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

WESTMORELAND COAL COMPANY, CONTESTANT	CONTEST OF ORDER
	Docket No. WEVA 82-152-R
v.	
	Order No. 886894; 1/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 82-369 A.C. No. 46-01514-03501
v.	
	Eccles No. 6 Mine
WESTMORELAND COAL COMPANY, RESPONDENT	

DECISION

Appearances: John A. MacLeod, Esq., Crowell & Moring, Washington, D.C., for Westmoreland Coal Company
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor

Before: Judge Melick.

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., "the Act", to contest an order of withdrawal issued to the Westmoreland Coal Company (Westmoreland) under 104(d)(1) of the Act and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for the violation charged in that order.(FOOTNOTE 1) The order before me (No. 886894) issued

by MSHA inspector Homer Gross on January 12, 1982, charges a violation of the regulatory standard at 30 C.F.R. 75.202 and alleges as follows:

> During a fatal accident investigation, it was revealed that the known overhanging rib in the old two north entry on two south west section (0270), 55' inby survey station number 9363, was not supported or taken down, which resulted in a fatal accident. The section was supervised by Robert Hairston, who was aware of the condition.

The cited standard provides as relevant herein that "overhanging or loose faces and ribs shall be taken down or supported."

At approximately 10:15 p.m., on January 11, 1982, a roof fall occurred at Westmoreland's Eccles No. 6 Mine, resulting in the death of scoop operator John H. Clay. The fall occurred in an area of "old works" last mined in the 1930's known as the old No. 2 Entry of the two southwest main section. A work crew under the supervision of section foreman Robert Hairston, was sent to the section on Friday, January 8, 1982, and again on Monday, January 11, 1982, to prepare to build a stopping needed to maintain required ventilation. On the latter date, the crew arrived on the section around 4:30 p.m. Hairston first performed the required examination of the work places and then assigned duties to the crew members. In the sequence of operations, the continuous mining machine was first trammed to the last open crosscut, left, connecting southwest main with the No. 2 entry of the old inactive two north haulway. Albert Honaker, the miner operator, proceeded to clean rock and coal from the mine floor across the 20 foot wide entry. While working there, Honaker observed what he described as a "brow"(FOOTNOTE 2) at the top of the No. 2 entry that protruded from the left rib some

10 to 14 inches along 8 feet of the entry.(FOOTNOTE 3) Honaker was unable to reach the "brow" because it was then too far inby the roof bolts, but as he left, he warned the "pin" crew (roof bolting crew) and Arthur Burdiss, the bolter helper, in particular, to "watch it". After cleaning as much as he could, Honaker left to work in another area. Honaker told foreman Hairston of the brow condition and they both later returned with a slate bar. They tried "four or five times" to bring it down but left the area without succeeding.(FOOTNOTE 4)

Arthur Burdiss, a roof bolter helper on Hairston's crew that afternoon, recalled being warned by Honaker of the "overhanging brow" in the old No. 2 entry. Burdiss estimated that the brow protruded some 10 to 12 inches along 4 feet of the rib. He and his co-worker, George Ayers, also tried to take down the brow with the slate bar but they too were unsuccessful. They were also unable to bolt into the overhanging brow because of the position of the roof bolter canopy. Four roof bolts were, however, installed to within 4 inches of the outby edge of the brow.

Jim Milam was working with the deceased just before the roof fall. They unloaded the supplies needed to build the stopping and Milam examined the entry to determine where to locate the stopping. At this same time, Honaker and Hairston were continuing in their efforts to take down the brow. According to Milam, it projected 12 to 14 inches into the entry and had a "hairline" crack or separation in it. He recalls commenting that it looked like a "bad brow" and asked if it had been checked. Milam and the deceased then also tried unsuccessfully to pull the brow down. Because of their inability to bring it down with the slate bar, Milam thought it was safe and both men began preparatory

work on the stopping. As they began shoveling loose coal from the rib beneath the brow, Milam saw some "flakes" begin to fall. This convinced him that the top was indeed "no good" but before he could shout a warning, the brow and some additional roof and rib fell onto Mr. Clay, causing his death. Milam later admitted, after seeing the amount and size of the debris from the fall, that the full brow had indeed extended some 22 feet along the entry and that "there was more to it" than he initially thought.

As a preliminary matter, Westmoreland claims that the regulatory standard here cited, 30 CFR 75.202, is unenforceably vague as applied to the facts of this case. The standard provides as relevant herein that "overhanging or loose faces and ribs shall be taken down or supported." Westmoreland appears to argue that because an MSHA inspector testified that he would not necessarily cite every overhanging rib (for example, a one inch overhang) that in his opinion posed no hazard, enforcement of the standard was therefore based upon the subjective discretion of the various inspectors. Westmoreland also cites in this regard an internal MSHA memorandum which provides in essence that overhanging ribs should be cited only when they present a hazard (Government Ex. No. 2). In determining the constitutional validity of a regulatory standard where challenged for vagueness, however, the language of the standard itself must first be examined. In this regard I find that the language provides constitutionally "reasonable certainty" and is indeed facially unambiguous. Accordingly, MSHA's enforcement practices under the standard are irrelevant to the defense asserted. Connally v. General Construction Co., 269 U.S. 385, 391; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337.

Westmoreland next argues that the brow which fell did not constitute an "overhanging rib" within the meaning of the cited standard. As previously noted, however, West Virginia State Coal Mine Inspector Danny Graham testified on behalf of Westmoreland that the terms "brow" and "overhanging rib" were essentially synonymous. The terms were used in this case by counsel and various witnesses to describe the same phenomenon and I have already concluded that the words are indeed synonymous. It is accordingly immaterial whether the cited phenomenon is referred to as a "brow" or "overhanging rib". I find that the phenomenon was, regardless of the terminology used, an "overhanging rib" within the meaning of the cited standard.

Westmoreland further contends that a violation of the cited standard cannot be supported where "every means of taking down or supporting an alleged overhanging rib was either infeasible or presented a potential hazard equal to or greater than the hazard presented by that overhanging rib." The contentions involve elements of two affirmative defences, i.e. impossibility of performance (or compliance) and the "greater hazard defense". In order to establish the former defense, the operator must prove that (1) compliance with the requirements of the cited standard either would be functionally impossible or would preclude performance of required work, and (2) alternative means of employee protection are unavailable. Diamond Roofing Company,

Inc., 80 OSAHRC 76-3653, 8 BNA OSHC 1080, 1980 CCH OSHD 24,274 (Feb. 29, 1980); Secretary v. Sewell Coal Co., 3 FMSHRC 1380 (1981), aff'd 686 F.2d 1066 (4th Cir. 1982). In order to establish the latter defense, the operator must prove that (1) the hazards of

compliance are greater than the hazards of non-compliance; (2) alternative means of protecting miners are unavailable; and (3) modification proceedings under Section 110(c) of the Act would have been inappropriate. Secretary v. Penn Allegh Coal Co., Inc., 3 FMSHRC 1392 (1981). Even assuming that modification proceedings would have been inappropriate under the unique facts of this case (an evidentiary matter which was not, however, fully developed at hearing), Westmoreland has failed to sustain its burden of proving the other necessary elements of either the impossibility of compliance or the "greater hazard" defense.

It has not been shown for example that it was necessary in the first instance to have required the miners to have erected a stopping beneath the overhanging brow. Evidence has not been presented to demonstrate that the stopping could not have been erected in a safer location or that other alternative means of meeting the ventilation requirements were unavailable. Even assuming, arguendo, that such alternatives were unavailable, Westmoreland has failed to prove that it would have been more hazardous to have supported or taken the overhanging brow down.

MSHA apparently concedes that the overhanging roof in this case could not reasonably have been blasted down or supported with roof bolts (because the canopy on the roof-bolting machine would not allow the machine to be placed under the subject brow) and that posts or crib blocks could not have been installed because of the angle of the brow (Government Ex. No. 4, page 4). MSHA maintains, however, that the overhanging roof could have been cut down by using the continuous mining machine. There is no dispute that no efforts were made to do this. Westmoreland concedes, moreover, that the continuous miner could have been brought in parallel to the old No. 2 entry if additional roof bolting had been first provided in the entry. It contends, however, that once in the vicinity of the brow, the ripper heads of the miner might have come into contact with roof bolts located in close proximity to the brow, causing sparks and possibly tearing down part of the roof. Westmoreland's argument fails, however, to take into consideration that the continuous miner could have been safely used to trim the brow just ahead of the roof bolting operation. Thus, the miner operator could have progressed alternately with the roof bolter, cutting down the brow without the ripper head of the miner ever being in close proximity to the inserted roof bolts.

Westmoreland also contends that the brow was beyond the reach of the ripper head and therefore the miner could not have been used to bring it down. Westmoreland ignores the evidence, however, that the miner could have been elevated onto blocks that would have given the ripper head sufficient height to have reached the brow. While Westmoreland also claims that it would not have been safe to have placed roof bolts in the area between the last open crosscut and the second last crosscut in the old No. 2 entry in order to properly position the miner, no specific safety problems have been cited. To the contrary, MSHA inspector Homer Gross opined that the continuous miner could have been safely used to bring the brow. Under all the circumstances, it

is clear that Westmoreland has not met its burden of proving either the "greater hazard" or "impossibility of compliance" defense. The cited violation is accordingly sustained.

Whether that violation was "significant and substantial", however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 at 825. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. Even considering only the testimony from the operator's witnesses, it is clear that a substantial overhanging brow existed in the cited entry in which at least a hairline fracture or separation could be observed. According to these witnesses, the brow protruded from 10 to 31 inches from the rib for as long as 22 feet of the entry. Even had the fracture or separation not been observed, Westmoreland's expert witness, Dr. Syd Peng, conceded that fractures may very well exist that are not visible. In addition, the overhanging brow in this case was sufficiently obvious to have attracted the attention of at least six experienced miners who were sufficiently concerned to have all made efforts to bring it down with a slate bar. It may reasonably be inferred therefore that all of these miners, at some point in time, perceived the brow as a serious hazard. Under all the circumstances, I conclude that the violation presented a high probability of serious or fatal injuries. There indeed existed a reasonable likelihood that the hazard of a roof fall would occur, resulting in injuries of a serious nature. Accordingly, I find the violation to have been "significant and substantial". For the same reasons, I find that the violation reflected a high level of gravity.

I further find that the violation was the result of the unwarrantable failure of the operator to comply with the law. A violation is the result of "unwarrantable failure" if the violative condition was one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Co., 7 IBMA 280. In this regard, the negligent acts of section foreman Robert Hairston are attributable to the operator. Secretary v. Ace Drilling Co, Inc., 2 FMSHRC 790 (1980). It is undisputed in this case that Hairston had been warned about the overhanging brow at issue, had seen the condition, and had apparently deemed it sufficiently dangerous to have made efforts on his own to bring it down with a slate bar. The very existence of this brow as described by the operator's own witnesses clearly constituted a violation of the cited standard. It may reasonably be inferred, therefore, that Hairston had knowledge of the violative condition but failed to correct that condition through indifference or lack of reasonable care. Zeigler Coal Co., supra. The violation was accordingly the result of the unwarrantable failure of the operator to comply with the law and, indeed, of gross negligence. Accordingly, I affirm the order at bar.

In determining the amount of civil penalty that is appropriate in this case, I also consider that the operator is large in size, that it has a fairly substantial history of

violations, and that the penalty here imposed would not affect its ability to stay in business. Within this framework of evidence, I find that a penalty of $8000 is appropriate.

Order

Order No. 886894 is affirmed and the contest of that order is dismissed. A civil penalty of $8000 shall be paid by the Westmoreland Coal Company within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

1 Section 104(d)(1) of the Act 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 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. 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.

2 West Virginia State Coal Mine Inspector Danny Graham, testifying on behalf of the operator, explained that the terms "brow" and "overhanging rib" are essentially synonymous. Both terms were used in this case to describe the same phenomenon and I conclude that the terminology is indeed synonymous.

3 There is some divergence of opinion regarding the size of this "brow". The operator's witnesses who actually saw it before it fell described it variously as protruding from 10 to 14 inches from the rib along 4 to 22 feet of the entry. The MSHA inspectors, basing their estimates on the amount of debris after the fall, thought the overhang would have been 22 feet long, 16 to 34 inches thick, and with a brow of up to 68 inches. West Virginia Coal Mine Inspector Graham, testifying for the operator, estimated, based on the same debris, that the brow had projected 30 to 31 inches into the entry. I do not consider the testimonial discrepancies in the size of the brow to be significant for purposes of this decision.

4 Mr. Hairston, the section foreman, declined to answer

questions relating to the subject matter of this case citing as grounds therefor the protections afforded by the Fifth Amendment to the U.S. Constitution. Counsel for MSHA could give no assurance that Hairston would not be subject to criminal liability based on the subject matter of this case and did not contest the asserted privilege. No inferences have been drawn from Mr. Hairston's refusal to testify in this regard based on his invocation of the Fifth Amendment privilege.