section 104(d)(1) is AFFIRMED as issued; the Notice of Contest is DENIED and this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge